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Making the most of your settlement agreements

A LOOK AT THE ISSUES THAT CAN RESULT IN A MONTHS-LONG BATTLE OVER THE FINAL AGREEMENT

So, you have an agreement to mediate an employment case. That's good news. It means that all sides have a reasonable expectation – or at least the hope – of ending the day with a signed settlement agreement. But far too often the mediation day does not end that way. Instead, the parties often leave with a term sheet listing items to include in a final, formalized agreement to be signed at some later point in time. This leaves attorneys ending the day only to subsequently battle over the final agreement for some period – sometimes even months. We all know attorneys who have been in this situation and have seen the unnecessary frustration and spent energy. The battle is not over the settlement amount (mediation at least resolved that difference), but the other terms. It does not have to be this way.

Sharp plaintiff's attorneys will know key areas of concern and be ready with solutions that are acceptable to all sides that they can either address before mediation (if the parties exchanged a draft agreement) or at the mediation's end so that the only thing to do at the end of mediation day is to literally fill in the amount to be paid, when defendant must pay it, and any other specific non-monetary items negotiated during the mediation. This article highlights these areas and provides suggested language and reasoning used to address these concerns. It applies to all negotiated settlement agreements whether reached through mediation or old-fashioned negotiation.

The issues below are not all-inclusive. Nor are they in order of importance. They simply represent some of the more common concerns that I've experienced in my own practice and expect to see again and again. Some items might not apply to you (yet). Others undoubtedly will bear importance. I have also included some sample language from my own cases that may serve as a useful template for yours.

Satisfying Labor Code section 206.5

Savvy defense attorneys usually insert language into settlement agreements stating something like "Plaintiff agrees that all wages owed have been paid." The attorneys clamor for this statement to ensure that Labor Code section 206.5 does not apply to invalidate the settlement agreement. Section 206.5 prohibits employers from requiring employees to sign releases to receive wages owed and so voids all contracts releasing an employee's claims where the employer has not paid all wages owed.

Plaintiffs' attorneys who bring wage claims cannot allow their clients to agree that all wages have been paid; to do so would be asking their clients to lie, because if all wages had been paid, then there would have been no claims in the first place. Unscrupulous defendants could likewise use the agreement's language and the plaintiff's signature to bring an action against the plaintiff attorney for malicious prosecution. So, what to do? Simply insert the word "undisputed" in between "all" and "wages" so that the relevant provision reads "Plaintiff agrees that all *undisputed* wages owed have been paid." This simple addition satisfies most defense attorney concerns over section 206.5. And it ensures that the final agreement accurately represents the plaintiff's claims. This is because according to *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796, section 206.5 does not prohibit releases where "a bona fide dispute" exists between the parties over whether the employer owed wages.

Yet simply inserting the word "undisputed" might not be enough for some employers. Some defendants demand more. So, at the opposite end of the spectrum, Defendants might require language like the following:

> Plaintiff further acknowledges and agrees that a good-faith dispute exists as to any alleged wage claims such that California Labor Code Section 206.5 does not bar or limit the general release of the Released Claims stated in this Agreement. That section provides in pertinent part as follows:
>
> "No employer shall require the execution of any release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of such wage has been made."
>
> In connection with the foregoing, Plaintiff acknowledges, agrees, represents and warrants to the Releasees, and each of them, that, pursuant to this settlement, it will be deemed, upon Company's performance of its payment obligations under this Agreement, that Plaintiff has been fully and properly paid for all time worked and for all required breaks in accordance with state and federal laws, to the extent applicable, and that there is and has at all times been a genuine, reasonable and good faith dispute between the Parties with respect to the foregoing.

Phew! That's quite a mouthful, but at least it provides language that can be acceptable to all sides. Indeed, a defense attorney once insisted on this more expansive language when I pushed back on her original plan to have my client claim that all wages had been paid.

Referencing Code of Civil Procedure section 664.6

Settlement agreements often contain reference to Code of Civil Procedure sec-

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tion 664.6. That provision permits courts to enter judgment to enforce the terms of a settlement signed by both parties. But do you always need this reference in settlement agreements? Absolutely not.

