



## Human Capital Issuance System



Chapter: 900

Transmittal Number: TN-10-001

Date: April 10, 2010

Office: Office of Civil Rights and Diversity

Subject: Settlement Agreements Pertaining to Equal Employment Opportunity (EEO) Claims

1. PURPOSE. To provide advice regarding the drafting and implementation of settlement agreements involving EEO claims at all stages of the EEO complaint process.

2. SCOPE.

This issuance provides guidance to all bureaus, offices and organizations in the Department of the Treasury. The authority of the Inspectors General is set forth in Section 3 of the Inspector General Act and the Internal Revenue Service Restructuring and Reform Act, and defined in Treasury Order 114-01 (OIG) and Treasury Order 115-01 (TIGTA), or successor orders. This guidance shall not be construed to interfere with that authority.

3. CANCELLATION. The Office of Equal Opportunity Program memorandum OEOP-002-01, dated June 15, 2001, is superseded.

4. EFFECTIVE DATE. This guidance is effective with the date of this chapter.

5. REFERENCES.

A. 42 USC 2000e, Civil Rights, Equal Employment Opportunities; 41 USC 1981a, Damages in Cases of Intentional Discrimination in Employment; 29 USC 626, Age Discrimination in Employment Act (ADEA), Recordkeeping, Investigation, and Enforcement, as amended by the Older Workers Benefit Protection Act (OWBPA).

B. 29 CFR §§1614.603, Voluntary Settlement Attempts; 1614.504 Compliance with Settlement Agreements and Final Action, and 1625.22, Waivers of Rights and Claims Under the ADEA.

C. Equal Employment Opportunity Commission (EEOC) Management Directive (MD)  
110, Chapter 12.

*This guidance supplements policies and requirements contained in the references cited above; it is not self-contained, and must be read in conjunction with the cited references and any applicable collective bargaining agreements.*

6. BACKGROUND.

The Department of the Treasury resolves many EEO claims through settlement agreements, which not infrequently are challenged after their execution by applicants or employees (aggrieved or complainants, but hereinafter referred to as complainants) claiming that the agreements have been breached. It is in the best interests of the Department of the Treasury and its employees for all settlement agreements to be in compliance with relevant law and written in clear language that facilitates timely implementation of the terms of the agreements.

7. POLICY.

**I. Purpose.** Public policy favors amicable settlement of disputes. This guidance outlines matters to be considered when drafting, reviewing, and signing settlement agreements. However, this guidance is not intended to alter any applicable law or regulation.

**II. Authority.** EEO regulations provide that each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. (29 CFR §1614.603)

**III. Consultation with Agency Legal Counsel.** Agency managers, EEO officials, and Human Resources officials are strongly encouraged to consult with Agency Legal Counsel before executing any settlement agreement that would bind the Agency. Each bureau should follow its own policy with regard to who in the Agency has delegated authority to approve settlement agreements.

**IV. Requirements of a Settlement Agreement.**

**A. Statutory Requirements.** All settlement agreements must be in writing, signed by both parties, and identify the claims resolved. (29 C.F.R. §1614.603) Nevertheless, the EEOC has found that settlement agreements are valid and enforceable when they are entered orally into the record in the presence of an Administrative Judge, and are transcribed by a court reporter.

Although settlement agreements signed by representatives on behalf of complainants have been found valid, the best practice is to obtain signatures of complainants. On behalf of agencies, authorized management officials must sign the agreements. However, even when an official acts under apparent as opposed to actual authority



when signing on behalf of the agency, such settlement agreements have been found to be valid.

**B. Other Fundamental Requirements.** A settlement agreement is a contract between a complainant and the agency. The EEOC has held that ordinary rules of contract construction apply to settlement agreements.

**1. Consideration:** In order for a settlement agreement to be valid there must be consideration from both parties, which means that each party must incur some legal detriment in exchange for the other party's promise. A settlement agreement that requires an agency to provide only what it already is required to provide does not impose a legal detriment on the agency and, if challenged, may be found to be invalid.

**2. Meeting of the Minds:** A settlement agreement must include specific and substantial terms whereby the complainant and the agency express their mutual assent to settle an issue in dispute. The plain meaning of the document must reflect a "contemporaneous meeting of the minds" in order for the agreement to be valid. *See examples in the Treasury "Guidelines for Drafting and Complying with Settlement Agreements."*

**3. Specificity:** The language in a settlement agreement should be specific and should provide timeframes and list, by position title, who is responsible for taking the actions called for in the agreement.

