Settling Employment Claims: How Recent Developments Impact Ground Rules and Key Strategies

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Agenda

- Strategic considerations for settling wage and hour, class and collective actions, sexual harassment, and whistleblower claims
- Format:
  - Key substantive legal rules and developments
  - Strategic considerations

Wage and Hour Settlements

Rules

- In most jurisdictions, to be enforceable, settlements of **Fair Labor Standards Act (FLSA)** claims require USDOL supervision or judicial approval
- In contrast to the FLSA, the settlement and release of **state** law wage and hour claims generally do **not** require judicial or agency approval, and can be accomplished privately
  - *DiFilippo v. Barclays Capital, Inc.* (SDNY 2008)—the execution of a general release and waiver bars a claim in court under the N.Y. Labor Law
- But some states have limitations
  - *E.g., Cal. Lab. Code § 206.5*—California employers cannot require an employee to sign a release of claims or rights to wages that are undisputedly due

Developments

- *Cheeks v. Freeport Pancake House* (2nd Cir. 2015)—once a litigation is filed, the parties cannot stipulate to dismiss FLSA claims without USDOL or court approval
  - Prior to *Cheeks*, litigants who settled out of court and who did not want to seek court approval of the settlement (often for strategic reasons) merely filed a stipulation of dismissal under FRCP 41(a)
  - In most other contexts, an FRCP 41(a) stipulation of dismissal is self-executing—no court approval is required
- In light of *Cheeks*, the dynamics of FLSA settlements have changed dramatically—once a litigation is filed, settlement strategies are materially limited
- Following *Cheeks*, settlement agreements signed after FLSA litigation has been initiated must be submitted for approval, and therefore become a matter of public record
  - Some judges are still willing to review settlement agreements *in camera*; most are requiring the parties to file them on the public docket

Developments

- Following *Cheeks*, courts have closely scrutinized FLSA settlement agreements to ensure that they are not over-reaching
  - Confidentiality agreements**:** Generally not approved
  - Non-disparagement clauses**:** Generally not approved
  - General releases**:** Provisions waiving "all claims" are routinely rejected
  - No re-employment provisions: Approved where high retaliation risk and minimal effect on plaintiff's career
  - Attorney's fees: Fees up to 1/3 of the total settlement amount are generally approved
- Open questions under *Cheeks*:
  - FRCP 68 offers of judgment
  - FRCP 41(a) dismissals without prejudice

Strategic Considerations

- To seek (approval) or not to seek?
- Considerations:
  - Risks of publicity
  - Amount of settlement
  - Likelihood of copycat claims
  - Age of claims/how much is left in the limitations period?
  - Timing
  - Amount of settlement compared to potential value of claims
  - Value of provisions a court is likely not to approve
- Separate agreements for (1) FLSA claims and (2) other claims?
- Key language in “private” FLSA settlement agreements
- USDOL supervision: advantages and risks
- Voluntary remedial back payments

Collective and Class Action Settlements

Rules

- **FLSA collective actions**
  - The court scrutinizes the settlement for fairness purposes
  - Once approved, notice of the settlement and the opportunity to participate in the settlement is sent to putative members of the collective
  - Opt-in mechanism under 29 U.S.C. § 216(b)—each individual participating in the settlement must file a consent to join the litigation/settlement (*i.e.*, "opt in") for his or her release of FLSA claims to be enforceable
  - "Do nothing" putative collective members will not release FLSA claims
  - One-stage versus two-stage notice
  - Settlement check as the opt-in form
  - Pre-"conditional certification" settlement versus post-"conditional certification" settlement

Rules

- **FRCP 23 and state law class actions**
  - The court scrutinizes the settlement for satisfaction of FRCP 23 prerequisites (if in federal court) or any state law prerequisites (if in state court)
  - Once approved, notice of the settlement and the opportunity to participate in the settlement is sent to putative class members
  - Opt-out mechanism under FRCP 23—class members who do not affirmatively exclude themselves from the litigation or settlement (*i.e.*, "opt out") can be bound to a judicially-approved class action settlement
  - If the settlement agreement is properly negotiated and drafted, "do nothing" class members will release state law claims
  - One-stage versus two-stage notice

