Severance Agreements: The New Lightning Rod

Insights
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Remember 2010? Not that long ago, yet as of that year, employers could rest pretty comfortably at night knowing that their garden-variety workplace rules would instill peace and control at the plant, store, or office, *not* subject them to monetary penalties, governmental oversight, and a not-so-coveted spot on a federal agency's website list of settlements.

In 2014, many employers, and certainly employment lawyers, are well aware of the forceful effort of the National Labor Relations Board to infiltrate even nonunionized workplaces, by peppering attacks on provisions found in almost any employee handbook: provisions governing at-will employment, employee confidentiality, and employees' use of social media. Words commonly used by management lawyers about the Board's new approach include "assault," "aggressive," and "war."

Now joining the attack, the EEOC has made recent headlines by filing two lawsuits – one under Title VII and one under the Age Discrimination in Employment Act (ADEA) – against companies based on fairly generic severance agreements with employees. In *EEOC v. CVS*, the agency alleges that the severance agreement unlawfully violates employees' right to communicate with the EEOC and file discrimination charges.

On the heels of the CVS litigation, the EEOC brought suit against a second company, CollegeAmerica Denver, with similar allegations relating to that employer's severance agreement. With these two lawsuits pending, the message to employers across the country is clear: take a close look at your severance agreements.

So What's The Problem?

From any employer's perspective, the terms that trouble the EEOC are truly "garden variety." In fact, a review of the agreements at issue in those two cases will likely induce a reaction for most of us along the lines of "looks pretty standard to me." A closer look at the complaints in both of the lawsuits clarifies what the EEOC considers problematic and may inform employers' strategy for drafting severance agreements going forward.

In the CVS lawsuit, the EEOC alleges that CVS "engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII" by "conditioning receipt of severance benefits on FLSA exempt non-store employees' agreement to a Separation Agreement that deters the filing of

charges and interferes with employees' ability to communicate voluntarily with the EEOC" and state fair employment practice agencies.

The EEOC found the sheer length of the agreement (five-pages, single spaced) noteworthy. But it honed in on phrasing in standard cooperation, nondisparagement, nondisclosure, release-of-claims, and covenant-not-to-sue clauses, to allege that the agreement interferes with an employee's right to file a charge with the EEOC or a state agency (sometimes referred to as a Fair Employment Practices Agency or FEPA), and to participate and cooperate with an investigation conducted by the EEOC or FEPAs.

The EEOC's allegations against CollegeAmerica echo the same views. In that case, the EEOC alleges that a separation agreement "chills and interferes with employees' rights to file charges and/or cooperate with the Commission and state [FEPAs] in violation of [the ADEA] and/or assist others pursuing discrimination claims against CollegeAmerica . . . ." Like the CVS separation agreement, the CollegeAmerica agreement included rather standard cooperation and nondisparagement provisions. But the "no claims" provision purportedly prohibits employees from even contacting any governmental or regulatory agency for the purpose of filing a complaint or grievance. The agreement also stated "[e]xcept as compelled by law, Employee will not assist any other private person or business in their pursuit of claims against the Company." Unlike the CVS agreement, the CollegeAmerica agreement did not include a specific carve-out provision that makes exception for any claim that an employee cannot lawfully waive.

Despite key differences in the two agreements, the common thread in both lawsuits is the EEOC's view that if a separation agreement can be read to deter an employee from filing a charge, it is unlawful, even if it does not explicitly *prohibit* the employee from filing a charge. This is true even where, as in the case of CVS, the agreement contains an explicit carve-out provision making clear that nothing in the agreement prohibits the employee from participating in any federal, state, or local agency proceeding.

The Bigger Picture

The lawsuit against CVS is by no means the EEOC's first lawsuit over a severance agreement. Back in 2006, the EEOC sued Kodak over its standard separation agreement. The resulting consent decree required Kodak to include specific language in any future release agreement. That language included the following disclaimer:

> ***Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or lawsuit filed by you or by anyone else on your behalf.***

Fast forward seven years to 2013: the EEOC now makes clear that it 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." Those policies and practices include retaliatory actions, overly broad waivers, and settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination.

Sure enough, in May 2013, the EEOC's Chicago District Office filed suit against Baker & Taylor, Inc. alleging that the employer's severance agreements interfered with employees' rights to file charges. In the 2013 consent decree, the EEOC again required the employer to include specific language in any future release agreement. But while the EEOC may have been content with the above language back in 2006, this time it added a statement that "[e]mployees retain the right to participate in such any [sic] action **and to recover any appropriate relief**," despite that the EEOC had expressly agreed that an employer may require an employee to waive any right to recover monetary damages in a release agreement in any post-settlement EEOC action.

Where Do We Go From Here?

Given the recency of the two lawsuits (one filed in February of this year, the second in April), it is too early to know their significance. CVS has filed a motion to dismiss and the court recently allowed the Retail Litigation Center to file an amicus brief in support. CollegeAmerica may well follow the same course. The only clear message from the litigation is that the EEOC has joined forces with the NLRB to dissect common employment documentation and attempt to further curtail employers' rights.

Perhaps for now the best approach is to modify your existing severance agreements to include a stand-alone (i.e., conspicuous) provision that leaves no doubt that nothing in the agreement is intended to interfere with an employee's rights under federal, state, or local civil rights or fair employment practice laws to file or institute a charge of discrimination, participate in any such agency proceeding, or cooperate in an investigation by any such agency. The provision could also state that any such action is not a breach of the agreement's confidentiality, nondisparagement, or cooperation provisions.

But despite the EEOC's inclusion of language purporting to allow an employee to "recover any appropriate relief" in the Baker & Taylor consent decree, it seems unnecessary, at least for now, for employers to go this far, particularly in light of the Kodak consent decree language. This approach represents a balance between the important interests in including confidentiality, non-disparagement, and cooperation clauses in severance agreements with the risk that these clauses may be found to violate employees' rights.

Stay tuned.

For more information, contact the author at JHendrick@fisherphillips.com or 214.220.9100