DEMAND/SETTLEMENT NEGOTIATIONS BOOKLET

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DEMAND/SETTLEMENT NEGOTIATIONS BOOKLET

The following provides a short overview of responses to some of the questions our clients ask about the demand and settlement negotiations in their case. Each case has its own set of facts that makes it virtually impossible for there to be only one answer applicable to all cases. However, the below may give you some insight into how your case may proceed. Of course, we want all of your questions to be answered and encourage you to call us, if you want to discuss your particular case.

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I. DEMAND LETTER

Settlement negotiations usually start when we send on your behalf the demand letter ("Demand Letter"), which commonly includes an Unpaid Wage and Overtime Spreadsheet ("Spreadsheet") to Employer that makes a settlement offer for resolving your claims against Employer. Most often Employer will challenge the facts in the Demand Letter and Spreadsheet. Employer will make an investigation to find documents, records, and witnesses that will dispute the facts we present to them. Please make sure we are aware of all facts, information, documents, and witnesses whether good or bad for your case.

The Demand Letter will include the initial settlement offer to resolve your case and represents the potential recovery you may receive if a jury at trial ultimately awards that amount. As discussed, you should not view the amount of the initial offer as the amount you will recover in your case because it usually is not. Instead, it is a negotiation tool meant to assist in our efforts to maximize your recovery by giving you the "room" to negotiate with Employer. The reasonable settlement amount for your case will likely be less because, as in all cases, there are pros and cons, including the following:

A. Based On Facts Most Favorable To You

The initial offer is based on the facts, records, and documents you have provided to us to date that most favor you. It does not necessarily take into account negative facts, records, and documents that Employer may present throughout your case, including at trial. Obviously, Employer will provide facts and documents favorable to it and either refuse to pay any amount or at least provide an amount substantially less.

B. Includes Amounts For Liquidated Damages

Your initial offer includes a claim for liquidated damages. Liquidated damages may be claimed by federal law in an amount equal to the unpaid wages only if Employer cannot establish that (1) its failure to pay minimum wage and/or overtime was in good faith and (2) it had reasonable grounds for believing its failure to pay minimum wage and/or overtime was not a violation of the FLSA. In our experience, employers usually try to establish both of these things so that the court will not award liquidated damages. If they are successful in establishing such, the amount of your recover will be significantly decreased.

C. Likely Based On A Three (3) Year Statute of Limitations

Your initial offer is likely based on a three (3) year statute of limitations. However, a three year statute of limitations can only be applied if an employer engaged in willful violation of the FLSA. Otherwise, it is a two (2) year statute of limitations. A willful violation is a high standard to achieve and seldom is accomplished. Accordingly, Employer will most likely claim that at most the two (2) year statute of limitations applies and may prevail on this issue because they do not believe they engaged in a willful violation.

Accordingly, you most likely may only recover unpaid wages and/or overtime, and liquidated damages for a period of two years prior to the date a lawsuit is filed with the court. However, your initial offer may be based on a period of three years prior to the date the lawsuit was filed with the court. If Employer establishes that a two (2) year statute of limitations is appropriate, the amount

you may potentially recover at trial will decreased.

II. COUNTER OFFERS AND COUNTER DEMAND

In our experience from prior cases, Employer will not respond to the Demand Letter or will provide a minimal counter-offer. We will attempt to further negotiate with Employer if there is a response. Of course, we will address with you offers we receive from Employer and will not accept or reject offers without your approval.

III. BENEFITS OF SETTLEMENT

There are benefits to settling your case that should be considered when (a) making a settlement offer or (b) deciding to accept or reject an offer from Employer. Some of them are listed below. Of course, if you wish to address these in more detail or others, please do not hesitate to let us know.

A. Resolution of Claim

Settlement resolves your FLSA claim earlier and without the need of a trial. By continuing on with litigation and trial, it may be several years or more before the case is resolved. For example, even if we prevail at trial, Employer can appeal the judgment. By settling, we should be able to conclude the matter so that you may receive your portion of the settlement money in a fairly short period of time after a settlement is reached.

B. More Likely to Receive Settlement Funds

You are more likely to actually receive the funds by settling. Sometimes employers are not solvent by the time a judgment is entered and even if we obtain a judgment, we may not be able to collect any funds from Employer based on the judgment. Accordingly, you need to pay particular attention to Employer's ability to pay a judgment because they may not have sufficient money and/or assets. Also, if we proceed into the discovery process, Employer will likely incur significant legal expenses to pay their attorney. This could potentially exhaust the money and/or assets they currently have and you may not recover from Employer.

