

# Drafting Clear and Enforceable Settlement Agreements

(and bargaining strategies to get there!)

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EXCEL 2012

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## Federal Sector Context

vs. Private Sector

- In the private sector, there are very few legal impediments to incorporating settlement terms voluntarily agreed to by the parties.
- In contrast, in the federal sector, there are a plethora of statutory and regulatory obstacles to settlement terms.

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## "NO" DOESN'T NECESSARILY MEAN "NO"



Not all "no's" are created equal! It is important to understand what the agency's opposition really is. Consequently, you must *distinguish* the



**"CAN'T DO"**  
FROM  
**"WON'T DO"**



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**“NO” DOESN'T  
NECESSARILY MEAN “NO”**

- In other words, is they agency saying that it is *opposed* to your proposal.....

**WON'T AGREE TO IT**

- Or that it is *not opposed* to the proposal, but that there is some legal bar to agreeing to it.....

**CAN'T AGREE TO IT**

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**“Can't do”**

**• Get explanation:**

- Is the Agency's objection to your proposed provision in its entirety, or only to a portion?
- Get full explanation as to what Agency believes the legal obstacles to be

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**“Can't do”**

**• Problem solve:**

- Ensure Agency's reasoning is based on correct information
- Check each aspect/component
- Talk with person who says it cannot be done

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## “Can’t Do”

- Bring in your own technical expert
- Use examples from other agreements

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## “Won’t Do”

- Determine why
  - **What** is reason agency won’t agree
  - **Who** is the reason agency won’t agree
- Use argument, facts, or precedence to overcome objection
- Would a third-party process help?

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## OTHER STRATEGIES: Present Alternatives

- Alternatives:
  - Minimize feeling that something is being forced on the other side
  - Gives the other side a feeling of power because they think they are choosing
  - May resolve “political” and procedural problems

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**OTHER STRATEGIES:  
The "sub-components"**

In negotiations, we rarely get "full relief." Each side makes compromises.

The risks of litigation/case evaluation, legal impediments, and personal animosities will likely mean that if the case is to settle only *some* of what your client hopes to achieve in litigation can be achieved short of that.

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**OTHER STRATEGIES:  
The "sub-components"**

Therefore, it is important to understand the "sub-components" of the personnel action at the heart of the dispute.

These "sub-components" can present opportunities for "fall-back" positions so that your client achieves a settlement of value or one that addresses the client's more important concerns.

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**The "sub-components"  
*e.g.*, Removal**

- Back pay
- Time on the rolls
- Future employability
- "Clean" record
- Retirement/Annuity
- Unemployment Insurance

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## The "sub-components" *e.g.*, Promotion

- Retroactivity
- Back pay
- Current promotion
- Next promotion
- Priority consideration
- Recognition – enhanced promotability

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## Basics

- Knowingly and voluntarily agreed to
  - Any stage of the complaint process
  - Shall be binding on both parties
- 29 C.F.R. § 1614.504(a)

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## What is Wrong?

"The sum of \$6,250.00 be awarded to the Complainant (Mr. Thomason) as the result of the mediation on 12/14/2000 conducted at the Trenton P & DC. This will constitute a final settlement of all allegation (sic) in this complaint. This award is pending the authorization and approval by the appropriate authority of the U.S. Postal Service. The complainant understands that an award will be subject to any/all taxes by State & Federal (IRS) Government."

*Thomason v. USPS*, Appeal No. 01A13298, 6/7/02 15

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## Void for Lack of Consideration

"Pending Approval" is too speculative and vague to be enforced.

Agency is not obligated to incur any legal detriment at all.

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## Anything Wrong?

If the need for a part-time flexible (PTF) arises on Tour 2 and if it's a new hire, management will consider moving the new PTF to Tour 1 and moving [complainant] to Tour 2. If it would be a downgrade for [complainant], then [he] will have the option to take the transfer or not.

*Muhammad v. USPS*, EEOC No. 1A14145, 10/5/01 <sup>17</sup>

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## How About This One?

- We will make a concerted effort to improve our working relationship and day to day dealings and respect for each other; and
- Strive not to assume the worst of any situation.

*Estock v. USPS*, EEOC No. 01A15048, 1/10/02 <sup>18</sup>

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## Plain Language

- Avoid legalese
  - Whereas, to-wit, null and void, etc.
- Use active voice

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Intent of parties



Plain Meaning Rule

*Hyon v. USPS*, Request No. 05910787 (12/2/1991) 20

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- Plain and unambiguous
- Four corners of the instrument
- No extrinsic evidence of any nature

*Montgomery Elevator Co. v. Building Eng'g Servs. Co.*, 730 F.2d 377 (5th Cir. 1984) 21

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## Define Terms

- Some commonly-used terms in the federal sector may not have a uniform of commonly understood definition.
- The Parties should define exactly what they mean, or else you may find the EEOC defines it differently when you allege a breach.

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## Define Terms

Examples of some commonly-used terms without a uniform definition:

- Priority consideration
- Clean record
- Destroying all negative documents
- Neutral reference

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## Job Assignment -- Anything Wrong?

