SETTLEMENT OF EMPLOYMENT DISPUTES: A CHECKLIST

by

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ANTECEDENTS

THIS ARTICLE REPRESENTS SOME OF THE AUTHOR'S THOUGHTS ON SETTLEMENT ACCUMULATED OVER 35 YEARS OF EMPLOYMENT LAW PRACTICE. THE LIST OF INDIVIDUALS WHO I SHOULD THANK FOR THEIR SAGE ADVICE AND COUNSEL OVER THE YEARS IS LONG AND TO ATTEMPT TO LIST ALL, THE AUTHOR RUNS THE RISK OF FAILING TO MENTION, AND MAYBE OFFENDING SOMEONE. AMONG THE JUDGES WHO HAVE INSPIRED THE AUTHOR TO STRIVE TO SETTLE EMPLOYMENT DISPUTES IS THE HONORABLE ORMA R. SMITH OF THE NORTHERN DISTRICT OF MISSISSIPPI, WHO OFTEN SPOKE OF THE UTILITY OF "THE SOFT WORDS OF CONCILIATION" AND THE HONORABLE ROBERT R. MERHIGE OF THE EASTERN DISTRICT OF VIRGINIA, A MASTER AT PERSUADING PARTIES TO RESOLVE A DISPUTE.

PRIOR VERSIONS OF THIS ARTICLE HAVE APPEARED IN PUBLICATIONS FAR TOO NUMEROUS TO MENTION. MOST RECENTLY, A VERSION IS CONTAINED AS A CHAPTER IN RICHARD A. ROSEN'S SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES: NEGOTIATING, DRAFTING, AND ENFORCEMENT (ASPEN PUBLISHING 2000).

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"No thoughtful person wants 'fighting each other in the courts' to be the chief business of society."

Timms v. Rosenblum, 713 F.Supp. 948, 956 (E.D. Va. 1989) (Ellis, J.)

"If you get down and quarrel every day, you saying prayers to the devil."

Robert Nesta Marley

Introduction

- There follows in a checklist format some of the author's thoughts on resolution of disputes, particularly terminations, arising in the workplace.

The Problem

- Identify the players.
- Assess the interests of the players. Be a behavioralist.
- What are the themes and counter-themes?
- Conduct an appropriate investigation of the matter.

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The Damages

- In evaluating damage exposure, the parties should consider any statutory cap on recoveries (e.g. the caps in the 1991 Civil Rights Act)

- Decisional law suggesting the range of awards for emotional distress can be useful in negotiations. Some judges have collected awards and listed the same in their opinion approving or disapproving a jury's verdict.

- On punitives, the Supreme Court's State Farm decision needs to be considered.

The Interests

- Health and insurance issues

- Retirement issues

- Employability concerns

- Public community and customer relations issues

- Compensation issues

The Insurance Considerations

- Initially, employer's counsel needs to determine what coverages there may be. Work with the company's risk management to identify the coverages.

- Determine, working with risk management, when the claim must be reported to the carrier.

- Reporting to the carrier may result in the matter being re-assigned to an attorney on the carrier's panel of approved counsel.

The Termination

- Can counsel prevent a threatened termination? Or, has the Rubicon been crossed? Unfortunately, all too often both employees and employers do not consult fully before termination occurs. Many disputes could be avoided with such consultations. And, in many instances, transactional costs for all concerned are reduced dramatically. In-house resolution can

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be increased dramatically using fair employment offices, employee assistance programs, counseling, peer review, quality circles, mediation, and a whole range of other possibilities.

- How important is it for the employee to keep the job? Would loss of the job be devastating to the employee? For example, is this an older employee who might be only marginally employable elsewhere? Or is there a disabled employee who might encounter substantial problems in finding another job? Is retraining a possible answer to the problem? Has an EAP been pursued? How about a counselor? Mediation? Peer review?

- How important is the individual employee to the employer? What effect would termination have on the morale of others? Is this one of those "line drawing" cases? Is precedent at stake? Is there someone else whose fresh look at this might help resolve it? How strong is the employer's Human Resource function? How strong is house counsel? Did the employer follow its established practices and procedures? Does the employer have established policies and procedures?

- What advice should counsel give to an employee presented with the dilemma of "resign or be fired?" Under state law, what effect will "resignation" in such circumstances have on eligibility for unemployment compensation benefits?

- If the employee can see the handwriting on the wall, counsel should recommend that he/she consider purchasing mortgage insurance in case of involuntary job loss.

Collateral Proceedings

- Sometimes the employee may be a party or interested person (e.g. a suspect) in the collateral proceeding.

- Examples would include criminal and regulatory proceedings (e.g. SEC).

- Such collateral proceeding may need to be addressed in the settlement.

Document Destruction

- Increasingly, the employee's demand letter will trigger consideration of document retention and avoidance of spoliation disputes downstream.

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- There may be regulatory requirements that dictate document preservation.

- The employee's counsel may make document preservation a pre-condition to negotiations.

Client Communciations

- Employee should be strongly advised not to use the company's e-mail account to communicate with counsel as, to do so, may compromise attorney-client privilege and may not be secure.

- Clients should be advised to be judicious in the dissemination of such communications for fear of compromising attorney-client privilege and the confidentiality of the negotiations process.

- Surveillance by agents of one party or another, where permitted, needs to be assessed.

- Employer's counsel needs to have assurances that privacy concerns will be a paramount consideration for the investigator.

- Employee's counsel needs to forewarn the client that there may be surveillance. In disability cases, video surveillance needs to be assessed.

Preparation for Settlement

- Identify the claims asserted, their elements, and the damages cognizable.

- Evaluate each such claim against the facts. Identify the areas where facts diverge.

- Identify the claims that the employee has not explicitly asserted either for tactical reasons (e.g. taxes, insurances) or out of ignorance.

- Evaluate the unasserted claims.

- Employee's counsel may want to submit a settlement brochure to the employer as early as possible with a narrative explanation of the claims and the employer's damage exposure. Concentrate on the employee's hard damages. Judiciously use exhibits. Keep the themes simple.

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- Some form of damages questionnaire is sometimes useful to use. Counsel should personally review it with the client before negotiations commence.

- Sometimes, there will be a credit report on the employee in the employer's files. Normally that report was legitimately obtained. But, its use during litigation or settlement negotiations may give rise to a claim, including a possible claim against counsel, for an illegitimate use of the report. Chester v. Purvis, 260 F.Supp.2d 711 (S.D.Ind. 2003).

Negotiations

- "It is said that a good settlement of a dispute is one where the parties agree that the settlement is favorable to both sides. The Court finds that the converse can be true as well: when both parties leave the table dissatisfied with the outcome." Echols v. Williams, 267 F.Supp.2d 865, 867 (S.D.Ohio 2003)

- "Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are 'motivated by a desire for peace rather than from a concession of the merits of the claim.' United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982). What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sorts of 'facts' would be highly misleading if allowed to be used for purposes other than settlement. See Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69, 71 (4th Cir. 1987)." Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 981 (6th Cir. 2003) (quoting Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D.Cal 1990)).

- Cloak discussions under Fed.R.Evid. 408 and any state counterpart to ensure that all that is said and done in the course of settlement is not admissible in evidence. Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955 (1988). Statements made during settlement discussions are absolutely privileged. See, e.g., Arochem Inter., Inc. v. Buirkle, 767 F. Supp. 1243 (S.D.N.Y. 1991) (construing California law); Sodergren v. Johns Hopkins Univ. Applied Phys. Lab., 773 A.2d 592, 603 (Md. App. 2001) ("[T]here is a sufficient nexus between a judicial proceeding and the settlement of that proceeding, including the negotiations leading to that settlement, the settlement agreement, and the implementation of that settlement agreement, to extend

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the exclusive privilege"). Further, such statements are protected from third-party discovery as well. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976 (6th Cir. 2003).

- It is sometimes difficult to determine whether an offer is made in compromising or attempting to compromise a claim. Both the timing of the offer and the existence of a disputed claim are relevant to the determination. Cassino v. Reichhold Chemicals, 817 F.2d 1338, 1342-43 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988) (offer of severance pay conditioned on waiver of age discrimination claim made contemporaneous with discharge not protected by Rule 408); Big O Tire Dealers v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1372-73 (10th Cir.1977), cert. dismissed, 434 U.S. 1052 (1978) (correspondence between parties prior to the filing of an action held "business communications" rather than "offers to compromise" and thus outside scope of Rule 408); Lightfoot v. Union Carbide Corp., 110 F.3d 898, 909 (2d Cir. 1997) (an unconditional offer of reinstatement is not excludable under Rule 408. By definition, an unconditional offer does not require an employee to abandon or modify his suit and without an employer's request to do so is not made "in the course of compromise negotiations"); Steinberg v. Obstetrics-Gynecological & Infertility Group, P.C., 260 F.Supp.2d 492, 498 (D.Conn. 2003) (communications between parties must "reflect their willingness to settle the dispute" if they are to be excluded under Rule 408); Cf. Affiliated Mfrs., Inc. v. Aluminum Co. of America, 56 F.3d 521 (3rd Cir. 1995) (holding that the term "dispute" in Rule 408 "includes both litigation and less formal stages of a dispute.")

- Understand that Evidence Rule 408 only addresses admissibility, not discoverability, of settlement negotiations. The parties might want to state that they deem the settlement talks to be privileged. The Sixth Circuit has recognized such a privilege where a third-party sought to compel the disclosure of the settlement talks. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976 (2003).

- Exclusion of evidence of settlement of prior discrimination lawsuit against employer's predecessor was not abuse of discretion in employment discrimination case, although EEOC's report and complaint in prior suit were admitted. Williams v. Fermenta Animal Health Co., 984 F.2d 261, reh'g denied 992 F.2d 192 (8th Cir. 1993).

- ADEA conciliation efforts may be admissible into evidence. EEOC v. Gear Petroleum, Inc., 948 F.2d 1542, 57 FEP Cases (BNA) 457 (10th Cir.

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1991); See also Maschka v. Genuine Parts Co., 122 F.3d 566, 570 (8th Cir. 1997).

- A Georgia Court of Appeals has held that the factual assertions in a demand letter from the employee's counsel can be used at trial to impeach the plaintiff. Travitt v. The Grand Union Co., 429 S.E.2d 309, 311 (Ga. 1993). See also Graves v. Graves, 310 S.E.2d 901 (Ga. 1984) (holding factual assertions made in discussions where no compromise or settlement is offered to be admissible).

- Establish ground rules for communication with one another. Be especially careful about communicating into corporate offices by facsimile before arranging procedures that assure the confidentiality of facsimile transmissions. There is technology available that promises confidentiality of fax transmissions. See, e.g., Barry D. Bayer, "Fax Guard Promises Confidentiality For Transmissions, ECCO Improved", The Daily Record 16 (Nov. 1, 1993).

- Most attorneys were not taught how to negotiate in school. It may be useful to read a good book on negotiating tactics. For example, read Gerard I. Nierenberg's The Art of Negotiating (Pocket Books, 1989), Roger Fisher and William Ury's Getting to Yes: Negotiating Agreement Without Giving In (Penguin, 1991), George Fuller's The Negotiator's Handbook (Prentice Hall), Herb Cohen's You Can Negotiate Anything (Bantam Books, 1980), or Steven P. Cohen's The Fine Art of Negotiating (1995) (identifies 12 common negotiating mistakes).

- Arrive at negotiating sessions with form language. Bring a diskette with forms. Careful drafting is essential as lawyers can disagree over colons and semicolons, or the absence thereof. See e.g., Slottow v. American Casualty Co., 10 F.3d 1355, 1361 (9th Cir. 1993).

- Subordinate your personality to the client's goals. Be a problemsolver, not a problemmaker.

Pressure Points for Settlement in Litigation

- Deposition of Plaintiff

- Pyramid deposition of employer CEO or other high-ranking corporate executive

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- Pendency of summary judgment or other dispositive motion.

- Mandatory settlement conference

- Billings from counsel

Alternative Dispute Resolution

- Alternative dispute resolution (ADR) is often times a preferred substitute to traditional litigation. See James Ottavio Castagnera, Employment Law Answer Book, Chapter 15 (Panel Publishers, 1996 Supp.). While a court cannot coerce parties to settle (Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)), a court may direct a party or a party's attorney to attend a settlement conference. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989) (en banc). See also Rule 16(a)(5) of the Federal Rules of Civil Procedure, which states that "the court may in its discretion direct the attorneys…to appear before it for a conference or conferences before trial for such purposes as…facilitating the settlement of the case."

- The Ohio Court of Appeals observed that the case before it underscored "the need for some form of alternative dispute resolution operating totally outside the court system" so that parties "in a nominal case . . . can express corrosive contempt for one another without dragging their antagonist through the expense inherent in a lawsuit." Leichtman v. WLW Jacor Communications, Inc., 634 N.E.2d 697, 699, 92 Ohio App.3d 232 (Ohio Ct. App. 1994) (Per Curiam).

- According to James Lozier, an attorney who works in insurance defense, ADR is helpful because it gives would-be plaintiffs the opportunity to vent their frustrations, rather than sit through years of litigation: "Claimants sometimes just want to vent. They want to yell, scream, rant, and rave. Let them. It can be a real cathartic event." See American Association of Insurance Services, *Alternative Dispute Resolution: Going Face-To-Face with Clients Saves Time and Cuts Costs* (Fall 1998), *available at:* http://www.aais.org/communications/viewpoint/vpfl98.htm.

- The value of an apology in ADR should not be underestimated. Sometimes, an apology by an alleged "bad actor" can lead to a more favorable settlement for the apologizing party. See, e.g., Jeffrey M. Senger, *Frequently Asked Questions About ADR*, U.S. Atty's Bulletin (Nov 2000), *available at:* http://www.usdoj.gov/odr/article2.pdf.

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- Good resources on ADR include the ALI-ABA Video Law Review course materials for "Conflict Resolution in the Workplace Enters a New Era" (January 27, 1994), the ALI ABA's "Practice Checklist Manual on Alternative Dispute Resolution" (2002), and the Advanced New ALI-ABI Course on "Mediation and Other ADR: Dispute Resolution for the 21st Century" (September 18-19, 2003).

- The language of a pre-dispute arbitration clause can be critical. For example, the courts have found the terminology all disputes "arising under" the settlement agreement to be less broad than the language "arising out of or relating to this agreement." See, e.g., S.A. Mineracao Da Trindade-Samitri v. Utah Intern., Inc., 745 F.2d 190, 194 (2d Cir. 1984).

- There are many forms of settlement conferences with the court, including direct participation by the trial judge, a magistrate judge, or a settlement judge.

- Counsel sometimes is concerned when the trial judge is a direct participant in the negotiations, whether the trial be bench or jury.

- On the other hand, some consider it an opportunity to "test market" the case. With a difficult client, direct participation by the judge may be a plus.

Arbitration

- Sometimes the parties agree post-dispute to settle the matter in binding arbitration.

- The terms of any such agreement, the arbitration protocol, needs to be carefully drafted as a host of otherwise unanticipated issues can lead to disputes downstream. For example, the costs of arbitration can be quite substantial. It should be clearly understood which party bears the costs.

- Sometimes a pre-condition to mediation or arbitration is a high-low agreement, so-called "baseball arbitration," where the parties agree that at least *x* will be paid (the low) and no more than *y* will be awarded (the high).

- The pros and cons, especially cost, of a panel of arbiters should be

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considered.

Mediation

- Sometimes, the parties agree to "med-arb," that is, non-binding mediation followed by binding arbitration in the event that mediation is unsuccessful. When this is in the ADR protocol, the parties ought to consider the pros and cons of selecting one individual to be both mediator and the putative arbiter.

- Sometimes the parties will agree to attempt to settle the matter in non-binding mediation. Careful draftsmanship of the agreement to mediate can be essential. Sometimes, the parties will agree to select a mediator who is merely facilitative. Other times, an evaluative mediator is sought. Be careful, some mediators will not do evaluative and some may not be suited to be merely facilitative.

Summary Jury Trials

- Civil Rule 16 provides for a summary jury trial. If the parties were to agree to settle the matter through summary jury trial, one consideration is the secrecy of such a proceeding. The Sixth Cirucit in In re the Cinicinnati Enquirer, 94 F.3d 198, 199 (1994) held that summary jury trials are essentially settlement proceedings and thus "historically closed procedures." Id. See also Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903-04 (6th Cir. 1988).

Effect of Offers

- The potential long-term impact of recognition of a Ford Motor Co. offer from the defense needs to be fully explained to plaintiff. See Ford Motor Co. v. EEOC, 458 U.S. 29 (1982).

- If the employer elects to submit a Rule 68 offer of judgment, careful draftsmanship is essential.

Recurring Ethical Issues

- Rule 4.1 (truthfulness in statements to others) of the ABA Model Rules of Professional Conduct provides as follows:

> In the course of representing a client a lawyer shall not knowingly:

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(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.

- The degree to which attorneys are required to be honest with one another in settlement negotiations remains unclear. See e.g., Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 Geo. J. Legal Ethics 411 (1988-89); Robert S. Adler and Elliot M. Silverstein; *When David Meets Goliath: Dealing With Power Differentials in Negotiations*, 5 Harv. Negotiation L. Rev. 1, 38 (Spring 2000).

- For discussion on the importance of honesty in negotiations, see, e.g., Robert Fitzpatrick, *Attorneys' Ethical Responsibilities During Settlement Negotiations*, SG047 A.L.I.-A.B.A. 1153 (1999); Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 Ky. L.J. 1055 (1999); Charles B. Craver, *Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive*, 38 S. Tex. L. Rev. 713 (1997); Scott Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 Rev. Litig. 173 (1989).

- The Indiana Supreme Court has held that one party's attorney had a right to rely on the other attorney's representations as a matter of law. Fire Insurance Exchange v. Bell, 643 N.E.2d 310, 312 (1994). There, counsel for the defendant insurance company misrepresented the limits on the policy, and the court held that the plaintiff could sue for fraud. See also Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 107 Cal.App.4th 54 (2003) (holding insurer's counsel liable to insured's judgment creditors who reasonably relied upon counsel's fraudulent misrepresentations).

- Magistrate Judge Grimm of the United States District Court in Maryland, in Ausherman v. Bank Of America Corp. et al., 212 F.Supp.2d 435, 443 (D. Md. 2002) sanctioning an attorney for deliberately untruthful statements of material fact that he made during settlement negotiations, stated the following:

"Each lawyer undoubtedly has an important

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> duty of confidentiality to his client and must surely advocate his client's position vigorously, but only if it is truth which the client seeks to advance. The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up what is necessary for justice in the end."

- When is there a duty to disclose facts during settlement negotiations? For an excellent discussion of the subject, see C. Michael Moore's Chapter 3 entitled "The Duty to Disclose in Settlement Negotiations," contained in Richard A. Rosen's Settlement Agreements in Commercial Disputes (Aspen Publishing 2000).

- In most jurisdictions, the parties to a settlement cannot agree that counsel for one party will not represent a client against the other party ever again. Such an agreement is plainly unethical. See, e.g., Rule 5.6(b) of the ABA's Model Rules. The rules of professional conduct state that an attorney may not offer or make an agreement to restrict an attorney's right to practice. See e.g., Wolt v. Sherwood, A Div. of Harsco Corp., 828 F. Supp. 1562, 1569 (D. Utah 1993) (Utah's rule). Jarvis v. Jarvis, 758 P.2d 244, 246-47 (agreements that restrict a lawyer's right to practice law and that limit a client's freedom in choosing an attorney are void as against public policy) (Kan. 1988). Thus, defendants cannot condition settlements on plaintiff's counsel agreeing to not accept other cases against the defendants.

- Sometimes one party to the settlement discussions wishes to threaten the other party with adverse publicity if the matter does not settle. Advise those clients regarding your local extortion statute. For example, Ohio's provides that it is criminal to "threaten to expose any matter tending to subject any person to hatred, contempt, or ridicule or to damage his/her personal or business repute...with purpose to obtain any valuable thing or valuable benefit." Ohio Revised Code §2905.11.

- A persistent issue in litigation under fee-shifting statutes has been whether a settlement offer conditioned on a resolution or waiver of fees was ethical. Compare Evans v. Jeff D., 106 S. Ct. 1531, 1544-45 (1986) (holding that fee waivers in settlement offers are valid in the absence of legislation to the contrary) with Bernhardt v. Los Angeles County, 339 F.3d 920 (9th Cir. 2003) (county could be enjoined from subjecting

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plaintiff to blanket policy requiring waiver of attorney's fees in all civil rights settlements in which it is involved).

- Representation of attorneys presents unique problems because of the attorney-client privilege. See, e.g., X Corp. v. Doe, 816 F. Supp. 1086 (E.D.Va. 1993); Fitzpatrick, "The Duty of Confidentiality: May An Attorney Sue His or Her Former Employer and Divulge Client Confidences Obtained During the Course of His or Her Employment?" (ALI-ABA course materials, Advanced Employment Law and Litigation, 1995).