**4. Absence of Coercion/Duress:** An agreement to resolve EEO claims must be voluntarily entered into by the parties.

**5. Older Workers Benefit Protection Act (OWBPA):** A settlement agreement resolving claims raised under the ADEA must include the appropriate waiver, in accordance with the OWBPA. The waiver must:

- (a) be clearly written in a manner calculated to be understood by the complainant;
- (b) specifically refer to rights or claims under the ADEA;
- (c) not waive rights or claims that may arise after the date the agreement is executed;
- (d) include valuable consideration for the complainant in exchange for the waiver;
- (e) provide written notice advising the complainant to consult with an attorney before signing the agreement; and

- (f) provide the employee a reasonable period of time within which to consider the settlement agreement.<sup>1</sup>

An individual alleging that a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement in order to challenge the agreement. See Oubre v. Entergy Operations Inc., 522 US. 422 (1998).

**6. Compliance Language:** Pursuant to EEO regulations, claims of breach of a settlement agreement first must be addressed at the agency level. Therefore, a settlement agreement should include notice that if the complainant believes that the agency has failed to comply with the agreement in its entirety, or with any of its terms, he/she must notify the Associate CHCO, Civil Rights and Diversity, within 30 days of when he/she knew or should have known of the alleged noncompliance. The complainant can request that terms of the agreement be implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

**7. Withdrawal of Complaints:** The best practice is to incorporate into the settlement agreement a statement that the complainant is withdrawing his/her complaint(s) with prejudice.

**8. Confidentiality:** If avoidable, it is best not to include confidentiality provisions in a settlement agreement, as an agency can find it very difficult to fully control the actions of all employees, which can result in breaches. However, the resolution of EEO claims in certain instances can be achieved only if the parties agree to keep the terms of the settlement agreement confidential. In such instances, language should be included to the effect that confidentiality shall be maintained except as is necessary to carry out the terms of the agreement, respond to a claim of breach, comply with a lawful order of a court, or comply with other applicable laws.

**C. Scope of Relief.** An agency may agree to any relief to make the complainant whole that the complainant would be entitled to if there were a finding of discrimination. In cases brought under Title VII and the Rehabilitation Act, the relief can include back pay, front pay, placement in a particular position, expunction of official records, compensatory damages, and attorney's fees and costs. However, with respect to attorney's fees, no award is allowable for the services of any employee of the Federal government.

It is permissible for an agency to agree to less than "make whole" relief. Therefore, a settlement agreement can include a retroactive personnel action but no, or only partial, back pay. An agreement can also provide for a retroactive personnel action pertaining to retirement, but all appropriate contributions to the retirement funds must be made before the personnel action can have an effect on the complainant's retirement status or pension. (MD 110 - Questions and Answers/New Chapter on Settlement Authority).

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<sup>1</sup> This guidance applies only to settlement of matters that are within the formal or informal EEO complaint process. General Counsel should be contacted for advice regarding any matters that are outside of this process.



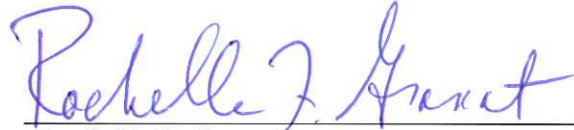
In cases brought under the ADEA, attorney's fees are not available at the administrative level and compensatory damages are not available at all. Compensatory damages also are not available when claims are based on disparate impact and are not available under the Rehabilitation Act when claims are based on reasonable accommodation and the agency has made good faith efforts to accommodate the complainant.

**D. Guidelines.** More specific information, including examples of preferred language and language to be avoided, is available in "Guidelines for Drafting and Complying with Settlement Agreements."

8. RESPONSIBILITIES.

- I. Each EEO Officer shall establish a procedure for ensuring settlement agreements meet the requirements set forth in this issuance.
- II. Bureau EEO Officers should establish procedures to ensure settlement agreements are monitored to ensure compliance with the agreements.

9. OFFICE OF PRIMARY INTEREST. – Office of Civil Rights and Diversity;  
Office of Deputy Assistant Secretary for Human Resources and Chief Human Capital Officer.