Developments

- New York
  - *Desrosiers v. Perry Ellis Menswear, LLC* (NY 2017)—in a state court settlement with individual named plaintiffs before a class has been certified, the parties must nonetheless send notice to putative class members informing them of the settlement
- Federal
  - Amendments to FRCP 23 go into effect December 1, 2018
  - Claims-made settlements
  - Reversions
  - *Cy pres*

Strategies

- Pre-litigation/“pre-packaged” settlements
- Venue considerations (federal versus state court)
- Absent class members
- Blow-up clauses
- “Buying peace” versus a narrower settlement
- Tax treatment of settlement proceeds
- Class Action Fairness Act issues

Strategies

- Mediation strategies
- Valuing claims
- The drivers of settlement values: number of total workweeks in limitations period(s), rate(s) of pay, hours assumptions
- Valuing the overtime hour for settlement purposes
  - “Time and a half”
  - Half-time/fluctuating workweek method
  - Regular rate issues—what’s in and what’s not
- NY-specific issues
- California-specific issues
  - PAGA claims
  - Daily overtime
  - Salary can’t cover more than 40 hours of work per workweek

Sexual Harassment Claims

Key Issues Post the *#MeToo* Movement

- Confidentiality
- Non-disparagement
- Allocation of claims
- Tax consequences of settlement payments

Non-Disclosure & Confidentiality Restrictions

- **General Rule**: parties can agree to confidential settlements and/or non-disclosure agreements
- **Developments**: limits on confidentiality
- **Enacted legislation**: NY, CA, AZ, LA, VT, TN, and WA have each enacted laws that limit the enforceability of non-disclosure and confidentiality agreements
- **Proposed legislation**:
  - States: NJ, PA, and VA
  - Federal: HR 4729, Ending Secrecy About Workplace Harassment Act

Non-Disclosure & Confidentiality Restrictions: New York

- **N.Y. Gen. Oblig. Law § 5-336 and N.Y. C.P.L.R. 5003-b**
  - Effective July 11, 2018

- Three-step process for memorializing that a non-disclosure provision is the preference of the complainant
  - 21-day consideration period and 7-day revocation period

- Potentially two separate agreements needed to memorialize complainant's agreement not to disclose facts underlying a claim of harassment

Non-Disclosure & Confidentiality Restrictions: California

- Senate Bill 820 (September 2018)

- Key Points:
  - Prohibits confidentiality or non-disclosure provisions in settlement agreements that prevent the disclosure of factual information involving allegations of sexual misconduct – unless the party alleging the harm desires confidentiality language to protect his/her identity
  - Does not void or prohibit confidentiality provisions that prevent disclosure of the amount paid in settlement of a claim

Tax Reform:
The Tax Cuts and Jobs Act of 2017

- **Section 162(q): Payments related to sexual harassment and sexual abuse**
  - Deductions are not allowed for:
    - "(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement; or
    - (2) attorney's fees related to such a settlement or payment"
- Effective for amounts paid or incurred after December 22, 2017
- Conference Report offers no guidance as to scope

Strategic Considerations

- **Confidentiality Considerations**
  - Important or not important
  - Application of confidentiality restrictions to counsel
  - Carve-out (*i.e.*, accountant, tax professional, mental health practitioner)
    - Execution of separate Acknowledgement of Confidentiality
  - Identification of individuals to whom plaintiff has disclosed
  - Return or destruction of confidential information
- **Inclusion of a Non-Disparagement Provision**
- **Potential for additional complainants**
- **Settling on behalf of an individual defendant**
- **Timing of settlement payments**
- **Allocation of settlement payments**

Whistleblower Claims

Regulatory Considerations

- OSHA must approve SOX settlements
- SEC's anti-chilling regulation (17 CFR 240.21F-17)
  - "Nothing prohibits cooperation with governmental agencies, including, without limitation, the EEOC, NLRB, and SEC"
  - Prior notice to the employer cannot be required
  - Agreement can waive employee's right to recover monetary damages in connection with claims released in Agreement, **except** whistleblower bounties under Dodd-Frank

Strategic Considerations

- Key Settlement Provisions:
  - Representation of full disclosure
  - Cooperation
  - Return of confidential information
  - Confidentiality (subject to carve-out)
  - Non-disparagement (subject to carve-out)
  - Payment of settlement over time
  - Liquidated damages

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