- Where counsel for the employee has been provided by the employee with documents that are the property of the employer, the District of Columbia Bar's Committee on Legal Ethics has opined that the documents should be returned to the employer unless the employee has a plausible claim to ownership of the documents. In 1993, the Ethics Committee considered the scope of an attorney's obligations with respect to documents provided by the client but ostensibly the property of the client's former employer. Opinion No. 242 (September 21, 1993) discussed the issue in the context of four ethical rules (1.5, 1.2(e), 1.6 and 3.4(a)), concluding that the attorney could not return documents claimed to be owned by the former employer if doing so would compromise client confidences. In addition, it found that the attorney was obligated to return to the client all documents to which the client had a plausible ownership claim. (The client planned to use them to write a book.) As to documents for which no such plausible claim existed, the attorney was obligated to "preserve" them until court order or agreement resolved the matter. The Committee concluded that it did not have the power to resolve any of the competing document ownership claims. See Opinion No. 242; See also. Fitzpatrick, "Ethical Obligations of an Attorney Concerning Documents That May Be the Property of a Third Party," Annual Advanced ALI-ABA Course of Study Employment Discretion and Civil Rights Actions in Federal and State Courts. San Francisco, California, (Feb. 22-24, 1996.)

- There are unique and difficult ethical issues in defending lawyers and law firms. See Rule 1.6 of the District of Columbia Rules of Professional Responsibility and comments 21 and 22 thereon. See also Julia Evans Guttman, *Defending Lawyers On Trial*, 11-SPG Crim. Just. 3 (Spring 1996) for a detailed discussion of these issues.

- Formal Opinion No. 93-370 of the ABA's Standing Committee on Ethics and Professional Responsibility precludes a lawyer, absent informed client

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consent, from revealing to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement. A number of judges now advise counsel that the subject will be discussed by the court and that counsel should discuss the matter with the client before having a settlement conference. For example, retired Magistrate Judge Clarence Goetz of the U.S. District Court for Maryland had a form letter to counsel which read in pertinent part as follows:

> "Please note that the American Bar Association Standing Committee on Ethics and Professional Responsibility has recently issued a Formal Opinion (No. 93-370) which precludes a lawyer, **ABSENT INFORMED CLIENT CONSENT,** from revealing to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement. The opinion does not preclude a judge, in seeking to facilitate a settlement, from inquiring into those matters. Therefore, please discuss these items with your client **before** appearing for the settlement conference."

- Some attorneys for employees contend that a settlement provision restricting the former employee's right to voluntarily provide relevant information to others suing the same company violates Rule 3.4(f) of the Model Rules. Cf. Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 n.3 (D. Mont. 1986) (cites to Rule 3.4(f) as allowing an attorney to advise employees of a client to refrain from voluntarily giving information to another party). Further, the Fourth Circuit has stated that a blanket gag order that prevents an employee from communicating with an attorney or the EEOC would be unreasonable. Felty v. Graves-Humphreys Co., 785 F.2d 516, 519 (4th Cir. 1986).

- For an excellent discussion on professional ethics and the settlement process, including honesty, the duty to convey settlement offers to client, the representation of multiple parties, restrictions on practice, and threats in negotiation, see Daniel M. Schrauer's Chapter 4 in Richard A. Rosen's Settlement Agreements In Commercial Disputes (Aspen Publishing 2000).

Confidentiality

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- It might be wise to obtain a separate confidentiality agreement at the start of the settlement negotiations. Such an agreement should be designed to prevent leaks to individuals who have no need to know about the terms of a settlement that are being discussed or, indeed, that settlement is being discussed. See Fitzpatrick, Get Confidentiality Agreement before Settlement Negotiations, Federal Discovery News 5 (Feb. 1995); Sample Form Pre-Negotiations Confidentiality Agreement prepared by Fitzpatrick & Associates (ALI-ABA course materials, Advanced Employment Law and Litigation, December 1995, Washington, D.C.).

- Insist that it be mutual, i.e., both the employee and the employer should be bound not to divulge the terms under discussion or even, if deemed appropriate, that discussions are underway.

- Of course, if you settle, one or both parties normally will want a confidentiality agreement that restricts communication of the terms of the settlement.

- Inevitably, both the employee and the employer will be asked how the dispute was resolved. Thus, there should be an exception to the confidentiality clause that allows the clients to state the matter has been resolved.

- There should also be an exception in the settlement agreement to any provision regarding corporate proprietary trade secrets, enabling former employees to exercise “bragging rights” about their former job duties when they embark upon subsequent interviews in search of new work.

- Counsel should be concerned about the identities of those individuals with whom their respective clients discussed the matter before executing the settlement, particularly where there was no pre-negotiated confidentiality clause. The employee may want to seal a list of names of persons to whom disclosures were made in order to later show the "genie was out of the bottle" before execution of the agreement's confidentiality clause. The employer may want to prepare a similar list to protect itself also.

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- Who is bound by the confidentiality provision? All employees? Only management? All who know the terms of the agreement? There may be specific individuals whom the employer wants to be identified as being bound by the confidentiality clause, such as, a spouse or a medical provider. There may be individuals whom the employee wants to be bound even after leaving the employer. The enforceability will be enhanced by a separate instrument signed by such individual(s).

- Sometimes, the employee professes to want to write a book about their experiences, or to testify before Congress about same, or report alleged wrongdoing to public authorities, or to even file a bar complaint.

- The attorney may be sued if the attorney reveals the confidentiality clause of a settlement agreement. Nabisco Inc. v. Ellison, 1994 WL 622136 (E.D. Pa. 1994).

- The confidentiality provision should include, for example, that the employer is not to disclose that employee retained counsel, asserted claims, filed an EEOC charge, and so on.

- The employer may want language that the settlement agreement is non-discoverable in future litigation. The employee should want the employer to "carry the water" on that issue in future litigation. See City of Groton v. Connecticut Light & Power Co., 84 F.R.D. 420 (D. Conn. 1979), aff'd. without opinion, 802 F.2d 443 (2d Cir. 1986). Some employee's attorneys will refuse on principle to be a party to such a clause. Corboy, "Secret Settlements," 122 (Trial June 1993); Laleh Ispahani, The Soul of Discretion: The Use and Abuse of Confidential Settlements, Vol. VI, No. 1, Geo. J. of Legal Ethics 111 (Summer 1992); Richard L. Marcus, The Discovery Confidentiality Controversy, 1991 U. Ill. L. Rev. 457; Wayne D. Brazil, Protecting The Confidentiality of Settlement Negotiations, 39 Hastings L. Rev. 955 (July 1988).

- In Kalin Auskas v. Wong, 151 F.R.D. 363 (D. Nev. 1993), the court held that a former employee who entered into a confidential agreement to settle an employment discrimination case may be deposed provided that he did not divulge the substantial terms of the settlement agreement. See also Reiser v. West Co., 1988 WL 35916 (E.D. Pa. 1988) (female plaintiff suing employer for sex discrimination allowed to depose a former female employee despite confidential settlement agreement with employer).

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- Some courts require a greater, more "particularized showing" that the settlement agreement is relevant and calculated to lead to the discovery of admissible evidence. Fidelity Federal Sav. And Loan Assoc. v. Felicetti, 148 F.R.D. 532, 534 (E.D. Pa. 1993). Courts in the Second Circuit, for example, have required this more particularized showing. See, e.g., Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552 (D.N.J. 1994); Morse/Diesel, Inc. v. Trinity Industries, 142 F.R.D. 80, 84 (S.D.N.Y. 1992); Morse/Diesel, Inc. v. Fidelity and Deposit Co., 122 F.R.D. 447, 450 (S.D.N.Y. 1988). In Botarro v. Hatton Associates, the Eastern District of New York observed that:

  > given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing that admissible evidence will be generated by the dissemination of the terms of a settlement agreement. 96 F.R.D. 158, 160 (E.D.N.Y. 1982).

  This view was rejected in Bennett v. La Pere, 112 F.R.D. 136, 138-39 (D.R.I. 1986), which rejected the notion of a particularized showing. But see Vardon Golf Co., Inc. v. BBMG Golf Ltd. 156 F.R.D. 641 (N.D. Ill.1994) (following Bottoro and rejecting Bennett).

- Settlement agreement was admissible into evidence in a disability rights case where the defendant argued that the agreement was relevant to show that plaintiff was not motivated to work. Ensing v. Vulcraft Sales Corp., 830 F. Supp. 1017 (W.D. Mich. 1993).

- In the case of public/government employers, because the settlement is paid by tax dollars, many settlements against such entities are not as a matter of state law confidential. Check applicable state law.

- The clients should be advised that secret settlement of an employment dispute with a governmental employer may be held by the court to be contrary to public policy unless the parties can demonstrate that interests favoring confidentiality outweigh the interests favoring disclosure. In one case, the court held that a newspaper had standing to challenge a court order that terms of a settlement agreement be kept confidential. Daines v. Harrison, 838 F. Supp. 1406 (D. Colo. 1993).

Required Public Disclosures

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- SEC filings
- Unemployment filings
- Suspicious Activity Reports (SARs)
- U-5s w/ SROs (e.g. NASD)

Failure to Tender Back Consideration

- A court of equity is always reluctant to rescind unless the parties can be put in status quo. Adelman v. Conotti Corp., 215 Va. 782, 794, 213 S.E.2d 744, 781 (1975). However, the courts do not agree as to "whether restoration of the status quo is a precondition to litigating the right to rescind. Where fraud is charged as a ground for rescission of a contract, the courts are in disagreement; some hold that a tender of restoration is a precondition to a right of action, others hold otherwise." See Covington v. Skillcorp Publishers, Inc., 439 S.E.2d 391, 392 (Va. 1994) (citing 12 Samuel Williston, A Treatise on the Law of Contracts § 1530, at 652 (Walter H. E. Jaeger ed., 3d ed. 1970) and holding otherwise). But see Braner USA, Inc. v. CM Technologies, Inc., 674 N.E.2d 942, 944 (Ill. App. Ct. 1996) ("Rescission cannot be granted where the party claiming recision is unable to restore the benefits received by it").

- A district court applied "free market" contract law analysis to decide whether to enforce a tender-back requirement against an individual who signed a release and sought to bring a Title VII action. The court found this requirement inapplicable in view of the fact that Title VII was created precisely to combat deficiency in market, namely inappropriate discrimination, which had the effect of placing parties in unequal bargaining positions. Rangel v. El Paso Natural Gas, 996 F. Supp. 1093 (D.N.M. 1998).

- In Oubre v. Entergy Operations, Inc., 522 U.S. 422, 118 S. Ct. 838, 139 L.Ed.2d 849 (1998), the Supreme Court also addressed the issue of the employee who fails to return the consideration on which the waiver was purportedly based. The Court held that an employee who fails to do so may still sue their employer under the ADEA. See Id. The Court also stated that, "[i]n further proceeding in this or other cases, courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee . . ." Id. at 428. Employees in this situation

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should be made aware of this possibility.

- The EEOC promulgated a regulation in December 2000 in accord with the rule of Oubre, stating that "[r]etention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement" under the ADEA. 29 C.F.R. § 1625.23 (2003). See also Kiren Dosanjh, *Old Rules Need Not Apply: The Prohibition of Ratification and "Tender Back" in Employees' Challenges to ADEA Waivers*, 3 J. Legal Advoc. & Prac. 5 (2001) (discussing in detail the merits of the new EEOC regulation). For a detailed description of the effect that the new rule may have on employers, see Condon McGlothlen and M. Margaret Banas, *New Rule May Jeopardize Settlement and Separation Agreements*, 19 No. 7 ACCA Docket 74 (July/August 2001), *available at* http://www.westlaw.com.

Tolling of Statutes of Limitation

- Have a form tolling agreement ready to transmit when you need to avoid "going adversarial" (for example, filing with EEOC) prematurely.

- Assuming the tolling agreement will be recognized, the parties might agree to toll all such time periods from some date certain (e.g. the first signature date of the tolling agreement) to some other date, certain or otherwise (e.g. upon five days written notice from either party, five days after a mediation conference).

- Will the courts or EEOC recognize it? Is the time limit jurisdictional? Some states have a statute that governs the enforceability of agreements not to plead the statute of limitations. See, e.g., Virginia Code, Section 8.01-232 which, *inter alia*, requires such an agreement to be in writing. See also, Tucker v. Owen, 94 F.2d 49 (4th Cir. 1938) (a promise made after the statute of limitations has lapsed could be ineffective).

- Private agreements have been determined lawful for the purpose of tolling the statute of limitations. Hunter-Boykin v. George Washington Univ., 132 F.3d 77 (D.C. Cir. 1998). Because agreement to toll limitations period could be interpreted to only suspend that period (as opposed to waiving period until certain date), evidence of "unequivocal" waiver not required to uphold agreement. Id.

- With respect to agreements to shorten a limitations period, the Supreme Court has stated the rule as follows: "[I]t is well established that, in the

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absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period." Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 608 (1947).

- Will estoppel work? See, e.g. U.S. v. Consolidated Const., Inc., 1992 WL 164519 at *2 (D. Colo. 1992) (conduct by defendant which leads to a delay in filing by the plaintiff estops the defendant from raising a limitations defense).

- Various groups have attempted to create a menu of the unbelievable number of claims, common law and statutory, that can arise out of a workplace dispute.

- Married to any such menu should be any pre-conditions to suit filing (e.g. filing administrative charge) and the statutes of limitations for same and suit.

Withdrawal of EEOC Charges

- Corporate counsel need to be aware of the fact that a charging party's settlement with his/her employer does not necessarily end the EEOC's investigatory and enforcement powers. See, e.g., EEOC v. Citicorp Diners Club, Inc., 985 F.2d 1036, 1040 (10th Cir. 1993); EEOC v. Children's Medical Center, 719 F.2d 1426 (9th Cir. 1983).

- Counsel may feel it appropriate to agree on the text of the letter to the EEOC and any deferral agency withdrawing the charge prior to the execution of the settlement agreement. Corporate counsel may insist that settlement is conditioned on the anti-discrimination agencies agreeing to the withdrawal.

- In doing so, make that sure you follow EEOC procedures set forth in the EEOC Operations Manual and those of a deferral agency under its worksharing agreement with EEOC. See John J. Balitis, Jr. and Alec Hillbo, *Short-Circuiting Litigation: Using the Administrative Process to Your Advantage* at 53, *available at* http://www.fclaw.com/Seminar/Materials/2001labor/LE3.pdf (citing 29 C.F.R. § 1601.10 and EEOC Compliance Manual § 7.1(a)).

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Covenant Not to Sue or File Administrative Complaint

- If settlement is reached before an EEO charge is filed, have a provision that contains a representation that no such charge has been filed and that forbids employee from filing an EEO charge with EEOC or any other local, state, or federal agency, or anyone filing on the settlor's behalf.

- The employer's counsel should insist that the employee agree to a covenant not to sue or to file administrative charges. If the employee violates this provision, can an employer sue for damages for breach? The courts have split on this issue. A Texas court has found that the "breach of a release may be grounds for an action for damages." Widener v. Arco Oil and Gas Co., 717 F. Supp. 1211, 1217 (N.D.Tex. 1989) ("Because the purpose of entering into a release is to avoid litigation, the damages a releasor suffers when the release is breached are its costs and attorney's fees incurred in defending against the wrongfully brought action.") One court has said it can "use the releases only as a shield, and not as a sword, and, thus, may not institute a suit for damages on account of their breach." Carroll v. Primerica Fin. Serv. Ins. Marketing, 811 F. Supp. 1558, 1567 (N.D.Ga. 1992).

- Whether a court will recognize an employee's breach of covenant not to sue as actionable may be an issue of careful drafting and, as such, employer's counsel should include a provision for damages in the event of a breach. See Issacs v. Caterpillar, Inc., 702 F. Supp. 711, 713 (C.D.Ill. 1988) ("unless a covenant not to sue expressly provides for damages in the event of breach, it will be presumed to be intended for *defensive* purposes only, absent allegation that the subsequent lawsuit was brought in bad faith.")

- The agreement also may say that the employee is not to cooperate with others, not to participate in any class action, and so on. For example, the agreement may read as follows:

> The Employee agrees not to request, or to directly or indirectly cause, any governmental agency or other person to commence any investigation or bring any action against the company, its affiliates, or their successors or assigns, or the directors, officers, employees or agents of any of them, and the Employee waives any remedy

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or recovery in any action which may be brought on the Employee's behalf by any government agency or other person.

- Covenants impairing the ability of an employee to cooperate in a federal or state agency's investigation of an employer's conduct may be unenforceable and "void as against public policy." See EEOC v. Astra USA, 94 F.3d 738, 745 (1st Cir. 1996). See also Connecticut Light & Power Co. v. Secretary of U.S. Dept. of Labor, 85 F.3d 89, (2d Cir. 1996) (attempts in settlement agreements to restrict employee's ability to communicate with federal agencies violated the Energy Reorganization Act of 1974). Further, it has been argued generally that settlement agreements requiring parties to, short of a subpoena, refrain from cooperating in civil or criminal proceedings may be violations of the federal laws against obstruction of justice. See *Speak No Evil: Settlement Agreements Conditioned on Noncooperation are Illegal and Unethical*, 31 Hofstra L. Rev. 1 (Fall 2002).

- The employer may include language that explicitly states that the consideration (e.g. money) has to be returned in the event this covenant is violated. Before Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), which held that a failure to tender back consideration did not constitute a ratification of a release, the circuits were split on the issue. Compare Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992) (retention of benefits, after learning that a release is voidable, does not constitute a ratification of the release); Botefur v. City of Eagle Point, Oregon, 7 F.3d 152 (9th Cir. 1993) (court holds that a plaintiff in a §1983 employment case is not required to return or offer to return consideration received pursuant to a valid release agreement as a requisite to filing a §1983 action regarding matters allegedly released); with O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362-63 (4th Cir.), cert. denied, 112 S. Ct. 177 (1991) (releasor's retention of benefits, after learning that a release is voidable, constitutes a ratification of the release); Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991) (same). For further discussion of those issues, see the Failure to Tender Back Consideration Section of the paper supra.

- An action challenging the validity of the release may not be deemed by the courts to be a breach of a covenant not to sue. See, e.g., Astor v. Int'l. Business Machines Corp., 7 F.3d 533, 537 (6th Cir. 1993) ("While this covenant not to sue broadly covers all claims relating to the employment

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relationships, it cannot cover suits that challenge the validity of the release agreement itself. Otherwise, the parties would be denied the means to escape a voidable obligation not to sue.")

- Counsel must carefully craft the language of a general release to assure that a court does not later hold, as the Illinois courts do, that when a release contains words of general release in addition to recitals of specific claims, the words of general release are limited to the particular claim to which reference is made where the releasing party was unaware of other claims. See Continental Concrete Pipe Corp. v. K & K Sand & Gravel, Inc., 1990 WL 7095 at *3 (N.D.Ill. 1990) (holding that a general release is limited to the particular claim to which reference is made); Chicago Transit Authority v. Yellow Cab Co., 463 N.E.2d 738, 741 (Ill. App. Ct. 1982) (holding the same).

- If the employee executed, and breached, a covenant not to sue, the employer may be entitled to a reasonable attorney's fees in accordance with the language of the agreement. See generally Artvale, Inc. v. Rugby Fabrics Corp., 363 F.2d 1002, 1008 (2d Cir. 1966) ("[I]t is not beyond the powers of a lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail liability for damages, including the most certain of all--defendants's litigation expense.").

- Typically, the settlement will provide that a demonstrated breach of the covenant will result in, *inter alia*, an award of counsel fees. See, e.g., Astor, 7 F.3d. at 540 (fees awarded to employer where employee breached a covenant not to sue).

Liquidated Damages for Breach of Settlement Agreement

- Employees' counsel often strongly opposes a provision imposing liquidated damages in the event of a breach of the agreement. If employees' counsel insist that it be mutual, i.e., a breach by the employer would lead to the imposition of liquidated damages, the employer may withdraw the demand for a liquidated damages provision.

- Violation of confidentiality provisions often times is defined as a material breach and to do so is inherently dangerous. Employees' counsel should be very cautious in agreeing to a liquidated damages provision tied to breach of a confidentiality clause.

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- Violation of non-disparagement provision for both sides similarly is an area that is inherently dangerous. One protection may be to state in the agreement that certain statements by the employer would not be considered to be disparaging (e.g. "the employee in our view did not fit in the new corporate culture").

- If you have a liquidated damages clause, the parties ought to negotiate an amount for liquidated damages that is tolerable. Do not agree to an absurd dollar figure. A liquidated damages clause may be denied when the stipulated amount is so extravagant or is so disproportionate as to show fraud, mistake, or oppression. Gruschus v. C.R. Davis Contracting Co., Inc., 409 P. 2d 500, 504 (N.M. 1965); Raymundo v. Hammond Clinic Ass'n., 449 N.E.2d 276, 283 (Ind. 1983).

- The employer may insist that there be language that it has the right to recover more than a fixed amount if such damages are provable. Insistence on having its cake and eating it too may risk invalidation of a liquidated damages clause. *See* Whittaker Corp. v. Calspan Corp., 810 F. Supp. 457, 463 (W.D.N.Y. 1992).

Prohibition on Re-Applying for Employment – "Don't Darken My Door Again"

- Often times, the employer demands a provision that the terminated employee never again apply for employment with the company, as defined in the agreement (successors, affiliates, and so on). Employees' counsel need to be careful that such a provision not be drafted too broadly and thereby unwittingly preclude the employee from a vast number of companies in the event of a later acquisition or merger.

- The clause may be unlawful if applied to a person protected by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. *See* EEOC Opinion Letter, 12/15/83, Emp. Prac. Dec. ¶5109, which dealt with the question whether an employer is legally obligated to consider for rehire any of its former employees who have already lawfully retired under a bona fide employee benefit plan of such employer. It had been argued that a waiver precluding future employment may be an unlawful prospective waiver under the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) ("OWBPA").

