

EEOC Challenges Standard Severance Agreement Language

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A new EEOC lawsuit could have repercussions on employers' standard severance agreements. At issue in the lawsuit, which was filed last week in the Northern District of Illinois, is the language of a standard severance agreement which – according to the EEOC – unlawfully prevents employees from communicating with the agency or filing discrimination claims. As many employers know, general principles of contract law allow an employee who enters into a severance agreement to waive the right to file a legal claim seeking to recover money damages. However, the general rule is stricter for EEOC charges, where courts have found that a release may not prevent someone from pursuing their federal rights with the EEOC based on the interests of public policy. Ostensibly, the thrust of the EEOC's new lawsuit tracks the public policy exception. Yet, the EEOC's challenges go deeper and, troublingly, attack long-accepted and common-place provisions in severance agreements. Here is a synopsis of the key provisions that are under fire:

1. **Cooperation.** The cited paragraph provides that if the employee receives legal process (subpoena, deposition notice, etc.) as part of a lawsuit or an administrative investigation, he will promptly notify the employer's general counsel. 2. **Non-Disparagement.** This paragraph provides that the employee will not to make any statements that would disparage the business or reputation of the employer or its officers. 3. **Confidentiality.** This paragraph provides that the employee shall not disclose the employer's confidential information (defined as including personnel data, wage information, succession plans and affirmative action plans) to third parties without prior written authorization. 4. **General Release.** This paragraph provides that the employee releases the employer from any and all causes of action, including lawsuits or charges regarding any claim of unlawful discrimination. 5. **Covenant Not To Sue.** This paragraph provides that the employee shall not initiate or file a complaint or any action in court or with a government agency (i.e. a charge of discrimination). However, the paragraph also clarifies that it is not intended to interfere with the employee's ability to participate in an agency proceeding, or prohibit the employee from cooperating with a government agency in connection with an investigation.

In light of the lawsuit, the EEOC clearly is not satisfied with the above "safe harbor" language in the "Covenant Not to Sue" disclaimer. And the attack on the "Cooperation," "Non-Disparagement" and "Confidentiality" provisions –

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none of which addresses agency charges or proceedings – frankly is baffling.

The EEOC appears to be pushing the envelope – taking on several widely accepted practices – to see how far it can chip away at contractual provisions that keep former employees from pursuing claims. This may be only the opening salvo of what could prove to be a long war. The stakes for employers could not be higher: if the EEOC prevails, employees who sign severance agreements could then file a charge of discrimination against their employers (notwithstanding their contractual promise to release all discrimination claims); and then disparage the employers and disclose their confidential information. In other words, the severance agreements would be worthless. Worse, instead of fostering closure and resolution, any severance money paid by employers could be used to fund the very legal actions that they sought (and paid money) to avoid.

Update:

Since writing this blog, I attended a conference where the EEOC went over its strategic enforcement plans for the coming year. One of their highest priorities is to evaluating severance agreements like the one at issue in this case for provisions that the agency believes are overbroad, which would discourage people from exercising their rights, or would inhibit the agency's ability to investigate claims.

Given the EEOC's increased focus on this issue, it is more important than ever that employers proceed with caution in drafting severance agreements. We will closely monitor the progress of the case and any additional input by the agency on this topic. In the meantime, employers should scrutinize the terms of their standard severance agreements and consult with their attorneys to determine if any revisions to the agreements are warranted.