SETTLEMENT MANAGEMENT: REAL TOOLS YOU CAN USE

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SETTLEMENT MANAGEMENT: REAL TOOLS YOU CAN USE

I. ENVIRONMENT FOR SETTLEMENT AND OUR PERSPECTIVES

Robert Tobey and I share a lot of the same recollections about how things used to be, and how the advent of mediation has changed things in the law practice. It is my view that good lawyers, in the pre-mediation days, accomplished a lot of what mediation accomplishes without the formal structure or requirements. But the onset brought improvements. Even good lawyers did not have the advantage of an independent voice to speak to their own clients when the clients did not want to listen, could not really understand, or believed they knew best. It has always been a challenge to lawyers to have the fearless gunfighter reputation sometimes sought by the clients, while being able to know when to fight and when to parley.

Formalized mediation has made things happen, with court orders, deadlines, and such that some folks just did not get around to doing when they should have. For a while it kept cases from being fully developed before they were settled, which has always been a foolish notion from a business standpoint. Since its advent, though, it has become institutionalized as part of the "drill" and may actually run up costs. Whether that is true depends on the advocates, the clients, and the local culture. That tendency can be controlled to some degree by a structured approach to mediation, much like the "trial by agreement" model being advocated by a new set of believers, discussed further below.

What are the advantages? Generically, these are usually agreed:

- A deadline to be ready to talk settlement.
- A dedicated and sufficient time period with all necessary players to focus on the deal and get it done, if it will be done.
- A context and timeframe to get settlement done before the case is completely prepared for trial.
- A court imposed requirement (handy with clients who may see any consideration of surrender as fear or cowardice, rather than a desire to live only to vanquish greater foes in the future as your destiny demands).
- Incentives to focus case preparation and discovery toward what you need to consider settlement.
- An independent voice to evaluate your case.
- An independent perspective to sell your points to the other side, with a credibility that an advocate will never have with the "enemy".
- The ability to explore options without showing "yellow" or revealing a weakness or concern—shopping options in a way that few opposing advocates can pull off.
- The chance for direct access to the other party, their decision makers, adjusters, etc., instead of their lawyer carrying your proposals, adding a spin, and trying to still sound tough and stay in control.

Other advantages are case specific.

The disadvantages include:

- A higher level of preparation and discovery and paperwork than was often required in the old days, when instincts and intuition were more valued. No one wants to show up to mediation—only to be embarrassed when you can't answer all the questions and show off with the paperwork. The same competitive fear that drives trial lawyers to over-prepare for trial is at work in the mediation environment. This results in more preparation and details and less ability to make decisions based on trial honed gut instincts at an earlier stage. Fewer cases are based on some key liability facts or witness dynamics.
- This has clearly run up defense costs for those that did not postpone real settlement efforts until the 30 days (or weekend) before trial.
- Mediators that don't really know trials, are out of touch with real local juries or judges, and/or don't have the credibility and nerve to change the perspective of hardheaded folks about the realities of trial and appeal. "You never know what a jury will do" is not a speech worth $1,500 – $2,500. Mediators have to find solutions in ways that are acceptable to the personalities involved, and that sounds like good business wisdom.
- A waste of time in the cases that should be settled after two, 30 minute phone calls, or at the bar after a particular deposition wraps up
- Going to mediation with so called authority, but with a bunch of "second guessers" to face after the day is done. The decision has to be made by those that are looking it in the face, not those who were not on the field

I believe that institutional and economic realities drive outcomes, but the core principle of transaction cost and exposure should always be at play. Delay may have some value, but Plaintiffs can get their cases tried in most jurisdictions we frequent, if that is what they want to do. Plaintiffs with cases that can be structured to "divide and conquer" among disparate interests on the Defense side can always up the ante.

Twenty years ago we were trying different cases. I could not even spell employment lawyer in those days. Now that is most of our docket in the public sector arena. I am not sure if a single public employee has left a government job without filing a lawsuit, at least south of San Marcos. Most of the jurors have lost a job, or their family members have lost one, and it was never their fault. Plaintiffs are figuring out how to have 2 cases instead of one, dividing federal and state claims, to increase the exposure. If they can create potential conflicts between the defense interests, that means another lawyer and the tab goes up. Happy Hour is over. Most of the cases are resolved on legal defenses, and the game is all about whether the Plaintiff can get past the Plea to the Jurisdiction ("PTJ") or Motion for Summary Judgment ("MSJ"). They know that on the front end, but if part of the case remains, they will want to settle it for some real money because they got inside the fort, and paid their dues to get there.