- Rather than a permanent bar on application for reemployment, a compromise might be an agreement that the employee will not apply for a

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fixed period of years, two or three years, for example.

- In Kendall v. Watkins, 998 F.2d 848 (10th Cir.), cert. denied, 114 S. Ct. 1075 (1993), the court held that a "Never Darken Our Door Again" provision did not effect a prospective waiver of Title VII rights and the employer could not reject future employment applications for discriminatory reasons even though the employer had no obligation to consider the applications.

- In Adams v. Philip Morris, Inc., 67 F.3d 580 (6th Cir. 1995), the Sixth Circuit remanded to the district court to determine the intent of the parties in a case where a former employee executed a release and waiver of all claims against the employer in a termination agreement. The Sixth Circuit held that though an employee "may not prospectively waive his or her rights under either Title VII or the ADEA [in this circuit]," a settlement agreement that incorporates the "future effects of prior discrimination" is permissible and "effectively bars new discrimination claims based on post-settlement conduct that stems directly from, or is a continuing effect of, past discrimination." Id. at 584.

- Consider a savings clause stating that the parties can modify the terms of the agreement, including the prohibition on reemployment, in writing if signed by each party or the authorized agent thereof.

Return Documents

- Which documents "belong" to the employer and which "belong" to the employee? Employer's counsel, depending on the litigation environment, may want to ensure that all copies of certain critical documents be returned. In such an instance, a very specific clause should be drafted to assure return and that breach is a material breach. See also Opinion 242 of the District of Columbia Bar's Committee on Legal Ethics discussed under Paragraph 4 of this article.

- On the other hand, employee's counsel on principle just may not agree to return the employee manual and other policy and procedures documents. Such counsel may want to refer to them when they get their next client against this particular employer. Some may want to use them in drafting forms for corporate clients or to show as an example of how to do or not to do something. Counsel needs to be aware that once the documents get into public domain (e.g. NELA's form bank), there is probably no way for employer to get them back.

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- Does the employee have customer lists? Are they to be returned? Does the employer have any need for them? Feldman & Jackson, *Protecting Customer Lists*, 16 Employee Rel. L.J. 507 (Spring 1991).

- What other proprietary information does the employee have that should be returned?

Non-Competition Commitments

- If a non-competition agreement already exists, assess whether it is enforceable. Is there an applicable law clause? Is it rock solid? Many factors can result in the law of another jurisdiction applying. For example, when was it signed? What is its temporal and geographic scope? Is there a state statute on the subject? A state supreme court decision? A public policy prohibition against the agreement itself or certain terms contained therein? McKinney, *Noncompetition Clauses in Executive Employment and Severance Agreements*, 16 Employee Rel. L.J. 29 (Summer 1990).

- The former employee's counsel may argue that an employer could not enforce the existing agreement in order to create an interest on the part of the employer to renegotiate another noncompetition agreement as a part of a total settlement package.

- Apply the same analysis to the non-solicitation clause.

- Some states (e.g., California) severely restrict non-competition agreements. See Cal. Bus. Prof. Code § 16600; see also Latona v. Aetna U.S. Healthcare Inc., 82 F.Supp.2d 1089, 1094 (C.D.Cal. 1999) (non-compete agreements that remove employee from a significant part of employee's market violate California law).

- If one is negotiated as a part of the settlement, be certain that it is narrowly and precisely drawn. Employees' counsel need to watch out for "directly and indirectly" language in non-competition agreements.

Boards of Directors

- If the employee serves on the company's board, the employer will want to effectuate his/her resignation and removal.

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- If the employee serves as the employer's representative on boards of charities, community groups, and the like, the employer may want the individual to assist in substituting someone else from the company in a manner that does not create ill will or otherwise tarnish the company's image in the community.

Corporate Confidentiality Agreements

- The employee has to be able to discuss (or even brag about) previous accomplishments during job interviews. Therefore, employee's counsel needs to be careful that corporate confidentiality clauses do not inadvertently restrain the client's ability to market his/her services.

- Did the employee sign an ethics agreement? Does it apply post-termination?

- Employees' counsel need to be warning their clients about fiduciary and other duties that their clients may owe to the former employer by virtue of formal agreements with the employer or by virtue of the applicable state common law.

Reasons for Termination

- Can you change the reasons for termination for purposes of marketing the terminated employee to a new employer or to assuage his or her psyche?

- Consider that if the employee's records reflect a resignation, it may affect his ability to obtain unemployment benefits. Does that matter to the employee?

- Terminations for violence, fraud, theft, ethics violations, and the like present unique problems, including whether there is a legal duty to make disclosure to prospective employers.

- Recently, a Florida court recognized that an employer may be liable to another employer for failing to advise the second employer of, for example, the violent propensities of a former employee. See Jerner v. Allstate Insurance Co., 650 So.2d 997 (Jan. 18, 1995).

- Among the possible explanations for termination could be one of the following:
  i. Reduction in force ("RIF");
  ii. Reorganization;
  iii. New management-new team;
  iv. Workforce adjustment;

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v. Retirement;
vi. Resignation;
vii. Employee wishes to pursue other opportunities;
viii. Personal reasons;
ix. Disagreements with the boss; or
x. Reasons to be kept strictly confidential.

- Increasingly, the shield of a fictional reference or a neutral reference policy runs into concerns that the failure to disclose the true reasons for termination may lead to liability for the employer in the future.

Multiple Parties

- The employer's counsel needs to know if there is a "Mary Carter" agreement and state law on the subject. For example, such agreements are void in Florida. See, e.g., Ward v. Ochoa, 284 So.2d 385 (Fla. Sup.Ct. 1973); Dosdourian v. Carsten, 624 So.2d 241 (Fla. 1993). See also Ziegler v. Wendel Poultry Service, Inc., 615 N.E.2d 1022 (Ohio 1993); Leon v. J.&M. Peppe Realty Corp., 190 A.D.2d 400, 596 N.Y.S.2d 380 (1993).

- A Mary Carter agreement is an agreement entered into between the plaintiff and one or two or more alleged joint tortfeasors whereby the settling defendant stays in the litigation, the settlement agreement is kept secret, and there is a guarantee to the plaintiff of some recovery (and usually some limitation on the maximum recovery).

- In Maryland, as in most states, the court requires that the terms of the Mary Carter agreement must be disclosed to the jury before the jury hears testimony from witnesses of the settling party so that the jury can adequately assess the stake in the outcome which the witness has. See General Motors Corp. v. Lahocki, 410 A.2d 1039 (Md. App. 1980); see also Auto Village Inc. v. Sipe, 492 A.2d 910 (Md. App. 1985).

Rights to Contribution

- The question arises: Does a settling party surrender any right of contribution that may exist as between third parties? See, e.g., McKenna v. Austin, 134 F.2d 659, 665 (D.C. Cir. 1934)("The wrongdoer who settles... does not surrender his right of contribution..." But see Rose v. Associated Ames Thesiologists, 501 F.2d 806, 810 n.10 (D.C. Cir. 1974) (A settling party's share should dispose of that party's percentage of the judgment without regard to whether the settlement is either greater or less

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than the pro rata share of the judgment).

- In an early Title VII case, the Court held, in a collectively bargained setting, that contribution as between employer and union would not be permitted. Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981), affirming in part and vacating in part, 606 F.2d 1350 (D.C. Cir. 1979).

- Employee's counsel should advise and protect the client regarding alleged joint tortfeasors who are not parties to the settlement. See, e.g., Mitchell, "Credit and Contribution Among Alleged Joint Tortfeasors" (unpublished 1994). For example, what happens if you do not join? Is there an automatic 50% reduction in damages?

Health Insurance

- Whether the employee is entitled to receive written notice of rights under the Comprehensive Omnibus Budget Reconciliation Act of 1986 ("COBRA"), 29 U.S.C. §1161-1168, such as the right to continue on employer's health insurance plan? See Harris, *A Review of Recent Developments Affecting COBRA Reports*, Employee Relations L.J., Vol. 21, No. 2 (Autumn 1995).

- What will be the termination date for purposes of COBRA? Is it the end of severance pay period or the last working day? The termination date is the trigger date for the start of the 18 months.

- The agreement may include language explaining who pays health insurance premiums? The employer or employee? Do they co-pay? New split or old split?

- Did the employee have any preexisting health condition or problem? You need to be familiar with HIPAA (Health Insurance Portability and Accountability Act).

- If the employee does not need the former employer's health insurance, consider waiving it in exchange for more money in the overall settlement. The employer may need to obtain waivers from the employee's dependents.

- Does state law require the employer to offer an employee conversion rights after the COBRA period has ended? Does state law provide

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different standards for when the employee may continue health insurance coverage? For example, Maryland's state statute covers some employers not covered by COBRA.

- If the employee's spouse is employed, what coverage, if any, does the spouse have? When can the spouse get on his/her employer's plan? Can the spouse get family coverage? What was the consequential increase in the employee's overhead? This item should be considered in valuing the case.

Severance Pay

- What if a "severance" payment is paid in a lump sum? Is this still an advance on wages or salary?

- What was the amount offered before counsel for employee entered picture and asserted a claim? What have other employees been offered? Is there a written severance pay plan? Is there flexibility on either side?

- How was the figure computed? By what formula? Is there any precedent? Ask for charts, facts, and the like.

- What will be the tax treatment for a lump sum distribution?

- What will be the effect on eligibility for unemployment compensation?

- If salary continuation is already on the table before the claim is asserted, it is difficult to later convert that money into a sum paid to settle a "personal injury" claim.

- Will the money be paid over time? Is the employer solvent? What is the risk of a default? What is the risk if the employee violates the agreement and loses conditional payments? Are there any guarantees?

- Can payments be stretched out over time so that the employee can remain an employee for purposes of receiving health insurance and other similar benefits and delaying the COBRA start date?

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- Sometimes, the employer is having cash flow problems and cannot pay in a lump sum, but rather in a series of periodic payments. In such a settlement, employee's counsel may demand an acceleration clause or liquidated damages in the event of any default in timely payment. You should also consider how you might protect the client from default by an insolvent employer. Alternatively, have a "confession of judgment" provision by which the employee may have judgment entered against the employer without prior notice of hearing if the employer defaults on any installments. The amount of the judgment would be the gross amount of the remaining installments. Sometimes a settlement can be divided or paid over two fiscal years. Find out when the employer's fiscal year ends. You should also consider how you might protect the client from default by an insolvent employer. A personal guarantee is one possibility; another is collateral.

Future Employment

- Sometimes, the employer will insist that the severance pay cease if and when the employee obtains a new position during the severance pay period.

- The language of such a clause needs to be carefully drafted. What constitutes new employment? Part-time or full-time? Comparability of old and new jobs? Consulting work?

- Sometimes, the employer will want the employee to report all offers of employment made to the employer and the reasons the offer was rejected. Another demand sometimes made is to report regarding efforts to obtain employment to de-incentivize employee from taking "a sabbatical.

Additional Money

- If employer's counsel is reasonably sure that an attorney will surface for an employee being terminated, then you may not want to place all your chips on the table in the opening "offer." One must understand that uniformity is then compromised.

- Is the severance pay to be included as earnings in computing pension eligibility? Compare Licciardi v. Kropp Retirement Plan, 990 F.2d 979 (7th Cir. 1993) (holding that severance pay is not to be included as earnings in computing pension eligibility) with Lynn v. CSX Transp., Inc., 84 F.3d 970 (7th Cir. 1996) (pension eligibility is to be determined on the basis of the language in the pension plan itself, rather than the settlement agreement).

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- When a settlement agreement does not specify a particular time by which payment must be made, the court will imply a requirement that payment be made within a reasonable time. Janneh v. GAF Corp., 887 F.2d 432, 436 (2d Cir. 1989), cert. denied, 498 U.S. 865 (1990).

- The claimant might insist on an acceleration clause in the event the respondent defaults on a payment.

Letter(s) of Reference

- Typically, the employee will draft the letter for the employer. Employee's counsel should review it before submitting it to the employer.

- Sometimes, the parties attach the reference letter to the separation agreement and disclaim any claim arising out of using the same so long as terms are followed.

- It may facilitate agreement on the text of the letter if the employee relies on prior written evaluations if available and if laudatory.

- Who is to sign the reference letter? Should the party signing the letter be released by the employee from potential claims for giving the reference?

- Employee's counsel may want to negotiate a provision that the employer is not to make statements that are inconsistent with the letter of reference.

- Employee's counsel may obtain a provision that the employer is not to disparage job performance. The term "disparage" generally means to "unjustly discredit or detract from the reputation of another…." See Black's Law Dictionary, (7^{th} ed. 1999). Characterizing a failure to complete certain tasks as "incompetence" would not "merely constitute an employer's evaluation of an employee's work performance," but would actually serve to "disparage" an employee and thereby give rise to a potential cause of action for defamation. See Kelleher v. Corinthian Media, Inc., 208 A.D.2d 477, 477 (N.Y.A.D. 1994).

- Are there former supervisors who would provide a letter of reference?

- How should you handle release forms from prospective employers? Federal and state government forms can be particularly troublesome. For example, New York City's Department of Investigation has a form that applicants sign waiving confidentiality respecting personnel records of former employers and the Department asks former employers very direct questions (e.g. "Is this person eligible to be hired? Did the above person

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resign after being notified that he or she would be discharged?")

Verbal References

- Does the employee want the employer to provide a verbal reference?
- Does the employee wish to silence the previous employer? Or to silence particular individuals associated with the former employer?
- Are there individuals who, if free to talk, will support the employee?
- Are there individuals who are generally hostile to the employee? Is there a danger of a defamation claim downstream? Employer's counsel has a mutual interest in curbing abuse by such individuals.
- What about former supervisors/co-workers who have left the company? How can you control what others say after they leave the company? What do company records say about the terminated employee? How can you control access to such records, sanitize them, seal them, destroy them, and so on?
- How will the phone be answered immediately after the termination? The secretaries or receptionist must be instructed to answer in a professional manner that does not inadvertently suggest that there was a problem.

Attorneys' Fees

- In Maher v. Gagne, 448 U.S. 122, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980), the Court ruled that a plaintiff who prevails through settlement rather than litigation on the merits is still eligible for attorney's fees as a prevailing party.
- If the settlement agreement does not state that attorneys' fees will be awarded to the prevailing party in an action to enforce, the holding in Christianburg Garment v. EEOC, 434 U.S. 412 (1978) may not apply, especially if the claims being settled do not have fee-shifting provisions.
- In Morris v. Communications Satellite Corp., 149 F.R.D. 1 (D.D.C. 1993), the court held the Christianburg Garment rule applied to a claim for fees for enforcing settlement agreement.
- From the lawyer's perspective, one wants to ensure that there is no ambiguity regarding all claims for attorneys' fees being released and resolved, the release should say so explicitly and a clause should say that the claimant is not a prevailing party.

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- Generally attorneys' fees are deductible if they produced taxable income. You will need to allocate them if part of the settlement is excludable from gross income. Plaintiffs must be aware that, under federal tax law effective August 20, 1996, deductions of attorneys' fees may trigger an alternative minimum tax, thereby greatly affecting taxes owed. See Benci-Woodward v. C.I.R., 219 F.3d 941, 944 (9th Cir. 2000) (construing 26 U.S.C. §§ 56, 67 as not allowing deductions of such fees for alternative minimum tax liability).

- Many employers will pay in settlement the employee's attorneys' fees. Employers view counsel as a moderating influence. The employer is required under OWBPA to encourage the employee to obtain counsel. Review and consultation with a competent attorney further ensures that the settlement cannot be voided at a later date.

- What is the tax treatment if fees are paid in a structured settlement annuity? Be very careful about constructive receipt. See, e.g., Childs v. Commissioner of Internal Revenue, 63 U.S.L.W. 2331 (U.S.T.C. 1994). Amounts promised to attorneys under structured settlements that describe future payments of attorneys' fees for previously rendered services are neither funded nor secured so as to constitute "property" for purposes of Section 83 of Internal Revenue Code, and therefore fair market value of such amounts is not includable in gross income for year in which agreements are effected.)

- A provision that attorneys' fees will be paid to the prevailing party in any contest regarding breach of the settlement agreement is sometimes included in the agreement.

- If the employer pays the employee's attorneys' fees, the employee's lawyers' Federal ID number should be given and it should be agreed as to whether the employer will give an IRS Form 1099 to that lawyer.

- More than ever, attorneys should be prepared for an audit - especially those attorneys handling contingent fee cases - because of a new federal tax law requiring more payments to attorneys to be reported on Form 1099. The deduction method should rarely be used by attorneys when treating client expenses. Instead, the IRS recommends treating these amounts paid on behalf of clients as "loans." Those attorneys who must change accounting systems should swiftly file a Form 3115, "Application for Change in Accounting Method," as the old 90 day grace period following notice of audit has been eliminated. See Daniel T. Morgan and Christine M. Bayles, *Rev. Proc. Simplifes Voluntary Accounting Method Changes*, 59 Tax'n for Acct. 4, 7 (July 1997).

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Non-Disparagement

- Employee's counsel, before insisting on a provision that the employer is not to disparage the employee, should consider the employee's reaction if the employer insists it to be mutual.

- While oftentimes the focus of discussion is disparagement of the employee, the employer increasingly has similar concerns. For example, it has become endemic for persons, most suspected to be disgruntled former employees, to place anonymously on on-line message boards disparaging comments about the company and its executives.

- The parties may list in the agreement specific measures the employer is to take to assure non-disparagement. For example, many times the Company's Security Department is where the leak will be made to a prospective employer. You can better assure it is plugged if the General Counsel, for example, has agreed to advise the Security Department in writing that the existence and terms of the agreement are strictly confidential.

- Sometimes the parties agree upon the text of a Non-Disclosure and Non-Disparagement Statement that is to be signed by employers' managers and officials who are aware of employee's dispute. More often than not, those managers and officials at sufficient levels of authority bind the employer in the event of a breach of the non-disparagement provision.

- Increasingly, the employer wants to prevent former employees from disparaging the employee. Employer's counsel may want a clause that absolves it from any liability if breached by a former employee unless participation by the employer can be proven.

Indemnification

- What do the bylaws say about indemnification of corporate officers and directors?

- What state law applies in terms of statutory obligations in this regard? What is the state of incorporation? What does the state statute say about indemnification?

- Are there possible claims against the company in which the employee played a role?

- Are there possible accusations against the employee?

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- The vulnerability of company officers and human resources professionals has increased significantly in recent years.

- Obtain a copy of the Directors and Officers ("D&O") insurance policy. Get policy numbers and address of the carrier.

- The company might agree to pay for the employee's time, expenses, and legal fees if the employee offers to cooperate with the employer in some future litigation.

- The parties should address explicitly whether the release is intended to discharge the employer's insurance and indemnity obligations relating to the employee. See, e.g., Vitkus v. Beatrice Co., 11 F.3d 1535, (10th Cir. 1993) (triable issue of fact existed whether language discharges such obligations regarding employee's service on board of failed savings and loan).

Witholding Tax Issues: Severance Payments

- Sections 3102 and 3402 of the Code, 26 U.S.C. §§ 3102 and 3402, require employers to withhold social security and income taxes imposed on employees from the employees' wages. The withheld taxes are part of the wages of an employee and are held in trust for the benefit of the United States. 26 U.S.C. § 7501 ("a special fund in trust for the United States"); Slodov v. United States, 436 U.S. 238, 243, 98 S. Ct. 1778, 1783, 56 L. Ed.2d 251 (1978). Thus, those funds may not be used as working capital for the business. Id., McGlothin v. United States, 720 F.2d 6, 8 (6th Cir.1983). An employee whose taxes are withheld but not actually paid over to the government is credited with payment. Slodov, 436 U.S. at 243, 98 S. Ct. at 1783. Therefore, the government has recourse against the persons responsible for remitting the taxes to the IRS. Id. Section 6672 provides that when a "responsible person," the person charged with collecting, accounting for and paying over withholding taxes, "willfully" fails to do so, he is liable for a penalty equal to the amount of the unpaid taxes. McGlothin, 720 F.2d at 8. If an assessment is made against a corporate officer, the burden of proof by a preponderance of the evidence is on the officer to show that he was not a responsible person or that he did not act willfully. Calderone v. United States, 799 F.2d 254, 258 (6th Cir. 1986).

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- The IRS is allowed to make identical assessments against multiple parties under § 6672. McCray v. U.S., 910 F.2d 1289, 1290 (5th Cir. 1990), cert. denied 499 U.S. 921, 111 S. Ct. 1313, 113 L. Ed.2d 246 (1991); USLIFE Title Ins. Co. of Dallas v. Harbison v. I.R.S., 784 F.2d 1238 (5th Cir. 1986). Responsible persons are held jointly and severally liable for a § 6672 violation. McCray, 910 F.2d. at 1290; USLIFE 784 F.2d at 1243. The IRS is limited, however, to a single collection of a § 6672 penalty. McCray, 910 F.2d. at 1290; USLIFE 784 F.2d. at 1243.

- Is the employee the "responsible person" for IRS tax withholding purposes? Did the employee sign payroll checks? As treasurer? As chief financial officer? *See*, e.g., Barton v. United States, 988 F.2d 58 (8th Cir. 1993); Barnett v. I.R.S., 988 F.2d 1449 (5th Cir. 1993) (an officer of a corporate employer is a "responsible person" where he owned 20% of the company stock, and served as director and vice-president during the quarters for which the taxes were not paid); United States v. Jones, 33 F.3d 1137 (9th Cir. 1994) (individuals were not "responsible persons" because they did not have authority to pay the taxes and nothing indicated that they selected the creditors to pay).