C. Less Likely Employer Will Abandon or Dissolve Corporation

Even if Employer does have sufficient money and/or assets, they may decide to abandon or voluntarily dissolve the corporation in an attempt to avoid liability for any size demand or judgment. They may try to abandon or voluntarily dissolve the corporation but still continue to do similar business activities. While an attempt may be made to find assets, we do not handle this type of law and you

will need to find a separate attorney that does. Accordingly, if the corporation is abandoned or dissolved, you may not receive any recovery.

D. Settlement Avoids Extensive Discovery

If the case is not settled, the parties will most likely take extensive discovery that will include deposition of you and past and current employees of Employer. During this time, Employer may learn facts that weaken your claim. These facts may be used against you at trial to reduce or eliminate the amount of hours you claim you are owed. This will also add to the attorneys' fees and costs and will require the litigation to become more complicated.

You should also consider the amount of time you will likely be required to spend responding to discovery requests from Employer, which may include you (1) responding to (a) written interrogatories (questions), (b) requests to produce certain documents and records, and (c) requests to admit to certain facts and (2) give a deposition. Each is discussed in more detail below. For example, you may have to take a full day or more off of work because your deposition could last all day. Unfortunately, you will probably not be able to recover the lost wages that result from your time spent at a deposition.

E. Less Costs Incurred

While we have agreed to advance the costs associated with pursuing your case, these costs must be reimbursed when and if Employer pays a recovery amount. These costs can use up a substantial portion of the amount recovered, especially the longer a case is litigated and more discovery is taken. Some of the costs associated with litigation are listed in the agreement with you. They include, but are not limited to, the cost of filing suit, service of process, discovery, expert, document copies, electronic research, etc.

F. Withholdings and Other Deductions by Employer

An employer generally deducts withholdings and other deductions from the settlement check(s) for unpaid wages and overtime and/or liquidated damages. These amounts represent the payment of federal income and social security taxes, child support, wage garnishment, and other withholdings and/or deductions employer may be required by law, court order, and/or contract to withhold and/or deduct. The amount of any withholdings and/or deductions by an employer are often unknown during settlement negotiations and usually result in your recovery being less than the amount agreed to in settlement or awarded by the court/arbitrator(s) for unpaid wages and overtime and liquidated damages.

Employer determines the amount of withholdings and other deductions and John

Bales Attorneys does not participate in this process. Accordingly, John Bales Attorneys does not make any representations as to what such amounts will be or the amount of your recovery after withholdings and other deductions are subtracted by an employer. If you desire tax or financial advice or information, we recommend that you retain a separate attorney, accountant, or tax advisor practicing in these areas.

G. **Criminal Record**

Unfortunately, a criminal record for crimes that occurred in the past 10 years could be damaging to your case. Your credibility may be attacked by Employer based on your criminal record or other bad acts. If they succeed in attacking your credibility, the jury may believe Employer's assertions that you worked less overtime hours than you claim or that you did not work any overtime. This may cause the jury to find in favor of Employer or substantially reduce any judgment entered by the jury.

H. **Attorneys' Fees and Costs**

If litigation is commenced, your claim will likely be brought under the Fair Labor Standards Act ("FLSA"), Florida Minimum Wage Act ("FMWA"), and other applicable law. Under the FLSA, the Court may award payment of your attorneys' fees if you win your case. Generally, the Court may only award attorneys' fees to Employer under the FLSA if you are found to have filed your case in bad faith. Under the FMWA, a court may award attorneys' fees to the prevailing party whether that is you or Employer. In essence, if you pursue your claim under the FMWA and lose, the Court may order that you pay Employer's attorneys' fees.

IV. **ATTORNEYS' FEES AND COSTS INCURRED IN PURSUING EMPLOYER FOR LIABILITY AND YOUR DAMAGES FOR UNPAID WAGES AND OVERTIME**

If you prevail in establishing employer's liability and your damages, the FLSA provides for a "fee shift," which means that Employer must pay a reasonable amount of attorneys' fees and costs incurred by us in pursuing your case. Throughout your case, we will address Employer's liability and your damages for unpaid wages and overtime first and then address the amount for attorneys' fees and costs incurred in pursuing employer's liability and your damages for unpaid wages.

The Authority to Represent and Contingency Fee Agreement ("Agreement") that you signed before the start of our representation determines the amount of attorneys' fees and costs. The Agreement establishes that the amount of attorneys' fees and costs paid by Employer may not necessarily represent your complete obligation to John Bales Attorneys because the Agreement entitles John Bales Attorneys to either (1) the

applicable percentages of the total amount recovered as set forth in the Agreement, (2) the total amount of fees awarded by the Court or arbitrator, or (3) the total amount of fees a party agreed in settlement to pay, whichever is greater.