Rochelle F. Granat

Deputy Assistant Secretary for Human Resources  
and Chief Human Capital Officer

## **GUIDELINES FOR DRAFTING and COMPLYING with SETTLEMENT AGREEMENTS**

These guidelines are intended to educate Agency officials regarding minimum standards Treasury should follow in the drafting of settlement agreements. Managers, EEO officials, and HR officials are strongly encouraged to seek advice from Agency legal counsel before executing any settlement agreements that would bind the Agency. Each bureau should follow its own policy with regard to who in the Agency has delegated authority to approve settlement agreements.<sup>1</sup>

### **A. Ensure the inclusion of three nonstatutory but fundamental elements of a valid settlement agreement.**

#### **1. Consideration - Benefit/Detriment**

*There must be consideration from both parties; each party must incur some legal detriment in exchange for the other party's promise. Below are examples of a lack of legal detriment on the part of the agency.*

Example A: An agreement requiring the agency to "make a conscious effort to examine the workload each day so that perhaps [complainant] can work towards an eight-hour day" does not require the agency to incur any legal detriment. Lowrance v. United States Postal Service, EEOC Appeal No. 01A10685 (January 10, 2001).

Example B: An agreement provided that "both parties will agree to re-address the issue dispute within 100 days or after the OWCP [Office of Workers Compensation Programs] rules on the underlying dispute, whichever is sooner." The EEOC found that the requirement was of no legal detriment to the agency (as well as being too vague to enforce). Hickok v. United States Postal Service, EEOC Appeal No. 01A21772 (May 3, 2002).

Example C: Similarly, the EEOC found that an agency incurred no legal detriment when it promised "to revisit [complainant's] request for a last chance agreement (LCA) on or about January 1, 2005," provided that he had demonstrated he had resolved his medical condition and had become a productive member of society. The EEOC noted that if the complainant satisfied the terms of the agreement, the agency was under no contractual obligation to do anything. Kinslow v. United States Postal Service, EEOC Appeal No. 0120053586 (November 9, 2006).

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<sup>1</sup> While the term "resolution agreement" typically is used when referring to an agreement pertaining to an informal Equal Employment Opportunity (EEO) complaint, and "settlement agreement" is used in reference to the resolution of a formal complaint, "settlement agreement" herein refers to agreements resolving EEO claims at any stage in processing. Similarly, the word "complainant" is used to refer to any applicant or employee entering into a settlement agreement, whether the agreement resolves a formal or informal complaint.



*The inadequacy of consideration can result in a determination that the settlement agreement is void.*

Example D: A hiring freeze in place during the relevant time period effectively made it impossible for the complainant to receive the priority consideration for which she bargained; the hiring freeze resulted in such an inadequacy of consideration that the agreement is void for lack of consideration. Lee v. Department of the Navy, EEOC Appeal No. 01A20577 (April 25, 2002).

## **2. Meeting of the Minds**

*To resolve an issue in a settlement agreement, the agreement must contain language whereby the parties mutually assent to specific and substantial terms; there must be a meeting of the minds. Below are cases that illustrate an absence of these fundamental requirements.*

Example A: The parties "agreed" that the complainant would be returned to work following a medical examination at an agency medical unit and that the complainant would continue to pursue the issue of back pay. The EEOC ruled there was no meeting of the minds because the agreement raised the issue of back pay, but did not resolve the issue with any specific terms to which the parties agreed. Since the back pay issue was, in the EEOC's view, inseparable from the issue of reinstatement, the EEOC refused to enforce the agreement. Luongo v. United States Postal Service, EEOC Appeal No. 01A24090 (April 3, 2003).

Example B: A settlement agreement for a postal worker specified that the casing rate would be changed to 98 percent as a resolution of all issues. However, a review of the record revealed that the agency believed that the casing rate would be changed to 98 percent in just one instance while the complainant believed that his casing rate would be changed to 98 percent forever. The plain meaning of language in the settlement agreement was not specific enough to clarify which party's interpretation was embodied in the agreement. The EEOC found there was no meeting of the minds on this matter, and declared the settlement to be void. Nimphius v. United States Postal Service, EEOC Appeal No. 01A31827 (July 28, 2003).

## **3. Specificity**

*It is essential to use language that specifically describes what action the agency and the employee will take and/or not take. If a provision of the settlement agreement is not clearly described and defined in the document itself, the EEOC may refuse to enforce the agreement, declaring it void because of its vagueness. Below are examples of terms that the EEOC has found to be too vague.*

Example A: A provision that a named agency official "will give clear and concise instructions to complainant and they will not be in conflict in nature" is too vague to be

enforced. Largado v. United States Postal Service, EEOC Appeal No. 0120071067 (April 27, 2007).