- "It is no excuse that, as a matter of sound business judgment, the money was paid to suppliers and for wages in order to keep the corporation operating as a going concern - the government cannot be made an unwilling partner in a floundering business." Collins v. United States, 848 F.2d 740, 741-742 (6th Cir. 1988) (per curiam). The purpose of this statute is "to protect the government against losses by providing it with another source from which to collect the withheld taxes." Gephart v. United States, 818 F.2d 467, 473 (6th Cir. 1987). "When net wages are paid to the employee, the taxes that were, or should have been, withheld are credited to the employee even if they are never remitted to the government; so the IRS has recourse only against the employer for their payment." Mazo v. United States, 591 F.2d 1151, 1153 (5th Cir.), cert. denied, 444 U.S. 842, 100 S. Ct. 82, 62 L. Ed.2d 54 (1979).

- The “responsible person” can have penalties imposed for the failure to pay. See, e.g., Greenberg v. United States, 46 F.3d 239 (3rd Cir. 1994) (in-house controller who paid other creditors even though he knew withholding taxes were due and owing “willfully failed to pay over taxes” and was subject to penalties.

- The statute makes the responsible individual personably liable for a company's unpaid withholdingtaxes only if he "willfully" fails to pay them. 26 U.S.C. § 6672. In Phillips v. Internal Revenue Service, 73 F.3d 939 (9th Cir. 1996), the Court defined "willfulness" as "reckless

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disregard." The trial court relied on Wright v. United States, 809 F.2d 425 (7th Cir. 1987).

Benefits in General

- Sometimes, the benefits advice is too complicated for the attorney who does not specialize in benefits law. Sometimes it may be necessary to refer to and work with a benefits specialist. Do not be afraid to express your concerns when they arise and offer the option to the client. Raising the possibility early can help to avoid Monday morning quarterbacking later on when administration of the settlement becomes unduly complicated.

- Request copies of plan documents immediately, including stock option plans, restricted stock laws, pension plans, and cash balance plans.

- Be aware of the employee's rights under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA") to copies of ERISA plans. There are ERISA penalty provisions for failure to disclose plans upon request. ERISA penalties for failure to disclose are $100 per day. Make sure you request summary plan descriptions ("SPD's") and the actual plans, including the actual insurance policy for long-term disability.

- You ought to consult with the client's estate lawyer. You may also want to work with a financial planner. The client may have one.

Stock Options

- If there is a qualified or unqualified stock option plan and the employee was a participant, this item needs to be assessed in valuing the case. See Black & Scholes, "The Pricing of Options and Corporate Liability," Journal of Political Economy (1973). For instance, with respect to non-qualified plans, a severance package may include accelerated accrual or vestiture of stock, or cash amounts to replace benefits that are forfeited upon termination. Wayne N. Outten, *Negotiating the Severance Agreement from the Employee's Perspective*, 45 No.1 Prac. Law. 65, 73 (January 1999), *available at* http://www.westlaw.com.

- Stock options with regularity are a part of compensation packages. Counsel need to obtain the option plan early on to evaluate what, if any, flexibility there may be in terms of vesting and exercise dates.

- In a circumstance where the employee has acquired a small percentage of

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stock as part of his/her compensation, the majority shareholders may owe a fiduciary duty. See, e.g., Brennan v. Chestnut, 973 F.2d 644, 648 (8th Cir. 1992) (Minn. law); Santoni, "The Employer's Duty Under the Federal Securities Laws to Disclose Material Information to Employee Shareholders," 16 Employee Rel. L.J. 177 (Autumn 1990).

- Is the company to buy the options back? At what price? How are the options valued? Typically, the employee cannot force the company to buy the options back?

- Restricted stock also is a common element in compensation packages.

- Sometimes, the employee may own shares in a closely-held corporation. The company may want the shares to be conveyed back.

Pension

- Is there a pension?

- What type?

  i. Defined benefit;
  ii. Defined contributions (profit-sharing plans);
  iii. Simplified Employee Pension ("SEP");
  iv. Employee Stock Ownership Plan ("ESOP").

- For a lump sum distribution, check rollover and withholding rules. The new rules apply for distributions after December 31, 1992.

- Also review actuarial data. Is a lump sum payment at settlement to be included in the calculation of pension? *See* Licciardi v. Krupp Retirement Plan, 990 F.2d 979 (7th Cir. 1993).

- Finally, determine whether there is some way to get the employee into early retirement. Is there an ERIP that has not yet been submitted to I.R.S. in which the employee can be a participant?

- The employee may be a participant in a top hat plan, that is, a non-qualified plan. These plans oftentimes are called supplemental retirement plans. Such a non-qualified plan is unfunded and is designed for high level managers and officers or other highly-paid employees. ERISA's vesting rules do not apply to a top hat plan. So, for example, a top hat plan can provide for 10 years vesting, even though ERISA requires five

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year vesting.

- Is there a cash balance plan? Distribution, portability, and tax issues need to be considered.

- Obviously, given the volatility of the law with regard to the legality of such plans, a claim may be asserted by the employee, assuming it is timely.

Trusts

- Is there a trust?

- If so, what type?

  i. Rabbi trust; or
  ii. Secular trust.

- Familiarize yourself with employee's rights under the trust.

- Different rules and regulations may apply to the trust if it is created by a subsidiary corporation or a partnership. See, e.g., Susan P. Serota, *Employee Benefits Considerations In Joint Ventures*, 54 Tax Law 477, 497 (Spring 2001).

Life Insurance

- Obtain a copy of the life insurance policy on the employee.

- What type is it?

  i. Split-Dollar;
  ii. Group-Term;
  iii. Supplemental Life; or
  iv. Key "Person" Insurance.

- What conversion rights does the employee have under applicable state law? See, e.g., Va. Code § 38.2-3332 (1950); Md. Code, Ins., §15-414; What are the premiums? Are the rights better than the employee can get on the open market? If there are cash flow problems, can the employer pay the premium until the employee is on his or her feet?

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Savings Plan (401k)

- Be familiar with the 401(k) distribution and portability rules. Normally, if anyone takes money out of an IRA or a 401(k) before age 59½, he or she pays a 10 per cent penalty. There are at least three exceptions:

  i. The participant terminates employment in the calendar year in which he/she turns 55 or thereafter;
  ii. Death or disability at any age; and
  iii. The distribution is part of a series of substantially equal periodic payments over the life of the participant or the joint lives of the participant and a beneficiary.

- An employee may obtain a statement from the employer of the exact amount to be paid.

- Secure a date certain for payment of the 401(k) money.

- Be very careful with withdrawals from employee retirement plans, like 401(k)s. To avoid paying taxes, the entire 401(k) distribution must be rolled over. The employer has to provide the employee with a written explanation of the choices at least 30 days before the distribution. Understand that unless the employee instructs the employer to make a direct transfer, the employer must withhold 20 per cent and the client then must find the 20 per cent elsewhere within 60 days of the 80 percent distribution. Avoid the 20 per cent trap. *See* MacDonald, "How to Beat the 20 per cent Withholding Trap," 62 Money (February 1993).

Outplacement

- Increasingly, employee's counsel should be negotiating for their clients to choose the outplacement service. Employer-chosen services might be "chicken farms" i.e., mass production factories that do not provide quality personal service. Human resources should be looking for and insisting on outplacement services that provide quality one-on-one attention. Some services now promise to not overload on clients.

- What is the dollar value of the outplacement being offered? Typically, the outplacement firm charges a percentage of base salary.

- What is the duration of the benefits? Are they available until the employee gets any job or the job the employee's choosing in the employee's sole and absolute discretion?

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- Does outplacement have any real value to the employee? If little or none, the employee may use it as a bargaining chip for more money at a later stage in the negotiations, e.g. trade it for cash.

- If the matter does not settle, employee's counsel should consider whether the client has a mitigation obligation to use the outplacement to the fullest extent possible if it is offered with no strings attached.

- Advise the employee to discuss the potential tax consequences of outplacement with his or her CPA or tax adviser. *See* Rev. Rul. 92-69, 1992-2 C.B. 51 (For example, if an employer maintained a severance pay plan and terminated employees could elect to receive outplacement services in lieu of higher severance payments, the IRS ruled that the value of the outplacement services [equal to the reduction in severance payments] would constitute income to the employee and would be subject to employment taxes); Bosco, "I.R.S.: Developments: Employer-Provided Outplacement Services," Vol. 5 Benefits Law J. No. 4, 607 (Winter '92-'93).

Use of Office and Support Services

- Secretarial help during the transition period for the former employer in preparing application letters and mailing out resumes may be useful to the employee.

- Could the employee borrow a PC from the employer to prepare form letters? What is the duration of the loan? Can the employee's information remain on the website for a period of time after termination?

- Can the employee use the equipment on site? During what days and what hours?

- Will the employer pick up the minimal cost of envelopes and postage?

- Having the employer take telephone messages for the employee (even after the employee is no longer on site), could be of benefit to the employee.

Peculiar Problems in Specific Professions

- With departing law firm partners, there are partnership and ethical issues.

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- With association executives, there often are "political" issues with the Board.

- With federal, state, and local employees, there are arcane civil service issues.

- With executives, there oftentimes are pre-existing written employment agreements.

- With in-house counsel, there are delicate ethical issues.

Consulting Services

- Is the employer interested in retaining your employee as a consultant in the future? How about an availability agreement? Be aware of the peculiar tax rules on these deals. Can the employee accept another job during the consultancy?

- One fiction is for the employee to be engaged to be available. Employee's counsel should make sure the employee can work elsewhere and that there will be no earnings offset.

Company Car

- The employer will want the car to be returned.

- The employee may want to purchase it.

- Who pays for insurance, gas and maintenance if use is permitted?

Web Site

- During the employee's search for new employment, it may be important to the employee that he/she continue to appear on the employer's web site. Sudden disappearance from the website may undercut the employee's marketing of him/herself.

Cell Phones and Laptops

- Quite frequently the employee will want to retain the cell phone, PDA, Blackberry, laptop or other equipment the company has provided. The

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laptop may need to be purged of corporate confidential material as a part of compliance with a clause in the agreement requiring the employee to retain or destroy all such documents, and to certify compliance.

Employment Status

- Sometimes, there is an interest in affirming the "employee's" status as exempt or non-exempt, or as an independent contractor. Obviously, tax issues are considerable depending on one's employment status as well as federal and state wage and hour considerations. Given the peculiar FLSA settlement requirements established by statute, such an affirmation may be useful ammunition in any future FLSA disputes.

Company Loans/Outstanding Debts

- Does the employer have any outstanding liens on the employee's property?
- If there was a loan, what was the collateral for it?
- Did the employee take advantage of the employer's educational tuition assistance plan? If so, what is the effect of plan's reimbursement provisions in the event of termination? Does your client owe money?
- What are the tax consequences of the tuition assistance?
- Are there any outstanding promissory notes?
- Check state statutes to determine the legality and compliance requirements for setting off wages against unpaid loans or debts.
- Sometimes, a promissory note regarding payments to be made over time is a part of the settlement package.
- The employee may insist on an acceleration of all payments clause as well as a confession of judgment provision.
- Employee's counsel, where there are concerns regarding the company's ability to pay, may insist on some further guarantee of deferred payment.

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Relocation Assistance

- Is your client overseas and does he or she need repatriation to the United States?

- Did your client recently relocate to the area for this job and does he or she need to have the employer assume relocation costs to his or her former residence?

- Does the employer have a policy on relocation assistance? Is there a provision in the employment contract for such assistance?

Disability Insurance

- Is there a short-term disability ("STD") plan? If so, obtain a copy of it. Can the employee qualify?

- Is there a long-term disability ("LTD") plan? If so, obtain a copy. Can the employee qualify?

- The salary difference between LTD and the old salary is an area for fruitful negotiation.

- Understand that the definition of disability under the Social Security law (42 U.S.C. §423(d)(1)(A)) is different than that used in most private disability insurance policies. Thus, a denial of a claim by Social Security will not necessarily result in a denial by the private insurance carrier. Indeed, in many instances, the employer or the carrier will assist in an appeal of the Social Security denial as Social Security disability payments are an offset under the private policy.

- Be familiar with the specific plan. The private plans define disability differently. The definition oftentimes changes after the first two years of LTD.

- How to handle the disabled client since the enactment of the Americans with Disabilities Act 42 U.S.C. §12101 et seq. ("ADA") is in flux. It is likely that the policies of the private carriers will change regarding "disability" as employers are required to reasonably accommodate the disabled employee or job applicant.

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Partnership Interests

- In a real estate enterprise, for example, the terminated employee may have limited partnership interests that can be quite valuable.

- Review the partnership papers. They may provide that upon termination the terminated employee has to sell to the employer. That may or may not be advantageous to the terminated employee. He/she may want to extend the life of the interests to allow future appreciation in value. How the interest is valued (the formula) is quite important.

Expense Accounts

- If the employee has outstanding expenses at time of discharge, then there should be a clause that he or she is paid that amount within specified period of time. Make certain the employee provides receipts.

- Before raising any issues regarding expenses, "woodshed" the client regarding any earlier fraudulent, puffed, or otherwise inappropriate expenses the client submitted, and that closer scrutiny might uncover.

Bonuses

- Is there a written bonus plan? If so, obtain a copy of the plan and review the formula. Can the employee argue under the language of the plan that there is an amount due? If so, the employee will use it as a bargaining chip.

- If employee was not there the entire year, the employee may argue for a prorated bonus. Does the language of the plan or past practice support or preclude prorating? Explicit language providing for a prorated bonus in a prior agreement between the employer and employee will generally be enforceable. See Snap-On Inc. v. Ortiz, 1999 WL 592194, *18 (N.D.Ill. 1999).

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Eligibility for Unemployment Compensation

- Does the employer consider the employee to be eligible for unemployment benefits? When does eligibility start?

- Is there a statute preventing the employee from waiving his right to file for unemployment benefits? If not, the employee who has another job lined up may agree not to apply for unemployment as a bargaining chip in settlement negotiations.

- Obtain a provision in the agreement that the employer will not contest a claim for unemployment and that it will take all actions necessary to qualify the employee/claimant.

- What is the effect of severance pay on eligibility for unemployment? How does the employment service treat the receipt of severance pay in a lump sum as compared to salary continuation? For example, the unemployment form Maryland sends to employers (Request for Separation Information) asks about pension or other retirement payments, profit-sharing, bonus payments, severance pay, etc.

- In the District of Columbia, the unemployment statute provides that an employer who "makes an award of back pay" to a terminated employee who has received unemployment benefits during the same period must withhold from the back pay award an amount equal to the benefits and repay said amount to the unemployment commission. D.C. Code, Title 42-120 (F).

- Maximum benefits are $359 per week in the District of Columbia, $310 per week in Maryland, and $318 in Virginia.

- One has to make about $34,000 in the District of Columbia to be eligible for maximum benefits, as compared with approximately $21, 000 for the maximum benefits in Maryland or Virginia

- Maryland gives 26 weeks, District of Columbia 20 to 26 weeks and Virginia 12 weeks

- Avrutis & Wulff, "How to Maximize Your Unemployment Benefits" (Avery Pub. Group, Garden City Park, N.Y., 3d ed.)

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Accrued Vacation

- Be aware of the law in your jurisdiction regarding vesting of accrued vacation. See, e.g., Suastez v. Plastic Dress-Up Co., 647 P.2d 122 (Calif. 1982) (right to paid vacation vests pro rata as work is performed and cannot be forfeited by failure to reach the anniversary of an employee's hire date); Henry v. Amrol, Inc., 272 Cal. Rptr. 134 (Cal. App. 1990) (court overturned a "use it or lose it" vacation policy because this policy would result in forfeiture of vested vacation benefits).

- Is the employee entitled or not to a lump sum distribution of accrued vacation? Must the entitlement be paid within a certain number of days? What is the company's policy or practice? What does case law and administrative decisional law under local wage and hour law hold?

- What is the amount due?

- By when does it have to be paid? See, e.g., Md. Lab. & Emp. Code Ann. Sec. 3-505.

Accrued Sick Leave

- Although accrued sick leave is not usually an entitlement, it is sometimes useful as a bargaining point. For example, the employee goes on paid sick leave and then terminates. It is rare for the employer to have a practice of paying such leave in a lump. Nonetheless, check with the client.

- What is the amount accrued? If substantial, it may suggest a hard-worker who was devoted to the company, and be raised as a theme in negotiations.

Wages

- Be certain that all wages have been timely paid. Obtain an acknowledgement that they have been paid.

- Check to see if there are deductions in wages for damages or non-payment.

- Remember FLSA's tough release procedures.

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- Certain aspects of the FLSA are not voidable. See 6 Employ. Coordinator para. C-28309 (2003).

- Be aware of case law holding that late payments are a FLSA violation. Biggs v. Wilson, 1 F 3d 1537 (9th Cir. 1993), cert. denied, 114 S. Ct. 902 (1994); Accord Caldman v. State of California, 852 F.Supp. 898, 900 (E.D.Cal 1994); Cf. Rogers v. City of Troy, N.Y., 148 F.3d 52, 57 (2d Cir. 1998) (whether payments are "timely" for the purpose of FLSA is to be determined by objective standards rather than solely contractual language).

Commissions

- If the employee worked on commission, you'll have to estimate compensation on a quantum meruit basis. Unless there is a written agreement or policy to the contrary, a quantum meruit argument will be a bargaining chip with counsel discussing whether there is a legal entitlement and, if so, what is the reasonable value of services. See, e.g., Maryland Wage Payment Collection Law § 3-501 (2003).

- Also, be familiar with the covenant of good faith and fair dealing. The classic case is the discharge to defeat a claim for a sizeable commission. In some states this is known as a discharge to avoid financial obligation. *See*, e.g., Bretton v. Menard, Inc., 438 N.W. 2d 116 (Minn. App. 1989); Holman v. CPT Corp., 457 N.W. 2d 740 (Minn. App. 1990); Buyess v. Paine, Webber, 623 F.2d 1244 (8th Cir. 1980); MMubango v. Minn. Pollution Control Agency, 1996 WL 481549, *4 (Minn.App. 1996).

- In most jurisdictions if the employee was the "procuring cause" of the sale, he or she is entitled to the commission or at least a prorated portion of it to reflect the employee's work. See, e.g., Solo Sales, Inc. v. North America OMCG, Inc., 702 N.E.2d. 652, 653-54 (procuring sale rule applies to commissioned employees, unless the contract specifically specifies otherwise) (Ill.App. 1998).

Taxes:

Tax Withholdings and Tax Forms

- This has been a huge area of dispute, misunderstanding, and downright confusion.

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- Agreement on what amounts of the settlement are taxable and non-taxable is essential.

- Agreement on the necessity of a tax form for taxable income is essential.

- Agreement on the specific form to be issued is essential.

- The timing of the tax filing (e.g. all one tax year or spread) is essential.

- Consideration of the deductibility by the employer of the payment(s) is essential.

- Consideration of the taxability of any non-cash transfer agreements 9e.g. out placement is essential).

- Consideration of the deductibility of the employee's legal fees is essential. Law is developing on this issue and is heavily dependent on state attorney lien law. This may effect whether or not the employer can not report the fees as part of the employees' recovery.

- Some statutes exclude from their protection so-called "highly compensated executives." **[cite]** It may be in one's interest to affirm that status.

Taxes: Tax Treatment of Damages Received (Judgment or Settlement) Pursuant To Anti-Discrimination Laws

- Due to recent statutory and regulatory changes and case law, individuals receiving money as the result of a judgment from, or a settlement of, an employment dispute based on an anti-discrimination statute (i.e. ADEA, Title VII, etc.) should, for tax purposes, first determine whether to classify that money as (a) wage or non-wage income, or (b) money which is excludable from income pursuant to Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.

- In Comm'r. of Internal Revenue v. Schleier, 115 S. Ct. 2159 (1995), the Supreme Court reversed the court of appeals and held that neither the back pay nor liquidated damages portions of an Age Discrimination in Employment Act ("ADEA") class action settlement received by the employee were excludable from gross income under Section 104(a)(2). The Court held that, in order for money received under such statutes to be excludable from income under Section 104(a)(2), a two prong test had to be met: (i) the payment must be derived from prosecution or settlement of an action based upon tort or tort-type rights, and (ii) the payment must be "on account of personal injury or sickness." Id. at 2167 The Court held

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that neither test was met in this instance for both the back pay and the liquidated damages portions of the award. The Court found that the ADEA claim was not based on tort or tort-type rights inasmuch as the monetary remedies provided for under the ADEA (like the pre-1991 version of Title VII) "provide no compensation 'for any of the other traditional harms associated with personal injury.'" Id. at 2167 (citing United States v. Burke, 112 S. Ct. 1867, 1873 (1992). The back pay portion of the award was not excludable as income inasmuch as "[t]he amount of back wages recovered [under the ADEA] is completely independent of the existence or extent of any personal injury." The liquidated damages portion of the award was also not excludable from income inasmuch as the liquidated damages were not received "on account of personal injury because "Congress intended liquidated damages to be punitive [and not compensatory] in nature." Id. At 2165 (citing Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985)). The Tax Court had held previously that an age discrimination settlement is excludable from income tax. Downey v. Commissioner, 33 F.3d 836 (7th Cir. 1994).