The Agreement states, in part, the following:

> The CLIENT understands and agrees that the attorneys' fee and costs amount will be negotiated with the at fault party separately from and without regard to the amounts of the unpaid/lost wages or other damages, if any, that the CLIENT is seeking. The CLIENT further understands and agrees that any check made payable to the FIRM for attorneys' fees and costs may, at the sole discretion of the FIRM, be deposited directly into the FIRM's operating account.
>
> If a party is required by contract, statute, rule, or otherwise, or a party agreed in settlement, to pay fees for legal services, the CLIENT agrees that the FIRM's fees shall be based on either the applicable percentages of the total amount recovered as set forth above in this Contract, the total amount of fees awarded by the Court or arbitrator, or the total amount of fees a party agreed in settlement to pay, whichever is greater.

These provisions are included in the Agreement because the FLSA and similar laws include what is commonly called "an attorneys' fee shift provision". This means that employers are required to pay an employee's reasonable attorneys' fees and costs when the employee prevails in the case. This provision is included in these laws because, in most cases, without this fee shift an employee would be unable to retain an attorney to accept the case on a contingency fee basis or could not afford to pay an attorney at standard hourly billing rates. It is rather common for the employer to aggressively defend in these cases, and the attorneys' fees and costs will often exceed the amount of damages suffered by the employee. In such an event, an employee like you could not obtain an attorney to represent him or her and would have little recourse against an employer who violated these laws.

Unfortunately, employers in most cases will vigorously defend against paying you any amount for failing to pay unpaid wages and/or overtime. This will require our firm to expend a substantial amount of attorneys' time and incur significant costs on your behalf to pursue your claim. Consequently, in most cases, the amount recovered from Employer for payment of attorneys' fees and costs is more than the amount recovered for unpaid wages and/or overtime.

V. **RELEASE**

If your case is settled, you will likely be required to sign a release that includes a release of Employer from further responsibility and liability for at least your claims against them for violating the FLSA by failing to pay wages and/or overtime compensation. Employer

may also insist that you release them for all other claims including past and present injuries, damages, and losses sustained by you relating to Employer. Essentially, if a settlement is reached and you sign a release, you will most likely not be able to bring any further claims against the Employer.

VI. LITIGATION PROCESS

If we are unable to reach a settlement agreement with Employer during the pre-suit period, we will probably begin the litigation process, which can sometime be a lengthy process without any guarantee you will ever recover. The following outlines the typical litigation process. Of course, your case may be different, but this will give you a basic understanding of the process.

A. Complaint

A complaint is a court document that initiates your lawsuit by stating your claims, the wrongful conduct of Employer, and the relief that you seek. If a settlement agreement cannot be reached, we will draft the complaint and file it with the Clerk of Court for the Florida Circuit Court where your job was located. Once filed, we will attempt to have the complaint served upon Employer, which can take thirty (30) days or more depending upon the speed of the process serving company hired for the purpose of service.

B. Removal to Federal Court

In most cases, Employer will remove your case from the Florida Circuit Court where your case was filed to the United States District Court. This means that you case will be heard by a federal court and judge. Employer will have thirty (30) days from the date they were served to remove the case to federal court. The overall removal process can take months.

C. Answer

Generally, Employer will have twenty (20) days to respond to the complaint after it is served. However, if the case was removed to federal court, Employer may have additional time to file an answer.

D. Discovery

After the answer is filed, we will begin the discovery process that will most likely include Employer requiring you to (1) respond to (a) written interrogatories (questions), (b) requests to produce certain documents and records, and (c) requests to admit to certain facts and (2) give a deposition. During this process, Employer may learn facts that weaken your claim or call into question your

credibility based on any negative past conduct and witness testimony. Employer may be able to use this against you at trial to cause the jury to find in favor of Employer or substantially reduce any judgment entered by the jury. The following discusses some of the discovery tools that may be used in your case.

1. Interrogatories

Interrogatories are questions that you are required to provide your sworn responses to that can be used against you at trial, including for the purpose of impeaching your credibility. If interrogatories are served on you, you should carefully read the questions and write down all the information you have including dates, witnesses, addresses, facts, and similar information that responds to each interrogatory. It is important that you answer each interrogatory that is given to you unless the response calls for information that is irrelevant or protected by privilege. We will help you determine what responses request irrelevant and/or privileged information so that you make the proper objection to them.

