

TABLE OF CONTENTS

PREFACE	1
I. RECENT DEVELOPMENTS	1
II. SAMPLE AGREEMENTS	3
III. NONPRECEDENTIAL DECISIONS	3
IV. THANKS AND ACKNOWLEDGMENT	3
CHAPTER 1: GENERAL PRINCIPLES AND ADVICE	5
I. WHEN CAN PARTIES SETTLE A DISPUTE?	5
II. CAN JUDGES FORCE SETTLEMENT AND DO COMPLAINANTS HAVE A "RIGHT" TO SETTLEMENT CONFERENCES?	5
III. WISDOM OF THE AGREEMENT	5
IV. SETTLEMENTS CAN COST MORE THAN LITIGATION	6
V. LAW OF CONTRACTS	7
VI. GENERAL OVERVIEW OF EEOC AND MSPB LAW OF CONTRACTS	8
A. MUTUAL CONSIDERATION	8
1. Void for Lack of Consideration	8
B. EEOC LAW	9
C. MERIT SYSTEMS PROTECTION BOARD LAW	10
1. Applying Basic Principles of Contract Law	10
2. The Importance of Specificity	10
3. Language Controls	10
a. Ambiguous Language	11
b. The Board Will Not Add or Modify Terms	11
c. Silence; Absence of a Term	11
d. Terms of Art	11
4. Interpreting Terms	11
D. REVIEW BY THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT	12
E. REVIEW OF AGREEMENTS BY THE U.S. COURT OF FEDERAL CLAIMS FOR CASES INVOLVING MONEY AND PAYMENTS FROM THE FEDERAL GOVERNMENT	12
F. REVIEW OF EEO AGREEMENTS BY DISTRICT COURTS	13
VII. TERMS OF ART IN AGREEMENTS	13
VIII. WRITTEN AGREEMENTS	15
IX. ORAL AGREEMENTS	15
A. EEOC LAW	16
1. An Oral Agreement Is Reached Before an Administrative Judge and the Agreement Is Transcribed	16
2. A Party Relies on an Oral Agreement to His or Her Detriment	16
3. An Oral Agreement Is Ratified By a Party Who Implements Its Terms	17
B. MSPB LAW	17
X. AGREEMENT TERMS SHOULD NOT CONFLICT AND THE AGREEMENT MUST BE READ AS A WHOLE	18
A. INTERPRETING THE AGREEMENT AS A WHOLE	18
B. CLEARLY AND UNAMBIGUOUSLY SET FORTH THE TERMS OF THE AGREEMENT	18
C. CONFLICTING TERMS	18
XI. THE EFFECT OF SILENCE IN AN AGREEMENT	19
XII. UNAMBIGUOUS TERMS CAN BIND A PARTY	20
XIII. AMBIGUOUS TERMS	20
XIV. AMBIGUOUS LANGUAGE IS CONSTRUED AGAINST THE DRAFTER	21
XV. SCOPE OF SETTLEMENT AGREEMENTS AND AUTHORITY TO REVIEW	21
A. EEOC LAW	21
B. MSPB LAW	22
XVI. UNLAWFUL TERMS	23
XVII. MUTUAL MISTAKE	23
XVIII. MISREPRESENTATION	24
XIX. SETTLEMENT AGREEMENTS WITH TIME LIMITS TO COMPLETE SPECIFIC TASKS	24

XX.	SETTLEMENT AGREEMENTS WITHOUT TIME LIMITS TO COMPLETE SPECIFIC TASKS	25
XXI.	TIME FRAMES FOR AGREEMENTS WITHOUT ENDING DATES	26
	A. CASES INVOLVING BREACH OF AN AGREEMENT NOT CONTAINING A DEADLINE.....	26
	B. CASES INVOLVING NO BREACH	27
	C. THE "REASONABLENESS" TEST	27
	D. BAD FAITH	27
XXII.	DUTIES IMPOSED ON A THIRD PARTY.....	27
XXIII.	CLEAR/GLOBAL WAIVERS	28
	A. WAIVER CASES INVOLVING DISCIPLINE	28
XXIV.	SCATTERED, UNCLEAR, OR INCOMPLETE WAIVERS.....	29
XXV.	VOLUNTARINESS CLAUSE	30
XXVI.	EEOC: OFFERS OF RESOLUTION	30
XXVII.	MODIFYING AN AGREEMENT.....	31

