

This document was created by Michael A. Levy for use at the EDNY ADR program “Mediator’s Proposal Workshop” on June 4, 2024.

Sample Clauses

INTRODUCTION

With the agreement of both sides, I am making a mediator’s proposal to recommend the terms upon which I think this dispute could settle after both sides have had an opportunity to digest the contents of this communication.

NO EVALUTATION

While I may have my own views as to the merits of the claims and defenses, that’s something that I’m not going to articulate to either side because first, I haven’t been asked to opine on that, and second, I believe there are more practical reasons for considering a settlement without recourse to a further discussion on the underlying merits of the claims or counterclaims.

PROCEDURE FOR RESPONDING TO PROPOSAL

The proposal outlined below is being sent to both counsel in this case, and I am asking that counsel for each party respond no later than the close of business on [date], with a one word response to the proposal: “Yes” or “No.”

If both sides respond “Yes,” I will let you know that you have a deal. If one party responds “No,” I will not inform the “No” party as to whether the other party said “Yes,” only that you don’t have a deal. You can then proceed with alternative means to address the case. By doing that, the side which said “No” will not have an advantage of knowing that the other side was willing to settle on the terms proposed by me.

NO FURTHER NEGOTIATION OF TERMS

In addition, I will ask that you respond only to the terms laid out in this proposal and that you do not seek to negotiate any other terms with me as this is the only proposal I will be making. If there is any question concerning a particular term that you wish to raise, I will be happy to respond so long as all sides are copied on the exchange and have a fair opportunity to raise their own questions about the subject at hand.

STATEMENT OF RATIONALE FOR SETTLEMENT

In making this proposal, I am under no illusion that either party in this case will necessarily be happy with it. In fact, my expectation is that both parties will likely find some dissatisfaction with the proposal. However, as I'm sure I've previously mentioned to you, I've given up the notion that a good settlement is one where all parties are equally happy or equally unhappy. My own experience has taught me that it's the rare instance in which all parties are equally happy. If that were the case, the matter probably would have settled long before it ever got to me. On the other hand, I see a good settlement as one in which all parties are able to consider and weigh the costs and benefits of their options, and thereafter take a deep breath, swallow hard, and then find it palatable enough to say, "This makes sense under the circumstances, and I can live with it."

In deciding whether to settle this case or to go forward with the litigation, both sides should take into account the potential risks and/or costs (in both time and expense) of not settling but proceeding to a trial. Without getting into the merits of the case, everyone must consider such factors as (1) the risk of winning or losing more or less at trial that turns out to be substantially different from either side's expectations, and (2) the risk of some significant change in circumstances potentially affecting any of the parties by the passage of time before this case can be tried.

SPECIFICATION OF CLAIMS AND RECOMMENDED PAYMENTS

All that said, after taking into account the plaintiff's claims, including her FLSA and discrimination claims, her mitigation of damages, the emotional distress claimed, her attorneys' fees, the procedural history of the case, and the defendant's defenses, including the legal issues associated with classification of the plaintiff's job, the counter-calculation of potential overtime damages, liquidated damages, WTPA claims, and all other anticipated considerations associated with discovery, motion practice and then the conduct of a trial, I am proposing that this case be settled as follows:

1. Defendant ABC, Inc. will pay to plaintiff Jane Doe, in full satisfaction of all claims alleged in the complaint the aggregate sum of \$55,000 (the "Settlement Sum.")
2. The allocation of the Settlement Sum among the various claims shall be determined by agreement between the parties. Failing an agreement, the parties shall allocate the Settlement Sum, to be inclusive of all of plaintiff's claims for legal fees, as follows:
 - Alleged Unpaid overtime - \$12,000
 - Alleged WTPA violations - \$10,000

- Discrimination and retaliation claims (neither admitted nor denied) - \$25,000
- Emotional distress claims - \$8,000

STIPULATION OF SETTLEMENT

Subject to the limitations specified in NY General Obligations Law 5-336, the parties shall enter into a stipulation of settlement, with usual and customary confidentiality provisions as to those portions of the allocated Settlement Sum other than wage and hour claims as may be permitted by law to remain confidential, with usual and customary clawback rights for violations of the confidentiality provisions to the extent permitted by law.

In the event that the Court will not grant *Cheeks* approval of the overtime portion of the Settlement Sum because it finds the same to be inadequate, the allocation of the Settlement Sum shall be adjusted by shifting such amount of the payment for the discrimination and retaliation claims to the wage and hour claims as shall be permitted by the Court.

To the extent permitted by law, the parties shall exchange general releases as to such of the claims contained in the complaint as are not subject to the FLSA. Additionally, the plaintiff will agree to usual and customary non-disparagement provisions in the stipulation of settlement.

The settlement sum will be payable within 30 days of *Cheeks* approval by the Court.

In response to any information concerning the Plaintiff which may be requested by third parties, Defendant will only be required to disclose Plaintiff's job title(s) and dates of employment with Defendant.

CONTINUED GOOD FAITH NEGOTIATIONS

It is expected that the stipulation of settlement will be negotiated by both parties and their representatives in good faith and without any intent to use such negotiations as a means of impeding a final settlement of this litigation. In the event of any impasse in the negotiation of the terms of the stipulation of settlement, the parties shall submit the dispute to an agreed upon, independent third party who shall act as an arbitrator to decide and resolve the impasse and whose decision(s) will be final and binding. In the event the parties are unable to agree upon a third party to decide and resolve any such disputes, Michael A. Levy, who has mediated this case, will be the default and serve as the arbitrator. The parties are advised that once this mediator's proposal has been made, the mediator can no longer serve in a mediator capacity, having rendered a view on how this case can be settled.

SALUTATION

Although this has not been an easy matter to mediate, I very much appreciate the obvious good faith exercised by both sides in this process. While I may not be opining as to the merits of the underlying claims and defenses, I can certainly opine as to the quality of the representation of the parties in this case and say that I believe you have both served your clients with the highest degree of integrity and professionalism, and I appreciate your efforts.