



## Episode 40: “NYS Division of Human Rights Settlement Conferences and Probable Cause Hearings, Part 2,” With Catherine Ostrowski Martin

Speakers: Ari Kwiatkowski, Barclay Damon,  
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**[Ari Kwiatkowski]:** Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

**[Ari]:** Hey, guys. Welcome back to “What Employers Need to Know about New York State Division of Human Rights, Settlement Conferences and Probable Cause Hearings.” A chat with a division attorney. This is part two of our three-part segment, and I am so happy to welcome back to the podcast, Catherine Ostrowski Martin. Welcome, Catherine.

**[Catherine]:** Thank you. I’m excited to be here again.

**[Ari]:** Yes. And so happy to have you back again. So, like I said, part two out of three today, I really think it would be helpful for our listeners if we focused on the actual settlements, how the parties enter into a settlement agreement and some nuanced things that I think is important for respondents and complaining parties to know when they’ve...when they’re involved in a charge or excuse me, a complaint before the Division of Human Rights. So, Catherine, I think we ended last episode and you kind of gave us a rundown of what happens at the settlement conference. Let’s assume that the parties have reached a settlement. Hurray! And we can kind of move on with trying to wrap up the matter. And, you know, a lot of times there’s a monetary component or typically a monetary component of a settlement. But I wanted to ask, in your experience, are there other items or other things that you’ve seen included in settlements that maybe are non-monetary?

**[Catherine]:** Absolutely. So in probably the vast majority of our settlements, there is, like you said, the monetary amount. As far as lost wages and mental anguish goes. In addition to those, because the division is a party to all these proceedings, if you look at our captions, it says, I think Division of Human Rights on behalf of X person complainant. The division wants to—like I said earlier, we’re representing the state’s interests and making sure that victims of discrimination are able to seek justice and ideally future discrimination is prevented. So the vast majority of our settlements also include things that are in the public interest. So this could be, say, an employee is bringing a case against an employer for sexual harassment. So part of a stipulation could include requiring the employer or several people who work for the employer or an entire company undergo additional training on sexual harassment. And that’s on top of the annual training that’s already required under New York state law. Another component that we see is having the division review a nondiscrimination policy. And, you know, like if it was a sexual harassment case, we’d review the sexual harassment policy and things like that. So there’s a couple of different options. And we usually add into that our division poster, they’d be hanging up where employees can see it in all workplaces, which again is already required under the law. But we want to make absolutely sure that employers are following through on that.

**[Ari]:** Right. Yes. And that makes sense. And I have seen those types of things in, I think probably with respect to the training piece, some training component, probably in every settlement that I’ve been involved in with the division. So that that makes perfect sense. I’m really glad you pointed that out. And in your experience, Catherine and we kind of mentioned this a little bit last week, sometimes the complaining party may not even be looking for a monetary settlement. Right? Like sometimes it may be they want their job reinstated or maybe some other type of item that the respondent may not even be thinking of or might not have any idea what that

could be until they're at the settlement conference. So in your experience, is that something that you see as well, maybe some a non-monetary piece of a settlement?

**[Catherine]:** Sure. So that's definitely...in a very small minority of cases have no monetary settlement. And a lot of times we see that in disability cases where someone is requesting a reasonable accommodation and they got the accommodation, they're good to go either in housing or employment and...which kind of makes things simpler for everyone. But it's also frustrating because usually at the point that we get to with a division settlement conference, the complainant has usually asked for this accommodation maybe for years. And so that's why it's so important to have, you know, the training in there too. So people are aware of their obligations under the law so it doesn't have to go through this long process.

**[Ari]:** Yeah. And hopefully not happen again with maybe a different complaining party.

**[Catherine]:** Absolutely.

**[Ari]:** Understood. So I kind of want to talk a little bit about the substance of a settlement, Catherine, and specifically you know, are there things that cannot be included in a settlement or specific items that the parties cannot agree to?

**[Catherine]:** Sure. So everything ultimately is up to the determination of our commissioner who operates under New York state law. So there are a couple of things that are not allowed specifically. Generally, we have a general stipulation of settlement that we know complies with the law, that we know is good with public policy, and the division attorney will draft that up. Sometimes, you know, respondent's attorneys will ask for things like a "no rehire" clause, saying that the complainant agrees to never apply to the place of employment again. And that kind of goes against public policy, because these are people that have been discriminated against. So to say you can never apply to this employer, every again in your whole life, particularly when it may be a chain store and may be one of the only places someone can seek employment in a small town.