CHAPTER 2: GUIDELINES FOR SETTLEMENT 33

I.	BEFORE THE MSPB	33
	A. 5 CFR 1201	33
	B. THE MSPB JUDGES' HANDBOOK.....	35
II.	BEFORE THE EEOC	36
	A. 29 CFR 1614	36
	B. MD-110.....	37
	C. EEOC JUDGES' HANDBOOK.....	39
	D. ENFORCEMENT GUIDANCE AND INTERFERENCE WITH EEOC ENFORCEMENT EFFORTS	41
III.	AGREEMENTS INVOLVING BARGAINING UNIT EMPLOYEES.....	42
	A. UNION'S ROLE IN REACHING AGREEMENTS	42
	B. ARBITRATORS.....	42
	C. WAIVER OF APPEAL RIGHTS.....	42
IV.	OPM GUIDANCE ON AGREEMENTS AFFECTING RETIREMENT BENEFITS.....	43

CHAPTER 3: SETTLEMENT AUTHORITY 49

I.	AGENCY REPRESENTATIVE.....	49
	A. EEOC LAW.....	49
	B. MSPB LAW	50
II.	APPELLANT'S OR COMPLAINANT'S REPRESENTATIVE.....	50

CHAPTER 4: COLLATERAL USE OF AND CHALLENGES TO AGREEMENTS AND OFFERS 53

I.	COLLATERAL ATTACKS ON SETTLEMENT AGREEMENTS IN ANOTHER FORUM.....	53
	A. SUMMARIES OF CASES INVOLVING COLLATERAL ATTACKS	53
II.	SETTLEMENT AGREEMENTS AS EVIDENCE	53
	A. SIMILARLY SITUATED AND COMPARATOR EMPLOYEES.....	54
	1. Disparate Treatment.....	54
	B. DISPARATE PENALTIES.....	54
	C. SETTLEMENTS USED AS EVIDENCE OF ACCOMMODATIONS GRANTED	55
III.	SETTLEMENT OFFERS AND DISCUSSIONS AS EVIDENCE IN LITIGATION OF AN EMPLOYEE'S CASE	55
V.	THREATS OF ACTION DURING SETTLEMENT NEGOTIATIONS.....	56
	A. MSPB LAW	56
	B. EEOC LAW.....	56
VI.	SETTLEMENT AGREEMENTS OR THE PROCESS OF SETTLING AS INDEPENDENT ACTS OF DISCRIMINATION OR OTHER ILLEGAL PURPOSE	57
VII.	EFFECT OF DEATH OF COMPLAINANT/APPELLANT IN CARRYING OUT AGREEMENT TERMS.....	57
VIII.	EFFECT OF RESIGNATION OR TRANSFER TO ANOTHER AGENCY ON CARRYING OUT TERMS.....	58

CHAPTER 5: PREPARATION FOR SETTLEMENT 59

I.	BE PREPARED.....	59
	A. AGENCY ADVISERS AND REPRESENTATIVES	59
	B. ALL REPRESENTATIVES	59
II.	WRITE SELF-EXECUTING TERMS.....	59

