

A background image showing a group of business professionals in a meeting. A man in a suit and tie is on the left, gesturing with his hands. A woman in a grey blazer is in the center, holding a smartphone. Another person is on the right, partially visible. They are gathered around a table with a tablet displaying charts and documents. Coffee cups are also visible on the table.

# Negotiating Non-Monetary Settlement Terms

NELA/Illinois lunch seminar

January 10, 2023

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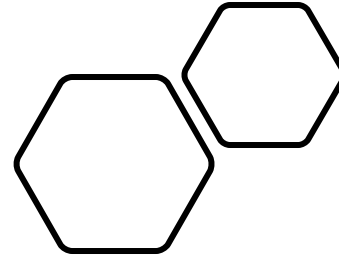
David L. Lee

Kimberly Hilton

## The problem:

- Once you've agreed to the money, you have no leverage for negotiating non-monetary terms.

# The plan:



Negotiate the non-monetary terms before you agree to the money!



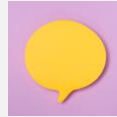
# Settlement Proposals in Writing



Make settlement proposals only in writing (unless you're at a mediation or a settlement conference).



Except when it's not helpful



Refer early and often to non-monetary terms



Use your firm's Policy on Non-Monetary Terms of Settlement



Frame your settlement proposals to avoid triggering other side's defensiveness and reflexive opposition

# Non-Monetary Terms Policy

## Policy on Non-Monetary Terms of Employment Settlements – Law Offices of David L. Lee (revised 10/19/2022)

### All settlements must:

- have all non-monetary provisions (including, but not limited to, releases) be mutual or mirror-image, to the extent possible,
- be immediately binding (other than OWBPA time-period, if applicable, or court, agency, and/or union approval, if required),
- not require any dismissal with prejudice or any withdrawal of the Charge until after the settlement checks have cleared,
- provide that the settlement consideration be paid on a date certain, not be conditioned on anything outside our client's control other than the passage of a set number of days, and carry interest and penalties if paid late,
- not require our client to indemnify the employer for any tax consequences,
- characterize backpay for Illinois clients for whom unemployment might be at issue as "severance",
- not carry liquidated damages nor require repayment of any or all of the settlement consideration for any breach or alleged breach of any provision of the Settlement Agreement,
- not expressly describe any particular clauses as being "material" or anything similar,
- not require our client to verify or certify anything not at issue in the matter being settled,
- not cover persons unknowable to our client, such as "shareholders", "insurers", "agents", "future employees", etc.,
- not release anything after the date the settlement was agreed to in principle, and
- expressly not release rights or claims (if any) to vested benefits (including, but not limited to, the correct calculation of and/or the correct contribution to any such benefit) under the Workers Compensation or Occupational Diseases Acts; under any insurance policy; to defense of or indemnity for alleged actions or omissions in the scope of our client's employment with your client; or as a customer, consumer, shareholder, policy-holder, policy-beneficiary, trust beneficiary, account-holder, or account-beneficiary.

### Our client does not require a no-reapplication clause, but if your client does, then that clause must:

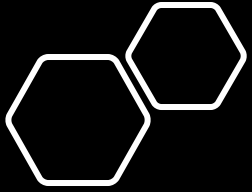
- provide that our client does not breach the clause by responding to a blind ad, to a personal solicitation, or to an ad or solicitation that does not make obvious that the potential employer is (or is affiliated with) your client,
- not be a reason for your client to refuse to do business with our client or with any past, present, or future employer of our client,
- not be a reason for your client to remove or bar our client from the premises nor to fire, demote, discipline, or reduce the pay of our client should your client merge with, acquire, or be acquired by our client's employer or should your client re-hire our client,
- expressly not carry damages for any breach, and
- sunset after a set, reasonable time.

### Our client does not require a non-disparagement clause, but if your client does, then that clause must:

- expressly not apply to normal competitive statements nor to normal competitive comparisons,
- be drafted to cover defamation rather than "disparagement", and
- sunset after a set, reasonable time.