Plaintiffs cases seem to be fewer and smaller in the context of government claims, and the immunity defenses have created an effective screen for many Plaintiffs lawyers and firms. They know the risk of a PTJ and are looking for a payday before having to brief and appear and argue on the merits.

II. ACTUALLY THINK ABOUT IT AND MAKE A PLAN

These considerations, and others, require a settlement strategy. Why do you settle and when do you decide? How good is the law for the defense and what is the process for getting legal defenses resolved in the jurisdiction? What is the track record with those judges? If you try the case, or the part that remains, will you have the same court that was educated by the dispositive motions, or some other judge?

What questions will the jury answer? Will you get any real help from the instructions that assist your presentation of a factual defense? In other words, will you get a jury decision based on the legal standard the courts set out, or just a lay person "fairness" review? How do your facts meet the average juror's expectations? If it is an employment case, do you have a work place that most jurors would like and recognize, or one that they will believe falls short? Bad managers, poor policies, inconsistent application, and multiple witnesses that are critical of the organization can be very dangerous. If the jury won't like the work place and the supervisors, don't be confident that you can get them to focus on legal concepts of comparative discrimination and so forth. Do you have examples that stack up well for comparison? What will you be able to show the jury that your clients did right? Are those things admissible? What don't you want them to hear about, and will the other side get it into evidence.

These issues make it a chess game on optimum timing. Are there points in discovery that work best? What are the problems that the Plaintiff's counsel has with scheduling or vacation, or other settings? Can you settle just before Christmas? Seriously. Do you want to go for a dispositive ruling, or use that for leverage and roll the dice? What set of developments or events can you orchestrate that crescendo into a mediation that tilts things your way?

What are your problems and when will the other side fully understand them? Are they getting information from inside your organization, or from other ex-employees that will break your knees? Make sure that your intel is equal to or better than theirs. We had a recent case where a witness that we counted on as solid, turned out to be a long time friend of an interested party. After he no longer worked for the Defendant employer, and internal work place politics shifted around from his faction, he ended up an unreliable "free agent." He was stuck to the paperwork he had created, but as to everything else, he was on board with the other side, and ready, willing, and able to point fingers at those who had accepted and acted on his information. Our clients found it astonishing that he was no longer supportive, because they had relied substantially on his prior factual information and judgment from the very beginning.

How you go about investigating your case, and then orchestrate your discovery and deposition schedule, can make a big difference. If you can spot people that may be realigning or unreliable, you may be able to move ahead with settlement strategies before they are fully understood by the Plaintiff's counsel, and before their testimony is in the can. These options are fleeting and fragile, since your discovery obligations must be met, and the duty to provide and disclose may not be manipulated. The rules don't require you to reveal your work product or your "crystal ball" though.

Shifting focus somewhat, the next question is whether your case has issues that need to be tried? Are there client expectations to go to the mat? Are there legal issues that have to be resolved in order to make future decisions and set policy? On the other hand, is this the best case to try them? These strategic issues can be very important, and need to be addressed early on. If Plaintiff's counsel knows that you intend to try this case and take it up, it makes a difference.

What is the projected defense cost, plus appeals, plus time delay on the dollars? Is the Plaintiff willing to wait that long? Does your client understand the true cost of going the long road to the end?

Aside from positioning your case, and the Plaintiff for settlement, you have to position your own client for settlement. How will you get them to understand the realities and risks inherent in your case? A balance of optimism and commitment to a strong defense cannot

get in the way of making sure your client understands the risk of loss and where it comes from.

Should you take formalized steps to evaluate jury reactions to your facts? Should you take formalized steps to evaluate the judge on your case by consulting with other lawyers? Does your client need to hear from an independent source about the positives and negatives? Clients often have no clue about what is going to happen and how it will happen in trial. They don't really know what the jury will be asked, or whether the jury has the ability to see things from their "obviously right" perspective. More than likely, their organization has given them the "yes man" answers and data to assure them of a righteous position. But the nature of the adversary system is that the jury will hear the bad stuff, too, and often will hear it very well and for hours on end. Make sure the clients have that context before mediation takes place.

