

Guidance Regarding Restrictive Settlement Agreement Terms

Settlement agreements that result from alternative dispute resolution (ADR) must comply with the applicable NRC Employee Protection regulation, e.g., 10 C.F.R. § 30.7, 40.7, 50.7, 61.9, 70.7, 72.10 or 76.7. Specifically, subsection (f) of these regulations states, in part, that no settlement agreement “may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) [of the regulation] including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC’s regulatory responsibilities.”

Simply put, while recognizing that there are many approaches to demonstrating compliance with the above referenced provision, each settlement agreement should state, in laymen’s terms, that the complainant is in no way discouraged or precluded from raising safety concerns or engaging in any other type of protected activity. For illustrative purposes, the following are examples of improvements made to the language contained in settlement agreements to ensure that they are compliant with the applicable Employee Protection regulation:

Example 1:

Section X. Right to Raise Safety Concern. Notwithstanding any other provision in this Agreement, [the complainant] understands that nothing in this Agreement precludes [him/her] from communicating, nor impairs or restricts in any way [his/her] ability to communicate, with the NRC or any other government agency, or representatives thereof, concerning any safety or workplace concerns [s/he] may have.

Modified to the following:

Section X. Right to Raise Safety Concern. Notwithstanding any other provision in this Agreement, [the complainant] understands that nothing in this Agreement precludes [him/her] from communicating, nor impairs or restricts in any way [his/her] ability to communicate, with the NRC or any other government agency, or representatives thereof, concerning any potential violations or other matters within NRC’s or other government agency’s regulatory responsibilities, or from testifying in any NRC proceeding, or before Congress, or at any Federal or State proceeding regarding any provision or proposed provision of the Atomic Energy Act or the Energy Reorganization Act.

Example 2:

Section X. Neither party shall disparage the other and [the complainant] shall be free from any impediments to recourse and use of [licensee’s] concerns resolution program, or similar programs operated by the NRC. [The complainant] shall not be subject to any action that chills or discourages disclosures of the type protected by the Energy Reorganization Act, or the rules and regulations of the NRC. Nothing in this Agreement shall be construed to prohibit [the complainant] from reporting any suspected instance of [licensee] illegal activity of any nature, any nuclear safety concern, any workplace safety concern, or any public concern to the NRC, the Department of Labor (DOL), or any other Federal or State governmental agency, and shall not be construed to prohibit [the complainant] from participating in any way in any Federal or State administrative, judicial, or legislative proceeding or investigation, except for the claims released by this Agreement, including [his/her] claim of discrimination as stated in the Report.

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Modified to the following:

Section X. Neither party shall disparage the other and [the complainant] shall be free from any impediments to recourse and use of [licensee's] concerns resolution program, or similar programs operated by the NRC. [The complainant] shall not be subject to any action that chills or discourages disclosures of the type protected by the Energy Reorganization Act, or the rules and regulations of the NRC. Nothing in this Agreement shall be construed to prohibit, restrict, or otherwise discourage [the complainant] from participating in a protected activity as defined in 10 C.F.R. 50.7, including, but not limited to, reporting any suspected instance of [licensee] illegal activity of any nature, any nuclear safety concern, any workplace safety concern, any public concern, or any other matter within the NRC's regulatory responsibilities to [licensee], [complainant's] employer, the NRC, the Department of Labor (DOL), or any other Federal or State governmental agency, and shall not be construed to prohibit [the complainant] from participating in any way in Federal or State administrative, judicial, or legislative proceeding or investigation, except for the claims released by this Agreement, including his claim of discrimination as stated in the Report.

Example 3:

Section X. Except as may be required by law, employee agrees that [s/he] has not and will not make any disparaging statement to current, former or prospective customers, contractors, vendors, shareholders, or employees of [licensee], its parent, subsidiaries, affiliates or successors, to any person or entity or governmental organization about [licensee], its parent, its affiliates, subsidiaries, shareholders, their officers, directors or employees, regardless of whether employee regards the statement to be true.

A "disparaging statement" was defined to be as follows:

Any communication, oral or written, which is intended, or would tend, to cause the recipient of the communication to question the business condition, quality of products and services, legal compliance, integrity, competence, fairness or good character of [licensee], its parent, subsidiaries, affiliates or successors or the person to whom the communication relates.

Since the definition of "disparaging statement" contained restrictions on communication regarding a host of issues including "legal compliance" and "integrity," it was found to be overly broad in potential violation of the NRC's Employee Protection regulation. The NRC recommended that the definition be modified or deleted to clarify that the complainant has the right to raise safety issues or engage in some other protected activity. Subsequently, the parties mutually agreed to delete it.