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Proskauer Delivers Webinar on Settling Employment Claims

Law and the Workplace Blog on **December 21, 2018**

On December 12, Proskauer partners Allan Bloom, Elise Bloom, and Harris Mufson delivered a webinar focused on how recent developments in the law impact the ground rules and key strategies for settlement in four distinct areas of employment litigation.

Wage and Hour. Mr. Bloom explained that, in most jurisdictions, settlements of Fair Labor Standards Act (FLSA) claims require U.S. Department of Labor (DOL) supervision or judicial approval. In the Second Circuit, the 2015 decision in *Cheeks v. Freeport Pancake House* changed the landscape for resolving FLSA claims that are already in federal court litigation, by requiring judicial approval even in the context of a stipulated dismissal under Federal Rule of Civil Procedure (FRCP) 41(a). In light of *Cheeks*, FLSA settlement agreements entered into in the context of pending litigation are more likely to become matters of public record.

Class and Collective Actions. Ms. Bloom explained that courts are obligated to scrutinize settlements for fairness and satisfaction of the prerequisites under FRCP. And with the recent Rule 23 amendments, parties who come forward with a settlement must be prepared to demonstrate the agreement will be approved after the notice period. Ms. Bloom outlined four key factors for this preliminary determination: adequacy of representation, fair negotiation, adequacy of relief, and equitable treatment of class members. Because many of the records satisfying these factors will be in the defendant's possession, Ms. Bloom underscored the importance for employers to come to court prepared to address these issues, even though the burden is on the plaintiff to file for approval of the settlement.

Sexual Harassment. Ms. Bloom emphasized four key issues in the wake of the *#MeToo* Movement: confidentiality, non-disparagement, claim allocation, and tax consequences. For example, a number of states, including New York and California, have limited the enforceability of confidentiality provisions in agreements settling sexual harassment claims. Turning to the recent tax reform, Ms. Bloom explained that tax deductions are no longer allowed for settlement payments (or the related attorney's fees) on sexual harassment claims if the settlement is confidential.

Whistleblower. Mr. Mufson noted that after a whistleblower complaint is filed with the Occupational Safety and Health Administration (OSHA), an investigation will occur, and if the claims settle during this investigatory period, any agreement must be approved. Mr. Mufson specifically drew attention to OSHA's general disapproval of gag provisions, and the need for employers to scrutinize confidentiality provisions as a result. Turning to the Securities and Exchange Commission's (SEC) anti-chilling regulation, Mr. Mufson explained that agreements may not prohibit employee cooperation with governmental agencies. Although Mr. Mufson observed that the recent administration change has led to a sharp decrease in SEC enforcement actions, covered employers should make clear that agreements do not prohibit government cooperation and that notice is not required before doing so. Finally, Mr. Mufson explained key settlement strategies for resolving whistleblower claims, including obtaining important representations from the whistleblower.

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