

Expert Interview with David S. Warner of Dorf & Nelson LLP: Settlement of Employment Discrimination, Harassment, and Retaliation Claims

A Practical Guidance® Article

Attorneys who prosecute and defend discrimination, harassment, and retaliation claims have traditionally had minimal access to market trend information regarding financial and nonfinancial settlement and severance agreement terms. Indeed, but for the agreements they or their firm colleagues themselves have negotiated, and the few publicly available settlement/severance agreements, most counsel have been flying blind when it comes to knowing the market trends for such agreements. To help solve this problem, in late 2021, Lexis Practical Guidance launched **Private Market Data: Employment Discrimination Settlements**, a unique data bank of private employment discrimination, harassment, and/or retaliation settlement/separation agreement terms.

The customizable data bank provides L&E attorneys with a broad view of current settlement market trends, which attorneys can leverage to develop more effective settlement strategies and ensure their clients receive the most favorable settlement agreement terms. (To contribute to the data bank and view the most current results, click [here](#).)

Lexis Practical Guidance also sent follow-up questionnaires to a select group of attorneys—who had contributed to the data bank—to gather their unique insights into current market trends.

The questions below are answered by David S. Warner, Co-Chair of the Labor & Employment department at Dorf & Nelson LLP, a multi-office law firm serving as counsel to a wide range of corporations, entrepreneurs, growing businesses, and successful companies as both legal counsel and trusted advisors. Mr. Warner advises, trains, and

represents employers across the country in all aspects of employment and labor law; has skillfully guided employers of all sizes in a variety of industries through challenging employment situations and ever-changing employment laws; and has extensive litigation experience involving single- and multi-plaintiff lawsuits, class/collective actions, arbitrations, and government agency proceedings from New York to California.

1. Does the stage of the dispute in which the discrimination/harassment/retaliation settlement/severance agreement occurs (e.g., prior to demand letter or after litigation is initiated) have a material impact on the settlement amount? What trends have you noticed regarding the timing of the agreement?

In my experience as a defense-side lawyer, the cost of settlement generally increases after litigation. However, I understand that plaintiff-side lawyers generally believe pre-litigation settlements are more likely and more lucrative than post-litigation settlements.

2. Are there any types of employment discrimination/harassment/retaliation claims (e.g., sexual harassment, racial discrimination, failure to accommodate disability, etc.) that usually bring about higher settlement/severance amounts? If yes, can you please identify the claims and tell us why you think this is the case?

Sexual harassment claims, particularly those involving claims of unwelcome physical contact, tend to bring about higher settlement amounts. I believe that is due, in part, to the fact or perception that juries and other fact finders tend to find such conduct exceptionally offensive and opprobrious.

3. What are the most important provisions in discrimination/harassment/retaliation settlement/severance agreements that employers often insist on including in the agreement but often encounter resistance from employees? Why are these terms important and why do they encounter resistance?

Some employees resist one-way release, confidentiality, and non-disparagement clauses. These terms are often important to employers that want closure. Employees who resist them tend to do so just because they want parity or mutuality of commitments, as a matter of fairness. This can be challenging if/when the employer has not determined the extent to which it may have claims against the employee and when the employer is not comfortable committing everyone in the entire organization to confidentiality and non-disparagement. Generally, employers have no desire to publicize these matters, even internally, or the terms of any settlement.

4. What are the most important provisions in discrimination/harassment/retaliation settlement/severance agreements that employees often insist on including in the agreement but often encounter resistance from employers? Why are these terms important and why do they encounter resistance?

I find that employees often want neutral reference and non-disparagement commitments. While employers are not generally opposed to providing neutral references, they are often reluctant to make broader commitments on behalf of all their employees.

5. Have there been occasions during discrimination/harassment/retaliation settlement/severance negotiations where you've agreed to modify terms (financial and/or nonfinancial) in a way that was favorable to the opposing party? If yes, could you please briefly discuss what modifications were made and why you agreed to modify?

I have occasionally encouraged clients to agree to make the release mutual, particularly when it is a small employer with limited means. I once had a client agree to add a confession of judgment for the balance due from a settlement in the event it did not adhere to the payment plan it insisted upon. It was amenable to that because it recognized that the pandemic created uncertainty as to its resources and viability, plus it needed to be relieved of the mounting legal fees arising from the court's short litigation deadlines.

6. Have there been times during discrimination/harassment/retaliation settlement/severance negotiations where the other side agreed to modify terms (financial and/or nonfinancial) in a way that was favorable to your client? If yes, could you please briefly discuss what modifications were made and why the other side agreed to modify?

I have generally been able to limit an employer's non-disparagement commitment to an instruction to specific employees that they not disparage the plaintiff. I also often insist upon a provision allowing for liquidated damages in the event the plaintiff breaches the confidentiality commitment.

7. Has mediation helped you resolve discrimination, harassment, and retaliation disputes? Why or why not?

Generally, yes, but often with strong mediators who are comfortable voicing their opinions about the strengths and weaknesses of each side's positions. Mediators who merely shuffle proposals back and forth are generally not helpful.

8. Has COVID-19 affected resolutions of discrimination/harassment/retaliation disputes? If yes, how so?

Generally, yes. In the first few months of the pandemic, I found that employees were more receptive to reasonable settlement amounts, perhaps out of fear that the employer may not survive the pandemic so that it was not worth the risk of holding out for more. Now, the challenge is to get parties to make the same compromises they would in a live mediation when they are now simply attending it by videoconference from their homes or cell phones, which requires less effort than attending mediation in person.

9. Do you think the MeToo movement has affected how discrimination/harassment/retaliation settlements are negotiated? If yes, how so?

It resulted in the enactment of laws that impose tricky rules around negotiating confidentiality. However, I have yet to see an individual that was not already predisposed to confidentiality.

10. Similarly, do you think the Black Lives Matter movement has affected how discrimination/harassment/retaliation settlements are negotiated? If yes, how so?

No, I have not seen that. I suspect it may have a greater impact on settlements of police officer misconduct claims.

11. Can you identify the most important factors impacting (a) the decision to enter into a discrimination/harassment/retaliation settlement/severance agreement and (b) the financial and other terms of the settlement of employment discrimination/harassment/retaliation claims?

Employers generally want the certainty of a fixed cost in exchange for closure, without harming employee morale, so their decision generally depends on the risk that the hard and soft litigation costs will or will not exceed the cost of settlement.

12. Are there any other trends you've noticed regarding settlement/severance agreements resolving employment discrimination/harassment/retaliation claims?

No.

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