

NEW DIFFICULTY WITH SETTLEMENTS AT THE NEW YORK STATE DIVISION OF HUMAN RIGHTS

Employers' Advisor Blog Archives
August 18, 2014

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The New York State Division of Human Rights' (NYSDHR or the Division) standard stipulation of settlement document does not always include all of the terms that an employer would want when agreeing to pay a monetary settlement to a current or former employee to settle a complaint. For example, the settlement documents do not always contain a confidentiality provision or a non-disparagement clause. The release of claims paragraph is not typically as broad as an employer may want it to be. The settlements also do not typically state that the settling party will forfeit his or her right to reapply for employment with the employer in the future. Often times, to supplement this standard settlement document, employers require a complaining party to execute both the Division's document and a second settlement agreement signed just by the parties. This document was not part of the official file at the NYSDHR, but the Division did permit the practice of entering into these agreements.

Recently, I was advised by a representative from the Division of a development that may make it more difficult to settle cases in which an employer has received a probable cause determination. As part of a discussion before a pre-hearing settlement conference, I learned that the current administration will apparently no longer permit any side agreements when parties enter into a Division settlement.

A few practical tips on where to go from here:

1. If you ask, the Division will usually agree to a confidentiality provision in the stipulation of settlement.
2. If you ask, the Division will usually also agree to a non-disparagement clause, but only if it applies to both parties. Seriously consider whether that is acceptable. Although an individual complainant can agree not to make any statements about the employer, it is very difficult for an employer to ensure that none of its employees makes an off-handed negative statement about their former colleague.
3. If you ask, the Division will usually include a provision that the former employee will not reapply for future employment with the company in the stipulation of settlement.

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A few final thoughts: especially if a complainant is represented, this development may mean that private settlement agreements are preferred (as they arguably may already have been in many circumstances) over pursuing settlement through the Division. The parties can agree in a private settlement that the complainant will withdraw his or her complaint at the Division, having the same effect as an NYSDHR stipulation of settlement that the matter will be resolved. However, in a private settlement, the parties can also agree to a broader release, confidentiality, and non-disparagement clause that will be more consistent with the employer's goals in resolving the matter (including, potentially, a refund of the settlement money for breach by the complainant). Any prohibition against side agreement documents should be considered when preparing for a pre-hearing settlement conference and strategizing about next steps upon receipt of a probable cause determination.