- It is important to note that the Schleier court held that the IRS regulations found at 26 C.F.R. § 1.104-1(c) (1994) imposed an *additional* requirement which must be met in order for a recovery to be excludable as income. Not only must a settlement be "on account of personal injury or sickness," but it must also be based upon the assertion of "tort or tort type rights." Schleier, 115 S. Ct. at 2166.

- In United States v. Burke, 112 S. Ct. 1867 (1992), the Supreme Court rejected the taxpayer's argument, and held that back pay awarded under Title VII was not excluded as income under Section 104(a)(2) of the Internal Revenue Code. Since the claim in Burke arose before the effective date of the Civil Rights Act of 1991, the Court considered only the remedies available before those amendments, which dramatically expanded the relief available. The Burke Court concluded that Title VII was not "tort-like" because it addressed legal injuries of an "economic character." Id. at 1873.

- The Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (introduced as H.R. 3448) was signed into law on August 20, 1996. Section 1605 of this Act revises Section 104(a)(2) in several relevant and significant ways. First, the language of 104(a)(2) was changed to exclude from income only "the amount of damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal *physical* injuries or *physical* sickness." (emphasis added) Second, existing language in Section 104(a) was struck and the following language added to the end of Section 104(a): "For purposes of paragraph (2), emotional distress [including, according to

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the legislative history, the physical symptoms resulting from such emotional distress] shall *not* be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amounts paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress." (emphasis added)

Therefore, the exclusion from gross income *does not* apply to any damages received (other than for medical expenses) based on a claim of emotional distress that is not attributable to a physical injury or sickness. The exclusion *would* apply to any damages (other than punitive damages) received based on a claim of emotional distress that is attributable to a physical injury or physical sickness.

- Regarding the taxation, both before and after the passage of the Small Business Job Protection Act of 1996, of back pay and damages for emotional distress received in satisfaction of a claim for denial of a promotion due to disparate treatment under Title VII of the Civil Rights Act of 1964, one should thoroughly review IRS Revenue Ruling 96-65, 1996-53 I.R.B. 5 (ruling that, both before and after the amendments to Section 104(a)(2), payments for such back pay were not excludable from income and were considered, for tax purposes, "wages;" also ruling that payments for such emotional distress were excludable from income prior to the amendments in 1996, but are excludable after the 1996 amendments only to the extent that they are damages paid for medical care (as described in Section 213(d)(1)(A) or (B)) attributable to emotional distress).

- In Banks v. United States, 81 F.3d 874 (9th Cir. 1996), the court held that plaintiff's settlement with his union of a claim for breach of fair representation was excludable from gross income under pre-1996 Section 104(a)(2). In this case, the union was not an employer inasmuch as unions do not pay wages to their members. The court held that in this case, the union settled the matter to compensate the plaintiff for its unfair treatment. Thus, the damages were "tort-like" and the plaintiff's injuries were personal injuries, and the income derived from the settlement was excludable from gross income under Section 104(a)(2).

- A conflict in the circuits has arisen as to the taxation of settlement payments made to different members of a class of employees who have filed a class action lawsuit against their employer. The separate disputes arose out of the settlement of a common action brought by the employees of the Continental Can Company under the Employee Retirement Income Security Act of 1974 ("ERISA"). When the parties entered into the settlement agreement, they each believed that the settlement proceeds

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would provide compensation for the plaintiffs' anxiety and emotional distress. At the time of distribution of the settlement proceeds to plaintiffs, Continental Can withheld FICA and federal income taxes from the settlement payments to the plaintiffs. In 1993, after the settlement proceeds had been distributed, the U.S. Supreme Court held that Section 502(a)(3) of ERISA does *not* provide "tort-like" compensation damages (making settlement money paid pursuant to that statute non-excludable). Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993). Two plaintiffs, one in the 5th Circuit and one in the 4th Circuit, filed claims for refunds of the FICA and federal income taxes from the IRS, with differing results:

In Dotson v. United States, 87 F.3d 682 (5th Cir. 1996), the Fifth Circuit held that the interpretation of ERISA at the time of the settlement governed the tax treatment of the settlement proceeds and that the settlement payments were therefore not taxable income.

In Hemelt v. United States, 122 F.3d 204 (4th Cir. 1997), the Fourth circuit held that the Mertens holding, even though issued subsequent to the settlement being finalized, determined the nature of the settlement. The court applied Schleier to the facts in determining that the settlement payment was not excludable from income as tort damages. The court also held that the settlement proceeds to the plaintiffs were "wage income" inasmuch as the payments to the plaintiffs arose out of the employment relationship.

Taxes: Punitive Damages

- The Supreme Court, in O'Gilvie v. United States, 117 S. Ct. 452 (1996), resolved a conflict between the circuits on the proper taxation of punitive damages received in the employment context. Prior to this decision, five of the six appellate courts addressing the issue of the exclusion from income of punitive damages had held that punitive damages were not excludable from income. In O'Gilvie, the Court held that punitive damages received in a tort suit for personal injuries were *not* excludable from income under section 104(a)(2). O'Gilvie involved punitive damages received in a products liability suit by the family of a woman killed by a defective product. The jury awarded $10,000,000.00 in punitive damages. The family paid taxes on the punitive damage award, but immediately sought a refund. The Supreme Court ultimately held that the punitive damages the family had received were *not* excludable from income inasmuch as they were not received "on account of" personal injuries, but rather "on account of" the defendant company's conduct and the jury's decision to punish that conduct. Id. 454-457.

- If a legitimate claim exists, make sure to assert potential claims for

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personal physical injuries in the opening demand letter to the employer with an eye toward receiving favorable tax treatment at settlement. Failing to assert a "physical" injury claim may subject all settlement monies to taxation. *See*, e.g., Kurowski v. Commissioner, 917 F.2d 1033 (7th Cir. 1990); Whitehead v. Commissioner, TC Memo 1980 - 508, 41 TCM 365 (1980); Anderson v. Commissioner, TC Memo 1979-309, 38 TCM 1206 (1979).

Taxes: Separating Payments in Settlement of Different Types of Claims

- Employment related claims will often include several different types of claims (with each potentially receiving its own particular tax treatment). When these matters settle, the agreement between the parties typically requires a settlement of all claims, known and unknown, and may allocate portions of the settlement to the different claims. The practitioner would be aware that the IRS and the courts are not required to abide by the allocations made by the parties to a settlement for tax purposes.

- In McKay v. Commissioner, 102 T.C. 465 (1994), a former oil company executive sued his employer for wrongful discharge, breach of an employment contract, RICO violations and punitive damages. Following a jury award of both compensatory and punitive damages, the parties entered into a settlement agreement allocating part of the settlement to the wrongful discharge tort claim and to the breach of contract claim but not to the punitive damages claim. The Tax Court upheld the parties' allocation of the settlement proceeds inasmuch as the allocation was based on the employer's counsel's prediction of success on appeal, recognition of the jury verdict, mutual assessment of the total and relative values of the claims and was negotiated through the adversarial process. Id. at 472.

- In Robinson v. Commissioner, 70 F.3d 34 (5th Cir. 1995), the parties, after a jury award in favor of plaintiff, agreed to a cash settlement providing for an allocation of 95% of the damages to "mental anguish" and 5% to lost profits and 0% to punitive damages. The state court approved the agreement. The IRS objected to the allocation, arguing that is was not reached through a "bona fide adversary proceeding" where defense counsel permitted plaintiff to allocate the proceeds as he wished and where the trial judge "rubber-stamped" the agreement. The Tax Court disregarded the parties' allocation of the settlement proceeds and re-allocated the proceeds in accordance with the original jury verdict of 16% for mental anguish. The Fifth Circuit affirmed the Tax court's findings.

- The Eighth Circuit similarly rejected the parties' settlement allocation and upheld the settlement allocation as determined by the Tax Court in Bagley

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v. Commissioner, 121 F.3d 393 (8th Cir. 1997). Bagley was sued by his employer for claims arising out of breaches of contract and fiduciary duty. Bagley countersued on several tort claims. A jury awarded Bagley actual and punitive damages on all of his claims. Following the jury verdict, Bagley and his employer reached a settlement whereby both suits were dismissed and the employer paid Bagley an additional $1.5 million as compensation for a number of personal injury claims. The Tax Court determined that $500,000.00 of this settlement amount was, in fact, payment of punitive damages. The Eighth Circuit, in affirming this decision, distinguished the facts in Bagley from those in McKay. The Court found that in Bagley, neither party wanted to specifically allocate a portion of the settlement proceeds to punitive damages, there was no express statement that punitive damages were not part of the award, the employer was faced with a high probability of being found liable for punitive damages, and that the employer paid $500,000.00 more to settle Bagley's countersuit than the jury had awarded in compensatory damages in the largest of the three jury awards in Bagley's favor.

Taxes: Taxation of Pre-Judgment Interest (Non-Wage Income)

- Generally, statutory pre-judgment interest on damages (even in personal physical injury cases) is not excludable from gross income under section 104(a)(2) inasmuch as it is not properly characterized, for tax purposes, as a payment "on account of personal injury or sickness". See Brabson v. United States, 117 S. Ct. 607 (1996). Also see Kovacs v. Commissioner, 100 T.C. 124 (1993), aff'd without published opinion, 25 F.3d 1048 (6th Cir.), cert. denied, 115 S. Ct. 424 (1994) (prejudgment interest assessed under a state law on a wrongful death claim was not excludable from gross income under Section 104(a)(2))

- In Hemelt, 122 F.3d 204 (4th Cir. 1997), the plaintiffs attempted unsuccessfully to argue (as an alternative to their primary argument that the entire settlement was non-taxable under 104(a)(2) as tort damages; see above) that a segment of their settlement was non-wage income derived from pre-judgment interest and was therefore not subject to FICA. The Fourth Circuit agreed that an element of such a settlement may include an allocation to pre-judgment interest, but noted that was not the case with the settlement agreement at issue and also noted the difficulty in specifying the amount of the settlement which represented such interest.

Taxes: Tax Treatment of Attorney's Fees in Employment Disputes

- In Alexander v. I.R.S., 69 T.C.M. 1792, aff'd, 72 F.3d 938 (1st Cir. 1995),

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the Court held that the taxpayer was required treat attorneys' fees as a "below the line" miscellaneous itemized deduction subject to the two percent (2%) floor. Alexander argued that he should be able to deduct the attorneys' fees incurred with the prosecution and settlement of claims against his employer for breach of an express employment contract, breach of an implied pension benefits contract and age discrimination under one of three theories: (i) directly against the settlement proceeds as a cost of disposing of a capital asset, (ii) as an non-employee trade or business expense under Section 62(a)(1) of the Internal Revenue Code, or (iii) as a reimbursed employee expense under section 62(a)(2). The court disagreed. In Alexander, the settlement agreement made no mention of attorneys' fees, and no portion of the monies was specifically delineated as attorneys' fees. The lesson from Alexander at present is that attorneys' fees received in connection with a settlement should be unequivocally referenced as attorneys' fees, should be paid directly to the attorneys, and should be linked to a fee-shifting statute so that there is a basis for arguing that the fees paid by the employer are in satisfaction of that statute. Further, the agreement should state that the employer will issue a 1099 directly to, and only to, the attorney for the amount of those fees.

Taxes: General Tips for the Practitioner

- Unless you practice tax law, encourage your client to obtain independent advice from tax counsel or a Certified Public Accountant (CPA).

- Even if the employee agrees to an indemnification provision, the employee should not be responsible for the employer's social security contribution and should not pay the company's counsel fees.

- If proper, the settlement agreement should say that no IRS Form 1099 will be issued. Make sure the employer's payroll and accounting people are aware of this requirement. Familiarize yourself with IRS rules for the Form 1099.

- If proper, the agreement should state that no W-2 form will be issued.

- Remember all checks over $10,000 issued by a bank must be reported to IRS. Don't try to get cute with multiple checks for less. That's criminal. See U.S.C.A. § 6050I (2003).

- Provide for direct vendor payment, such as outplacement and attorneys' fees, to possibly eliminate some of the income tax burden on the client.

- Send a letter to the client if necessary about the client's reporting responsibilities (especially if the client hints that he or she may take

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chances and should not report).

- Provide a warning letter to the client that you would expect to be paid at your hourly rate to defend his cause before the IRS in the event of an audit.

- Create a written record that no advice was given to client on taxes (if that is the case). The employer's counsel may want a paper trail that it provided no tax advice in distributing the settlement proceeds.

- Typically, the employer will want a provision that it does not pay if there are tax problems in the future. Resist an indemnification of the employer's tax consequences and attorneys' fees if the IRS pursues it. As a practical matter, such an indemnication may not be enforceable.

- Send the client a warning letter about the Schleier decision. It may be wise to send a letter to all clients who settled in 1995. Maybe even to those who settled during the last six years, given the IRS statute of limitations. Warn the client also about the pending legislation.

- Where there are claims for breach of contract and for personal injury, for example, the parties should allocate a portion of any monies received in a settlement to each. Otherwise, the recipient of the monies may be taxed on the entire amount even though a portion could have been allocated to the personal injury claim and would be tax free. See, e.g., Taggi v. United States, 835 F. Supp. 744, 746 (S.D.N.Y. 1993) ("Where a settlement agreement is silent as to what portion, if any, of a settlement payment should be allocated towards damages excludable under 26 U.S.C. §104(a)(2), the courts will not make the allocation for the parties."); Villaume v. United States, 616 F. Supp. 185, 190 (D.Minn.1985) ("The parties did not specify at the time of the settlement which portion was attributable to lost income or business damages, and which portion was attributable to personal injury damages. The Court will therefore treat the entire payment as income."); Whitehead v. Commissioner, 41 T.C.M. (CCH) 365 (1980) (where "settlement was made in consideration of a variety of potential claims, including contract as well as tort claims and the release ... did not allocate the payment among these claims....the entire amount of the settlement must be included in gross income.")

Client in Midst of Separation/Divorce

- The valuation and distribution of retirement and other deferred compensation plans has been described as "a family law practitioner's worst nightmare." Just think what it is for an employment lawyer unaware of the implications of the terms of settlement for a client in matrimonial

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litigation or under a matrimonial decree.

- If your firm does not do family law and is not equipped to advise regarding Qualified Domestic Relations Orders (QDROs), involve someone who can. Oftentimes in a large corporation there will be such a person.

Employees' Personal Possessions

- Get private materials out of the client's personal computer data base and delete all personal matters on the employee's personal computer.

- Try to convince the employer to avoid the cardboard box scenario when the employee is escorted out the door at termination. Try to convince the employer to treat the employee with dignity, rather than like a common criminal.

- Obtain all of the employee's documents, awards, books, pictures, and the like.

Personnel File

- Negotiate for removal or destruction of adverse references. A clause requiring the employer to remove such references from a personnel file is an enforceable contractual provision. See Musick v. Dept. of Energy, 2003 U.S. App. Lexis 16522, *11 (Fed Cir. 2003).

- If destruction is not possible, negotiate for retention of such material under seal.

- Obtain the right to review the file to ensure that no adverse references remain in it.

Release

- Employee's counsel may insist that the release be mutual, i.e., the employee releases the employer and the employer releases the employee.

- If the employer will not fully release the employee, negotiate whether the employer will at least release the employee from all claims except for fraud or embezzlement.

- One party may want to specifically preserve claims from the sweep of an otherwise global release. For example, the employee wants to preserve his/her claim for indemnification in the event he/she is a party in some

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future proceeding arising out of the employment relationship. The employer may want to preserve claims of embezzlement or similar claims.

- The employer will want language in the release that specifically releases future post-settlement effects of past wrongs. Presumably, Evans disposes of this problem at least in the area of discrimination claims without the need for such language.

- Sometimes, the parties want to "empower" the company's agents to speak freely about the former employee. Historically, the employer is concerned about defamation liability as well as any non-disparagement clause in the settlement agreement. Is a clause enforceable that covenants not to sue out any claim arising out of such "speak freely" agreements?

- In determining which claims to specifically reference, consider any systemic changes that the company has undertaken during the employee's tenure. Are there any changes that might give rise to a claim? For example, the employer converted to a cash balance plan during the employee's tenure with the company. The employer then needs assesses the pros and cons of specifically referencing same.

- What if the employee is a member of any existing, putative or certified class? Should the claim be excluded from the reach of the release? Otherwise, how procedurally is a release effected? Contact lead counsel for both sides in the class action.

- When specifically referencing state claims released and when drafting the covenant not to pursue future claims, counsel need to be familiar with state laws that prohibit the waiver of such claims (e.g. workman's and unemployment compensation claims for benefits) and whether it is feasible to obtain a release and whether it should nonetheless be specifically referenced. Some jurisdictions may attach criminal liability to such a specific release or covenant.

Have any claims not been released?

- Claims that arise after the effective date of settlement should not be released. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974), the Court said: "[A]n employee's rights under Title VII are not susceptible of prospective waiver." The Sixth Circuit in Adams v. Phillip Morris, 67 F.3d 580 (6th Cir. 1995) held that every release that bars claims based on future conduct is not necessarily a prospective waiver. Holding that the determining factor is the parties' intent, the Circuit remanded the case to the trial court to determine whether the employee's claim is a "continuing effect" of the employer's bias (and thus a valid

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waiver) or a prospective waiver (and thus invalid).

- The employer will demand a general release. Increasingly, the employee's counsel will demand one too. Employee's counsel should make sure the client understands what a general release is. Allegedly negligent advice regarding the effect of a general release may subject the lawyer to liability. See, e.g., Ziegelheim v. Apollo, 128 N.J. 250, 607 A.2d 1298 (1992).

- Are there any claims to be preserved (pension benefits, workers' compensation benefits, FLSA, and the like)?

- Have the parties complied with OWBPA? If not, the releases may not be an effective waiver of any rights the employee had under ADEA. *See*, e.g., Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993) (ADEA waiver ineffective where agreement did not refer specifically to any statutory ADEA rights or claims, the employee had not been advised in writing to consult with an attorney, the employee was given only five days to consider the agreement, and the employee was not given seven days to revoke the agreement).

- The employer may want the employee to affirm that it has fully complied with its OWBPA requirements.

- The Third Circuit reversed the trial court and held employer's policy of granting enhanced severance benefits to all terminated employees who sign release does not implicate policies underlying disparate impact theory, because policy does not per se affect older workers more harshly than younger workers, there is no evidence that it affects older people adversely, and neutral policy clearly is not motivated by discriminatory impulse. DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3rd Cir. 1995), cert. denied, 116 S. Ct. 306 (1995).

- The release will typically include "present effects of past acts" language to preclude against such claims.

- The employer will want the release to explicitly cover all claims for attorneys' fees.

- There are certain claims that cannot be released without following special procedures (for example, under the Fair Labor Standards Act of 1938, 29 U.S.C. §201 et seq.). *See*, e.g., Druffner v. Mrs. Fields, Inc., 828 P.2d 1075 (Utah 1992) ("waivers of FLSA rights which are neither administratively supervised nor judicially approved are not enforceable to bar a cause of action for unpaid overtime compensation. Such waivers are

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against public policy and are unenforceable as a matter of law.") Make sure you have addressed them if there is a real claim there.

- The Department of Labor has a regulation (29 C.F.R. § 825.220(d)), providing that an employee may not waive, nor may an employer induce employees to waive, their FMLA rights. The Fifth Circuit has held that regulation to prohibit prospective waivers of FMLA rights, not the post-dispute settlement of claims. Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003).

- In most states a worker's claim to receive worker's compensation for work-related injuries cannot be waived. See, e.g., N.Y. Work. Comp. Law §32 (McKinney 1993) ("No agreement by an employee to waive his right to compensation under this chapter shall be valid."); Warden v. E.R. Squibb & Sons, Inc., 840 F.Supp. 203, 208 (E.D. N.Y. 1993) (holding that language does not prohibit waiver of a retaliatory discharge claim under the worker's compensation statute).

- If the claimant has entered into a settlement of a worker's compensation claim, the claimant may have inadvertently released an employment discrimination claim. Brooks v. Zenith Electronics Corp., 1993 WL 368923 (N.D. Ill. 1993).

- A worker's compensation settlement may preclude the plaintiff from proceeding with a claim under the Americans with Disabilities Act. See, e.g., Oswald v. LaRoche Chemicals, Inc., 894 F.Supp. 988 (E.D. La. 1995).

Waiver of Claims

- While it is rare for a spouse to sue, claims have been asserted on the spouse's behalf for loss of consortium and even intentional infliction of emotional distress. Consider in appropriate cases whether a release from the spouse is also needed.

- Several courts have recognized that a spouse may have claims against the employer arising out of the treatment of his/her spouse. See, e.g., Reese v. Batesville Casket Co., 25 FEP Caes (BNA) 1472 (D.D.C. 1981) (Gasch, J.) (recognizes a claim for loss of consortium under §1981). The release should bind the spouse also.

- Does the release of one party hereafter act as a release of all other Tortfeasors? In Maryland it does unless the release explicitly provides that it does not act to release others than the defined releasers. Md. Code, Art. 50, Sec.19, *See* also Va. Code, Sec. 8.01.-35.1.

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- An excellent, as yet unpublished, article on this subject is a piece by Gerard E. Mitchell of the D.C. Bar entitled "Credit and Contribution Among Alleged Joint Tortfeasors."

- A number of states have laws providing that a general release does not extend to claims of which the party is unaware at the time of executing the release, which if known would have materially affected the terms of the settlement agreement. See, e.g., Cal. Civ Code § 1542. In order to waive the protection of this rule, the parties should express their intention to do so. See Casey v. Protor, 28 Cal. Rptr. 307, 378 F.2d 579 (1963); Jefferson v. Dept. of Youth Auth., 28 Cal. 4th 299, 307 (2002).