Example B: Ethereal provisions regarding “fair treatment” of employees are too vague to allow a determination as to whether the agency has complied with such an agreement. Johnson v. United States Postal Service, EEOC Appeal No. 01A21576 (June 17, 2003).

*It is helpful to define any terms of art used in settlement agreements.*

When using words which are considered terms of art, it is prudent to define within the settlement agreement what the parties mean. For example, “priority consideration” generally requires the agency to consider the employee for a position before referring any other candidate to the selecting official for consideration. Gross v. Department of Defense, EEOC Appeal No. 01A34109 (December 30, 2003). However, such a requirement leaves much unstated. To avoid confusion and subsequent breach claims, the Agency should carefully define in the settlement agreement the meaning of such terms as “priority consideration.” Further, it is often important for a definition to explain what is not meant by such terms.

**B. Whenever feasible, provide time frames for implementation of terms of the settlement agreement and job titles of the supervisor/manager responsible for implementation and for communication with the complainant.**

**1. Time Frames**

Settlement agreements routinely specify actions that will occur in the future. A well-written agreement will include realistic deadlines for such actions to be taken. Unrealistic time frames often lead to breach claims.

The EEOC has determined that “absent specified time frames for performance, the Commission expects a settlement agreement will be implemented within a reasonable period of time,” while acknowledging that it has not specified what a reasonable period is. Frazier v. Air Force, EEOC Appeal No. 01A21146 (April 17, 2003).

Ideally, settlement agreements that pertain to the reassignment of a complainant will include a date by which the reassignment will become effective and any qualifiers, such as duty station or other specific information that would clarify potential ambiguities in the agreement.

The EEOC has made clear that a settlement agreement placing a complainant into a specific position, without defining the length of service in the position, will not be interpreted to require the agency to employ the complainant in the specified job forever. See Holley v. Department of Veterans Affairs, EEOC Request No. 05950842 (November 13, 1997) and cases cited therein. As with time frames for performance of the terms of the agreement, the EEOC interprets agreements for length of assignments to mean a reasonable period. Taylor v. United States Postal Service, EEOC Appeal No. 01A11860



(April 25, 2001), request for reconsideration denied, Request No. 05A10668 (March 21, 2002). If a specific minimum duration for a reassignment is included in a settlement agreement, the agreement should also include qualifiers that explain what events or contingencies may result in a subsequent reassignment or return to the previous position held by the complainant.

When a settlement agreement includes a provision that the complainant will be returned to work by a certain date, a delay in the complainant's return can result in back pay from the date he/she should have been back on the job. See Rathburn v. United States Postal Service, EEOC Appeal 01A05726 (January 9, 2002).

## **2. Responsibility**

When a settlement agreement lists, by job title and name of the individual currently in the position, who is responsible for initiating the action or actions required by the agreement as well as who is responsible for assuring implementation of the agreement, it is easier for an agency to keep itself informed regarding the progress of implementation and to avoid misunderstandings and delays. However, the fact the individual who is responsible for compliance may no longer be in the same position does not abrogate the agreement. The individual who signs the settlement agreement is committing the Agency, not an individual, to comply with the terms of the agreement.

## **3. Point of Contact**

The designation of a point of contact (again, preferably by job title and name of the individual currently in the position) who can respond to questions from the complainant regarding the status of implementation of the agreement may minimize the possibility of a breach claim. Such a designation also should make it easier to respond to any breach claims that arise.

### **C. Adhere to the statutory remedies available to the complainant.**

*When drafting and approving a settlement agreement, the agency should not agree to provide relief that exceeds the remedies provided by various EEO statutes.*

#### **1. Compensatory damages**

Compensatory damages are limited to \$300,000. However, compensatory damages do not include back pay, front pay, attorney's fees, or restoration of leave or other such benefits. An award of back pay is limited to two years prior to the date on which the complaint was originally filed.

Compensatory damages are not available in cases brought solely under the Age Discrimination in Employment Act (ADEA).

## **2. Attorney's fees**

Attorney's fees are not available for claims based solely on the ADEA or the Equal Pay Act.

### **D. Include language explaining what the complainant must do if he/she believes the settlement agreement has been breached.**

#### **Notification Regarding Breach/Noncompliance**

Pursuant to 29 C.F.R. § 1614.504(a), the complainant shall notify the EEO Director, in writing, of any alleged noncompliance within 30 days of the date he/she knew or should have known of the alleged noncompliance. Within the Department of the Treasury, claims of breach/noncompliance must be forwarded to the Treasury Department's Office of Civil Rights and Diversity.