### Our client does not require a confidentiality clause, but if your client does, then that clause must:

- limit confidentiality to the negotiation of the Settlement Agreement and the money paid thereunder,
- permit disclosure:
  - >> in response to legal process (including discovery requests) and to government employees acting in their official capacities,
  - >> in response to a "source-of-funds" question by any financial institution or on any credit or mortgage application or any deposit;
  - >> to the court, mediator, agency, and/or union to effectuate, interpret, or enforce the settlement,
  - >> to attorneys, accountants, tax advisors, and financial advisors in seeking their professional services, to medical and mental-health providers in seeking their medical, therapeutic, or psychological services, and to clergy in seeking their pastoral services,
  - >> to current, former, and future: relatives by blood or marriage who are second cousins or closer, significant others, parents of our client's children, grandparents of our client's children,
  - >> of anything that is public record or that could be discovered through a FOIA or similar request,
  - >> of the fact (but not the amount) of the payment of severance;
  - >> to the extent needed or helpful to negotiate or adjudicate any liens on the case,
  - >> to the extent needed or helpful in any matter in which either party's attorneys' fees are at issue or to defend the attorney for either party against charges of professional misconduct or malpractice,
  - >> to the extent needed or helpful to respond to any statement by your client that is critical of our client's job performance or defamatory of our client or concerns any matter covered by the confidentiality clause,
  - >> in any future retaliation or discrimination claim by our client against your client or its successors, and
  - >> to the extent needed or helpful to our client's exercise of his or her rights (if any) under National Labor Relations Act §7.
- not require notice to your client of any of the above permitted disclosures, and
- sunset after a set, reasonable time.



# Techniques to Weaken Adverse Non-Monetary Terms



Sunset clauses



Reasonable notice and opportunity to cure



Exceptions



Safe-harbors



Shortened statute of limitations



Heightened burden of proof

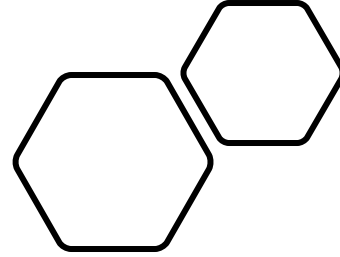


Explicitly re-state the law



Talking Points

# Confidentiality Clauses

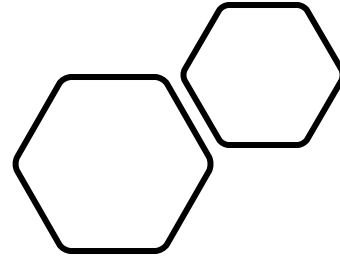


- Unworkability of having “terms” of Agreement be confidential. Go through the Agreement carefully to find unworkable terms. For example:
  - your client’s last date of employment
  - your client voluntarily resigned
  - your client will receive a stated reference
  - your client is under a confidentiality clause
  - etc.
- Have common-sense talking points to show this unworkability:

“If these ‘terms’ are confidential, what is my client supposed to say at job interviews? Further, if the confidentiality clause is itself confidential, my client might have to answer many job-interview questions with ‘I can’t answer that, and I can’t tell you why I can’t answer that’.”



# Confidentiality Clauses (cont.):



- Silliness of having some “terms” confidential -- does the other side really need to keep confidential:
  - that the Agreement is governed by Illinois law?
  - that the Agreement can be signed in counterparts?
  - that electronic signatures are valid?
  - Etc.
- Breaches of confidentiality usually come from the employer side.

“ Many of your employees will know the amount of the settlement simply by virtue of the document being internally filed and the checks being requisitioned and printed. Those people are much more likely to gossip, and to spread rumors that blow up into much bigger settlement amounts than are actually in the agreement, than my client is to tell people what she got, especially given that she thinks that what she got is pitiful. And I’m not going to subject my client to the risk of being sued over this when she’s more likely to get blamed for an employer-side leak than she is to violate the agreement herself.”

# Scope of Release

- Combination of definition of “released parties” and a general release has my client releasing people whom she couldn’t possibly know, for claims that she might not know exists.
- That combination also has my client releasing people and entities that she might have claims against that are totally unrelated to her employment with your client.
  - “How is my client supposed to know your client’s ‘future employees’, ‘future agents, etc.’?”
  - “If one of your client's ‘past, present, or future ... Insurers’ also happens to be my client's auto insurer or home-owners insurer, why should she be releasing it?”

A background image of a field of dandelions at sunset. The sun is low on the horizon, creating a warm, golden glow. Several dandelion seed heads are visible, some in sharp focus and others blurred, adding depth to the scene.

# Sunset Clauses

- “In [pick year in future], who’s going to care?”
- “Are you telling me that if somebody says they got more severance five years ago, you’ll give my client more money?”
- “Why should my client take on this obligation in perpetuity?”

Note: Sunset clauses, much like money, lend themselves to an inch-by-inch negotiating strategy: three years, five years, seven years, etc.



# Other Talking Points

# Impact of Previous Agreements on Negotiation Strategy



Non-Compete



Non-Solicitation



Confidentiality



Non-disparagement



Arbitration/Class Waiver Arbitration



# Legal Research Files on Common Settlement Issues



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Thank You!

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