



Laboring Results

A Monthly Dispute Resolution E-zine
of Elizabeth A. Moreno, A Professional Corp.

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THE D-LISTS **(The Darn Damages Demand Detail)** ***A check list for successful ERISA and Employment Mediations***

Participants at mediations go through tedious rounds of negotiations in trying to come up with a number to settle a case. When we think we have a settlement as to the damages, a party throws in an additional demand that was never mentioned in the early stages of mediation and the other party always scream, 'Darn! Why didn't they mention that in the beginning?' So to help prevent that last minute frustration, set forth below are D-Lists for those cases that have challenging details, ERISA and Employment.

ERISA D-List

- No Damages - The use of the word 'Damages' is a signal to the opposing party or the mediator that you are not familiar with the ERISA provisions. So be careful of your vernacular.
- Equitable relief, only - ERISA provides for appropriate equitable relief to redress a violation. Compensatory, emotional distress and punitive damages are excluded and not recoverable. Examples of appropriate relief are an injunction, restitution, and mandamus.
- No future benefits - Past benefits that are owing to the plaintiff constitute restitution. However, future benefits, for example, until age 65 under a disability policy, does not constitute restitution because those benefits have not accrued and are considered damages. In equity, a court can reinstate the policy so that the plaintiff continues to receive benefits, but plaintiff has to continue to be eligible for them.
- Medical payments/ Contractual rate- If the plaintiff is seeking payment for past medical bills under a health insurance policy, the amount that the health care provider should accept is the contractual amount under the health insurance policy. If a court holds that the plaintiff was covered under the policy, then the terms of the policy dictate including the contractual rate the insurer has with the healthcare providers.
- Offsets entitlement-If a disability plan provided reduce plan benefits by the amount of other benefits (Social Security or worker's compensation benefits), the

plan can obtain an offset for those benefits paid against a retroactive award of benefits.

- Attorney fees- ERISA has a fee shifting attorney fees and costs provision under section 502(g)(1), 29 U.S.C.S 1132(g)(1).
- Interest- The plaintiff is entitled to interest on the benefits that are due and owing. However, interest under federal law is not 10%, like California. Rather, it is tied to the Treasury yield of the Federal Reserve System, which is not even close to 10% these days.

Employment D-List

- Which Tax Form: 1099 or W-2 -This can cause a tentative settlement to fall through if the parties are not clear as to how the wages will be reported to the IRS and whether taxes will be withheld. You may agree on a number, but if a W-2 is issued and taxes are withheld, the ultimate number dramatically decreases. Be clear how the reporting to the IRS will be handled.
- Taxability- no free ride- Employment settlements are treated differently by the IRS than personal injury settlements. An Internal Revenue code provides that the settlement amount in an employment action is taxable. However, there are very limited exceptions and attorneys should call their tax adviser on to how to handle a settlement. Many times, large settlements are paid over several tax years, to lessen the tax burden on the plaintiff.
- Time Credited to Retirement - An employee, usually a public employee, who is still employed, may demand that they want the time that they did not work, but are getting damages for in the form of back wages, to be credited to the Retirement System. Be prepared to come to the mediation with this information. Plaintiff may insist that they be told the exact amount and will not settle until they are informed of the amount. Sometimes it may cause a delay in calculation or the retirement system can't do it.
- Outstanding vacation benefits- Employees will demand payment for outstanding vacation or if still employed, to be credited vacation time, during the time that the defendant is now paying them for back wages. Similar to retirement credit demands, if the parties are not prepared to address the issue, settlement may be delayed.
- Workers' Compensation Claim - In making demands, be clear up front as to whether or not there is a pending worker's compensation claim, and whether the existence of that claim will be part of the negotiations. This information is determined early on during the mediation. But, even after a denial by each party that it will not play a role and after three rounds of numbers negotiation, it suddenly becomes an issue with one side. One of the parties made a phone call and were told differently.
- Attorney Fees- In discrimination actions, attorney fees are recoverable. Be forthright as to whether the sum you are demanding includes attorney fees. At the eleventh hour, when a party realizes that they are not getting enough or giving too much, they tend to change the rules about their demand for attorney fees.

This is by no means an exhaustive list. In ERISA the issue of de novo review v. abuse of discretion review is always a lengthy discussion which goes to the merits of the claim. In employment cases you confront the tedious details such as confidentiality, non-disparagement, reinstatement, request for a letter of reference, and purging a personnel file information, to name a few. The details get glossed over at the

eleventh hour of the mediation. But these are important details that require attention, so if you are tired and you can't think anymore, pull out the D-list to make sure that you have determined that you have addressed the Details of the Darn Damages Demand.

To ask a question, to request more information on dispute resolution services send an e-mail to emoreno@eampc.com or log on to www.eampc.com. To unsubscribe please send an e-mail to emoreno@eampc.com and type remove in the subject line. If you know anyone who is interested in Laboring Results, do not hesitate to pass it along.

EAMPC
6080 Center Drive
Suite 600
Los Angeles, California 90045
Telephone: 310.444.3804
Facsimile: 310.390.8757
www.eampc.com