

Offers of Judgment under FRCP Rule 68 in Employment Cases

A Practical Guidance® Practice Note by A. Jonathan Trafimow and Yining Bei,
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68 offers in FLSA cases need judicial review. The effect of accepted and unaccepted offers on mootness varies, with accepted offers terminating the case and unaccepted offers not automatically mootting claims. The Supreme Court's decision in *Campbell-Ewald* clarified that unaccepted offers do not moot individual claims, leaving open questions about direct tenders of complete relief.

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The LexisNexis practice note discusses the use of Federal Rule of Civil Procedure 68 (FRCP 68) in employment cases, which allows defendants to make offers of judgment to encourage settlement and avoid trial. If a plaintiff rejects an offer and receives a less favorable judgment, they must pay the defendant's post-offer costs. The rule is particularly relevant in cases involving statutes like Title VII, FLSA, ADA, ADEA, and § 1983, which may include attorney's fees as part of "costs." The inclusion of attorney's fees in "costs" depends on the statute, affecting the accrual of fees after a Rule 68 offer. Potential downsides of Rule 68 offers include public entry of judgment against the defendant, timing issues affecting pre-offer costs, and limited impact in non-fee-shifting cases. Key considerations for making an offer include the statutes involved, early and accurate case assessment, client objectives, and timing. Precision in drafting offers is crucial to avoid ambiguities. State laws on offers of judgment vary, with some allowing both parties to make offers. FLSA settlements typically require court or DOL approval, and courts are divided on whether Rule

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Employment lawyer and litigator Jon Trafimow counsels clients on all aspects of employment-related issues, conducts workplace investigations and is an experienced trial lawyer. Jon is also an experienced mediator.

Jon's advice and counsel practice includes guiding clients who confront myriad workplace requests and complaints, ranging from allegations of violations of policy to harassment, discrimination and retaliation. He assists clients with disciplinary matters, addressing requests for leaves of absence for various reasons, managing reductions-in-force, drafting handbooks, severance agreements and other documents, and workplace training. The advice and counsel aspect of Jon's practice also includes workplace investigations.

Jon is an experienced litigator and trial lawyer. He has been counsel of record in numerous reported and unreported decisions. Jon is an experienced mediator, and brings those skills to benefit his clients seeking resolution of their disputes. The focus of his litigation is on claims of workplace discrimination, harassment and retaliation, but extends to claims of breach of contract and other employer-employee disputes.

Jon was previously a Fellow of the Coro Foundation Leadership New York Program. He frequently writes and lectures on employment law topics and has authored a book chapter (updated) entitled "Discrimination", published in the HR Guide to Employment Law: A Practical Compliance Reference (2009) and co-author of "The Sovereign Power of the State: A Proposed Theory of Accommodation," 12 Cardozo L.Rev.951.

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Yining Bei's practice focuses on high-stakes, complex commercial litigation, white collar and securities litigation, and international arbitration. Yining integrates her passion for legal research, her foreign language skills, and global experience into her work.

Prior to joining Carter Ledyard in 2024, Yining served as a judicial intern to the Honorable Roslynn R. Mauskopf at the District Court for the Eastern District of New York. She was also a student advocate at the Duke University Immigration Law Clinic, representing refugees in their defensive asylum claims.

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