

February 25, 2014

## EEOC Attacks Common Separation Agreement Provisions

A new lawsuit filed by the Equal Employment Opportunity Commission (EEOC) suggests that common separation agreement provisions may be construed as interfering with an employee's right to file administrative charges and participate in investigations under Title VII of the Civil Rights Act of 1964 – even if the separation agreement explicitly acknowledges an employee's statutory right to participate in proceedings and cooperate with the EEOC.

In the recent suit filed against CVS Pharmacy in the U.S. District Court for the Northern District of Illinois (*EEOC v. CVS Pharmacy, Inc.*, No. 1:14-cv-00863 (N.D. Ill.)), the EEOC took issue with provisions of the retailer's standard "*five-page single spaced Separation Agreement*" (emphasis in original). The EEOC singled out these paragraphs:

- a cooperation clause, requiring the employee to notify CVS's general counsel if the employee received, among other things, any type of inquiry, notice or order relating to an administrative investigation or other proceeding;
- a non-disparagement clause, prohibiting the employee from disparaging CVS;
- a confidentiality provision, prohibiting the employee from disclosing any personnel information;
- a general release, including the release of any discrimination claims;
- a covenant not to sue, which applied to "any complaint, claim, action or lawsuit of any kind" in any court or agency, but expressly *preserved* the employee's statutory right to "participate in a proceeding with," or cooperate with, any agency enforcing discrimination laws; and
- an attorneys' fees provision, requiring the employee to reimburse CVS for reasonable attorneys' fees incurred in the event the employee breached the Separation Agreement.

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With respect to the covenant not to sue, the EEOC expressed concern that the language effectively prevented a settling employee from filing an administrative charge of discrimination, despite the EEOC's longstanding position that settling employees cannot be required to waive their right to file administrative charges of discrimination. The agency also focused on that paragraph's explicit preservation of employee statutory rights: "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 EEOC was troubled by the fact that this acknowledgement only appeared as a "single qualifying line" "not repeated elsewhere" in the "five-page single spaced" Agreement. Thus, despite this carve-out language for discrimination proceedings, the EEOC contended that the Agreement effectively interfered with an employee's right under Title VII to file an administrative charge or participate and cooperate in an agency investigation.

The complaint in the CVS matter seeks broad relief, including injunctive relief precluding continued use of the Agreement, reformation of the Agreement to comply with the EEOC's interpretation, corrective communications by CVS to its workforce reminding them of their right to file charges and participate in investigations, and a 300-day extension of the statute of limitations to file an administrative charge by any employee who was subject to the Separation Agreement (or any "substantially equivalent" release).

As part of its ongoing campaign to combat what it views as systemic discrimination, the EEOC has signaled with this new lawsuit its displeasure with severance provisions that many employers and their counsel consider to be routine and critical to employers' willingness to pay money to settle threatened or potential claims. Depending on the ultimate outcome, the case has the potential to upend employers' existing severance agreements which seek to provide an employer with certainty that the former employee has relinquished all claims against the employer to the fullest extent allowed by law. In the meantime, employers are advised to review their form severance agreements and to consider reinforcing and highlighting the provisions that acknowledge the employee's statutory rights under Title VII to pursue and/or participate in administrative complaints, as well as making clear that nothing in the agreement is intended to interfere with employee access to the EEOC.



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