

Practice Update

EEOC Alleges that Standard Severance Agreement Language Violated Title VII

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Certain standard provisions contained in separation agreements commonly used by employers violate federal law, according to the Equal Employment Opportunity Commission (“EEOC”). Specifically, EEOC in a suit filed in Illinois against CVS Pharmacy, Inc. claims that routine non-disparagement, confidentiality, cooperation, and covenant not-to-sue provisions violate employees’ rights under Title VII. EEOC said that a CVS separation agreement – used with about 600 former employees – unlawfully interferes with the right of employees to: (1) file charges with EEOC and state and local fair employment agencies; and (2) to communicate with, and to participate in proceedings conducted by EEOC and state and local fair employment agencies. The language alleged by EEOC to be unlawful can be found in most separation agreements.

The suit focuses on the following language in the CVS separation agreement, which EEOC italicized in its complaint:

1. “Cooperation. In the event the employee receives a subpoena, deposition notice, interview request, or another inquiry, process or order relating to any civil, criminal or *administrative investigation*, suit, proceeding or other legal matter relating to the Corporation from any *investigator*, attorney or

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any other third party, *Employee agrees to promptly notify the Company's General Counsel by telephone and in writing.*"

2. "Non-Disparagement. Employee will not make any statements that disparage the business or reputation of the Corporation and/or any officer, director or employee of the Corporation."
3. "General Release of Claims. Employee hereby releases and forever discharges CVS Caremark Corporation . . . from any and all causes of action, lawsuits, proceedings, complaints, *charges*, debts, contracts, judgments, damages, claims and attorneys' fees against the Released Parties, whether known or unknown, which Employee has ever had, now has, or which the Employee. . . may have prior to the date of this Agreement . . . *The Released Claims include . . any claim of unlawful discrimination of any kind.*"
4. "No Pending Actions/Covenant not to Sue. Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed, or initiated, any *complaint*, claim, action or lawsuit of any kind against any of the Released Parties in any federal, state or local court, or agency. Employee agrees *not to initiate or file, or cause to be initiated or filed, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties . . . Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this Paragraph by Employee.*"
5. EEOC further highlighted the fact that the Agreement entitles CVS to attorney's fees in obtaining equitable relief or damages for a violation.

EEOC's complaint does not explain how the identified language allegedly interferes with the protected rights of employees, leaving employers to

speculate as to EEOC's reasoning through its use of italics.

In its April 10, 1997 "Enforcement Guidance on Non-Waivable Employee Rights under Equal Employment Opportunity Commission Enforced Statutes," EEOC stated that "an employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing or proceeding" under the employment laws enforced by EEOC. Accordingly, prudent employers have consistently included a carve-out in their agreements that the "covenant not-to-sue" provision does not prevent an employee from engaging in such protected activities. What is alarming in the CVS case is that the agreements at issue did contain such an exception, which was nonetheless deemed by EEOC to be insufficient.

Recognizing that the lawsuit simply represents EEOC's position, and there has been no judicial determination as to the merit of EEOC's claims, employers have to now consider whether to make changes to their separation agreements pending a court ruling on this lawsuit. Reasoning from the italicized phrases in EEOC's complaint, the following alterations may be considered:

1. Removing any reference to "administrative proceedings" in cooperation, release, or covenant not-to-sue clauses;
2. Clarifying that "non-disparagement" language does not prevent an employee from filing a charge, testifying, assisting or participating in any manner in an EEOC investigation, hearing, or proceeding;
3. Removing references to "charges" in release covenants;
4. Removing "agency" language from the covenant not to sue provision and specifically limiting the covenant not to sue to federal or state judicial forums, while specifying that the employee

waives the right to individual recovery in any lawsuit brought by EEOC.

As many times occurs, employers have to now make a business judgment as to whether to make these changes now or to see how the lawsuit is decided in court.

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