- The release should specify those individuals and entities being released. Otherwise, the employee may be able to pursue claims against individuals or entities not specified. The New Mexico Supreme Court has adopted a rule pursuant to which a general release raises a rebuttable presumption that only those persons specifically designated by name or by some other specific identifying terminology are discharged. Hansen v. Ford Motor Co., 120 N.M. 203; 900 P.2d 952 (N.M. 1995).

Breach of Settlement Agreement

- "[A] settlement agreement is a contract, and a s such, is enforceable under contract law principles. There is no basis to rescind a contract in the mere emotional regret of having agreed to its terms." Echols v. Williams, 267 F.Supp.2d 865, 867 (S.D.Ohio 2003).

- Absent language in the settlement agreement, normally state law will determine whether the party to a release can recover either compensation for its breach or damages on claims underlying the release. See, e.g., Abou-Khadra v. Mahshie, 4 F.3d 1071 (2d Cir. 1993) (Under New York law, one can get one or the other, but not both). As a general rule, an individual who executes a settlement agreement cannot "subsequently seek both the benefit of the settlement and the opportunity to continue to press the claim he agreed to settle." Wilmes v. United States Postal Service, 810 F.2d 130, 132 (7th Cir. 1987) (quoting Kirby v. Dole, 736 F.2d 661, 664 (11th Cir. 1984); see also Strozier v. General Motors Corp., 635 F.2d 424 (5th Cir. 1981).

- An accord and satisfaction is where one bargains for the promise to perform; whereas an executory accord is a bargain for actual performance.

- If the agreement is framed as an accord and satisfaction, the only available

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remedy would come from an action for breach of the agreement, i.e., breach of contract.

- On the other hand, if the agreement is an executory accord, then the underlying claim merely is suspended and is revived by alleged breach. In Spiridigliozzi v. Bethlehem Mines Corp., Cambria Div., 558 F. Supp. 734, 736 n.1 (W.D.Pa. 1980), the court held that the prior claim is revived if the "alleged non-compliance...relate[s] to a matter sufficiently substantial to justify invalidation of the settlement agreement."

- Where the settlement agreement was procured by fraud, the underlying claims can be revived. See, e.g., Pilon v. University of Minnesota, 710 F 2d 466, 468 (8th Cir. 1983); Sherman v. Standard Rate Data Service, Inc., 709 F. Supp. 1433, 1438 (N.D.Ill. 1989); But see Green Leaf Nursery v. E.I. DuPont De Nemours and Co., 2003 WL 21949591, *9 (11th Cir. 2003) (reliance upon misrepresentation during settlement negotiations must be reasonable in order to meet elements of fraud).

- A party who executes a release allegedly procured by fraud has only two choices of remedies - either disaffirm the release and offer to return the consideration, or affirm the voidable contract and waive the fraud. Melendez v. Horizon Cellular Telephone Co., 841 F. Supp. 687, 692 (E.D.Pa. 1994).

Material Breach

- Under the language of the settlement agreement or the applicable common law, what constitutes a material breach may be critical.

- In some states a party who materially breaches a contract may not enforce it against the non-breacher. Hurley v. Bennett, 163 Va. 241, 176 S.E. 171 (Va. 1934). The breach must be material. Neely v. White, 177 Va. 358, 14 S.E. 337 (Va. 1941).

- Oftentimes, the agreement itself will refer to violations of certain clauses (e.g. confidentiality) as agreed-upon material breaches, triggering certain consequences (e.g. cessation of payments).

Who Enforces the Agreement?

- Questions can arise regarding the ability of the court to enforce agreement. See, e.g., Sawka v. Healtheast, Inc., 989 F.2d 138 (3rd Cir. 1993)

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(employer's default in making disability payments under settlement agreement is no reason to set aside settlement, although it does give rise to a cause of action to enforce. Unless settlement agreement is incorporated in court order or judgment, the federal court lacks power to enforce). See paragraph 61 herein.

Attorneys' Fees in Breach Actions

- Attorneys' fees and costs should be awarded to the prevailing party in a successful breach action. The employee's counsel may insist that the Christiansburg Garment formula be followed if the breach action is for conduct that would constitute a violation of an EEO statute. The argument would be that the employer should not be placed in a better position just because the action is for breach of the agreement rather than breach of the statute. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

- A Texas Appellate court reversed an award of attorney fees even though it offended the lower court's holding that the release caused the former employee's claims. Jobe v. Texas Utilities Electrict Co., 7 ND LR (LRP Pub.) ¶ 33 (Tex. Ct. App. 1995).

- The employer may negotiate for a clause that any payments of money can be discontinued in the event of a breach. Conversely, default by the employer should accelerate all payments plus interest.

- Employee's counsel should negotiate for language that the employer cannot cease complying with the agreement until a court of competent jurisdiction (or arbitrator) adjudicates that there has been a breach.

Breach of Agreement - ADR

- Consider submitting all alleged breaches to non-binding arbitration or, alternatively, mediation before suit for breach of the agreement. Another possibility is non-binding mediation followed by binding arbitration if mediation fails.

Settlement Check(s)

- How is the check to be made payable? Consider the tax consequences to the client.

- When is the check to be presented? Upon execution of the agreement?

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Upon receipt of the executed agreement?

- Where was the agreement signed? Were there choice of law provisions included in the agreement?

- The employee's attorney will understandably want to guarantee his/her fee. Thus, the check should be paid "to attorney *in trust for* Client/Employee." The "in trust for" is the critical language.

- Some clients may live far away. How will you obtain signature on a check payable to both law firm and client?

Older Worker Benefit Protection Act ("OWBPA") Requirements[*]

- In an individual employee discharge or layoff in which the employer offers incentive pay in exchange for a waiver of an employee's potential age discrimination claim, the waiver must satisfy the following criteria:

  (i) The waiver must be "knowing and voluntary." 29 U.S.C. § 626(f)(1);

  (ii) The waiver must be written in a manner that can be readily understood by the employee to whom it is addressed. 29 U.S.C. § 626(f)(1)(A);

  (iii) The waiver must specifically tell an employee to whom it is addressed that he/she is relinquishing rights or claims arising under the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 626(f)(1)(B);

  (iv) The waiver cannot waive rights or claims that "arise" after the date the release is signed. 29 U.S.C. § 626(f)(1)(C). (This provision is somewhat ambiguous, but suggests that waivers signed under the OWBPA may be less comprehensive and less effective than pre-OWBPA waivers);

  (v) In exchange for the waiver, the employee must receive compensation in addition to anything of value to which the employee already is entitled. 29 U.S.C. § 626(f)(1)(D);

  (vi) The waiver must advise the employee (in writing) to consult with

[*]The author wishes to thank Doug Williams of the Ohio bar for his reliance, in part, on his paper entitled "Settlements and Releases After the OWBPA" published in the ALI-ABA Resource Materials: Employment and Labor Law.

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an attorney before executing the waiver. 29 U.S.C. § 626(f)(1)(E);

(vii) The waiver must give the employee a period of *at least* twenty one (21) days in which to consider the agreement. 29 U.S.C. § 626(f)(1)(F)(i). It appears that Congress intended only that employees have the option of using all twenty one (21) days to consider whether or not to release their claims, rather than require an absolute twenty one (21) day waiting period before agreements can be accepted by the employee. Employers drafting OWBPA waivers should include a statement informing the employee that he/she has the full twenty one (21) days in which to consider the agreement.

If practical, employers should also remind employees who attempt to execute agreements quickly that they have the full twenty one (21) days. Many employees are likely to want to obtain the additional severance benefits offered in exchange for the release before the full twenty one (21) days have elapsed. If the employer is assured that the employee has knowingly and voluntarily waived his/her right to the twenty one (21) day consideration period, this condition should be satisfied;

If the waiver is requested in connection with an "exit incentive" or other "employment termination program" offered to a group or class of employees, the employee to whom the waiver is addressed must be provided with certain information regarding the incentive or termination program (see below) and must also be given an extended, forty five (45) day period (rather than the twenty one (21) day period) within which to consider the agreement; and,

(viii) The waiver must provide for a period of *at least* seven (7) days following the execution of the waiver in which the employee may revoke the waiver. 29 U.S.C. § 626(f)(l)(G).

- Because the employee has seven (7) days from the date he signs the release to revoke it, the incentive pay and any other incentive should not be provided to the employee until after the seven (7) day revocation period has elapsed. The employer should clearly establish in the waiver how revocation should occur. Although employers may not be able to require an employee to revoke the agreement in writing during the seven (7) day period, they should require at least a telephone call to the designated personnel representative(s) communicating the revocation, or a detailed

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message that the employee has called to communicate the revocation of the release agreement.

- When a "group" or "class" of employees is asked to sign a release in the course of an "exit incentive program" or "employment termination program", the OWBPA requires even more information to be set forth in the release agreement. These requirements clearly apply when a formal reduction in force ("RIF") is carried out by a company. It is unclear, however, if the mere termination of a "group" of employees, like that which occurs in the closing of a single office or retail store, would be considered a RIF. That determination will depend on the circumstances of each closing, as the OWBPA does not provide any guidance regarding what is meant by the terms "exit incentive program" or "employment termination program." Until the law develops further and is interpreted by the courts, the conservative approach is to treat all multiple separations as a RIF.

- When waiver agreements are offered in the course of a RIF, employers now must include the following additional information in a waiver given to employees age 40 or over:

  (i) The class, unit, or group of individuals covered by the program: i.e., employees of "Division X" or "Store Y" or "Department Z." 29 U.S.C. § 626(f)(l)(H)(i). The Eleventh Circuit, interpreting the OWBPA, has held that confining information provided to employees under this section to a single plant (where the employer operated several plants) did not comply with the statute's requirements. Griffin v. Kraft General Foods, Inc., 62 F.3d 368 (11th Cir. 1995);

  (ii) The factors making an employee eligible to participate in the program: i.e., employees involuntarily terminated based on their position or geographical location; employees with X years of service. 29 U.S.C. § 626(f)(l)(H)(i);

  (iii) Any time limits applicable to the program: i.e., that the plan is available until _____, 199__. 29 U.S.C. § 626(f)(l)(H)(i);

  (iv) The job titles and ages of all individuals eligible or selected for the program: i.e., all clerical assistants, ages 25, 33, 44, and 52; or engineers, ages 29, 33, and 49. 29 U.S.C. § 626(f)(l)(H)(ii); and

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(v) The ages of all individuals in the job classification, organization, or unit who are not selected for the program: i.e., department managers transferred and not discharged are ages 26 and 38. 29 U.S.C. § 626(f)(l)(H)(ii).

- An employer is not required to provide the twenty one (21) day consideration period to the employee where the waiver is in settlement of a charge filed with the EEOC or an action filed in court alleging age discrimination. 29 U.S.C. § 626(f)(2). Only a "reasonable period of time" to consider the waiver must be provided to the employee n such a case. 29 U.S.C. § 626(f)(2)(B). Congress apparently assumed that an employee who has initiated a claim is more knowledgeable about the rights he or she is waiving than an employee who has not, and thus does not require an extended consideration period.

- Has the employer complied with OWBPA, especially with its disclosure requirements and the 21-day or 45-day rule as the case may be? See 29 U.S.C. §626(f).

- In the past, courts had been split on the issue of whether, in the event of a waiver's failure to comply with the strict requirement of the OWBPA, the employee "ratifies" the invalid release by retaining the benefits tendered in consideration for the release. See Blakeney v. Lomas Information Systems, Inc., 1995 WL 552933 (5th Cir.1995) (holding that, although a waiver did not comply with the OWBPA and thus was voidable, the employees nevertheless ratified the release by retaining the severance pay and making only a belated offer to tender back a portion of the pay); Wamsley v. Champlin Refining Chemicals Inc., 11 F 3d 534 (5th Cir. 1993) (holding that retention of the benefit constitutes ratification); Oberg v. Allied Van Lines Inc., 11 F.3d 679 (7th Cir. 1993) ("[n]o matter how many times parties may try to ratify a [waiver] contract, the language of the OWBPA, `[a]n individual may not waiver,' forbids any waiver");

- The Supreme Court has now clarified the issue in Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), supra Section 6. In that case, Oubre entered into a severance agreement with Entergy which provided her with $6,258.00 in exchange for a waiver of "any and all claims, demands, damages, actions, or causes of action" that she had against Entergy. In procuring the release, Entergy failed to comply in at least three respects with the requirements for an OWBPA waiver. Specifically, Entergy's release failed to: (1) give Oubre enough time to consider her options, (2) give her seven days to change her mind, and (3) make specific

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reference to any ADEA claims. After Oubre had received her severance benefits, she sued Entergy for age discrimination. Entergy argued that Oubre's claims were barred by the fact that she had "ratified" the contract by accepting and not returning the severance benefits prior to filing suit and/or barred by the principles of equitable estoppel. The Supreme Court rejected both of Entergy's arguments holding that the waiver was invalid as to Oubre's age discrimination claim inasmuch as the waiver provided to Oubre did not comply with the OWBPA. The court stated that "[a]n employee 'may not waive' an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids." Id.

- The Supreme Court in Oubre indicated that a waiver agreement purporting to release claims other than those brought pursuant to the ADEA which is not in compliance with the OWBPA operates only to invalidate the release as to the age discrimination claims. See Id. ("[a]s a statutory matter, the release cannot bar her ADEA suit, irrespective of the validity of the contract as to other claims.")

- If the employee repudiates a waiver and refuses to return the benefits tendered for the release, and the employer then sues for return of same, the employee may argue that it is retaliation. To prevent such an argument a clause should be inserted in the agreement authorizing any such action by the employer and explicitly stating that such an action would not be considered to be retaliatory. Accord Commonwealth v. Bull HN Info Sys., 16 F.Supp.2d 90, 105 (D.Mass. 1998)

- In assessing whether there has been OWBPA Compliance, the statutory OWBPA factors may not be exclusive. See, e.g., Bennett v. Coors Brewing Co., 189 F.3d 1221, 1228 (10th Cir. 1999).

- An example of the strictness with which the courts require adherence to OWBPA requirements is where the release specifically releases a claim of age discrimination, but does not specifically refer to the ADEA by name. See, e.g., Thiessen v. General Elec. Capital Corp., 232 F.Supp.2d 1230 1235-36 (D.Kan. 2002).

- Another potentially tricky situation under the OWBPA is the requirement that the employer advise the employee in writing to consult with a lawyer before signing the settlement agreement. In Cole v. Gaming Entertainment, L.L.C., 199 F.Supp.2d 208 (D. Del. 2002), the following language was insufficient because none of the company's agents had

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actually advised Cole to consult with an attorney: "Employee acknowledges that he/she has been advised to consult with an attorney prior to executing this Agreement, and has either done so or has freely chosen not to do so." Id. at 211. See also Theissen, 232 F.Supp.2d at 1237-39.

- Even where the employee is able to negotiate an individualized severance package, the OWBPA's requirement of 45 days to consider an agreement in connection with an exit incentive other employment termination program may be applicable. See, e.g., Theissen, 232 F.Supp.2d at 1239-41.

- Section 626(f)(4) states as following: "No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceedings conducted by the Commission." So far, arguments that non-compliance with that requirement voids an otherwise knowing and voluntary waiver of an ADEA claim haves been rejected. See Theissen, 232 F.Supp.2d at 1241-43; Wastak v. Lehigh Valley Health Network, 2002 WL 468709 (E.D. Pa. Mar. 27, 2002).

- How should employee's counsel deal with the twenty-first day under OWBPA to avoid being it viewed as a line in the dirt?

- In addition to the provisions of the OWBPA, counsel need to be aware of state statutory provisions permitting revocation of acceptance of a settlement. See, e.g., Minnesota's state statute that allows 14 days to revoke.

Mortgage Assistance

- Some clients (for example, in the classic "lure away" case) have been terminated shortly after moving from one part of the country to another. These clients typically have a two-home problem. It is imperative that the negotiations focus on a resolution of the dilemma.

- There is the check-to-check client who, very soon after termination, will be unable to meet the mortgage payment.

- Employee's counsel should find out from client whether there is mortgage insurance in the event of involuntary job loss? If so, be careful to package

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the settlement as such at least for the purposes of the insurance company.

Structured Settlement

- Beware of structuring attorneys' fees. The IRS will argue that counsel has constructive receipt of all fees in the initial year.

- The Tax Court has held that the fair market value of rights to attorneys' fees to be paid in the future under structured settlements need not be included as income for the year in which the settlements are effected. Chills v. Commissioner of Internal Revenue, 63 U.S.L.W. 2331 (1994).

- If you are negotiating a structured settlement for the employee, avoid constructive receipt. Talk in terms of the payments that could be made over time (for example, the annuity payments, the name of the carrier, its rating, and so on) and do not talk in terms of the actual amount of money that the employer will spend to purchase the annuities.

Effective Date

- The agreement will not be effective until after the seven-day OWBPA revocation period has elapsed. The employer typically would not distribute monies until the seven-day period has elapsed.

- The employee ought not to withdraw charges or dismiss the lawsuit until the seven days expire and agreement is effective.

- Sometimes the employer will deliver the settlement check prior to the end of the revocation period. If the check has been deposited in the employee's attorney's trust account, notify the employer's lawyer before disbursing the check.

Forum/Statute of Limitations/Applicable Law

- If a party alleges that another party breached the agreement, require that it give within 10 days written notice of the alleged breach within which alleged breaching party may provide an explanation or correct or minimize damages for the allegedbreach.

- In what forum do the parties want to enforce the settlement agreement? Court? Arbitration? Mandatory mediation before either court or arbitration?

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- Will the forum selection clause be upheld? See Lambert v. Kysar, 983 F.2d 1110, 1115 (1st Cir. 1993) (collects cases); Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 (1992); Willis Reese, "Supreme Court Supports Enforcement of Choice of Forum Clauses," 7 Intl.L. 530 (1972).

- When a specific state court is the chosen forum for enforcement actions, the agreement might include a provision asserting that such claims are not removable to federal court.

- Should there be a time limit (contractual statute of limitations) for the commencement of an action for breach? The parties may need to determine whether they can shorten under the applicable state statute.

- Should there be a clause making it mandatory that the parties pursue mediation before an enforcement or damages action is commenced?

- If arbitration, who pays? Is it realistic that the employee can pursue minor (but nonetheless important) breaches if he or she must pay all or part of arbitration costs?

- What is applicable law? Will the choice of law be upheld? Deal with conflicts of law rules.

- A valid choice of law clause may not prevent tort claims from being asserted under another state's law. See Green Leaf Nursery v. E.I. DuPont De Nemours and Co., 2003 WL 21949591, (11th Cir. 2003) (citing Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc., 133 F.3d 1405, 1409-10 (11th Cir. 1998) (explaining that a provision stating that a contract was "governed by" Illinois law did not incorporate Illinois tort law); Krock v. Lipsay, 97 F.3d 640, 645 (2nd Cir. 1996) (concluding that a choice-of-law clause providing that contract "shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts" did not encompass fraud claims for damages); Sunbelt Veterinary Supply, Inc. v. International Bus. Sys. U.S., Inc., 985 F.Supp. 1352, 1354 (M.D.Ala.1997) (explaining that a clause stating that a contract would be "governed by and construed under" California law was not broad enough to prevent application of the forum state's tort law); Burger King Corp. v. Austin, 805 F.Supp. 1007, 1012 (S.D.Fla.1992) (explaining that "claims arising in tort are not ordinarily controlled by a contractual choice of law

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provision.... Rather, they are decided according to the law of the forum state")).

Assignment of Claims

- There should be a representation that the employee has not assigned any claim. Sometimes, the employee will have assigned the fee claim to counsel.

- As some courts have emphasized that the attorneys' fees claim belongs to the plaintiff, and not the attorney, attorneys have been revising representation agreements to determine whether they can and/or should include an assignment of the fee claim clause in the agreement.

- If there is ambiguity, there may later be a battle over counsel fees. See, e.g., Bell v. Schexnayder, 36 F.3d 447, 1994 WL 555649 (5th Cir. 1994) (court held that the settlement negotiations were intended to resolve all claims and release the defendants from all liability relating to the subject matter of the suit).

Relationship With Insurance Carrier

- Must the insurance carrier approve the settlement before the carrier is responsible to pay the settlement amount? McNichols v. Subotnik, 1993 WL 500812 (8th Cir. 1993) (insured did not breach duty to cooperate with insurer by entering into settlement that served insured's best interests and thus settlement was enforceable against insurer).

- The allocation of settlement payments may be influenced by not only tax considerations, but also insurance considerations. See, e.g., Slottow v. American Casualty Co., 10 F.3d 1355 (9th Cir. 1993) (96% of settlement proceeds allocated in settlement to a claim covered by a D&O policy that employer had on defendant officer; court rejected allocation when employer sued on D&O policy to collect from carrier).

- Is the right to settle a third party's claims against the insured solely that of the insurer under the standard language found in a commercial liability issuance contract which does not contain a consent to settle clause? When an insurer settles a claim of the third party over the objection of the insured, is the insured entitled to injunctive relief or is the sole remedy of the insured a contract action against the insurer for "bad faith"? These issues were addressed under Pennsylvania law in Caplan v. Fellheimer

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Eichen Brauerman & Lashey, 68 F.3d 828 (3d Cir. 1996).