**[Ari]:** Right.

**[Catherine]:** That's not going to be permitted in the settlement. We also limit the release language to discrimination and the facts in this complaint. Know we can't release. I've had respondents' attorneys ask for relief. Says the complainant will never sue the respondent for anything ever in the future in perpetuity, which it doesn't make sense from a couple of standpoints, including a legal standpoint like say the complainant is involved in a car crash with one of the respondents' employees in the future. So we're not going to limit future claims that have nothing to do with the lawsuit as well.

**[Ari]:** Right. And that's really important to point out, because I think most respondents, you know, do want that type of broader release language. Can you kind of shed some light on what can be released in the context of the settlement, and what's permissible, and what the commissioner will accept basically in terms of the agreement between the parties?

**[Catherine]:** Sure. So it's good to know we have a general release that you can actually request from our hearings unit at any time: hearings at DHR dot NY dot gov [dhr.ny.gov/hearings]. And basically that release is...basically says that the division found probable cause because that is what happened. So that has to be in there sometime. You know, respondents want that out of there, but that's already happened in the past. The division found probable cause to move forward with the complaint and the parties are entering into a stipulation. And we had language in there that entering into the stipulation, the respondent did not admit liability for the allegations in the complaint. So they're not specifically admitting that they've done anything wrong. The complainant may feel otherwise, but that's our language in there. And basically, the complainant is releasing the respondent from the allegations in this case. And if the case was dual-filed with the EEOC, which some of our cases are, they're released from that case as well.

**[Ari]:** Catherine, one thing I wanted to ask you about, which is comes up a lot and I think is very important for respondents, employers in the context of a settlement is confidentiality. Can you talk a little bit about that and educate our listeners on whether or not that type of provision can be included in the stipulation of settlements?

**[Catherine]:** Sure. Absolutely. So it's kind of a tricky question because New York State is subject to FOIL, the Freedom of Information Law, and that includes all agencies. So the division itself can't agree to that sort of confidentiality in a stipulation. The parties, meaning the complainant and respondent or respondents, if they'd like, can request language regarding confidentiality. So what we'll usually see is maybe at the respondent request a paragraph be added, saying that the parties agree basically to say that the matter has been settled and there is kind of a nuanced New York state law regarding confidentiality and non-disclosure agreement. So the clause has to say that confidentiality does not extend to the underlying facts and circumstances of the complaint. There is another option, which is that the parties can enter into a nondisclosure agreement. This is only at the request of respondent. Usually the division is a bit hesitant to do that because we want to be transparent with the public and let them know what's occurring in our agency with a non-disclosure agreement, the parties can agree not to disclose any of the facts and circumstances regarding the case. It's a little bit complicated. There are some waiting periods involved and frankly, it usually delays the process a lot and the complainant and the respondent may or may not agree to it. So hopefully that answers your question.

**[Ari]:** It does answer it. And I think unfairly to you, maybe I asked a question that really is a yes or no answer, at least in some instances. I guess the answer really is it can be something that is agreed to, but it requires some additional massaging and there's some nuances there, really.

**[Catherine]:** Absolutely. And, you know, I know that that's something that a lot of employers are very concerned about. And my two cents is pretty much every case I've seen that complainants just want to be done. They want, you know, to settle or go to a hearing and be done. They don't want to ever see the other side again or talk about them or post on social media. I can't say it never happens, but I think that respondents are maybe more concerned than they need to be about that sort of thing.

**[Ari]:** Right. Yeah. Thank you. That's I think, a good perspective and an interesting piece of information to share with our listeners who are predominantly respondents, I think by and large part so. Thank you, Catherine. So one thing I wanted to kind of dive into, and this is something that I think has been asked of us more recently, which is I wanted to kind of dive into private settlements and the stipulation of settlement versus a private settlement and what that really means, because we've had a couple clients who have kind of gone to the division's website. There's a great information on there for complaining parties and for respondents, but this is a question that has come up. So could you kind of give a rundown to our listeners: the stipulation of settlement versus private settlement and how that how that really works?

**[Catherine]:** Sure. So after probable cause is found on private settlements, not involving the division will not have an impact on the case before the division. So, you know, the parties, if they enter into a private settlement and they say, okay, we're good to go, please dismiss the case. The division will say, hold on, we're a party to this as well. And make sure that we basically start from square one re-execute it, and put in all the language and the requirements that are legally have to be in there. And at that point, the commissioner will issue a final order, basically dismissing the case.