III.	HAVE SAMPLES HANDY	60
IV.	PREPARE FOR LANGUAGE, EDUCATION OR DISABILITY-RELATED BARRIERS.....	61
V.	DRAFTING TIPS	61
CHAPTER 6: ALTERNATIVE DISCIPLINE AGREEMENTS.....		67
I.	WHEN SHOULD AGENCIES USE ADAS?	68
II	EXAMPLES OF ALTERNATIVE SOLUTIONS	70
A.	PAPER SUSPENSIONS.....	70
1.	As Progressive Discipline.....	70
a.	Parties Can Agree to a Paper Suspension That Is the Legal Equivalent of a Suspension Under 5 USC 7501	70
b.	The Postal Service’s Effective Use of Paper Suspensions	71
c.	Other Agencies’ Effective Use of Paper Suspensions	72
2.	Unions and Paper Suspensions.....	72
3.	Paper Suspensions in USERRA or WPA Cases.....	72
4.	Appeals From Paper Suspensions.....	72
B.	REQUIRING COUNSELING, DRUG TESTING, TREATMENT, OR AN EXAM.....	72
C.	ADA OR LCA AS A REASONABLE ACCOMMODATION—TO INCLUDE DRUG AND ALCOHOL PROBLEMS	73
1.	Cases Involving the Use of ADAs/LCAs to Address Reasonable Accommodation Issues	74
2.	ADAs and LCAs Involving Firm Choices	74
D.	ADAS IN HARASSMENT CASES	74
CHAPTER 7: PREAPPEAL AND VOLUNTARY SEPARATION AGREEMENTS		75
I.	PREAPPEAL AGREEMENTS.....	75
A.	BOARD JURISDICTION.....	75
II.	LAST CHANCE AGREEMENTS.....	76
A.	WAIVERS OF APPEAL RIGHTS	76
B.	BREACH NOTICE.....	76
C.	EEO AND LCAS.....	77
D.	APPELLANT MUST HAVE MATERIALLY BREACHED THE AGREEMENT	77
E.	APPELLANT MAY GET A HEARING OVER WHETHER THE AGREEMENT WAS BREACHED.....	77
III.	EEOC REVIEW OF LAST CHANCE AGREEMENTS.....	78
IV.	ARBITRATORS AND LAST CHANCE AGREEMENTS	78
V.	VOLUNTARY SEPARATION INCENTIVE PAYMENT AGREEMENTS	79
CHAPTER 8: COMMON SETTLEMENT TERMS		81
I.	BEHAVIORAL ISSUES	81
A.	BROAD BEHAVIOR ISSUES.....	81
B.	REHABILITATION PROGRAMS.....	82
1.	Drugs	82
2.	Alcohol.....	82
3.	EAP Program	83
II.	PERFORMANCE ISSUES	84
III.	TRAINING	85
IV.	LEAVE ISSUES	86
A.	ADMINISTRATIVE LEAVE	86
B.	LEAVE AND WORK SCHEDULE ISSUES	87
C.	REDUCTION IN PENALTY OR CHANGES IN LEAVE USE	88
D.	INDEFINITE SUSPENSION WITHOUT RESOLVING FUTURE CASE.....	90
E.	SUBSTITUTING TIME ALREADY IN NONDUTY STATUS AS SUSPENSION TIME.....	90
F.	SUBSTITUTING TIME PAID FOR SUSPENSION DATES; SUBSTITUTING A PAPER SUSPENSION	90
V.	STATUS ISSUES.....	91
A.	REASSIGNMENT/PLACEMENT IN OTHER POSITIONS.....	91
B.	RESIGNATION.....	92
C.	VOLUNTARY DOWNGRADE	94
D.	FUTURE EMPLOYMENT/NEVER APPLY HERE AGAIN	95
1.	Specific Performance	95
2.	Agency Breach	96