- When settling a related worker's compensation claim, be aware that often times the claimant/employee will have signed a subrogation agreement with, for example, a union health and welfare fund that obligates the claimant/employee to reimburse the fund from any such settlement for payments made by the fund. For example, in Williams v. Lumbermen's Mutual Casualty Co., 664 A.2d 342 (D.C. 1995), the court held that the insurers that paid employee benefits under the Workers Compensation Act has an equitable lien on the proceeds of a settlement with a third party even though the parties to the settlement labeled it as a recovery for non-economic damages.

Assurances that Agreement is Knowing and Voluntary

- Factors to be considered to determine whether a release is voluntary:

  - The plaintiff's education and business experience.
  - The amount of time the plaintiff had possession of or access to the agreement before signing it.
  - The role of the plaintiff in deciding the terms of the agreement.
  - The clarity of the agreement.
  - Whether the plaintiff was represented by or consulted with an attorney.
  - How the consideration given compares with the amount of recovery sought otherwise.

  Bormann v. AT&T Communications, Inc., 875 F.2d 399, 403 (2d Cir.), cert. denied, 493 U.S. 924 (1989).

- The First Circuit has held that a release that may be the product of duress had been satisfied by the employee's subsequent silence or acquiescence. The court held that an employee could not wait 3 ½ years to allege duress, but rather must act promptly. The court did not spell out just how long a wait would preclude a challenge. Deren v. Digital Equipment Corp., 61 F.3d 1 (1st Cir. 1995).

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- Except for OWBPA which applies to ADEA claims, there is no bright-line test for determining what is a sufficient amount of time for an employee to consider a release and consult with an attorney before one is considered to have signed a release knowingly and voluntarily. See, e.g., Carroll v. Primerica Fin. Serv. Ins. Marketing, 811 F. Supp. 1558, 1565 (N.D. Ga. 1992) (collects cases).

- Several courts have used a "totality of the circumstances" test to determine whether the settlement was "knowing and voluntary." See, e.g., Bormann v. AT&T Communications, Inc., 875 F.2d 399, 403 (2d Cir.), cert. denied, 493 U.S. 924 (1989); Beadle v. City of Tampa, 42 F.3d 633, 635 (11th Cir.), cert. denied, 515 U.S. 1152 (1995); Torrez v. Public Serv. Co., 908 F.2d 687 (10th Cir. 1990); Stroman v. West Coast Grocery Co., 884 F.2d 458, 462 (9th Cir. 1989), cert. denied, 498 U.S. 854 (1990); Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1988); Rogers v. General Elec. Co., 781 F.2d 452, 456 (5th Cir. 1986); Pierce v. Atchison, Topeka and Santa Fe, Railroad Co., 65 F.3d 562 (7th Cir. 1995).

- Other courts have applied ordinary contract principles to determine whether a settlement was knowing and voluntary by focusing on the launguage of the agreement. See, e.g., O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir. 1991), cert. denied, 502 U.S. 859 (1991); Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044 n. 10 (6th Cir.), cert. denied, 479 U.S. 850 (1986); Pilon v. University of Minn., 710 F.2d 466 (8th Cir. 1983).

- A party who executes a release allegedly procured by fraud has only two choices of remedies -- either disaffirm the release and offer to return the consideration, or affirm the voidable contract and waive the fraud. Melendez v. Horizon Cellular Telephone Co., 841 F.Supp 687, 692 (E.D. Pa. 1994).

- The prior claim should not be revived unless the "alleged non-compliance... relate[s] to a matter sufficiently substantial to justify invalidation of the settlement agreement." Spiridigliozzi v. Bethlehem Mines Corp., Cambria Div., 558 F.Supp 734, 736 n.1 (W. D. Pa. 1980).

- Where the settlement agreement was procured by fraud, the underlying claim can be revived. See, e.g., Melendez v. Horizon Cellular Telephone Co., 841 F. Supp. 687, 691 (E.D. Pa. 1994).

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- The Virginia Supreme Court, recognizing that the courts are split on the question, held that the plaintiff in an action to rescind a settlement allegedly procured by fraud was not required, as a prerequisite to proceed with the recision claim, to tender back the amounts he received in settlement. Covington v. Skillcorp. Publishers, Inc., 439 S.E.2d 391 (Va. 1994).

- Plaintiff/employee was not coerced by her attorney to settle her sex discrimination case since serious, even heated discussions between plaintiff and attorney and attorney's threat to withdraw from case. McEneny v. West Delaware County Community School District, 844 F. Supp. 523 (N.D. Iowa 1994).

- The Second Circuit found dismissal inappropriate and reinstated an action brought by a Hispanic employee who claimed he was pressured into signing a $10,000 settlement of his Title VII claim. Livingston v. Adirondack Beverage Co., CA 2, No. 96-9301, 4/13/98. The court emphasized that the employee was not represented by counsel when he signed the agreement, therefore finding a factual issue that should be decided on the merits of the case. Id.

- An agreement settling a Title VII action, arrived at during mediated settlement conference held before parties became aware that federal district court - which had ordered conference - had then granted employer's pending motion for summary judgment, is enforceable. Sheng v. Starkey Laboratories, Inc., 117 F.3d 1081 (8th Cir. 1997). Mutual mistake argument unsucessful since mistake does not go to nature of deal and because employer assumed risk of error by entering settlement. Id.

Integration ("Zipper") Clause

- Federal courts do not have the inherent power to enforce a settlement agreement unless they include a separate provision in a dismissal order that either explicitly retains jurisdiction over the settlement of the agreement or incorporates the terms of the agreement into a court order. Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 381 (1994). Simply including the phrase "pursuant to the terms of the settlement" is not sufficient to incorporate the terms of the agreement. Shaffer v. GTE North, Inc., 284 F.3d 500, 503 (3rd Cir. 2002) (citing In re Phar-Mor, Inc. Sec. Litig., 172 F.3d 270, 274 (3rd Cir. 1999)). Further, a mere inclusion of terms that reinstate an action if the "settlement is not consummated" does not grant the court jurisdiction to enforce a settlement

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agreement. Id.

- A typical integration clause contains a statement that the signatories have not relied on any representations, promises, or agreements other than those set forth in the written agreement.

- The courts, faced with an integration clause, held that employees have no right to rely on oral representation and decline to admit parol evidence. See, e.g., Astor v. International Business Machines Corp., 7 F.3d 533 (6th Cir. 1993).

- A side letter may be unenforceable unless it is incorporated by reference in the settlement agreement. See, e.g., S.E.C. v. Levine, 881 F.2d 1179 (2d Cir. 1989).

False Claims Act

- The Ninth Circuit has held that a prefiling release of False Claims Act qui tam claims, when entered without the United States' knowledge or consent, cannot bar a subsequent qui tam claim. U.S. ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994).

Survival

- Both sides may want certain clauses of the agreement to be perpetual. Say so explicitly in the document.

- Examples of clauses the employee will want to be perpetual are good references and nondisparagement.

Dismissal of Suit

- Upon a showing of good cause, the government is entitled to a hearing to object to the settlement terms of a qui tam settlement between private parties. See, e.g., U.S. ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994)

- Sign the stipulation of dismissal and file with the court.

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- Write a letter to the client telling the client how much you appreciate the opportunity to provide advice during the client's ordeal. Tell the client again that you work in the area of employment law and if the client has any problems or questions to please contact you in the future.

Settlement After Judgment

- The Supreme Court ruled in U.S. Bancorp Mortgage Company v. Bonner Mall Partnership, 115 S. Ct. 386 (1994), that mootness by reason of settlement does not justify vacatur of a federal civil judgement under review. The Court distinguished United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950) stating that it stood by Munsingwear's dictum that mootness by "happenstance" provides sufficient reason to vacate.

- Some state courts have held that a settlement after an appeal vacates the lower court ruling. See , e.g., Neary v. Regents of the Univ. of California, 3 Cal.4th 273 (1992).

- Some courts have expressed hostility towards petitions to vacate an adverse trial court decision. See, e.g. United States v. Garde, 848 F.2d 1307, 1311 (D.C. Cir.1988) ("We do not wish to encourage litigants who are dissatisfied with the decision of the trial court `to have them wiped from the books' by merely filing an appeal, the complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision"); MAPCO Alaska Petroleum Inc. v. U.S., 1993 WL 513910 (Fed. Cl. 1993) (vacatur would be contrary to the public interest as the court did not want to encourage vacatur of its opinions as a bargaining element in settlement negotiations).

- Others have expressed concern about vacating an appellate decision where there is no further right to review unlike vacating a district court's decision. Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 62 U.S.L.W. 2408 (2d Cir. 1993)

- Many in the plaintiff's trial bar and the media are opposed on principle to such petitions. See, e.g., Rodriquez, "Legal Sleight of Hand: Don't Like Court Ruling? Make a Deal, Wipe It Out," Vol. XV, No. 51 Legal Times 1 (May 10, 1993); Comment, Is Settlement Conditioned on Vacatur An Option? Should It Be? Vol. 1991 No. 1, Journal of Dispute Resolution 87.

Post - Settlement/Decree Responsibilities

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- Does the agreement or decree improve downstream obligations?

- Generally, employers should avoid "obey-the-law" clauses. While most courts will not enforce such clauses, especially in a contempt proceeding, to avoid having to pay the fees to fight the issue, the employer's counsel should advise opposing counsel that any future breach of the law can be fully rectified under the law.

- A post-settlement/decree's obligations should be specifically limited in duration or, if such be the case, specified as perpetual obligations. The employer will want it clear that the agreement or decree automatically expires as of a date certain.

- Consider requiring ADR to resolve disputes. Such ADR clauses run the gamut from vague agreements to act like mature affidavits, not waste money on lawyers and mediators/arbitrators, and try like hell to settle such disputes without wasting money on some more formal commitments to mediation, med-arb, or some other form of ADR. See Fitzpatrick, "Shouldn't We Make Full Disclosure to Our Clients of ADR Options?" (ALI-ABA Course Materials, Advanced Employment Law & Litigation, 1995).

- Should the agreement specify a limitations period for resolution of post-settlement disputes? The employee may argue that it ought to be the contract statute of limitations under the governing law, that are virtually always long-term periods; whereas the employer may want a requirement that the employee must bring the matter to the attention in a formal fashion within a far shorter period of time so it has a fair opportunity to resolve a breach claim.

- For an excellent discussion of post-settlement considerations, see the piece presented by Charles S. Mishkin of the Michigan bar to the ABA's Committee on Individual Employee Rights and Responsibilities' Mid-winter meeting in 1995 entitled "Beware: Contempt of Court Civil Rights Enforcement Proceedings Are on the Rise."

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Enforcement of Agreement

- Avoid ambiguity in the settlement agreement. If the agreement is found to be ambiguous, a court may receive extrinsic evidence to determine the interest of the parties. See, e.g., Alexander & Alexander Servs. v. These Certain Underwriters at Lloyd's, 136 F.3d 82, 86 (2d Cir. 1998).

- If the parties want the court to be empowered to enforce the agreement, it is essential to explicitly have the court retain jurisdiction to enforce the settlement. See Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) reversing, 993 F.2d 883 (9th Cir. 1993)(holding that a district court's inherent power summarily to enforce a settlement agreement concerning an action before it, confers subject matter jurisdiction to enforce a post dismissal action to enforce such an agreement)(where Court held that a federal court lacks jurisdiction to enforce a settlement agreement when it dismisses the case pursuant to stipulation and the dismissal order neither incorporates nor otherwise retains jurisdiction to enforce the settlement). At least three Circuits had so held prior to the Court's decision. See Langley v. Jackson State Univ., 14 F.3d 1070 (5th Cir. 1994); McCall-Bey v. Franzen, 777 F.2d 1178 (7th Cir. 1985); Nature Conservancy v. Machipongo Club, Inc., 571 F.2d 1294 (4th Cir.), cert. denied, 439 U.S. 1047, 99 S. Ct. 722, 58 L. Ed.2d 706 (1978). But see Arco Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir), cert. denied, 429 U.S. 862, 97 S. Ct. 165, 50 L. Ed.2d 140 (1976). See also, Met Laboratories, Inc. v. Reich, 875 F. Supp. 304 (D.Md. 1995).

- The phrase “pursuant to the terms of Settlement” has been held to be insufficient to incorporate the terms of settlement and therefore did not confer jurisdiction over an action to enforce the agreement after Kokkonen. In re Phar-Mor, Inc. Sec. Litig., 172 F.3d 270, 274 (3rd Cir. 1999).

- Since Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994), disputes have arisen over the status of conditional dismissal orders. Compare Shaffer v. GTE North, Inc., 284 F.3d 500 (3rd Cir. 2002) with Metro-Goldwn Mayer, Inc. v. 007 Safety Prods., Inc., 183 F.3d 10 (1st Cir. 1999).

- Oftentimes when a case in litigation is settled, the court will issue an order dismissing the case with leave to reinstate the case within a designated

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time if the settlement is not consummated. The Seventh Circuit has been critical of this practice. See, e.g., Otis v. City of Chicago, 29 F.3d 1159 1163 (7th Cir. 1994)(en banc); Ford v. Neese, 119 F.3d 560, 562 (7th Cir. 1997); King v. Walters, 190 F.3d 784, 786 (7th Cir. 1999).

- A court is not required to use explicit language or "any magic form of words" to effect a valid incorporation of an agreement into a court order. Interspiro USA, Inc. v. Figgie Intern Inc., 18 F.3d 927, 930 (Fed. Cir. 1994). Rather, a court need only manifest an inferable interest to retain jurisdiction." Id. at 930.

- In Interspiro, the Federal Circuit relied upon the following language as "incorporat[ing] the terms of the agreement and adequate manufactur[ing] the court's intent to retain jurisdiction for the purpose of enforcing the agreement:

  > [t]he parties hereto have entered into an agreement settling the issues before [the district court], and by and through their attorneys, and pursuant to that agreement hereby stipulate that the complaint and counterclaim . . . be dismissed with prejudice with each party bearing its own costs and attorney fees. [Emphasis added.]

- Some courts have held that the federal courts have jurisdiction over the interpretation and enforcement of agreements settling Title VII claims. *See*, e.g., EEOC v. Henry Beck Co., 729 F.2d, 301, 305-06 (4th Cir. 1984) (district courts have jurisdiction to enforce the voluntary settlement of Title VII claims); E.E.O.C. v. Safeway Stores, Inc., 714 F.2d 567, 571-72 (5th Cir.1983), cert. denied, 467 U.S. 1204, 104 S. Ct. 2384, 81 L.Ed.2d 343 (1984)("federal courts have jurisdiction over suits to enforce Title VII conciliation agreements"); Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1509 (11th Cir.1985); Melendez v. Horizon Cellular Telephone Co., 841 F.Supp 687, 694 (E.D. Pa. 1994); Morigney v. Engineered Custom Plastics Corp., 1993 WL164299 (D.S.C.1993). (A claim for breach of an agreement settling a Title VII claim was "brought under "Title VII).

- Jurisdiction to enforce a settlement agreement follows jurisdiction in the district court over the original action Stephens v. City of Vista, 994 F.2d 650, 654 (9th Cir. 1993).

- Enforcement of a settlement agreement on behalf of a federal employee is

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governed by a unique set of rules. *See*, e.g., Perry v. Department of the Army, 992 F.2d 1575 (Fed.Cir. 1993).

- Standing alone, a settlement agreement is nothing more than a contract; the imprimatur of an injunction is required to render it a consent decree enforceable through contempt. See, e.g., D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 460 (7th Cir. 1993).

- The courts have construed Rule 65(d) strictly, requiring that the provisions of the settlement agreement be expressly set forth in a judicial order before they may be enforced in a civil contempt proceeding. See, e.g., Thomas v. Brocks, 810 F.2d 448, 450 (4th Cir. 1987); H.K. Porter Co. v. National Friction Prod., 568 F.2d 24 (7th Cir. 1977); Cf. Prairie Twp. Bd. of Trs. v. Hay, 2002 Ohio 4765 (Ohio.Ct.App. 2002). To prevail on a civil contempt petition, the petitioner must demonstrate by clear and convincing evidence that the respondent violated the express and unequivocal command of a court order, D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 460 (7th Cir. 1993).

- Retention of jurisdiction to enforce settlement agreement was insufficient to transform the agreement into a court order enforceable through a contempt proceeding. D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 453, 461 (7th Cir. 1993).

Words In Agreement

- Sometimes the parties have a side agreement. It should either be incorporated by reference. Otherwise, to make it enforceable one would have to argue that the provision of the agreement which it amplifies should be deemed ambiguous so that it is admissible.

- Some courts consider the term "arising under" to be less broad than the term "arising under or relating to." See, e.g., S.A. Mineracao Da Trinadade-Samitri v. Utah Int'l Inc., 745 F.2d 190, 194 (2d Cir. 1984); Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983).

- Some courts have found the existence of an agreement without an executed written settlement. Four factors may be examined to determine whether parties intended to be bound by a settlement in the absence of a document executed by both sides; (1) whether there has been an express reservation of the right not to be bound in the absence of a signed writing;

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(2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. Winston v. Mediafare Entertainment Corp., 777 F.2d 78 (2d Cir. 1985).

- An oral agreement may not be enforced when evidence shows that the parties did not intend to be bound by the oral settlement agreement. Ciaramella v. Reader's Digest Ass'n, Inc., 131 F.3d 320 (2d Cir. 1997). Conversely, courts may recognize an oral agreement when the production of written settlement documents merely memorialized the parties' prior agreement. Porter v. Chicago Bd. of Educ., 981 F.Supp. 1129 (N.D.Ill. 1997). Under New York law, a contract is unenforceable if the parties did not intend to be bound until after the execution of a formal written agreement. Zucker v. Katz, 836 F.Supp 137, 144 (S.D.N.Y. 1993). However, if parties have "agreed to the essential terms of their settlement" orally, even in the absence of "the memorialization of such agreement in writing," the parties are still "bound by the terms of the oral agreement." Echols, 267 F.Supp.2d at 868.

- The District Court for the District of Columbia recently held the opposite, ruling that an oral agreement was enforceable and that "a signed writing is not essential to the formation of a contract." Greene v. Rumsfeld, 266 F.Supp.2d 125, 136 (D.D.C. 2003) (quoting Davis v. Winfield, 664 A.2d 836, 838 (D.C. 1995)

Enforceability of Agreements To Not Make Experts Available

- The courts are split as to whether a settlement agreement with one defendant not to make expert witness available to other parties in a multi-party action is enforceable. Compare Wolt v. Sherwood, A. Div. of Harsco Corp., 828 F.Supp 1562, 1568 (D. Utah 1993) (". . . plaintiffs may settle for less from one defendant, if they believe other defendants will be placed at a disadvantage by virtue of the settlement and will, consequently, pay more in settlement in the future. To preclude a plaintiff from buying the expertise of a settling defendant could discourage the settlement process, and frustrate the public policy in favor of settlement.") and Board of Educ. v. Zando, Martin & Milstead, Inc., 182 W.Va. 597, 390 S.E.2d 796, 812 (1990) (agreement is enforceable) with Tom L. Scott, Inc. v.. McIlhany, 798 S.W. 2d 556 (Tex. 1990) (unenforceable when such agreements are used specifically to thwart justice).

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- Where one party to a contract is aware of a unilateral mistake by the other party to the contract, the party aware of the mistake cannot complain when the contract is interpreted to comply with the understanding of the mistaken party. Wolt v. Sherwood, A Div. of Harsco Corp. , 828 F. Supp. 1562, 1566 n. 15 (D. Utah 1993).

- An agreement reached at a court-mandated settlement conference was held to be enforceable even though the parties never executed a formal written document and the agreement could not be performed within a year. Kohn v. Jaymar-Ruby, 9 IER Cases (BNA) 552 (Calif. Ct. App. 1994).

Modification of Agreement

- In the event that unforeseen circumstances arise, the parties should explicitly provide that a court may modify the settlement agreement in accordance with the parties' intentions when entering into the settlement agreement.

- Similarly, the parties should include language permitting them to change the terms of the agreement by executing a written document, signed by both parties or their authorized agents, which should ultimately be attached to the settlement agreement.

- It's possible that a court may modify the agreement even without an explicit agreement between the parties. See, e.g., Laskey v. Continental Products Corporation, 804 F.2d 250 (3rd Cir. 1986) holding that district court had jurisdiction to entertain 60(b) motion to modify the settlement agreement to provide for allocation of settlement proceeds among the plaintiffs)

- In Morris v. Communications Satellite Corp., 149 F.R.D. 1 (D. D.C. 1993), the court allowed counsel for plaintiff to petition for modification of a settlement agreement which, as modified, provides that the defendant was to pay counsel directly their portion of the settlement monies to assure that counsel was paid.

Collateral Attack

- Voluntariness

- Fraud

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- Mistake
- Misrepresentations during negotiations
- Failure to disclose material facts

Rescission of Settlement

- "Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." Arnold v. Yarborough, 316 S.E.2d 416, 417 (Sup. Ct. App. 1984)
- Economic necessity in light of extreme financial stress does not constitute duress. Evans v. Aylward, 166 Kan. 306, 314, 201 P.2d 1044 (1949).
- "When a litigant voluntarily accepts an offer of settlement, either *directly or indirectly* through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney." Petty v. The Timken Corp., 849 F.2d 130, 133 (4th Cir.1988) (emphasis supplied).
- The courts are not uniform in the handling of claims that counsel did not have authority to settle. A Michigan federal court held that the mere fact that an attorney was retained by the plaintiffs did not give the attorney implied authority to settle and the attorney did not have apparent authority to settle. Rheault v. Lufthansa German Airlines, 1995 WL 552057 (E.D. Mich. 1995). In contrast, an Iowa federal court has held that if client contends that attorney was not authorized to enter into the settlement, the client has a heavy burden to prove that authorization was not given. McEnany v. West Delaware County Community School District, 844 F. Supp. 523 (N.D. Iowa 1994).
- The most risk adverse posture is a document confirming the terms of the agreement that is countersigned by all other parties and/or counsel with express authority, presumably a written power of attorney.
- Some jurisdictions permit uncountersigned confirming letter into evidence as proof of the existence and terms of the agreements.