Specific information regarding how a complainant can submit a claim of breach/noncompliance must be included in the settlement agreement. Suggested language (with substitution of "Aggrieved" where appropriate) is as follows:

If the Complainant believes that the Agency has failed to comply with the terms of this agreement, the Complainant shall notify the Associate CHCO, Civil Rights and Diversity, Department of the Treasury, in writing, of the alleged noncompliance with this agreement, within 30 days of when the Complainant knew or should have known of the alleged noncompliance. The Complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

Any claims that the Agency is not complying with the terms of this settlement agreement must be sent to the following address:

**Department of the Treasury  
Associate CHCO (Civil Rights and Diversity)  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220  
ATTN: 1801 L Street NW, Suite 600**

If the Agency has not responded to the complainant in writing, or if the Complainant is not satisfied with the Agency's written explanation, the Complainant may appeal to the EEOC for a determination as to whether the Agency has complied with the terms of the agreement. The Complainant's appeal may be filed 35 days after service of the allegations of noncompliance on the Agency but not later than 30 days after receipt of the Agency's written response to the allegations of noncompliance.



**E. Be cognizant of the EEOC's decisions addressing claims that a settlement agreement has been breached and the remedies that are available.**

**1. Compliance**

*The EEOC requires "substantial compliance" with the terms of a settlement agreement. While the EEOC will sometimes excuse minor deviations from the precise terms of an agreement, a single deviation (if substantial) can be sufficient for a finding of noncompliance. The examples below illustrate how "substantial compliance" has been interpreted.*

Example A: When an agency issued the complainant's attorney a check for the entire amount of the agreed upon attorney's fees and costs a few days after the expiration of the 60-day deadline, the EEOC found substantial compliance. Centore v. Department of Veterans Affairs, EEOC Appeal No. 01A04637 (November 2, 2000), request for reconsideration denied, Request No. 05A10131 (April 19, 2002). On the other hand, the EEOC also found in Centore that the agency breached other terms of the agreement because it did not show that it had done anything to attempt to carry out the terms of the agreement requiring it use its "best efforts" to "expeditiously" process the complainant's retirement and, therefore, found the agency in breach of these provisions.

Example B: An agency agreed to have a sign language interpreter present at stand-up meetings and other types of events. Management agreed to make every effort to have a sign language interpreter present at any last minute meetings "unless the emergency is at a magnitude of 9/11, Act of God or at the direction from the Postmaster General." The complainant alleged that the agency failed to provide an interpreter for the November 2, 2004 Quality of Work Life meeting at 7:15 p.m. The complainant contended that when he asked that the meeting be canceled, he was told that it was not possible, and that he and all of the other deaf employees were excluded from this meeting. The EEOC found that the agency was not in compliance with the settlement agreement because it had agreed that absent an emergency, it would provide an interpreter. Here, the EEOC found that the agency acknowledged that there was no emergency and the meeting could have been rescheduled. Koetz v. United States Postal Service, EEOC Appeal No. 01A52537 (January 23, 2006)

**2. Remedies**

*In instances in which an agency has fulfilled some but not all of its obligations under a settlement agreement, the complainant generally has to elect either specific performance of the remaining terms of the agreement, or a return to the status quo (return of any benefits) and reinstatement of the complaint.*

Example C: An agency agreed to provide the complainant a \$3,000 lump sum payment; official personnel file documentation of duties performed during a specified time frame; full-time employment as a GS-3 Sales Store Cashier; and priority consideration for the next GS-4 position in which she was interested and qualified. The complainant alleged,

and the agency acknowledged, that it failed to give her priority consideration in accordance with the agreement. The EEOC found that the agency breached the agreement by failing to provide priority consideration. It ordered the agency to notify the complainant of her option of having the terms of the agreement specifically enforced, or returning the benefits received and having her complaint reinstated. Standifer v. Department of Defense, EEOC Appeal No. 01A20757 (May 3, 2002).

*Note that the EEOC has awarded interest when an agency failed to make payment as agreed in the settlement agreement.*

Example D: The EEOC determined that where the agency agreed to pay the complainant within 30 days of settlement, but made no attempt to make the payment for 17 months, interest accrued from the day the check should have issued until the date it actually was issued. Fallwell v. Department of Agriculture, EEOC Appeal No. 01A14685 (September 12, 2002).