E.	ARRANGEMENTS FOR OTHER EMPLOYMENT	96
F.	NEW PROBATIONARY PERIOD; CHANGE IN TENURE	97
G.	RETURN TO DUTY	98
H.	TEMPORARY PROMOTION/WITHIN-GRADE OR QUALITY STEP INCREASES/PERFORMANCE	99
I.	PRIORITY PLACEMENT.....	100
J.	PRIORITY CONSIDERATION	101
K.	DETAILS/OPPORTUNITY TO LOOK FOR OTHER POSITIONS	102
L.	INTERGOVERNMENTAL PERSONNEL ACT AGREEMENTS.....	103
M.	REASONABLE ACCOMMODATION.....	104
N.	MEDICAL EXAMS OR TERMS	104
O.	CLASSIFICATION	106
P.	SECURITY CLEARANCES	106
Q.	OFFICE SPACE	107
R.	DRIVER'S LICENSE.....	108
S.	STAY AWAY TERMS	108
T.	SUPERVISION TERMS	108
VI.	RETIREMENT ISSUES.....	109
A.	DISCONTINUED SERVICE RETIREMENT	110
B.	DISABILITY RETIREMENT	111
C.	SUBSTITUTING RETIREMENT FOR ADVERSE ACTION	114
D.	RETROACTIVE PROMOTION OR OTHER ENHANCED BENEFITS UPON RETIREMENT	115
VII.	ECONOMIC ISSUES.....	117
A.	ATTORNEY FEES	117
1.	If Fees Are to Be Paid	118
B.	IF FEES ARE NOT ADDRESSED IN AN AGREEMENT.....	118
1.	EEOC Law	118
2.	MSPB Law.....	119
C.	COMPENSATORY OR CONSEQUENTIAL DAMAGES	120
1.	Claims for Damages for Breach of Agreement	121
D.	"TENDER BACK"; COLLECTION OF DEBTS	121
E.	TAXES.....	122
1.	For Damages Claims.....	122
2.	Interest on Lump Sum	124
3.	Interest When Agreement Addresses the Issue	124
4.	Thrift Savings Plan (TSP) Contributions	125
F.	BACK PAY.....	125
1.	EEOC Law and Guidance on Back Pay.....	125
2.	MSPB Law on Back Pay	128
G.	PAY RATES	129
H.	INTEREST ON BACK PAY	129
1.	Exceptions to Interest Requirements.....	130
a.	Back Pay in the Form of a Lump Sum Payment.....	131
I.	QUALITY STEP OR WITHIN GRADE INCREASES	131
J.	PAYMENT OR FORGIVENESS OF DEBTS	131
K.	RELOCATION EXPENSES	132
VIII.	REFERENCES AND RECORDS ISSUES	132
A.	CLEAN RECORD: EXPUNGEMENT AND REMOVAL OF RECORDS TERMS.....	132
1.	EEOC Law	134
2.	MSPB and Federal Circuit Law	134
B.	NEUTRAL OR OTHER REFERENCES	136
1.	Samples Dealing With Clean Records, Expunged Files and Related Clauses.....	138
IX.	AGREEMENT TO MEDIATE	140
A.	RESPECT, AND BEST EFFORTS TYPE CLAUSES.....	141
X.	LEGAL ISSUES.....	142
A.	INTEGRATION CLAUSES.....	142
1.	EEOC Law	142
2.	MSPB Law.....	142
B.	NONPRECEDENTIAL TERMS	143
C.	WAIVERS.....	143

1.	Broad Waiver to Include Current Appeal or Complaint and Future Appeals.....	144
2.	Future EEO Rights.....	145
3.	Lilly Ledbetter Fair Pay Act.....	146
4.	Non-Assistance Clauses and Future Witness After Settlement	147
5.	Waivers of ADEA Rights and the Older Worker’s Benefit Protection Act.....	147
a.	Statutory and Regulatory Requirements.....	148
6.	Unemployment Benefits	153
7.	Whistleblowing; Reports of Criminal Activity	153
D.	NONADMISSIONS CLAUSES.....	154
E.	TIME TO CURE ALLEGED BREACH OR NONCOMPLIANCE CLAUSES AND/OR RESTRICT THE RELIEF	155
F.	CONFIDENTIALITY CLAUSES.....	156
G.	PRESERVATION OF AGENCY’S LITIGATION AND INVESTIGATIVE FILES	159
H.	UNDERSTANDING OF TERMS CLAUSE	160
I.	SEVERING ONE TERM OF AN AGREEMENT	160