Section 664.6 only applies in cases that are in *active* litigation, or in instances where the parties request that the court retain jurisdiction over a settled case until full performance of the settlement terms. It has no bearing on cases in which the parties have not filed a lawsuit. Seems simple, right? I thought so too, until a partner at a large employment defense firm insisted at the end of a long day's mediation that section 664.6 language be included in our final settlement agreement. I tried to explain the section's irrelevance to our pre-litigation matter; but the partner insisted that I misunderstood the code section, claiming that section 664.6 grants the Court jurisdiction over the matter to enforce the settlement agreement. She was wrong. Section 664.6 does no such thing. Recognizing that the partner was not going to relent and, recognizing that it was not an issue worth fighting about because of the severability clause in the agreement, I allowed it to be in the pre-litigation agreement. But it does not have to be in pre-litigation agreements.

Should plaintiff's attorneys want to include Section 664.6 in their settlement agreement for cases in active litigation? Absolutely! The section makes it so much easier to ensure payment from the other side and can save significant heartache later. Let me explain.

I once had a client who we'll call Jane Roe. Jane had various psychological disorders that her wrongful discharge only exacerbated. Her mental state made her a great client for high emotional distress damages, but it also made litigating her case extremely difficult. At the case's second mediation, the mediator pushed both sides to a resolution at $350,000, a fair number. The mediator believed that all sides would accept the proposal. I did too. It was 11:30 p.m. and the employer's CEO was still present, ready to sign an agreement that we had negotiated in advance. But Jane balked just before signing. Her refusal to resolve the case at mediation angered the employer and entrenched everyone's position. So, the case continued. But the value declined largely due to Jane's poor deposition performance. Despite the case's great facts, it became clear that we could not rely on Jane to win at trial. She was too unstable.

The mediator had thankfully remained involved in the background as the case progressed. So, not long before trial, the mediator again made a settlement proposal. This time the number was $120,000 and we knew that defendants would accept. We had a candid discussion with Jane. She recognized that her best option was to settle and agreed to do so. We welcomed the agreement's reference to section 664.6 as Jane's instability might lead her to revoke the agreement even after signing; the section would instead allow the court to enter judgment according to the agreement's terms.

Confidentiality in sexual-harassment cases

California Senate Bill 820, passed in 2018, created quite a kerfuffle among employment attorneys about confidentiality in sexual harassment cases. Codified at Code of Civil Procedure section 1001, the bill voids contractual provisions that prevent a party from disclosing "factual information" about sexual harassment or related retaliatory conduct. Many employment attorneys erroneously assume that Code of Civil Procedure section 1001 prohibits confidentiality in all cases asserting sexual harassment. But that's not the case. Code of Civil Procedure section 1001 prohibits confidentiality only in cases where the plaintiff has filed a claim with an administrative agency or in court. So, for cases where neither a DFEH complaint nor a lawsuit is on file (such as instances of internal complaints or in demand letters), then the underlying facts may remain confidential.

This is a big boost to plaintiffs securing a quick resolution to sexual harassment cases because the fact of filing with the DFEH will prohibit confidentiality, and plaintiffs will want to promptly file with the DFEH to safeguard their claims, particularly if there was ongoing harassment. The net result might be that defendants will come to the bargaining table and settle quicker if the plaintiff's attorney properly emphasizes that Code of Civil Procedure section 1001 gives the parties a small window to negotiate a completely confidential agreement before the plaintiff files with the DFEH. Plaintiffs do not always have to immediately file with the DFEH, but it generally benefits them to file quickly – especially if there was ongoing harassment – to cover as much conduct as possible without relying on the continuing violation doctrine. Don't be fooled into thinking that a sexual harassment case cannot be confidential. And don't claim to the other side that it can't be confidential if the underlying filing requirements have not been fulfilled either, else you look like a fool.

That said, some confusion concerning confidentiality in sexual harassment cases may result from a federal law concerning attorneys' fees deductions that started in 2018. A provision in the Tax Cuts and Jobs Act of 2017 prohibits parties from deducting attorneys' fees in sexual harassment cases if the settlement agreement is subject to a confidentiality provision. The federal tax law does not prohibit confidentiality like California's state law does; the federal law just makes including confidentiality in sexual harassment settlements that much more expensive.

Agreements to not work for the employer again

Employers often insist on settlement agreement language that prohibits the plaintiff from working for them in the future. The demand is so routine that such provisions are now commonplace. But their banality does not mean that they are always going to be legitimate. The case of *Golden v. California Emergency Physicians*, D.C. No. 4:10-cv-00437-J SW (9th Circuit, July 24, 2018) explains why. There, the plaintiff, Dr. Golden, refused to sign a negotiated settlement agreement

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that prohibited future employment with defendant California Emergency Physicians Medical Group ("CEP") or any facility that it managed, owned, contracted with, or contracted with in the future. Dr. Golden argued that the provision violated California Business and Professions Code section 16600, which declares that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The Ninth Circuit agreed with Dr. Golden 11 years after he first filed suit.

