

Offers of Resolution

Offers of Resolution are now possible due to the rule changes made pursuant to 29 C.F.R. 1614.109(c). The purpose of the offer of resolution is to provide incentive to settle complaints and to conserve resources where settlement should reasonably occur. This revised regulation eliminates the ability of agencies to dismiss complaints for failure to accept a certified offer of full relief. The prior offers of full relief were difficult for the agency to make and difficult for the complainants to understand. Thus, these offers of full relief under the old rules were not very effective in the resolution of cases.

As labor attorneys review and develop aggressive strategies for dealing with EEO complaints, I believe it is important to use offers of resolution as a way to limit exposure for the agency and to demonstrate to your client that you intend to be proactive. You should review this option with your clients near the beginning of every case. I have found that management officials are receptive to this important strategy device.

The new rule provides that the offer of resolution must be in writing and must contain the following information: a notice explaining the consequences of failing to accept the offer; attorney's fees and costs, to date; any non-monetary relief must be specified; and monetary relief, which may be offered as a lump sum or may be itemized in amounts and types. It is important to note that although a comparison of non-monetary relief may be inexact and difficult in some cases, non-monetary relief can be significant and cannot be overlooked.

The revised regulation is similar to Rule 68 of the Federal Rules of Civil Procedure offer of judgment rule. The intent of the rule is to limit attorney fees and costs when a complainant rejects an offer and obtains less relief after a hearing. An offer of resolution can be made to a complainant who is represented by an attorney at any time from the filing of the formal complaint until 30 days before a hearing. If the complainant lacks legal representation, then the offer cannot be made until after an Administrative Judge is assigned to the case. Also, the agency cannot make the offer later than 30 days before a hearing. Obviously, the impact of an offer is less if the complainant is not represented. Also, if the complainant fails to accept the offer of resolution, an agency may make other offers of resolution and either party may seek to negotiate a settlement of the complaint at any time.

The complainant has 30 days from receipt of an offer to accept it. If the complainant accepts the offer, then according to the revised rules it would normally appear that you have an agreement. However, keep in mind that the resolution does not contain the normal language that you would have contained in the negotiated settlement agreement. I advise that you draft the settlement agreement and incorporate the terms from the offer of resolution. My reason for this approach is because you need the non-compliance and non-admission language that is in the boilerplate agreement.

If the offer is not accepted and the relief awarded in the decision is not more favorable than the offer, the complainant cannot recover attorney fees or costs incurred after the end of the 30-day acceptance period. Thus, it is important to make offers soon after acceptance of the formal complaint in situations where there is an opposing counsel in order to limit fees and costs. Of course, the regulation does allow an interest of justice exception to the withholding of attorney fees and costs in certain circumstances. This will happen when equitable considerations make it unjust to apply the provision. One example, would be when a responsible agency official informs the complainant that the agency would not comply in good faith with the offer. Hopefully, the EEOC will apply this provision in only limited situations. If this provision is used too frequently, then the new offer of resolution rule may be meaningless.

It will be interesting to review how many offers are accepted. Also, how will administrative judges rule with regard to offers of resolution that are not accepted when the ruling is favorable towards the complainant? This new tool can be successfully used to assist our clients limit some of their exposure. I include the model language for making an offer of resolution for your review.

B. Model Language for the Offer

This offer of resolution is made in full satisfaction of the claims of employment discrimination that you have made against [name of agency] in [identify the complaint by number or other clear and unambiguous designation]. This offer includes all of the monetary and/or non-monetary relief to which you are entitled, including attorney's fees and costs.

[For complainants who are not represented by counsel, include this paragraph:]

Your acceptance of this offer must be made in writing and postmarked or received in this office within thirty (30) days of your receipt of the offer. If you accept this offer, please indicate your acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent to your name. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[For complainants represented by counsel, substitute the following paragraph:]

The complainant's acceptance of this offer must be made in writing and postmarked or received in this office within thirty (30) days of your receipt of the offer. If the complainant accepts this offer, please indicate your acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent to your name. Please also obtain the signature of the complainant, which should be

placed on the line appearing above [his/her] name and include the date of [his/her] acceptance on the line appearing adjacent to [his/her] name. This offer will not be deemed to have been accepted without the signature of both you and the complainant. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[The following paragraphs must be included in offers sent ALL to complainants:]

If you do not accept this offer of resolution and the relief that you are eventually awarded by the Administrative Judge, or the Equal Employment Opportunity Commission on appeal, is less than the amount offered, you will not receive payment for the attorney's fees or costs that you incur after the expiration of the 30-day acceptance period for this offer. The only exception to this rule is where the Administrative Judge or Commission rules that the interests of justice require that you receive your full attorney's fees and costs.