Our clients can have strong feelings and judgments about the issues in the case, born of a long history of successful choices they have made in the context where they make those calls. Our clients are often city managers, police officers, finance professionals, medical personnel, mayors or other public officials. They are all making judgments based on the decision paradigm they are used to. You need to acquaint them with the difference in the context they will face. If they don't know the court room, and they don't know the confrontation process that takes place at trial, and the lack of control that goes with it, they will need your help to decide the settlement question. Sometimes they are willing to have a jury tell them they are wrong, but usually they are not. They will want their day in court, but need to understand what that means instead of what they think it means. Unless you show them the harmful and dangerous aspects of the case and how they can coalesce into an Oklahoma F5, they won't see it coming. Should you consider a focus group or other testing tools for your case? Has the client actually seen the pieces of the jig saw puzzle put together? Do they understand how the Plaintiff can still win, even if the jury believes some or most of your key facts and arguments?

III. MEDIATION OR TRIAL BY AGREEMENT

A number of lawyers are advocating for a contractual model of litigation that is designed to control costs and the absurd delays that are killing trial by jury, known as "trial by agreement." One piece of that puzzle is to consider a contractual approach to your trial, or your mediation, or both. In this context, the advocates discuss at the very outset a plan for the case, including discovery levels or phasing. Mediation in one or two phases can be a part of such an agreement. Discovery scheduling can complement that process. You may have a case with some distinct issues that need to be addressed, and proper planning could allow the case to be settled in the context of initial information exchange, the development and presentation of selected experts, or some resolution of pre-trial motions that have a significant impact on the case value. Frankly, a lot of this happens anyway by happenstance, so consider a plan for mediation in a deliberate fashion instead of just letting it come together as it will.

Settlement might also be facilitated by limiting the scope of discovery and the length of trial. Most trials don't need to take as long as the parties think they do. The judge and the jury know that, long before the lawyers do. Even when lawyers take more days in trial than they predicted, they are usually cutting out exhibits and witnesses and trying to wrap up. That shows that time has been wasted in sorting out all the details, deposing everyone in sight, and turning over every rock. Lawyers always prepare more than needed for trial. Consider who you need on the stand, to get the story told without repetition. What do you really need the jury to see and hear? How many times do they need to see or hear it? Consider an agreement that allocates time during pre-trial, and requires both sides to focus. Consider an agreement that limits the issues at trial, and even the possibility of agreed jury questions. If there are "swearing match" issues in your case, how quickly can the story be put together and so that the jury can hear the 2-4 witnesses that matter and resolve the contest?

What about a high/low agreement that limits the Defense exposure, if the case can be taken quickly to trial, the Plaintiff's counsel can save money, and delay avoided? This may be a good option with an agreement not to appeal, or an agreement limiting the issue on appeal. Evaluate the settlement issues in your case to determine which risks are the true "drivers" of your analysis and pricing for settlement. If those considerations can be managed by agreement, settlement of the case could occur at a reasonable range. Find what your mediator's history and attitude is about creative settlement options that may result in limited or alternate dispute resolution options. Can the parts of the case that matter be submitted to a jury, with all the peripheral matters set aside, stipulated, or left aside? These options may or may not be a good idea, because context can be critical to either side, or both sides. However, when the jury retires in real cases, they have heard a lot that they did not care about and won't pay any attention to. If for no other reasons, an alternative way to resolve the dispute with a jury deserves some attention and consideration.

IV. DEFENSE LAWYER FORMULA FOR THE SETTLEMENT CHESS GAME

A. In the Beginning

1. Outline your factual Defenses by component facts
2. Break those component facts down into EXHIBIT AND WITNESS PROOF
3. Deliberately look at the facts of your case LIKE A LAWYER/JUDGE
4. Then, deliberately look at the case LIKE A TRUCK DRIVER, TEENAGER FIRED FROM McDONALD'S, SCHOOL TEACHER, BOWLER, SOFTBALL PLAYER, HOTEL MAID, ETC.
5. Figure out the different SCRIPTS that the Plaintiff will use for their story. Don't make the mistake of thinking it will follow the cause of action or chronological model.
6. Score the outcomes based on the PERSONALITIES and capabilities of your witnesses
7. Can your witnesses COMPETE with their story and the personality of the Plaintiff?
8. How can you make the jury dislike or disbelieve the Plaintiff?
9. How can you minimize the problems with your own witnesses in order to maintain CREDIBILITY and to have a likeable SPOKESPERSON?