Golden shows what might happen with some settlement agreements. The risks are particularly acute in industries where there are relatively few key players, or where consolidation remains a risk. Airlines are one example. In 2008, there were eight major U.S. airline companies. Today, after mergers and acquisitions, there are only four. Closer to home, the healthcare industry in California is seeing rapid consolidation into a few key companies as well. This consolidation's net effect is to limit the future employment opportunities for persons who sign settlement agreements limiting their future employment.

A workable compromise that plaintiff's attorneys should pursue to give clarity to their clients – and likewise to appease employer concerns – is to create narrowed and specific provisions to the case at hand. For instance, if a client was a healthcare worker and was leaving employment at one of the large healthcare providers in Los Angeles County, the client may have concerns as to where they can work in the future. An appropriate action by a plaintiff's attorney might be to limit a no-rehire clause's applicability to either a) a specific geographic location and/or b) entities as of a certain date. The healthcare worker in our example may reasonably agree to a settlement agreement limiting her rehire ability into the former employer's Los Angeles County-based entities as of the date of the settlement agreement. This gives the plaintiff clarity as to where she can apply in the future while also preventing future disruption to her employment if the past employer with whom she has a no-rehire provision either purchases or merges with her future employer, thus eliminating any need to bring a section 16600 action in the future.

Non-disparagement clauses as veiled non-compete?

Non-disparagement provisions are standard in settlement agreements. Their inclusion should not normally bring much of an objection. But what if your client is a salesperson? If they were to be employed by a competitor, their attempts to promote a sale of their new employer's product over their former employer's product might be considered "disparaging" and so violating their settlement agreement. What to do? The simplest remedy is to insert the following phrase at the end paragraph containing the non-disparagement provision: "This language is not intended to, and does not, prohibit Plaintiff from truthfully comparing products and services if employed by a competitor." This additional sentence gives plaintiffs peace of mind that they will not be violating any sort of contractual provision and so subjecting themselves to penalties if they are simply doing their jobs. I have yet to receive opposition to this clause's insertion from any attorneys, especially when I explain to them the reasons for its inclusion to eliminate plaintiff's concerns that the non-disparagement could be any sort of noncompete.

Not agreeing to open-ended indemnity

Another common settlement agreement demand by employers is complete indemnification for all payments the employer makes according to a settlement agreement. This may not pose an issue in cases where the settlement agreement or the settlement funds are being paid to a client's trust account or strictly on a 1099 basis. But it does create concern for any payments made according to an IRS form W-2 and the withholdings thereon.

For payments made on a W-2 basis, the employer will withhold certain amounts as prospective payments for taxes. A standard indemnity clause would essentially absolve employers from any liability if they chose to not pay those amounts withheld from the settlement payment. This can subject some clients to substantial risk. For instance, I once had a client receive over $300,000 from a settlement agreement on a strict W-2 basis with over $100,000 withheld. Had my client's former employer not remitted those amounts withheld, then my client would have faced a tax liability of over $100,000, reducing his recovery even further and leaving him without any recourse. So, what to do?

To begin with, the wise plaintiff's attorney will add the following phrase to any standard indemnity clause: Plaintiff agrees to indemnify defendant for all taxes "*other than those amounts withheld by the employer according to the form W-2 payments stated above.*" These few words give peace of mind and clarity to the contractual arrangement.

Name California as the forum for enforcing the agreement

Some employers, particularly those from out-of-state jurisdictions generally considered more employer-friendly, often insist on forum selection clauses in settlement agreements placing the forum in the employer's proverbial backyard. This poses a great risk to California plaintiffs if the employer fails to live up to its end of the bargain. Now, instead of simply seeking out their past attorney (you) to help enforce the agreement, plaintiffs must start over at square one with a new attorney and may have to pay them hourly. They must find an attorney elsewhere to file a breach of contract claim against the employer in front of a potentially hostile court. Avoid all scenarios like this by simply ensuring that the forum for any dispute will be in California.

What about issues involving attorneys?

The tips thus far have centered on issues facing our clients and how to protect them. This section briefly addresses two common scenarios in which employers seek to ensnare the plaintiff's attorneys.

