

EMPLOYERS BEWARE- EEOC CHALLENGES STANDARD SEVERANCE AGREEMENT LANGUAGE

By: Joette S. Doran

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. On February 7, 2014, the Chicago District Office of the EEOC filed suit in the Northern District of Illinois against CVS Pharmacy. The EEOC contends that CVS, the nation's largest integrated provider of prescriptions and health-related services, unlawfully violated employees' right to communicate with the EEOC and file discrimination charges with the agency.

According to the EEOC, CVS conditioned the receipt of severance benefits for certain employees on an overly broad severance agreement set forth in five pages of small print. The EEOC contends the agreement interfered with employees' right to file discrimination charges and/or communicate and cooperate with the EEOC. It is alleged that interfering with these employee rights violates Section 707 of Title VII of the Civil Rights Act of 1964, which prohibits employer conduct that constitutes a pattern or practice of resistance to the rights protected by Title VII. Section 707 permits the agency to seek immediate relief without the same pre-suit administrative process that is required under Section 706 of Title VII, and does not require that the agency's suit arise from a discrimination charge.

Even though the CVS agreement contains an explicit provision which states that nothing in the agreement is intended to prevent the employee from participating in any proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, the EEOC contends the agreement violates Title VII. The EEOC alleges that the disclaimer language is insufficient since it was contained in single qualifying sentence that is not repeated anywhere else in the agreement.

The EEOC Complaint alleges that the language of following provisions of the Separation Agreement interferes with employee rights under Title VII:

Cooperation: “In the event Employee receives a subpoena, deposition notice, interview request, or other inquiry, process or order relating to any civil, criminal or *administrative investigation*, attorney, or other third party, *Employee agrees to promptly notify the Company's General Counsel by telephone and in writing.*” (emphasis in Complaint)

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.”

Non-Disclosure of Confidential Information: “Employee shall not disclose to any third party or use for himself or anyone else Confidential Information without the prior written authorization of CVS Chief Human Resources Officer.”

General Release of Claims: “Employee releases all “*charges*” and “*The Released Claims include. . . any claim of unlawful discrimination of any kind. . .*” (emphasis in Complaint).

No Pending Actions; Covenant Not to Sue: “Employee “represents that as of the date Employee signs the Agreement, Employee has not filed,” “any *complaint*” in any “agency,” and agrees not to “initiate or file *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.*” (emphasis in Complaint).

According to EEOC Regional Attorney John C. Hendrickson, “charges and communication with employees play a critical role in the EEOC's enforcement process because they inform the agency of employer practices that might violate the law,” “For this reason, the 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 aforementioned CVS provisions are standard and used in virtually every separation agreement. Because it is expected that the EEOC will continue to pursue the issue of broad release language, care should be taken when drafting a separation agreement. The agreement should address the EEOC concerns regarding the deterrent impact of the language of the agreement. As such, an employer may want to consider a disclaimer that pertains to the entire agreement which specifically provides that it is not intended to interfere with an employee’s access to the EEOC. The failure to carefully draft the agreement may result in action by the EEOC. As in the CVS case, the EEOC can seek relief which includes a permanent injunction enjoining use of the agreement, requiring the reformation of current and future separation agreements, training to human resources and management to educate them regarding employee rights, corrective communication to the workforce informing them of their right to file a charge of discrimination. Significantly, the EEOC is seeking to extend the statute of limitations to file charge of discrimination for any former non-store employee who signed the Separation Agreement.

Joette S. Doran has her law practice in Hoffman Estates. She concentrates in employment law and handles employment law actions in state and federal administrative agencies and courts. She is the Co-Chair of the NWSBA Employment Law Committee. For more information please visit her website at www.joettedoran.com.