B. The Legal Side

Now (instead of the more usual reverse order) think about the LEGAL DEFENSES:

1. How good is your PTJ or MSJ and who is going to hear it?
2. Do you have a right to appeal before trial?
3. What are your odds on appeal to the Court of Appeals?

C. Settlement Valuation in Context

Now that you have established a context:

1. With these things in context, determine the odds and the high/low value of the case. Do verdict research if necessary.
2. Now determine the case budget for:

    a. Dispositive Motion
    b. Mediation
    c. Trial

3. What should the case settle for? How does that compare to defense cost projections?
4. What would you take as Plaintiff's counsel?
5. How much will they have to work to get it done?
6. How will you set up a model that allows the Plaintiff to believe that they pushed you far beyond what you really wanted to pay?
7. What can you do to make settlement attractive while Defense costs are still low?

V. STRATEGY CONSIDERATIONS THAT RELATE TO THE SETTLEMENT CHESS GAME

A. Battlefield Essentials

1. What factual information is essential to success on your dispositive motions or at trial, and how can you get them nailed to the wall? I don't mean discovery, I mean nailed?
2. Do you want to depose the Plaintiff early for a road map, or later to eliminate facts, obtain admissions based on a full investigation, and frame the limits of the case?
3. Should you bifurcate discovery for pre-mediation information, and put off issues that you don't need until trial? How do experts, if any, fit into that story. Deposing experts prior to mediation can be a great waste of money, but in other cases it is essential to know the case value and how to proceed.
4. What witness is your best advocate or most impressive story teller? How can you get that witness deposed or interviewed?
5. What problems or loser witnesses do you have? How can you postpone the misery of seeing them come apart or avoid it until the case is over?

B. Settlement Decision Makers and Objectors

Now, you need to decide who will be deciding. Who has the authority and the checkbook? Who is the client? How do those two decision makers interact and influence each other? Are there issues of coverage, retention, etc.? Which decision makers have a personal vested perspective and which are "business" focused?

Based on the above information, how will you formulate a settlement strategy? Will a recommendation by meeting or letter be the approach? Is this a client that will take your advice, or need some convincing? Are you dealing with clients familiar with the courtroom context, and who understand the "finest engine ever devised in search of the truth?" What is best means to explore and experience the "rest of the story" in preparation for mediation or trial.

I always tell my clients that my duty is to prepare them to make the same decisions and choices they would make after the case is over, and the jury just retired to deliberate. Effective mediation means

getting to that place as quickly and economically as possible and will require some intuition and guess work.

VI. MEDIATION DO'S AND DON'TS FROM THE DEFENDANT'S PERSPECTIVE

A. When to Mediate

1. From the Defense standpoint, mediation should proceed if there are indications that defense costs will be a driver in the case, and if expectations could be reasonable. Identifying the good and bad facts and witnesses could allow you to put your best foot forward and get to a deal before the other side finds something that you are worried about. Sometimes it is not a fact or set of facts, or at least not facts that should legally matter, but a bad witness or a bad situation that a jury may not like can either cost you money or make the trial judge less likely to grant a MSJ because of the "smell."
2. It is true that mediation can be a waste of time if the parties don't have the necessary information, but a lot of this can be done informally instead of by discovery responses. Sometimes we get materials just before or during, and if the due diligence is ok, it can still work. Decision makers have to know what it is that we will be looking at in advance in order to be prepared to make a decision. In part this is just time to consider, in part it may be running the "traps" with other decision makers, but in part it is just time to think about it and get resolved to it. This is what I call "percolation time."
3. Paid or incurred medical, Medicare and other liens. This can be a major impediment to consideration of damages at issue. Make sure that all this information is available and understood. Force Plaintiff's counsel to produce evidence of medicals to be used in a damage model. You may need to arrange in advance availability of contact persons with decision making authority to get these things done, or the mediation may have to conclude with contingencies.
4. Choice of mediator. Should you use Plaintiff's counsel's suggestion to eliminate later claim of bias, or does that matter? Are judicial credentials needed if legal defenses or caps are critical issues to be "sold."

