



Don't Let the EEOC Take the Air Out of Your Severance Agreements

By Mary Knoblauch



Every severance agreement an employer offers to a departing employee includes a release of claims, typically in exchange for severance pay. Companies rely on these agreements to eliminate the risk of lawsuits. The Equal Employment Opportunity Commission, however, considers it has a vital role in making sure that there can still be employee lawsuits notwithstanding severance agreements.

In its most recent national strategic enforcement plan, the EEOC announced one of its top priorities is “preserving access to the legal system.” (EEOC Strategic Enforcement Plan FY 2013-2016 at p. 10 (Dec. 17, 2012), available at www.eeoc.gov.) The EEOC intends to “target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC’s investigative or enforcement efforts.” (Id.) The EEOC will scrutinize “overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination.” (Id.)

It should come as no surprise then that the EEOC is challenging a large employer’s severance agreement in a recently-filed federal lawsuit, *EEOC v. CVS Pharmacy, Inc.* What is surprising is that the EEOC is charging CVS Caremark with using an “overly broad, misleading and unenforceable” severance agreement, in

violation of Title VII of the Civil Rights Act, even though CVS’s severance agreement states its covenant not to sue was not intended to interfere with the employee’s right to participate in and cooperate with a government agency’s proceeding or investigation. Nevertheless, the EEOC claims that the CVS agreement unlawfully violated employees’ rights to file discrimination charges and communicate and cooperate with the EEOC. In the EEOC’s press release, its regional attorney, John Hendrickson stated, “[T]he right to communicate with the EEOC is a right that is protected by federal law. When an employer attempts to limit that communication, the employer effectively is attempting to buy employee silence about potential violations of the law. Put simply, that is a deal that employers cannot lawfully make.”

The EEOC takes issue with several provisions in the CVS agreement:

- The no cooperation clause requires an employee to notify CVS’s general counsel upon receipt of a subpoena or governmental inquiry.
- The non-disparagement clause precludes an employee from making “any statements that disparage the business or reputation of the Corporation, and/or any officer, director, or employee of the Corporation.”
- The non-disclosure of confidential information clause prohibits an employee from disclosing personnel-related information without prior written

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permission from CVS.

- The release of claims includes a release of all “charges” and “any claim of unlawful discrimination of any kind.”
- The “no pending actions; covenant not to sue” clause requires the employee to represent that the employee had not filed a complaint with any government agency and that the employee agreed not to file “any action, lawsuit, complaint or proceeding” asserting released claims. The employee also agreed to reimburse CVS for any legal fees that CVS incurred as a result of a breach of this clause.

The EEOC calls the carve-out allowing an employee to participate in a charge and cooperate with the EEOC a “single qualifying sentence that is not repeated anywhere else” in “the five-page single spaced” agreement. As a remedy, in addition to enjoining use of the agreement, the EEOC seeks to permit the employees who signed the agreement to bring charges against CVS. The EEOC seeks to take the air out of all of these agreements.

This remedy is not without precedent. Baker & Taylor reached a consent agreement with the EEOC in July 2013 that had a similar remedy in EEOC v. Baker & Taylor, Inc. If pressed to prove its case

against CVS, the EEOC may not prevail. However, this lawsuit demonstrates that the EEOC will continue to scrutinize severance agreements.

So what is an employer to do?

- Do not require an employee to provide notice to the company before communicating with the EEOC or another government agency.
- Make sure the non-disparagement clause has an exception for communications with the EEOC or another government agency.
- Do not characterize personnel-related information as confidential information.
- Include a highlighted paragraph stating that nothing in the agreement is intended to preclude the employee from cooperating with the EEOC and other enforcement agencies or filing a charge.
- State that the employee waives the right to recover damages or other individual relief in connection with any charge filed.

Following these tips when drafting a severance agreement will help an employer breathe easy and avoid scrutiny by the EEOC.

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