

Severance Agreements: Employer Beware

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In settling an existing charge of discrimination, administrative complaint or lawsuit, employers, upon advice of counsel, routinely obtain a release of all claims from the employee. This includes releasing any claims already asserted and any other potential claims the employee could assert in the future. Employers also utilize severance agreements as a means of minimizing litigation by obtaining a release of all claims from a departing employee when offering severance to the employee.

The language used in severance agreements is once again under scrutiny by the United States Equal Employment Opportunity Commission (EEOC). The EEOC recently filed a lawsuit against CVS which threatens to invalidate severance agreement provisions routinely used by employers.

The lawsuit alleges that the language in CVS's standard severance agreement is illegal because it unlawfully restricts the departing employee's right to communicate with the EEOC and file a discrimination charge. As a result of prior attacks on validity of severance agreements, while employers are advised to ask employees to agree not to sue the employer in court, employers have refrained from requiring employees to release their right to file a charge of discrimination or their right to participate in any investigation by the EEOC. In its lawsuit against CVS, the EEOC now takes issue with the following standard provisions, among others:

- a clause requiring the employee to notify CVS if the employee receives a request relating to any administrative investigation or other matter pertaining to CVS
- a non-disparagement clause, intended to prevent the employee from making negative or disparaging statements about CVS following his or her release of claims
- the general release, which includes a release of any claim of discrimination
- the agreement not to sue CVS

The EEOC took issue with the agreement not to sue despite the fact that CVS's severance agreement complies with prior EEOC proclamations regarding these issues and explicitly states that the employee's agreement not to sue excludes the right to file a charge of discrimination. Nonetheless, the EEOC taking issue with releases of claims is consistent with their current agenda. Bullet point item number five of EEOC's current three year strategic enforcement priorities plan reads as follows:

[text_box] Preserving Access to the Legal System. The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts. [/text_box]

Given the common use of and need for these provisions in severance agreements, this case needs to be carefully monitored. In the meantime, employers should take a close look and reevaluate their standard severance agreements.

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