B. Preparation for Mediation

1. I agree that a good packet to the mediator is well worth the time and energy. Make sure you equip the mediator to make your best arguments or point out problems or risks the other side may not appreciate. This is really true where the Defense sees legal defenses as dispositive, and where there is a Defense commitment to appeal…Plaintiff needs to know the money will be a long time coming if no deal is made.
2. You may want to meet with the mediator, but even if that is not realistic, always talk to them. This is especially true if you don't have a prior personal history with the mediator. Ask for input and reaction to your materials. You want to know how they are seeing the case once they have information from both sides.
3. Prepare your client for sticker shock. Make sure they understand that considering the possibility of losing is not an admission of liability. Prepare them for bottom line matters of money, but also non-monetary considerations, such as reinstatement, resignation in lieu of termination, letters of recommendation or neutral letters of reference. Deal in advance with the issue of final decisions by the governmental body if this is required, and make sure this is revealed up front in the mediation packet, at the session, and with the Court if standing orders are involved.

C. Procedure at Mediation

1. The Defense may want to skip an antagonizing engagement. It feels good and some lawyers want to show their clients how full of "piss and vinegar" they are. But whether it contributes to resolution is the question. It depends on the facts and the dynamics. It also depends on whether the Plaintiff's counsel has encouraged unrealistic expectations. Get the mediator's input on this in advance. Sometimes a "let us reason together" approach is better than a "we're going to kick your ass" approach. List all the issues that a Plaintiff should consider in evaluating the case value—respect the emotion, and try to minimize it to boil things down to a transaction. This can equip the mediator to carry your water. Emphasize that our job is to sell the settlement to public officials who are facing tough demands on public funds.
2. The Defense needs to recognize its weaknesses and show confidence in overcoming them, either by facts or legal defenses. Take advantage of what you know

the Plaintiff's counsel is worried about or should be.

3. Equip the mediator with ammunition. The mediator will be viewed as an unbiased participant and can help Plaintiff's counsel with a difficult client. Using copies of case law and key evidence is helpful to show how a judge/jury will perceive the presentation of the case. Objective statements—"my client adamantly disagrees with your claims; you risk losing your case; this will take a long time to finally resolve while a settlement check can be delivered in a matter of days; we respect your lawyer and we both try cases for a living and love it"—can't be controverted.
4. Remember that the game is not over when parties agree to final number and other consideration. The second half begins with documents and details to seal the deal, and get the signature on the release and Motion to Dismiss.

D. Making Offers and Counter Offers

1. The Defense should be trying to show why it should not pay more. What are the weaknesses in the facts. Every case has its value, and almost no Plaintiff gets what they believe in or expect. We have had objective third party input and experience in lots of cases just like this. We are willing to pay the same transaction cost for type of case, but not more. That is what we do. Rolling the dice for more is just gambling, and this is not Las Vegas.
2. Ask about everything they can tell you. Look for reasons to do something different. Just because you can't put "evidence" from mediation before the fact finder does not mean you can't learn things that are valuable if you are still going to trial. What makes them tick? Where are they nervous? What are they worried about? See if tying an incremental move in your offer can get you more information. Mediators are competitive too.
3. Don't be afraid to get serious early in the day. Cut to the chase—John Wayne.

VII. THE CLOSING

A. Be Prepared with the Paperwork

Be ready to close the deal if you can get to a handshake. There a number of technical, mechanical, craft issues that need to be addressed in the course of the discussions. You don't want a deal that blows up because of surprises or paperwork that was not properly handled during the mediation. Some of these things may need to be in your mediator packet up front, or dealt with by the mediator in the way he or she chooses to finesse them.

The employment relationship imposes a unique set of statutes and considerations on the execution of a settlement agreement, especially when a court looks at the settlement agreement and its enforceability. Courts perceive the employer to possess an advantage inherent in the employment relationship and will look at factors involving the fairness of the circumstances surrounding the execution of a settlement agreement. Depending upon the claims released, a court will either apply statutory requirements or common law guidelines.

Take time to study the statutory requirements for settlement if there are some. Your objective is to comply and make the potential for future claims and the recovery of damages remote.

B. General Settlement Agreement Considerations and Provisions

The principles below serve as benchmarks for evaluating your process of entering in a settlement agreement. In the employment context, these often have statutory force:

1. Is the agreement easy to understand;
2. Did the employee play a role in drafting the terms of the agreement;
3. Did the employee have sufficient time to consider the proposed settlement agreement or release;
4. Did the employee have an opportunity to consult with an attorney; and
5. Did the consideration exceed the employee's benefits for which he or she is already entitled by contract or law?

Inherently required of the evaluation of each principle is the creation and retention of the documentation reflecting the actions taken by the employer to ensure the process is fair. In any subsequent action to enforce the release, the ability to provide that documentation will be critical to the court.