- 1999 settlement agreement provided:
  - [Named agency official] will give [complainant] a job offer that includes the following:
    - 12-8:80 p.m. time slot
    - Saturdays and Sundays off
    - Pay location 321 (SPBS)

(continued)

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• [Complainant's] duties will include the following:

- Mail transportation equipment (set up SPBS)
- Un-cancelled letter pickup
- Un-cancelled priority pickup
- Un-cancelled flats pickup
- Non-machinable mail piece pickup

➤ [Complainant] will let [Named agency official] know whenever he is unable to continue a task as soon as the problem occurs.

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### Specificity

• Settlement agreement did not specify job assignment was to be permanent, or for any length of time.

• "[W]here an individual bargains for a position without any specific terms as to the length of service, it would be improper to interpret the reasonable intentions of the parties to include employment in the exact position *ad infinitum*."

*Jackson v. USPS*, Appeal No. 01A32581 (8/8/03) 26

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### Avoid Illegal Terms

- Agency will approve any outside employment
- Agency will pay liquidated or punitive damages
- Agency will pay compensatory damages for age discrimination case
- Agency will provide back pay beyond what the back pay act allows

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## Neutral Reference

- Not favored by courts/MSPB
  - *Pagan v. DVA*, 170 F.3d 1368 (Fed. Cir. 1999)
- Pitfalls of promising a “clean record”
  - Expectations of employee
  - Employer may have to lie or be evasive

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## References... consider:

- Use single point of contact
- Get employee's approval of reference content
- Attach Mutually Acceptable Letter of Reference to Settlement Agreement

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## Expungement

- Identify specific documents and files
- Timeframe
- Obtain appropriate authority to expunge
- Provide for employee's acknowledgement that agency complied

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## Be Precise

- Settlement agreement provided:
  - ... the letter of warning dated April 5, 1996 shall be removed from his [Official Personnel File] OPF.
  - ... the 7 day suspension dated April 30, 1996 shall be removed from his OPF.

*Cabone v. USPS*, Appeal No. 01A24819 (8/7/03)

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## Voluntary Clause

- Complainant has read and understands agreement
- Agreement is voluntary and not product of coercion or deceit
- Representation by attorney presumes knowledge and voluntariness
  - *Phipps v. USPS*, EEOC No. 01821994 (1982)
- Avoid rush to "close" deal prematurely

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## Confidentiality Provision

- Not a requirement -- *Kevin Harris v. Rochee*, 01A02093 (2002)
- Hard to maintain
- Often breached by agencies
- Breach can destroy entire agreement
- Avoid them

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## Lump Sum Payment

- Amount should be reasonably related to, but not exceed, amount of back pay, damages, attorney's fees court could award successful plaintiff
  - MD -110, Chapter 12
- Finding/Admission of discrimination not required

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## Attorney's Fees

- Address attorney's fee
- "Reasonable fees"
- Time frames for when required information must be submitted

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## Taxes

- Back pay taxable
- Compensatory damages
  - Emotional distress/pain suffering -- taxable
  - Personal physical injury or sickness -- not taxable
- Withholding is not required
  - Include provision: "Complainant bears full responsibility for all appropriate taxes."

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## Waiver

- Clear language that employee withdraws **all** current claims and waives future claims for **all** past issues
- Employee cannot waive future claims for issues arising **after** settlement agreement

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## Older Workers Benefit Protection Act

- Waiver written to be understood by individual
- Specifically refers to rights/claims under the ADEA
- Cannot waive rights/claims that arise after date of waiver
- Rights/Claims waived only in exchange for consideration

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## OWBPA Waiver (cont.)

- Advised to consult with attorney prior to signing the agreement
- Has 21 days to consider the agreement
- Has 7 days after signing to revoke the agreement
- Agreement is not enforceable until the revocation period has expired

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## Must Haves

- Consideration
- Identification of parties
- Effective date
- Signatures
- Waiver/Release
- Voluntary clause
- Breach procedures (good to have)

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## Unnecessary Clauses

- Avoid boilerplate clauses
  - Agency agrees not to retaliate
  - Agency will provide workplace free of harassment
- Violated provision creates unnecessary noncompliance issue
  - Appropriate forum is new complaint

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## When In Doubt

- Wait, and think about it
- Improvements can be made with more time to consider ramifications
- Make sure agreement solves the problem and does not create problems
- Research case law again

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Special Thanks To:

Sarah Tuck  
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Stephen Shih

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Thank You!

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## Valuable Resources

*The Federal Employees Legal Survival Guide, 2d ed*

by the attorneys of  
Passman & Kaplan, P.C.

To Order:  
[www.passmanandkaplan.com](http://www.passmanandkaplan.com)



(c) Joseph V. Kaplan, Esq.

• *LITIGATING FEDERAL  
SECTOR EMPLOYMENT  
AND LABOR LAW DISPUTES:  
A Practitioners' Handbook*

By Renn C. Fowler and Joseph  
V. Kaplan

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THE END  
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