The EEOC's Frontal Assault on Severance Agreements

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Employers routinely offer departing employees separation agreements, whether as part of a reduction in force or in connection with an individual termination. These separation agreements typically include enhanced monetary benefits in exchange for a broad release of claims and promises not to sue.

Such agreements are the very definition of a win-win proposition: the employee receives additional monies or other consideration to which she was not otherwise entitled, and the employer receives the assurance that it will not become entangled in litigation.

This seemingly uncontroversial arrangement is under attack in the U.S. Equal Employment Opportunity Commission's federal lawsuit against CVS Pharmacy Inc. that was filed on Feb. 7, 2014. In that lawsuit, the EEOC alleges that a separation agreement tendered by CVS to departing employees was "overly broad, misleading and unenforceable," and supposedly "interfered with employees' rights to file charges with the U.S. Equal Employment Opportunity Commission and Fair Employment Practices Agencies."

What were the onerous and offending provisions? The EEOC singled out five as problematic:

1. A *cooperation* clause that requires former employees who have been contacted by any administrative agency to contact CVS's general counsel promptly.
2. A *nondisparagement* clause that prevents former employees from speaking negatively about the employer.
3. A *nondisclosure of confidential information* clause.
4. A *general release of claims* that waives employee rights to pursue potential discrimination claims.
5. A *covenant not to sue*, preventing former employees from suing over released claims.

With the possible exception of the cooperation clause, all of the provisions attacked by the EEOC are commonplace in separation agreements—with good reason, as they advance the goal of buying peace with the departing employee, who is often receiving substantial monetary and other benefits. The EEOC's lawsuit takes pains to point out that the provisions at issue were supposedly buried in five pages of small print. Yet, the EEOC itself is not averse to relying upon and enforcing documents

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that contain far more detail than the CVS agreement it attacks in its recent lawsuit. It is not uncommon for the EEOC to propose and enter into consent decrees that are 15, 20 or even 30 pages long, filled with dense, technical language. For example, see the densely worded, 25-page settlement decree by the EEOC [PDF] that instructs an employer on routine matters such as how to keep interview information and how to email settlement packages.

The EEOC's lawsuit may very well have the perverse effect of discouraging employers from entering into voluntary severance arrangements with departing employees—depriving those employees of needed benefits. Without the ability to safely buy peace, employers may be saddled with needless litigation that could have otherwise been avoided, to the benefit of both sides. These hardly seem like the kind of outcomes the EEOC should be promoting with its scarce litigation resources.

This lawsuit bears close monitoring in light of its potential ramifications for severance agreements. If there is any silver lining to the lawsuit, it is the EEOC's singling out of the following fairly standard clause as being "buried" too deep in the document:

"Nothing in this paragraph is intended to or shall interfere with employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this agreement prohibit employee from cooperating with any such agency in its investigation."

The possible implication is that the same language would be deemed effective by the EEOC if highlighted better or given more prominence in the document. Certainly, employers need to take care that they include language that clearly and unequivocally preserves the employee's right to communicate with state and federal agencies, and that such language is set apart in such a manner that no one could claim the employee or their counsel would have overlooked it. Even this, however, may not be enough to satisfy the EEOC.

Only time will tell how the court will address this issue. In the meantime, as always, employers should seek legal counsel before tendering separation agreements to departing employees.

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