C. Enforceability

A verbal settlement agreement, even unsigned, can be a binding and enforceable resolution of claims. *Henry v. City of Fort Worth*, 2010 WL 598594 (Tex. App.—Fort Worth 2010). The Court in this case held that Rule 11 elements were not required since the unsigned document filed with the trial court on the trial date was accompanied by statements and testimony of the agent for the parties in open court. This case has some peculiarities, since some of the arguments made failed because they were not preserved for appellate review. But the case makes it clear that if and when

the trial court verbally renders judgment on a proposed settlement communicated in open court, the die is cast. If judgment is not rendered, the consent to settlement may be withdrawn. It is not necessary for a judgment to be signed, only for the court to render judgment on the terms presented. Obviously, the best solution is to have a written and signed agreement with all of the proper terms.

Obtain a representation and warranty that there are no other parties with claims, and that there have been no assignments.

Make sure that you have already explored with your own clients the proposal for mutual releases, and if the answer is no, be prepared with a strategy or set of options that does not mean you are wasting your time.

A settlement agreement properly done and authorized will waive immunity from suit and may be enforced, so it is important to make sure that when a deal is made, it is correct and free of mistakes or misunderstandings. The government may not settle a claim which involves a waiver of immunity to liability and to suit, and thereafter assert immunity as to the settlement agreement. *Texas A&M University-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002). In that case the common provision for a limited stock response to future employment reference inquiries was allegedly not followed by the director of personnel. It is not enough that the government accepts some benefits under a contract, it is necessary for the court to have jurisdiction over the suit and the claim in the first place, for a waiver of immunity to accompany the settlement agreement.

The principle in *Lawson* was reaffirmed in *Singer v. City of Waco*, 324 F.3d 813, 800 (5th Cir. 2003). Those cases were followed in *City of Corinth v. Nurock Dev., Inc.*, 293 S.W.3d 360 (Tex. App.—Fort Worth 2009) a federal case involving alleged breach of a settlement agreement over completion of a housing development. The complexities of settling a case where the city continues to exercise permitting, inspection and regulatory authority in the future are obvious. *Corinth* claimed that a different rule should apply to settlement of a federal cause of action because of the Eleventh Amendment principles involved, but the court rejected those claims because Eleventh amendment arguments are not relevant to municipalities. Thus, settling a Federal Fair Housing Act claim resulted in a waiver of immunity from suit and liability on the settlement agreement. See also *Texas A&M University System v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007).

In *Rhule* the Court approved an award of physical and mental pain and suffering damages in a breach of contract case over a worker's comp settlement. *City of Houston v. Rhule*, 377 S.W.3d 738, 738 (Tex. App.—Houston [1st Dist.] 2012)

The opinion there notes:

> "In lieu of trying the case to the jury, the parties reached a settlement agreement which provided that Rhule was to receive $36,000 and that the City was discharged and released from any claim Rhule might have for workers' compensation benefits or for other claims arising from his injury, "except that CHRISTOPHER A. RHULE shall receive lifetime open reasonable and necessary medical [expenses] for the injuries made the basis of this claim as provided by the [TWCA] with a mutually agreed upon doctor" (the "Settlement Agreement"). The trial court entered an agreed judgment to this effect in cause number 89–26686 on August 31, 1990 (the "Agreed Judgment")."

The Plaintiff alleged that the city changed its risk management program and personnel, leading to denial of pain medication and a pain pump as not reasonable and necessary and related to the prior injury. They argued that the Plaintiff could not recover pain and suffering and mental anguish in a contract case, and that his claim for denial of benefits had to be submitted to the administrative remedy of TWCA review prior to filing suit. The court rejected these claims under prior law concerning approval of comp settlements. The court further found that the city was estopped to deny is prior handling of the claim for fourteen years after the settlement was executed, and undertake a change in its position.

D. Confidentiality and Non-disclosure

This term of a settlement proposal will raise Public Information Act questions, but some things can still be accomplished. Consider the statutory provisions and make sure that you are not agreeing to things that the law does not permit.

E. Ineligibility for Future Rehire

These provisions involves a whole set of case law. There is good case law to support it, but the EEOC considers blanket no rehire provisions to be discriminatory. Tread carefully. Does it really do you any good?

