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It's Not Boilerplate: Essential Terms in Settlement Agreements

Opening Recitals



- Provide Context
- Define Dispute
- Identify Parties and how they'll be referenced in the Agreement
(address related parties)

Consideration



- Plaintiff → Usually monetary
 - Non-Monetary: e.g., transfer to a different dept., promotion, removal of disciplinary write-ups from the file
- Describe amount, allocations, timing of payment
- Not compensation otherwise owed (should include language that employee agrees that he/she has been fully compensated and consideration is above and beyond that)
- Employer → Primary consideration is the plaintiff's waiver and release of claims

Taxation



- IRS:
 - Determine the character of the payment and what gives rise to it
 - Determine if payment is gross income
 - Determine if payment is wages for withholding of employment taxes
 - Determine the appropriate reporting for the payment and attorneys' fees (1099, W-2)

Taxation



- Back pay, front pay and compensatory damages are gross income
- Attorneys' fees award/payment is included in the plaintiff's gross income even if paid directly to the attorney
- Personal physical injuries, sickness and other tort-like injury damages are excluded from gross income

Taxation



- Consequences of characterizing entire settlement as non-wages (1099)
- IRS wants its money ... And penalties and interest

Taxation



- FICA (social security and Medicare) are owed on all remuneration (compensation) paid to employee
- Employer must withhold employee's portion of FICA
- Back pay is wages and subject to withholding
- IRS v. 5th Circuit: front pay is wages (IRS), front pay is not (5th Circuit)

Taxation



- Attorneys' fees are not wages
- But they are taxable gross income to the employee
- Non-economic damages (mental anguish, etc.) are taxable gross income, but not wages

Taxation



- Summary:
 - Wages (back pay) are subject to withholding and reported through a W-2
 - Non-economic damages are gross income and reported through a 1099
 - Attorneys' fees are gross income and reportable for both employee and attorney through a 1099

TAXATION



- Harvey Weinstein Tax— I.R.C. Sec. 162(q)
 - Disallows deduction for hush money settlement of sexual harassment cases
 - If settlement of such a claim is subject to non-disclosure agreement, then no deduction for businesses

Release



- Identify specific claims
- Can release unknown claims but can't waive future EEO claims
- Be inclusive – list statutes, common law, etc.
- Address pending claims (e.g., EEOC charge)
- Define the “Released Parties” – employer plus affiliated entities, employees, executives, insurers, attorneys, etc.

Releases



- No Interference with Rights: Cannot prohibit an employee from filing a charge of discrimination or other administrative charge with a federal (or other government) agency
- Can provide that employee will not accept any monetary relief from such a charge

ADEA Release



- OWBPA – Waiver of ADEA claim is not valid unless “knowing and voluntary:”
 - Plain, understandable language
 - Specifically release ADEA claims
 - No waiver of of ADEA claims that arise after agreement is executed
 - Must be supported by consideration that employee isn’t otherwise owed
 - Advise employee in writing to consult attorney
 - Provide 21 days for employee to review
 - Provide 7-day revocation period after execution
 - If settling an EEOC Charge or lawsuit, then no 21 & 7 day requirement
 - ✦ Only reasonable period of time to consider the agreement

Future Employment



- Employers (and sometimes even the employee) want to ensure that the employee will not seek reemployment with the employer after a settlement
- EEOC believes this can be retaliatory
- However, courts considering the issue generally have concluded there is no retaliation when the parties agree contractually that the employee will not seek reemployment and will not be considered for reemployment

Confidentiality



- Usually very important to one side or the other
- Need to address who can be informed of the terms (attorneys, tax preparers, family members)
- Remember the Weinstein Tax
- Liquidated damages for breach

Non-Disparagement



- Identify who is bound – for employers this can be tricky
 - “Plaintiff agrees not to disparage Company and employees. Company agrees not to authorize any employee to make disparaging statements re: Plaintiff.”
- Neutral reference – define process and information

Other terms



- Non-admission
- Non-assignment
- Indemnification
- Separability and governing law
- No tax representations
- Integration Clause
- Ambiguous agreement not to be construed against either party
- Acknowledgments
- Effective date, signature, notarization

THE END



THANK YOU!!

Medicare



- **MMSEA**
 - Liability and other insurers (including self-insured entities) are required to determine the Medicare/Medicaid status for all claimants
 - Report to CMS when claims are resolved
 - Why? CMS is responsible to pay for Medicare-covered items and services to Medicare beneficiaries; however, if other insurance coverage is primary to Medicare, then that coverage pays before Medicare. Thus, reporting is required to ensure that Medicare is a secondary payer when other applicable funds are available

Medicare



- If claims involve workers' compensation or other physical injury, or if settlement proceeds are intended to cover past or future medical costs, then the employer must determine Medicare-eligibility, report to CMS if that is the case. The settlement agreement therefore needs to address the handling of this.
- If claims do not involve any of the above, then the settlement agreement should clarify that there are no outstanding Medicare claims related to the claims but that if Medicare ever sought payment from the employee related to the claims, the employee is required to pay those with the settlement funds