CHAPTER 9: ENFORCEMENT OR RESCISSION OF AGREEMENTS..... 163

I.	ENFORCEMENT OF AGREEMENTS	163
A.	EEOC	163
B.	MSPB.....	164
II.	SCOPE OF REVIEW OF AGREEMENTS	166
A.	EEOC	166
B.	MSPB.....	166
1.	Challenges to the Validity of an Agreement.....	166
2.	Petitions to Enforce an Agreement.....	167
III.	CHOICE OF ENFORCEMENT OR RESCISSION OF AGREEMENTS	167
A.	EEOC	169
B.	MSPB.....	170
IV.	COERCION OR DECEIT	171
A.	BY THE AGENCY.....	171
B.	BY THE JUDGE	171
C.	BY COUNSEL OR OTHER REPRESENTATIVES	172
V.	BAD FAITH AND “ILLUSORY PROMISES”	172
VI.	HARASSMENT AND REPRISAL CLAIMS	173
VII.	MENTAL PROBLEMS	174
VIII.	PUBLIC POLICY CONCERNING CRIMINAL OR INVESTIGATIVE INQUIRIES	175

APPENDIX: SAMPLES..... 177

I.	ADA AGREEMENT SHOWING USE OF <i>DOUGLAS</i> FACTORS IN THE EVENT OF COMPARISONS AND TERMS REGARDING EAP AND A VOLUNTARY DEMOTION	177
II.	AGREEMENT SUBSTITUTING RESIGNATION FOR REMOVAL; CLEAN RECORD TERMS AND LANGUAGE TO ENSURE ACCEPTANCE OF EACH MATERIAL PROVISION.....	179
III.	PRIORITY CONSIDERATION AND QUALITY STEP INCREASE; ACCEPTANCE INTO RECORD BY MSPB (NOTE: THIS IS A WELL-WRITTEN AGREEMENT FOR AN APPELLANT. AGENCY REPRESENTATIVES SHOULD NOTE THE DEGREE OF SPECIFICITY AND USE THIS TO YOUR ADVANTAGE IN AGREEMENTS YOU WRITE).....	180
IV.	ALTERNATIVE DISCIPLINE AGREEMENT SHOWING USE OF <i>DOUGLAS</i> FACTORS; PREPARING FOR POTENTIAL COMPARISONS WITH OTHER ACTIONS TAKEN; AND A PAPER SUSPENSION.....	181
V.	LAST CHANCE AGREEMENT SUBSTITUTING A SUSPENSION FOR A PERIOD OF AWOL AND RESIGNATION IF THE AGREEMENT IS VIOLATED.....	182
VI.	LAST CHANCE AGREEMENT INVOLVING ALCOHOL ABUSE	183
VII.	OFFERS OF RESOLUTION UNDER 29 CFR 1614.109(C)	184
VIII.	RETROACTIVE PROMOTION AND TRAINING	185
IX.	AGREEMENT TO MITIGATE A SUSPENSION AND HOLD THE REMAINDER IN ABEYANCE—IF THE 90 DAY SUSPENSION HAS BEEN TAKEN, ADDRESS THE BACK PAY ISSUE	186
X.	NOTICE OF VIOLATION OF ALTERNATIVE DISCIPLINE AGREEMENT	187
XI.	AGREEMENT TO VOLUNTARILY RETIRE WITH A BACK UP PLAN OF RESIGNATION, LWOP, AND AGREEMENT TO NOT RETURN TO THE AGENCY	187
XII.	AGREEMENT FOR RESIGNATION WITH SPECIFIC PERSONS TO BE THE CONTACT POINT FOR REFERENCES AND FOR CONTINUATION OF A CURRENT OWCP CLAIM	188

TABLE OF CASES..... 189