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To Settle Or Not To Settle: Lawyers Share Their Tips

By **Christine Caulfield**

Law360, New York (July 10, 2009) -- With employment litigation still one of the biggest strains on the corporate budget, it pays to know when to come to the bargaining table, attorneys say. Law360 invited lawyers to give their tips on when to hold 'em and when to fold 'em.

To settle or not to settle a case often comes down to a corporation's litigation culture: While some companies take a moderate approach, weighing the value of settlement on a case-by-case basis, others are vehement defenders, engaging in gladiator fights to the death.

But since 96 percent of all civil cases are resolved short of a jury trial, companies should consider how much time and money they want to invest on defending employment lawsuits that are destined, statistically, to settle, said Thomas Murphy of Hunton & Williams LLP.

While some companies are loathe to come to the negotiating table before at least taking a peak at the case against them, controlling the costs early on is a savvy move if settlement is all but a fait accompli.

Why Settle

For some companies, particularly those now struggling with cash flow issues and tight credit markets, the cost of attorneys' fees alone is an important initial criterion.

But in addition to legal fees and the possibility of huge payouts at the end of a trial, companies risk other damages when they fight employment litigation, said Mark Shank of Gruber Hurst Johansen Hail LLP, who refers to such damages as "hassle factors."

“Lawsuits wear on litigants, and if you're personally involved oftentimes it's a distressing course of events. Typically it's advantageous for both parties to settle, and settle early,” Shank said.

The negative publicity that comes with a high-profile employment case, for example, can do untold damage to a company's reputation, even if it emerges the victor in the court room, Murphy said.

“Bad allegations will hurt the brand, no matter what. We know Andy Warhol's 15 minutes of fame starts running at the beginning, not the end, of a case,” Murphy said.

Employee morale can also be damaged when a company fights an employee's action tooth and nail. Nothing, said Murphy, polarizes a work force more than a discrimination lawsuit.

“If someone's claiming they've been treated unfairly, chances are there may be co-workers who empathize with that individual and their plight,” he said.

Opening the floodgates is also another danger, if the employee's claim is a bona fide one, Murphy added.

What To Settle

Damages in sexual harassment cases often run high, especially when they involve allegations against top executives. Settling such claims, and settling them early, is advisable, attorneys said.

Claims of workplace violence also have the potential for big damages awards, as do retaliation claims, Fitzpatrick said.

With the U.S. Supreme Court consistently ruling in favor of employees in retaliation cases, the risk for companies of seeing them all the way to trial and losing is great, he said.

“It doesn't make a difference how good the underlying discrimination claim is once it has become a reprisal case,” Fitzpatrick said. “Judges of all hues don't like retaliation. And juries don't like it.”

When To Settle

Resolving an employment claim before litigation has even been initiated has become a popular strategy with plaintiffs attorneys and can often be a wise move for companies, lawyers said.

“Most people are willing to engage in a dialog before a complaint is filed with the court or a charge is filed with the [U.S. Equal Employment Opportunity Commission],” said

lawyer Bob Fitzpatrick, who represents both plaintiffs and defendants in employment law disputes.

Dan Westman, co-chair of Morrison & Foerster LLP's employment and labor group, said cases involving highly inflammatory allegations — whistleblower cases in particular — were ripe for prelitigation settlement.

“If plaintiffs lawyers come in with a reasonable posture rather than a warlike stance, that can make a difference too,” he said.

One advantage of settling a case before it's seen the inside of a court room is that it takes the emotion out of the battle, Murphy said.

“There's certainly no harm in inviting a company to engage in settlement discussions prior to filing suit, especially when a company is worried about its brand and reputation and might feel they have to vindicate themselves in the public forum by waging war against the other side” after a suit is filed, he said.

“I'd say corporations respond favorably to those types of overtures. They're certainly not rejected out of hand.”

According to Westman, whose practice typically involves defending employment class actions, settlements can often turn on where the litigation is going to play out.

Plaintiffs attorneys who launch litigation against a national corporation and have the pick of the courts will favor the employee-friendly Ninth and Second Circuits, but if a company can successfully argue for a venue change to a more conservative circuit, settlement often follows.

“I'm seeing more often lawsuits being brought for a tactical advantage in places where they shouldn't be brought. When the plaintiffs get the forum they want, it's more difficult to negotiate a settlement,” Westman said.

The era of electronic evidence has also brought with it different tipping points to settlement, said Westman, who represents individual clients in trade secrets litigation. A favorable court ruling on disputes over destruction of evidence, for example, can often induce talks, he said.

“How electronic evidence issues play out in a case has an effect on when you pursue settlement,” he said.

Other Pressure Points

The life cycle of an employment case, once filed, often presents golden moments when previously reluctant parties can be brought to the negotiating table, lawyers said.

One pressure point, they said, is the summary judgment stage, when a judge has heard arguments from both sides on the merits or otherwise of a case, but has yet to hand down a ruling.

“There's a period of time when the judge is making up their minds and nobody really knows what the judge is going to do. The plaintiff is saying, 'Maybe we're going to get blown away.' And the defendant is saying, 'Maybe we won't blow them away.' And it is that uncertainty that many times leads to a settlement, before the judge has even ruled,” Fitzpatrick said.

Another pressure point, from a plaintiffs attorney's perspective, can be the pending deposition of a high-level executive, Fitzpatrick said.

“When someone pretty high up has to spend substantial time getting prepped for a deposition and then has to sit in a room for a whole day, sometimes the reaction is: 'I don't have time for this. Let's see if we can find a way to settle,’” he said.

“In my experience, the higher up within the corporation, the less willing that person is to devote the time to a deposition, and that's certainly a major leverage point.”

From a defense attorney's perspective, a good time to talk settlement is immediately after the plaintiff's deposition, when he or she has finally had the chance to tell his or her side of the story, Murphy said.

“One of the reasons they find themselves bringing a lawsuit is to be able to express their upset over some perceived unfair treatment, and many times I find that the plaintiff is particularly amenable to talking about resolving a case at that point. They no longer feel the need to have a jury vindicate them,” Murphy said, adding that the presence of a senior corporate executive at the deposition often gave the plaintiffs a target for venting.