The first issue facing most attorneys is when the employers ask them to

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sign agreements approving them "as to form and content." But does approving an agreement in this way make the attorney a signatory to the contract? On July 11, 2019, the California Supreme Court held, in *Monster Energy Co. v. Schecter* (2019) __ Cal.5th __, that "an attorney's signature on a document with a notation that it is approved as to form and content does not, as a matter of law, preclude a factual finding that the attorney intended to be bound by the document's terms. The intent question requires an examination of the agreement as a whole, including substantive provisions referring to counsel. Ultimately, that question would be resolved by the trier of fact." So, attorneys should be wary of becoming parties to a contract based on approving the agreement as to form and content.

A second issue facing plaintiff's attorney is when the employer insists that the plaintiff's attorney be an actual party to the settlement agreement. Some plaintiffs' attorneys, simply wanting to be rid of the case, agree to this scenario. But doing so is unwise for several reasons. Among the challenges are those in which the plaintiff's attorney (and her law firm) could be separately sued by the employer in part based on their past client's non-adherence to the contract.

The easiest way to solve this is to ensure that the attorneys do not commit to anything, only the client does. The language then is as simple as "Plaintiff agrees that he will do x, y, and z." This language makes it the client's commitment alone.

Even so, some employers demand that plaintiffs' attorneys sign on to a settlement agreement for a specific term like confidentiality. This remains problematic, especially if you have other clients going after the same employer, as the employer might sue your firm for an alleged breach of contract to get you off the case. This was a concern in one case where three of our clients – all members of the same family – had worked at the same company and been misclassified as independent contractors. The adult daughter had the most valuable claims as she had worked full time. The parents' claims still held value, just not as much due to their part-time status.

We decided to first negotiate the daughter's claims, hoping to maximize their settlement value by not revealing that our firm represented all three family members. Our strategy worked, as the employer agreed to pay a more substantial sum than they would have if we had first started with all three together. However, the defendant's attorney recognized the possibility that the daughter's parents still had claims and worried that our client might tell them of her settlement, so they insisted on a strict confidentiality provision and demanded that our firm also be signatories to the agreement. We refused to agree, believing that they might try to assert a breach of contract claim against us if we then represented the parents. So, we pushed back and insisted that all confidentiality obligations go towards our client alone, that we had both ethical and legal obligations to maintain confidences, and that if we violated the terms, then our client could sue us directly for subjecting her to liability for a breach. In the end, the parties agreed to insert the following paragraph in the "confidentiality" portion of the settlement agreement:

> Plaintiff represents and warrants to Company and the Releasees that her undersigned counsel has advised her that they are ethically and legally bound to maintain the confidentiality of the information that is the subject of the confidentiality obligations under Paragraph 3.5.1 under applicable law, including without limitation California Rule of Professional Conduct 3-100 and California Business and Professions Code Section 6068, that Plaintiff has irrevocably instructed her undersigned counsel to comply with all such obligations and they have irrevocably agreed to do so, and that Company and the Releasees are intended beneficiaries of their agreement. Any actual or attempted revocation of such instructions or agreement will be deemed to be a material breach of this Agreement.

We then signed, approving the agreement "as to its form and content" and also "confirm[ing] that the provisions of [the specified paragraph above] are true and correct." The language was admittedly verbose. Defense counsel drafted it after I directed them to the relevant ethical rule and code section. But it was workable and achieved our objective of not being signatories. (Editor's note: after the *Monster Energy* decision, it's not clear that this worked.)

When we contacted the opposing counsel shortly thereafter with the parents' claims, they threatened a lawsuit against our past client (the daughter) for a breach of the confidentiality provision. But when I revealed that the parents were the ones who referred the daughter to us, then the attorneys' threats and the risk to our past client dissipated. We then resolved the parents' claims and recovered money for both the parents and our firm.

Conclusion

The above tips are not cure-alls in settlement agreements. But they are good places to start to ensure that you make the most of your settlement agreements. Considering each of them before signing settlement agreements will significantly assist your practice in resolving cases at mediation. Remember: Mediation is to find a workable compromise. The settlement agreement should reflect a workable compromise, and the tips above will help you find those key areas where compromise might be needed to ensure that you are achieving your client's best interest and your own as a professional. But, if after going through the above, you find yourself still with an obstinate defense attorney not agreeing on some of these issues, pass along a copy of this article to help them come to their senses.

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