F. Tax Reporting and Withholding

The internal revenue code defines what is income and what is not for tax purposes, and the provisions of a settlement agreement have only limited efficacy in establishing tax treatment of such payments. The settlement of any case should clearly define the tax filing and payment duties of the parties and the distribution of funds. The risk associated with any tax related expectations should be clearly placed, so that the deal does not fall apart over withholding or tax

liability. *Bagley v. Commissioner of Internal Revenue*, 121 F.3d 393 (8th Cir. 1997). If the employer fails to withhold when required by the code, a 100% penalty can apply. Withholding rules also involve regular wages v. supplemental payments which are made outside the regular payroll cycle. There are specific rules about those calculations, and they need to be determined prior to settlement conclusion in order to be drafted correctly and avoid surprises. The tax code also has special provisions for the tax treatment of attorney's fees as part of a settlement.

When a settlement agreement expressly allocates amounts among various types of damages, the allocation is generally binding for tax purposes. The adversarial context of an arm's length settlement process, done in good faith, can dictate tax outcomes.

There are two reporting mechanisms for the typical components of an employment settlement: Form W-2 and Form 1099-MISC. Before finalizing your deal, you need to know how the reporting will take place based on the categories within those forms. The tax consequences and the cost to each party need to be stated. There are employer costs/payments associated with the withholding options. The agreement needs to be clear about where that money is coming from and who is getting a check in what amount. This includes the attorney's fee distribution. I don't recommend doing this paperwork, but I do recommend knowing what it will involve and what the numbers are. The tax code has specific provisions that apply to attorney's fees which need to be understood and discussed. Bargain for indemnity against any future IRS claim against the employer for failure to properly file and pay under the IRC.

VIII. SPECIAL RULES IN EMPLOYMENT CASES

A. Fair Labor Standards Act ("FLSA")

The FLSA essentially precludes settling FLSA claims without the supervision of the Department of Labor ("DOL").

Without the supervision of DOL, courts have construed settlement agreements for FLSA claims as unenforceable against subsequent claims for statutory damages including liquidated damages. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). However, there are ways to address the concerns that a court might have when faced with enforcing a release that has been executed without the supervision of the DOL. A court's greatest concern in FLSA cases centers on the potential for an overreaching employer to attempt to waive an employee's wage entitlements and statutory liquidated damages. By providing for, and specifically enumerating, various damage elements, including liquidated damages, the settlement documents will show that damages were paid for each element of recovery. The practical effects of an FLSA settlement which resolve all but minimal exposure leaves little incentive for someone to undertake representation for the mere gleanings which might remain. Including a liquidated damage component in an agreement releasing FLSA claims fortifies the release, not because an employer is acknowledging that it did not act in good faith, but because it is both a potential and significant damages item available for recovery under the FLSA. An employer may exhibit its good faith compliance with the FLSA by reflecting that it is relying on specific case law, is relying on a consultation with DOL, or is relying on an expert witness evaluation by a person with DOL enforcement experience.

In addition, where a settlement payment has been made and subsequent litigation ensues, the payment arguably should offset any assessment of damages. *See Singer v. City of Waco*, 324 F.3d 813, 825-28 (5th Cir. 2003) (characterizing overpayments as pre-payments on shortfalls and not as late payments.

B. Family Medical Leave Act ("FMLA")

The language of the FMLA, sometimes referred to as the "sister-statute" of the FLSA, requires DOL to resolve FMLA complaints as it resolves complaints under the FLSA. 29 U.S.C. § 2617(b)(1). As discussed above, the FLSA authorizes the DOL to supervise the payment of the unpaid wages. The regulations governing the FMLA specifically prohibit waiver of FMLA claims. At least one court in the Fifth Circuit has applied this regulation to preclude enforcement of a settlement agreement. In *Bluitt v. EVAL Co. of America, Inc.*, 3 F. Supp.2d 761, 763 (S.D. Tex. 1998), the employee had executed a release to dismiss a lawsuit for hostile work environment sexual harassment under Title VII. But see *Bailey v. City of Philadelphia*, No. CIV.A. 00-5002, 2003 WL 329157 (E.D. Pa. Feb. 13, 2003) (enforcing a FMLA settlement when negotiated in a settlement conference).

C. Age Discrimination in Employment Act ("ADEA") and Older Worker Benefits Protection Act ("OWBPA")

The OWBPA statutorily prohibits the waiver of ADEA claims if the waiver is not "knowing and voluntary." In order to be "knowing and voluntary," the statute requires specific language in the waiver requires certain measures to be taken by the employer and implements a required timeline:

1. The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.
2. The waiver specifically refers to rights or claims arising under this Chapter.