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Effect of Settlement on Subsequent Malpractice Action

- The courts are split whether the underlying settlement precludes the subsequent legal malpractice action. See, e.g., "Settlement of the Underlying Suit: Will Subsequent Malpractice Action Be Precluded?" LLR Quarterly 7 (Oct. 1993).

- Some jurisdictions have ruled that settlement of the underlying claims precludes subsequent legal malpractice actions, others have ruled that a subsequent legal malpractice action will only be precluded if the plaintiff alleges the defendant lawyer fraudulently induced the settlement, and still others have ruled that settlement does not preclude subsequent legal malpractice claims relating to the underlying suit. Compare Lowman v. Karp, 476 N.W. 2d 428 (Mich. App. 1991) (claim not precluded) with Mitchell v. Transamerica Insurance Co., 551 S.W. 2d 586 (Ky. App. 1977) (settlement precludes claim) and with Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, 526 Pa. 541, 587 A.2d 1346 (1991) (settlement precludes malpractice claim absent fraud in the inducement).

- Grayson v. Wofsey, Rosen, Kweskin and Kuriansky, 231 Conn. 168 (1994) (holding that a client who agreed to settle may sue for malpractice "if the client can establish that the settlement agreement was the product of the attorney's negligence."); Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. 1992) (where the former client testified that she understood the settlement, thought it was fair, and entered into it voluntarily, the court held: "The fact that a party received a settlement that was `fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent.")

- In Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, 587 A.2d 1346 (Pa. 1991) the Pennsylvania Supreme Court held that a former client may not recover from his attorney for malpractice for negotiating a settlement that the client has accepted, unless the client can prove actual fraud by the attorney.

- McCarty v. Pedersen & Houpt, 621 N.E.2d 97 (1993) (holding former client can sue his attorney for malpractice even if the client agreed to settle the case and had an independent attorney review the settlement agreement before signing it).

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Some Contract Construction Rules

- What effect does the governing law give to a fully integrated agreement?

> Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions.... Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence.

Construction Interior Sys., Inc. v. Marriott Family Restaurants, Inc., 984 F.2d 749, 754 (6th Cir.) (emphasis in original), cert. denied, ___ U.S. ___, 114 S. Ct. 194 (1993) (quoting Aultman Hosp. Ass'n v. Community Mut. Ins. Co., 544 N.E.2d 920, 923 (1989)). "Even where a contract is not fully integrated, parol evidence cannot be admitted if its effect will be to vary or contradict any matter that is specifically covered by the written terms of the contract." Marriott Family Restaurants, 984 F.2d at 754 (citation omitted). Moreover,

> Ohio law further provides that "interpretation of written contract terms is a matter of law for initial determination by the court.... It is only when the relevant contract language is ambiguous that the job of interpretation is turned over to the fact finder ... and the determination whether a contract is ambiguous is made as a matter of law by the court."

Id. (quoting Potti v. Dramed Pharmaceuticals, Inc., 938 F.2d 641, 647 (6th Cir. 1991).

- Section 187 of the Restatement (Second) Conflicts of Laws provides

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

- "A party to a settlement cannot avoid the agreement merely because [s]he subsequently believes the settlement insufficient...." Glass v. Rock Island Refining Corp., 788 F.2d 450, 454 (7th Cir. 1986). See also Worthy v. McKesson Corp., 756 F.2d 1370, 1373 (8th Cir. 1985). Plaintiff's change

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of mind does not excuse his/her from performance of his/her obligations under the settlement agreement.

- When a settlement agreement does not specify a particular time by which payment must be made, the court implies a requirement that payment be made within a reasonable time. Janneh v. GAF Corp., 887 F.2d at 436. The employer to demonstrate its intention to honor the agreement should tender a check payable to the settlor. Any claim that defendant repudiated the agreement may be defused. See Taylor v. Gordon Flesch Co., 793 F.2d 858 (7th Cir. 1986). Moreover, even if employer had breached the agreement, it is debatable whether the employee could not rescind her agreement to withdraw her claims. See Dalessandro, 864 F.2d at 8, n. 1.

- In many rescission cases, the evidence may indicate that literal restoration is impractical upon rescission and the court may have to determine an appropriate method of restoration. See Adelman, 215 Va. at 794-95, 213 S.E.2d at 781-82 (directors' preferential stock treatment in return for their guaranty of corporate debt rescinded on condition that objecting stockholders obtain release of directors' liability to corporate creditor). Similarly, if the subject of restoration is money, the amount to be restored frequently cannot be determined until after hearing the evidence in support of rescission. See Long v. Harrison, 134 Va. 424, 447, 114 S.E. 656, 663 (1922) (after decreeing rescission, matter referred to commissioner to determine amount of consideration actually received by rescinding party).

- As a general rule, an individual who executes a settlement agreement cannot "subsequently seek both the benefit of the settlement and the opportunity to continue to press the claim he agreed to settle". Wilmes v. United States Postal Service, 810 F.2d, 130, 132 (7th Cir. 1987) (quoting Kirby v. Dole, 736 F.2d 661, 664 (11th Cir. 1984)); see also Strozier v. General Motors Corp., 635 F.2d 424 (5th Cir. 1981). If an employer breaches a Title VII settlement agreement, the employee may "undoubtedly . . . bring an action for breach of that agreement," Snider, 923 F.2d at 1408, but the employee's right to revive the settled claims is much less certain. This rule is the same as that under Pennsylvania law where "[i]f the consideration for the release of the prior claim is performance of the settlement agreement..., only substantial performance of the obligor's duties under the agreement will extinguish the prior claim." Polish American Machinery Corp. v. R. D. & D. Corp., 760 F. 2d. 507, 511 (3d Cir. 1985) (cited in Capek v. Mendelson, 821 F. Supp. 351, 358-359 (E.D. Pa. 1993)).

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- Many courts have held that parties who enter into Title VII settlement agreements waive their rights to proceed on the underlying claim. See, e.g., Pilon University of Minnesota, 710 F.2d 466 (8th Cir. 1983); Sherman v. Standard Rate Data Service Inc., 709 F. Supp. 1433 (N.D. Ill. 1989); Vermett v. Hough, 606 F. Supp. 732, 745 (W.D. Mich. 1984). Judge Rovner, then of the Northern District of Illinois (now of the Seventh Circuit), has gone so far as to state that "[e]ven when a party alleges a breach of a voluntary settlement agreement, [he] is precluded from reviving the underlying Title VII claim in federal court." Sherman, 709 F. Supp. at 1438 (citing Vermett, 606 F. Supp. at 745-746). Judge Rovner also acknowledged, however, that in a case where the settlement agreement was procured by fraud, the underlying claims can be revived. Sherman, 709 F. Supp. at 1438; see also Pilon, 710 F.2d at 468.

- In Spiridiglizzi, the court recommended that when the release of a Title VII claim is contingent upon the other party's performance of the promises made in the agreement (as opposed to being contingent upon a mere promise to perform), the prior claim should not be revived unless the "alleged non-compliance . . . relate[s] to a matter sufficiently substantial to justify invalidation of the settlement agreement". Spiridigliozzi, 558 F. Supp. at 736 n. 1 (cited with approval in Vermett, 606 F. Supp. at 732). This rule is the same as that under Pennsylvania law where "[i]f the consideration for the release of the prior claim is performance of the settlement agreement..., only substantial performance of the obligor's duties under the agreement will extinguish the prior claim." Polish American Machinery Corp. v. R. D. & D. Corp., 760 F. 2d. 507, 511 (3d Cir. 1985) (cited in Capek v. Mendelson, 821 F. Supp. 351, 358-359 (E. D. Pa. 1993)). Spiridigliozzi, F. Supp. at 736 n. 1 (cited with approval in Vermett, 606 F. Supp. at 732).

- Ambiguities in a written instrument are resolved against the drafter. See, e.g., Consolidated Am. Ins. Co. v. Mike Super Marine Servs., 951 F.2d 186, 188-89 (9th Cir. 1991).

- "[A]n oral settlement agreement must be definite, certain and unambiguous. For such an agreement to be binding on the parties it should be clear that it is full and complete, covers all issues, and is understood by all litigants concerned . . . . The consent of the parties being essential to a contract, until each has assented to all the terms, there is no binding contract; until assented to, each party may withdraw his bid or proposition." (Citations, punctuation and emphasis omitted.) Cross v. Cook, 147 Ga. App. 695(2), 250 S.E.2d 28 (1978). Poulos v. Home Fed.

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Savings, etc., Ass'n., 192 Ga. App. 501, 502(2), 385 S.E.2d 135 (1989).

- "Oral settlement agreements are enforceable if their existence is established without dispute, but where the very existence of the agreement is disputed, it may only be established by a writing." (Citations and punctuation omitted). Reichard v. Reichard, 262 Ga. 561, 564(2), 423 S.E.2d 241 (1992). "This requirement of a writing goes to the certainty of the terms of the agreement . . . . The writing which will satisfy this requirement ideally consists of a formal written agreement signed by the parties. However, letters or documents prepared by attorneys which memorialize the terms of the agreement reached will suffice." Brumbelow v. Northern Propane Gas Co., 251 Ga. 674, 676(2), 308 S.E.2d 544 (1983).

- Although a court may properly exercise its equitable power to modify an injunction that has become inequitable, modification is not a proper remedy when a party to a consensual order is dissatisfied with the bargain that was reached. See Kozlowski, supra, 871 F.2d at 246 ("The exercise of equity, however, does not permit a court to indulge a party's discontent over the effects of its bargain"). Moreover, a Stipulation and Order is analogous to a consent decree. See United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S. Ct. 1752, 1757-58, 29 L. Ed.2d 256 (1971). Thus, when considering the enforcement of the rights of the parties under a Stipulation and Order, a court must adhere to the bargain reached by the parties, and cannot substitute its own view of the proper bargain that should have been struck. See EEOC v. Local 580, Int'l Ass'n of Bridge, Structural And Ornamental Ironworkers, 925 F.2d 588, 592 (2d Cir. 1991) (consent judgment analogous to a contract); SEC v. Levine, 881 F.2d 1165, 1179 (2d Cir. 1989) ("consent judgments should be interpreted in a way that gives effect to what the parties have agreed to.")

- See also Brown v. Chrysler Corp., 112 Ga. App. 22, 143 S.E.2d 575, 576 (Ga. App. 1965) ("A contract must be given a reasonable construction which will uphold and enforce the instrument, if possible, rather than a construction which would . . . lead to an absurd result.")

- Standing alone, a settlement agreement is nothing more than a contract; the imprimatur of an injunction is required to render it a consent decree enforceable through contempt. See People Who care v. Rockford Bd. of Educ. School Dist. No. 205, 961 F.2d 1335, 1337 (7th Cir. 1992); In re Masters Mates & Pilots Pension Plan and IRAP Litigation, 957 F.2d 1020, 1025 (2d Cir. 1992).

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- Federal Rule of Civil Procedure 65(d) requires that the terms of any injunctive order be recited in the order it self:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ."

- The courts have construed Rule 65(d) strictly, requiring that the provisions of a settlement agreement be expressly set forth in a judicial order before they may be enforced in a civil contempt proceeding. In H. K. Porter Co. v. National Friction Prod., 568 F.2d 24 (7th Cir. 1977), the parties had executed a settlement agreement specifying their future obligations and providing that "[t]he Court shall enter a decree that said Settlement Agreement is the judgment in [the case]." 568 F.2d at 25. The district court obliged with an order stating:

> "The Court having examined . . . the Settlement agreement . . . hereby approve[s] the said Settlement Agreement and indicates its approval thereon and orders a copy filed as a part of this proceeding. The court further orders . . . that the said Settlement Agreement is hereby adopted and made a part of the decree by reference as the judgment herein."

Id.

- The court's failure "to spell out in a decree's text the specific obligations resting on the defeated litigant . . . fatal to any contempt proceeding . . . ." 568 F.2d at 27. The fact that the parties' obligations were set forth in the settlement agreement did not remedy the defect:

> When the question of contempt is raised, just as it is inadequate if the decree has merely referred to a statute, even though the statute clearly created the legal obligation which warranted the decree[,] so it is not enough for enforcement by contempt proceedings if the decree merely referred to a contract, even though the contract clearly created the legal obligation which warranted the decree.

Id. at 27-28 (citations omitted). Accord: Thomas v. Brock, 810 F.2d 448-450 (4th Cir. 1987); contra Davis v. City and County of San Francisco,

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890 F.2d 1438, 1450 (9th Cir. 1989). The fact that the district court retained jurisdiction to enforce the settlement agreement, is not necessarily sufficient to transform the agreement into a court order enforceable through a contempt proceeding. See Hanna v. Lane, No. 84 C 1635, 1989 WL 56898, at *5 1989 U.S. Dist. LEXIS 5910, at *12-14 (N.D. Ill. May 22, 1989); Smith v. Schermerhorn, No. 85 C 7372, 1989 WL 13252, at *1, 1989 U.S. Dist. LEXIS 1571 at *3-4 (N.D. Ill. Feb. 10, 1989); Boatman, 1988 WL 6957, at *2-3 1988 U.S. Dist. LEXIS 595, at *7-9; Central States Southeast and Southwest Areas Pension Fund v. Richardson Trucking, Inc., 451 F. Supp. 349, 350 (E.D. Wis. 1978). Of course, when enforcement problems arise, courts do retain the discretion to amend their decrees to include express commands sufficient to support future contempt proceedings. Hanna v. Lane, 1989 WL 56898, at 5* 1989 U.S. Dist. Lexis 5910, at *14; Smith v. Schermerhorn, 1989 WL 13252, at *2 1989 U.S. District Lexis 1571, at *4.

- Under New York law, a contract is unenforceable if the parties did not intend to be bound until after the execution of a formal written agreement. Jim Bouton Corp. v. WM. Wrigley Jr. Co., 902 F.2d 1074, 1080 (2d Cir. 1990), cert. denied, 498 U.S. 854, 111 S. Ct. 150, 112 L. Ed.2d 116 (1990); Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985); R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 74 (2d Cir. 1984); Schneck v. Francis, 26 N.Y.2d 466, 311 N.Y.S.2d 841, 842, 260 N.E.2d 493, 494 (1970). "This rule holds true even if the parties have orally agreed upon all the terms of the proposed contract." R. G. Group, Inc. v. Horn & Hardart Co., 751 F.2d at 74. On the other hand, however, where the parties do not intend that an agreement must be reduced to writing to be binding, and there are no material terms of the contract left open for negotiation, an informal oral agreement may be binding even if the parties contemplate memorializing their agreement in writing. Winston v. Mediafare Entertainment Corp., 777 F.2d at 80; R. G. Group, Inc. v. Horn & Hardart Co., 751 F.2d at 74. Thus, "[w]hat matters are the parties' expressed intentions, the words and deeds which constitute objective signs in a given set of circumstances." R. G. Group, Inc. v. Horn & Hardart Co., 751 F.2d at 74.

- The Second Circuit has set forth four factors to determine whether the parties intended to be bound prior to executing a written contract; namely, whether: (1) either party has expressly reserved the right not to be bound absent a written agreement; (2) there has been partial performance of the contract; (3) all of the terms of the alleged contract have been agreed upon "such that there is literally nothing left to negotiate or settle;" and (4) the

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agreement at issue is the type of contract that is generally committed to writing. R. G. Group, Inc. v. Horn & Hardart Co., 751 F.2d at 75-76; see also Winston v. Mediafare Entertainment Corp., 777 F.2d at 80. These factors may be shown by "oral testimony or by correspondence or other preliminary or partially complete writings." Winston v. Mediafare Entertainment Corp., 777 F.2d. at 80 (quoting Restatement (Second) of Contracts § 27 comment c (1981)).

- If the settlement is silent, the court must determine a reasonable time for performance. See, e.g., Evergreen Amusement v. Milstead, 206 Md. 610, 617, 112 A.2d 901 (1955).

- The determination of materiality requires consideration of the parties' intent as evidenced, in part, by any writings. Schneider v. Dumbarton Developers, 767 F.2d 1007, 1013 (D.C. Cir. 1985).

- The court will not construe a contract to achieve absurd results. See e.g., Brown v. Chrysler Corp., 112 Ga. App. 22, 143 S.E.2d 575, 576 (Ga. App. 1965).

Settlements with Federal Government

- An agreement between an agency and an employee settling a civil service dispute is a final and binding resolution of an appeal in the MSPB. 5 C.F.R. §1201. 41(c)(2) (1992).

- Settlement of appeals to the federal Merit Systems Protection Board (MSPB), if approved by MSPB, are enforced by MSPB. 5 C.F.R. §1201.41(c)(2)(i) (the MSPB "retain[s] jurisdiction to ensure compliance with the agreement.") See also, Perry v. Dept. of Army, 992 F.2d 1575 (Fed. Cir. 1993) (applying regulation and enforcing settlement).

- Several courts have held that a federal employee fails to exhaust administrative remedies when he rejects a settlement offer for full relief on the specific claims he asserts. See, e.g., Francis v. Brown, 58 F.3d 191 (5th Cir. 1995)(Title VII); Frye v. Aspin, 997 F.2d 426, 428 (8th Cir. 1993) (Rehabilitation Act); Wrenn v. Secretary, Department of Veterans Affairs, 918 F.2d 1073, 1078-79 (2d Cir. 1990), cert. denied, 479 U.S. 977, 111 S. Ct. 1625, 113 L.Ed.2d 721 (1991)(ADEA)("[L]itigation is not a sport in which the hunter may release a trapped quarry for the thrill of further chase.")

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Class Action Settlement

- A variety of methods have been utilized by the courts in distributing remaining class damages or class settlement funds. These methods include: (1) claimant fund sharing; (2) reversion to the defendant; (3) general or specified escheat to a governmental body; and (4) cy pres distribution. See generally, 2 Herbert B Newberg & Alba Conte, Newberg on Class Actions §§ 10.13 to 10.25 (3d Ed. 1992). The district court's order of distribution is subject to review for abuse of discretion. In re Equity Funding Corp. of America Securities Litigation, 603 F.2d 1353, 1362-65 (9th Cir. 1979). For a discussion of these methods, See Powell v. Georgia-Pacific Corp., 843 F. Supp. 491 (W.D.Ark. 1994).

- Recently, the Third Circuit held that a settlement class must satisfy the Rule 23 criteria for litigation class. In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3rd Cir. 1995).

- Although the number of objections is not dispositive, a small percentage "strongly favors settlement." Stoltzner v. U.S. Steel Corp., 897 F.2d 115, 118-19 (3d Cir. 1990) (29 objections among 281 class members favor settlement).

- To satisfy due process, the notice to the class "must be sufficiently informative and give sufficient opportunity for response." Kyriazi v. Western Elec. Co., 647 F.2d 388, 395 (3d Cir. 1981).

- The notice's essential purpose should be "to fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." Philadelphia Housing Authority v. American Radiator & Std. Sanitary Corp., 323 F. Supp. 364, 378 (E.D. Pa. 1970), aff'd 453 F.2d 30 (3d Cir. 1971).

- Majority rule does not always control in class action settlements. See, e.g., Reynolds v. King, 790 F. Supp. 1101, 1108 (M.D. Ala. 1990).

- Generally, "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Marino v. Ortiz, 484 U.S. 301, 304, 108 S. Ct. 586, 587, 98 L.Ed.2d 629 (1988) (per curiam); Fed. R. App. P. 3(c) ("The notice of appeal shall specify the party or parties taking the appeal"). But is not settled whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's

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approval of the compromise. According to two leading treatises, "[a] member of the class who appears in response to the court's notice, given pursuant to the Rule [23.1], and objects to the dismissal or compromise has a right to appeal from an adverse final judgment although he did not become a formal party of record." 3B James W. Moore, Moore's Federal Practice, ¶23.1.24[3] (objector's right to appeal derivative suite settlement); ¶23.80[5] (objector's right to appeal class action settlement) (1993); 7C Charles A. Wright, et. al., Federal Practice & Procedure, 1839, at 182 (1986) ("[a]n objector to the settlement may appeal the court's approval of the compromise"); see also Webcor Elecs. v. Whiting, 101 F.R.D. 461, 465 n. 11 (D.Del. 1984) ("The law is now settled that objectors may appeal a court's decision approving a settlement").

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SETTLEMENT OF EMPLOYMENT DISPUTES: A CHECKLIST

DRAFT NO.	DATE	ATTORNEY
n/a	May 17, 1994	RBF
2	November 3, 1995	LAM
3	November 7, 1995	RBF
4	November 11, 1995	RBF
5	November 13, 1995	RBF
6	November 28, 1995	RBF/LAM
7	June 3, 1996	LAM
8	December 3, 1996	RBF
9.	February 12, 1998	EMC (Only sections updated were “Taxes” (#46) and “OWBPA”(#53) & Table of Contents)
10.	November 10, 1999	DC (only changes were headers, footers and cover page)
11.	August, 2003	RBF (update to be used Oct 2003)

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