

BEWARE OF THE “FINE PRINT”: SETTLEMENT AGREEMENTS IN FEHA CASES

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The Fair Employment and Housing Act (FEHA, Government Code Section 12940 et seq.) permits claims of sexual harassment, sex discrimination, racial discrimination, retaliation, and other related assertions. When such an action is settled, the tendency of claimant's counsel may be to view the subsequently prepared written release and settlement agreement, execution of which will almost certainly be a condition of the settlement, to be a mere formality.

However, agreement upon a monetary settlement to resolve an FEHA case is, for better or worse, only the *beginning* of the necessary settlement negotiations between the claimant's counsel and the employer's counsel. Matters of importance to the claimant's vocational, financial and even personal life lurk in that settlement agreement.

Discussed below are some “transactional” issues that typically arise in, and become terms of, written settlement agreements in FEHA cases.

Confidentiality

The employer almost always strives for total confidentiality, from virtually everyone, of everything about the case, including both the underlying assertions, and the settlement itself.

Agreements to render a settlement confidential are generally permissible. A claimant's agreement to confidentiality is a “bargaining chip”, not readily calculable in monetary terms. *Cf.*, Barella v. Exchange Bank (2000) 84 Cal.App.4th at 801: “... the value to a particular plaintiff of public vindication (or, conversely, the negative value of confidentiality) is so highly subjective and elusive that no court can determine its monetary worth.”

An initial question in the usual FEHA settlement agreement negotiation is the proposed

scope of confidentiality. Of course, publicly filed court documents (*i.e.*, filings outside of a protective order) are not confidential, and new Rules limit the circumstances under which court documents may be filed under seal. See Calif. Rules of Court, Rules 243.1 and 243.2.

But as to the details of the settlement itself, which would not generally be disclosed in a public court filing, the employer may seek to keep confidential not just the terms (the amount paid, the provisions of the settlement agreement, etc.), but also the allegedly actionable *conduct* that underpinned the claimant's causes of action.

Some claimants will be unsympathetic to proposed restrictions on their ability to relate to others their account of how they were wronged. Such a restriction has "real world" implications to the claimant beyond those of social conversation – for example, when she is inevitably asked in the future why she left her last job, the answer the claimant is free to give can depend on the language of the settlement agreement.

Another frequently arising issue, where confidentiality in whatever scope has been agreed upon, is whether there are exceptions to the obligation of confidence. Typical exceptions to any agreed confidentiality might include permitting claimant's disclosure to his attorneys, accountants, and health care providers (where applicable), and certainly permitting disclosure to a court or administrative agency upon proper order.

Negotiation may be required, however, as to proposed restrictions concerning the claimant's disclosure of the settlement amount to his parents, spouse, or cohabitant. A typical negotiated resolution of this issue would be to identify, in the settlement agreement, a limited universe of persons (spouse, parents, adult children) with whom the claimant already shares an ongoing financial relationship, and to permit disclosure of the amount of settlement, and perhaps

also the other terms of the settlement agreement, to such persons. That disclosure might be conditional upon each discloser agreeing, informally, to retain the confidence of the disclosure.

Part and parcel of any discussion of confidentiality is that the employer will usually raise the issue of the *consequences* of breach of confidentiality by the claimant. The employer will frequently suggest a provision incorporating a fixed or “liquidated” damages clause. Such provisions are governed by Civil Code Section 1671(b), which provides that liquidated damage clauses are valid unless the party seeking to invalidate the provision establishes it was unreasonable under the circumstances existing at the time the contract was made. A typical form of agreement prepared by employer’s counsel will recite a sum of liquidated damages per incident of unauthorized disclosure.

If such a provision is agreed to, there are numerous details for negotiation and resolution: what is the amount of liquidated damages per event of breach; is there a “cap” as to liquidated damages regardless of the number of breaches, and (if so) what is that amount (e.g., three to five times the “per event” damage sum); is the issue of breach to be decided by a Court or an arbitrator; is the obligation bilateral, in that the employer shares an obligation of confidentiality as well; should the evidentiary standard be altered to “clear and convincing evidence”, in recognition of the “he said, she said” nature of the inquiry? While careful efforts to educate the client as to his obligations of confidentiality will hopefully render moot the “real world” consequences of these clauses, these matters must still be carefully negotiated.