3. The individual does not waive rights or claims that may arise after the date the waiver is executed.
4. The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.
5. The individual is advised in writing to consult with an attorney prior to executing the agreement.
6. a) the individual is given a period of at least 21 days within which to consider the agreement; or b) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.
7. The agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.
8. If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to:

    a) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
    b) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

9. A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum:

    a) subparagraphs (A) through (E) of paragraph (1) have been met; and
    b) the individual is given a reasonable period of time within which to consider the settlement agreement.

10. In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).
11. 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 proceeding conducted by the Commission. 29 U.S.C. § 626(c)(1), (f).

Similar to the totality of the circumstances test, the waiver of an ADEA claim must be clearly written and understandable by an average employee. These settlement agreements must refer to the ADEA claim by name however. The settlement agreement cannot release claims that may arise after the date the waiver is executed. The settlement agreement must also advise the employee to seek the advice of an attorney before signing the settlement agreement.

However, even more stringent then the totality of the circumstances test, is the OWBPA requirement to give an employee twenty-one (21) days to consider whether to execute the settlement agreement. Further, the settlement agreement must also allow for a minimum of seven (7) days to revoke the settlement agreement and this period may not shortened by agreement. Until the revocation period expires, a waiver is not enforceable.

The requirements imposed on a reorganization or reduction in force is important to note. If an employer is conducting a reorganization affecting the group or a class of employees, the employer must inform the employees of: 1) the factors used to determine whether an employee would be part of the group terminated; 2) time considerations applicable to the program; 3) the job titles and ages of the employees eligible for or selected for the reorganization or the reduction in force; and 4) the ages of all individuals in the same job class or organizational unit that was not eligible or has not been selected. If the settlement agreement involves a reduction in force or reorganization, forty-five (45) days must be given to the employees to consider the settlement agreement.

The U.S. Supreme Court decided *Oubre v. Entergy Operations, Inc.*, 52 U.S. 422, 428 (1998) and held that the OWBPA regimen must be followed in assessing the effect of ADEA waivers, even when an employee retains payment received in return for a release:

> "The statute governs the effect of the release on ADEA claims, and the employer cannot invoke the employee's failure to tender back as a way of excusing its own failure to comply."

The Court did indicate that an inquiry may need to be made whether the employer has claims for restitution, recoupment, or set off against the employee for the benefits retained by the employee.

D. Title VII

Unlike the preceding sections addressing FLSA, FMLA and ADEA claims, federal common law governs the requirement for a release of Title VII claims. Consistent with other claims, an employee cannot prospectively waive rights under Title VII. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII."); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 854 (5th Cir.1975) ("[T]he release cannot preclude a suit for any form of appropriate relief for subsequent injuries caused by future acts or undertakings.") Title VII does not impose statutory requirements on settling and releasing Title VII claims and the Fifth Circuit specifically stated that public policy favors voluntary settlement of employment discrimination claims brought under Title VII. *Smith v. Amedisys Inc.*, 298 F.3d 434, 441 (5th Cir. 2002) (citing *Rogers v. General Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986)) (citations omitted).

In their analysis of a release of a Title VII claim, courts apply the "totality of the circumstances" test. Illustrative of the test, the Court in *Amedysis* required the employer to establish that its former employee "'signed a release that addressed the claims at issue, received adequate consideration, and breached the release.'" *Id. Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994), cert. denied, 513 U.S. 1019 (1994). The employee was then required to demonstrate that the release was not valid.

E. Texas Commission on Human Rights Act ("TCHRA")

In enacting the TCHRA, also referred to as the Texas Labor Code, the Texas Legislature intended to correlate state law with federal law in employment discrimination cases for claims involving discrimination based on race, age, sex, religion, national origin, or disability.

Language in Section 21.203 of the Labor Code specifically encourages settlement. In drafting a settlement agreement to waive claims under the Labor Code, looking to the federal law requirements for the corresponding claim serves as a good guide to drafting an enforceable agreement because the lesser standard for state law claims will be subsumed by the federal standard. For example, the strict requirement of any release that complies with the strict ADEA and OWBPA presumably will be enforced for age discrimination claims under the Texas Labor Code. *See, e.g., Hartnett v. Chase Bank of Texas National Association*, 59 F.Supp.2d 605, (N.D. Tex. 1999).