**[Ari]:** Understood. And is that order different or how or is that order different than the order after stipulation? So kind of just clearing up some ambiguity, just really probably with respect to what things are called in the type of proceeding, but I think it would be helpful for our listeners to kind of get some clarification on that.

**[Catherine]:** Sure. So yeah. So an order after stipulation is what I was talking about. Basically, in layman's terms, it's dismissing the case. But basically the order is reviewing the stipulation and incorporates the stipulation itself, it will literally have the three or four pages in there and then the commissioner will say, okay, look, let's go ahead and sign off on it and the case is over at that time.

**[Ari]:** Understood. So basically, Catherine, at this point, can the parties really enter into a truly private settlement without any input or knowledge on behalf of the division after a probable cause determination?

**[Catherine]:** I mean, I never say never. People are going to do what they want, but it won't impact the status of their case before the division.

**[Ari]:** Understood. So, Catherine, you touched on this a few minutes ago, but we have talked a lot over our what we've called our discrimination-related segment about dual filings with the New York State Division of Human Rights and the EEOC. And basically last...two weeks ago, Debbie Kent explained what it means when things are dually filed and why a complaint and a charge may be dually filed. Can you talk about whether the division—and we're talking about once an order has been issued—does the division notify the EEOC of the settlement? And how does that work with communication between the agencies?

**[Catherine]:** Sure. Yeah. So once an order is issued, that's it between...as far as the case goes before the division or before EEOC. It's the same. You don't have to do anything else. EEOC is certainly not going to move forward with the case after there's been a final order and vice versa. And we do have communication between the two agencies, so everyone's on the same page.

**[Ari]:** So basically, if you've settled the complaint with the division, that EEOC charge is not going to...there will be no separate investigation by and in large part and the whole...the allegations of discrimination are essentially resolved at that point.

**[Catherine]:** Yes, everything that was filed under that case number is usually a DHR case number and then an EEOC case number. That is all concluded. I'm only clarifying that point because sometimes complainants have more than one complaint against the same employer. So if you're looking for a global settlement, you're going to want to make sure that all of those case numbers are included in the settlement paperwork.

**[Ari]:** Yes, that is a very, very important point, Catherine. So I think we're ending or excuse me, I think we're nearing the end of our second episode together. But before I let you go, I want to ask basically the million-dollar question, which is, Catherine, in your opinion, what can and should an employer do to make the settlement conference and the settlement process go smoothly?

**[Catherine]:** Sure. So, I mean, to start off by not answering your question, and it's best to avoid the whole situation entirely. Right. So that means making sure you're training your employees and your policies are all in accordance with New York state law and maybe even going above and beyond New York state requirements to have a diverse and inclusive workplace or school or place in a public accommodation. Once you get to the settlement conference, I guess I have a sort of "kindergarten rule" I like to follow. You have two ears and one mouth, so you want to listen to what the other party is saying. And try to limit emotion and listen to your attorney as well, which is, you know, it's easier for us to say, I guess. And but you know.

**[Ari]:** Catherine, can you just come on every week and just say that? No, I'm just saying.

**[Catherine]:** Absolutely. Listen to your attorney, because they're you know, we're a little bit more divorced emotionally from the case. And we've seen probably hundreds, if not more, cases and kind of have a reasonable expectation of how the process goes. And we can give you advice based on that. So if at all possible, try to divorce your emotions from the either financial or policy aspects that may come out of a settlement.

**[Ari]:** Yes, I think that makes sense. And that has been advice that we've really received, I think, for most of our guests in this segment, Catherine, which is take a breath, try not to take things personally. Obviously, it's very hard. I know it's hard, of course, for complainants, hard for respondents, because it's their business, their livelihood. But yes, just approaching it with an open, sound mind, I think.

**[Catherine]:** Absolutely.

**[Ari]:** Thank you so much, Catherine. We so appreciate you joining us for part two of this series. I think this was a great period on the end of the settlement conference sentence. To our listeners, next week, Catherine will be back with us and she will be joining us to talk about what we need to know about the public hearing. So definitely tune in next week. We'll see you then. Thanks, Catherine.

**[Catherine]:** Thanks, Ari.

**[Ari]:** The *Labor & Employment* Podcast is available on barclaydamon.com, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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