Also, to anticipate another “real world” problem, the following clause is often useful: “It is not a violation of confidentiality for claimant to respond to an inquiry concerning the matter by stating that the case was settled or resolved.”

As to hypothetical future subpoenas served upon the claimant by other litigants, the agreement should make clear that the claimant is not in breach if she complies with a lawful subpoena or court order, or testifies truthfully.

Non-disparagement Obligations

The employer may seek an agreement that the claimant refrain from disparaging the employer and its employees. A claimant's agreement to a non-disparagement clause has a "real world" impact on everything from what he may state in future employment applications and interviews, to what he may say in casual conversation with friends and relatives, to what he may say if subpoenaed to testify, at deposition or trial, in another matter.

If included, a non-disparagement obligation should mutually bind the officers, managing agents, and perhaps particular named supervisors of the employer. It should also bind all individual defendants who are being dismissed. Finally, it should contain exceptions for truthful testimony given in compliance with a lawful subpoena or court order.

Scope Of The Released Claims

There may be claims the claimant possesses related to pension benefits, disability or health care benefits, wage claims, stock options, and/or other employee benefits, the entitlement to which is in no way related to the FEHA settlement. For the claimant's protection, the language of the settlement agreement should precisely define the scope of claims being released.

Mutuality Of Release

Typically, the employer's counsel will draft a written settlement agreement with the claimant as the Releasor, releasing all claims against the employer, as Releasee. In such circumstances, claimant's counsel must consider whether there are any known, or even potential,

claims by the employer, or individual defendants, against the claimant. If there are, then mutuality of the release is required for the claimant's protection.

Job Retention; And Disclosures To Prospective Employers And Others

While it is almost a given that job retention will be a subject of the settlement negotiation, often overlooked is what will be reported to legitimate inquirers (prospective future employers, prospective mortgage lenders, etc.) after the claimant leaves her employment. Claimant's counsel should seek agreement that those making such inquiries shall be informed of the claimant's job title, duration of employment, rate of pay, satisfactory job performance, and voluntary resignation; and shall be further informed that the employer's internal policies preclude further discussion.

Tax Characterization Of Settlement Proceeds

While detailed discussion of income tax issues is beyond the scope of this article, how the settlement proceeds of an FEHA action are characterized may have profound implications for the claimant's income tax and FICA obligations, and withholding obligations related thereto. See, for example, Lisec v. United Airlines (1992) 10 Cal.App.4th 1500, holding that where award of damages in a wrongful termination case did not include any sought after redress for deprivation of wages earned, payroll tax withholding on the damages award was improper.

Additional issues might arise, in a contingent fee situation, related to the tax consequences of the claimant's attorney's entitlement to a share of the proceeds of the settlement. There may also be issues as to whether part or all of the settlement proceeds arise from claims for "personal physical injuries or physical sickness", in which case such amounts are excludable from gross income under 26 U.S.C. Section 104(a)(2). Additionally, the nature and

timing of the employer's tax reporting of the payments to be made should be clearly stated in the agreement.

Claimant's counsel should consider retaining tax counsel during the settlement process. The claimant should certainly be urged to obtain professional tax preparation assistance to make sure that there is appropriate tax reporting of the settlement proceeds in the proper tax year.

Referral Of Issues As To Breach Of The Settlement Agreement To Arbitration

The parties may wish to empower someone to resolve disputes related to the scope or interpretation of, or alleged breach of, the written settlement agreement. What happens if that person is unavailable should be stated as well.

Conclusion

Those issues set forth above are typical of the recurring issues that arise in FEHA settlements. Claimant's counsel should give these issues due consideration, and – where appropriate – include language in the settlement agreement which resolves them appropriately.