2. Request for Production

Request for Production requests you provide certain documents to Employer that may help or hurt your case. If request for production are served on you, you should respond to each request unless it asks for irrelevant or privileged documents. We will help you determine what responses request irrelevant and/or privileged information so that you make the proper objection to them.

3. Request for Admissions

Request for Admissions request you admit certain facts as true in your case. As to each request made, you must respond by admitting or denying the facts. Any fact that you admit as true is deemed not to be in dispute in your case and we are unable to argue that that fact is not true at trial. If request for admission are served on you, you should respond to each request unless it asks for irrelevant or privileged information. We will help you determine what responses request irrelevant and/or privileged information so that you make the proper objection to them. Any request that you fail to provide an answer to, will be deemed admitted.

4. Depositions

A deposition is your oral testimony taken under oath by a court reporter in response to questions by other attorneys, and in some cases, by an attorney representing you. The testimony is transcribed after the

deposition is concluded and is available for use by either side for summary judgment or trial. A judge or jury is not present during the deposition; only the lawyers, the witness, the court reporter, and a representative of each party usually attend. In all likelihood, the proceedings will be held in one of the attorneys' offices or in a court reporter's office.

If a deposition is scheduled in your case, we will provide to you the *Deposition Preparation Booklet* that many clients have found helpful in preparing them for their deposition. The booklet discusses many topics relating to deposition including the following: (a) purpose of a deposition, (b) what to wear, and (c) suggestions relating to your testimony.

E. Mediation

Mediation is a confidential, informal conference where the parties to a dispute meet with a neutral, impartial person called a mediator, in an effort to reach a mutually acceptable agreement. A judge or jury is not present during a Mediation; only the lawyers, the parties, and the mediator. The mediator controls the mediation, but does not have authority to make a binding decision or force the parties to accept a settlement with which they are not satisfied. The mediator helps the parties voluntarily reach a settlement of the dispute. He or she is not to be bias in favor of either party, but may bring up positive and negative issues in an attempt to have all parties understand the entire case.

If mediation is scheduled in your case, we will provide to you the *Mediation Preparation Booklet* that many clients have found helpful to prepare them for their mediation. The booklet discusses many topics relating to mediation including the purpose of mediation and what to wear.

F. Summary Judgment

Summary judgment takes place after discovery has finished and before the trial date. It can take place at approximately the same time as mediation, or shortly afterward. During summary judgment the opposing party has an opportunity to argue to the judge that based on the facts uncovered during discovery, the law is clear that you could not win at trial. In the event you lose at summary judgment, your case is finished and you may or may not appeal the judge's decision. If you lose at summary judgment you may also be required to pay for the opposing party's costs of litigation. Your attorney will educate you about the likelihood of succeeding at summary judgment as your cases progresses. It is difficult to ascertain a likelihood of success when discovery is not yet complete.

G. Trial

The purpose of a jury trial is to review facts of your claim, including your lost wages. If trial is scheduled in your case, we will provide to you the *Trial Preparation Booklet* that many clients have found helpful to prepare them for their trial. The booklet discusses many topics relating to trial.

H. Appeal

Please be advised that even if we prevail at trial, Employer can appeal the judgment or sometimes may not be solvent by the time a judgment is entered. As you know, our contract with you provides that we will not represent you in an appeal unless a separate agreement can be reached. In any event, even if we obtain a judgment we may not be able to collect any funds from Employer based on the judgment. Accordingly, you need to pay particular attention to Employer's ability to pay a judgment because they may not have sufficient money and/or assets. Also, if we proceed into the discovery process, Employer will likely incur significant legal expenses to pay their attorney. This could potentially exhaust the money and/or assets they currently have and you may not recover from Employer. Even if Employer does have sufficient money and/or assets, they may decide to abandon or voluntarily dissolve the corporation in an attempt to avoid liability for any size demand or judgment.

I. Tolling Agreement

We may attempt to enter into a tolling agreement with Employer if it appears settlement negotiations have the potential of being successful. A tolling agreement is essentially a contract between you and Employer in which Employer agrees to waive it rights to contend that (1) your claim for non-payment of wages and overtime under the FLSA are barred with respect to the time period that is specified in the tolling agreement and (2) an administrative agency or court is without jurisdiction to entertain such claims under the FLSA. In essence, a tolling agreement provides that if you file a lawsuit before the expiration of it, Employer should consider the date of filing the lawsuit as the effective date of the tolling agreement, if you file a lawsuit before it expires.