



Rule 68 Offer of Judgment: Advantageous for Defendant-Employers

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Under the Federal Rules of Civil Procedure Rule 68 (“Rule”), offers of judgment have become a cost effective way for employers to quickly resolve individual, collective or class actions. For example, in employment cases, the Rule effectively imposes penalties on a plaintiff-employee (1) who rejects a reasonable settlement offer made by a defendant-employer and (2) is unable to obtain a verdict that exceeds that settlement offer.

Pursuant to Rule 68 subsection (a), an offer of judgment is a written offer containing a specified dollar amount to settle the plaintiff’s claims in full. It may also include attorney’s fees and other items. Applying the rule to the employment context, the Rule provides that a defendant-employer may make an offer to a plaintiff-employee within at least 14 days before the trial date. The offer will contain a judgment amount, offered on specified terms that may also include the costs accrued by that time. If the employee wishes to accept the offer, the acceptance must be made in writing within 14 days from the date the employee was served with the offer. At that point and time, either party may file the offer, attached with the notice of acceptance and the proof of service, to the clerk to enter judgment. [1]

If the employee does not accept the offer, subsection (b) of the Rule provides that the offer will be deemed to be “withdrawn,” but will not preclude the employer from making another offer later in the litigation proceeding. Also, the evidence of an unaccepted offer is admissible only for cost determinations. [2]

With respect to the costs of litigation in actions involving unaccepted offers, if the plaintiff obtains a judgment that is less in value than the unaccepted offer, the plaintiff is liable to pay for all post-offer costs.[3] Correspondingly, if the plaintiff obtains a court judgment that is greater than the offer of judgment, then the plaintiff does not have to pay for any post-offer costs.[4]

And perhaps more importantly, an employer’s offer of judgment that is the equivalent to an employee’s individual claim for liability, may moot the individually named plaintiff’s action and any collective action that the individually named plaintiff brings against the employer.

The possibility of a rejected Rule 68 offer mooting a named plaintiff’s collective action because the offer would have settled the plaintiff’s individual injury, was recently decided by the United States Supreme Court in *Genesis Healthcare v. Symczyk*, No. 11-1059, 2013 U.S. LEXIS 3157 (U.S. 2013). There, in a 5-4 decision, the Supreme Court found that a plaintiff-employee’s rejection of an employer’s offer of judgment rendered her individual and entire collective action moot because the offer of judgment would have satisfied the plaintiff’s individual claim in its entirety.

As permitted under the Federal Labor Standards Act (“FLSA”), the plaintiff in *Genesis* brought a wage claim against her employer on behalf of herself and “other similarly situated” employees. The plaintiff’s complaint alleged that Genesis violated FLSA when the company automatically deducted 30-minutes of employee pay from employee salaries for daily meal breaks regardless if the employees ever actually took a meal break. In response to the plaintiff’s claim, Genesis made an offer of judgment in the amount of \$7,500 to settle the plaintiff’s individual claim for the alleged unpaid wages. Although the plaintiff did not accept the offer, she conceded that the offer was enough to satisfy her individual claim in its entirety.

After non-acceptance, Genesis moved to dismiss the plaintiff’s claim for lack of subject matter jurisdiction. Specifically, Genesis argued that because Genesis offered to settle the plaintiff’s individual claim in its entirety and no other plaintiff had yet joined the action, the plaintiff’s FLSA collective action was rendered moot. The District Court agreed and dismissed the case. On appeal, the Third Circuit reversed the District Court’s ruling and held that although the Rule 68 offer mooted the individual plaintiff’s claim, the offer could not be used to merely “pick off” named plaintiffs in collective actions and therefore, the collective action was not moot.

The Supreme Court, however, agreeing with the decision of the District Court, reversed the Third Circuit’s decision and dismissed the plaintiff-respondent’s collective action for lack of subject matter jurisdiction. The Supreme Court held that the mootness of the respondent’s individual claim thereby mooted her entire collective action.[5] Thus, the cause of action lacked any controversy in need of justiciable review.

In light of the Supreme Court’s decision, Rule 68 has the potential to provide employers with pivotal benefits in defending a case against a plaintiff. Not only can the offer serve as vehicle to shift post-offer costs to the employee, but it also has the potential to remove sole plaintiffs in collective actions and thereby dismiss the entire collective action brought against the employer. It will be interesting to see what impact the Court’s decision will have on future class actions. As you can see, a Rule 68 offer is a powerful tool that employers should always strongly consider in any employment action.

If you or your company would like more information on employment law, contact James G. Ryan at jryan@cullenanddykman.com or via his direct line at 516-357-3750.

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[1] Fed. R. Civ. P. 68 (a).

[2] Fed. R. Civ. P. 68(b).

[3] Fed. R. Civ. P. 68(c). Since Rule 68 is silent on whether costs in the offer include attorney fees, prevailing defendants are more likely to recover attorney fees from the plaintiff if the underlying statute for the claim for relief contains a fee provision and the offer explicitly states that its costs include attorney fees.

[4] Fed. R. Civ. P. 68(d).

[5] The Supreme Court did not explicitly rule on whether a Rule 68 offer moots a plaintiff's individual claim. The Supreme Court explained that there is currently a circuit split on this issue, however, because the respondent-employee conceded that the offer of judgment satisfied her claim in its entirety, this issue was not properly reserved on appeal.