



Severance Agreements Under Attack by the EEOC

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Two recent lawsuits filed by the Equal Employment Opportunity Commission (EEOC) underscore the federal agency's intent to continue, and even expand, its attack on severance agreements. Generally, a severance agreement offers a departing employee money or other benefits in exchange for a release of any and all claims. Employers may offer a severance agreement in a variety of circumstances, including where there are no anticipated claims against the company. Moreover, public policy favors the voluntary settlement of employment disputes.

That said, the EEOC has long taken the position that, while employees may waive the right to file a private lawsuit against an employer, they cannot be precluded from filing charges with the EEOC or participating, in any manner, in an EEOC investigation, hearing, or proceeding under EEOC-enforced statutes (e.g., Title VII, Americans With Disabilities Act, Age Discrimination in Employment Act and Equal Pay Act). See EEOC Notice No. 915.002: *Enforcement Guidance on nonwaivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes* (April 10, 1997). Courts also have consistently held that the right to file charges with the EEOC and assist in its enforcement efforts is nonwaivable.

EEOC v. CVS Pharmacy, Inc.

In February 2014, the EEOC filed suit in Illinois federal court against CVS Pharmacy Inc. alleging that the company has engaged in a pattern or practice of resistance to the rights secured by Title VII by conditioning receipt of severance benefits on a severance agreement that “deters the filing of charges and interferes with employees’ ability to communicate voluntarily” with the EEOC and other fair employment practices agencies. *Equal Employment Opportunity Commission v. CVS Pharmacy, Inc.*, Civil Action No. 14-cv-863 (N.D. Ill., February 7, 2014). According to the suit, among the purportedly offending provisions, many of which are commonplace in these types of agreements, were requirements to notify the company if the employee became part of an administrative investigation; not to disparage the company or its officers, directors, or other employees; not to disclose confidential information; to release all claims, including charges; to represent that the employee had not filed or initiated any complaint with any agency; and to covenant not to sue the company. The EEOC also challenges the severance agreement on the basis that it contained only a single qualifying sentence in the “Covenant Not to Sue” paragraph stating that “[n]othing in this paragraph is intended to . . . interfere with Employee’s right to participate in a proceeding with any appropriate” government agency enforcing discrimination laws or “prohibit Employee from cooperating with any such agency in its investigation.”





EEOC v. CollegeAmerica Denver Inc., et al.

In late April 2014, the EEOC filed a similar suit against CollegeAmerica. *Equal Employment Opportunity Commission v. CollegeAmerica Denver Inc.*, Case No. 1:14-cv-01232 (D. Colo., April 30, 2014). In that suit, the EEOC alleges that the private college's severance agreements improperly "chill and interfere" with its employees' rights to file age-discrimination charges and cooperate with the EEOC and/or assist others in pursuing age-discrimination claims against CollegeAmerica in violation of the Age Discrimination in Employment Act (ADEA), 29 USC § 626(f)(4). According to the complaint, the at-issue severance agreement states that the employee agrees to "refrain from personally (or through the use of any third party) contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to" CollegeAmerica or to publicly or privately disparage the reputation of CollegeAmerica. The suit further alleges that CollegeAmerica retaliated against the college's former director by suing her for having filed a charge of age discrimination with the EEOC in contravention of her severance agreement.

These cases are in their infancy and employers likely have a long wait before receiving much-needed judicial guidance on which of the many commonplace severance agreement terms will be considered to interfere with the right to file charges with the EEOC and to cooperate with its enforcement efforts. Regardless, these cases clearly signal that the EEOC is resolute in its aim to develop case law holding common severance terms to be unlawful, even when paired with a disclaimer noting the employee's right to file charges and cooperate with the EEOC.

ASK MSK

Q: Do these cases mean employers can no longer use the severance agreements they have used in the past?

A: Although it remains to be seen how the courts will rule on the EEOC's suits against CVS and CollegeAmerica, the agency's complaints do create a degree of uncertainty for employers. The EEOC's actions indicate that it is trying to establish case law that would significantly limit the use of many common provisions in severance agreements.

Q: What should employers do in response to the suits filed by the EEOC?

A: Employers should review their standard severance agreements and consider taking steps to strengthen their agreements and prevent similar claims against them by the EEOC. This could include strengthening and making more specific existing provisions that preserve the departing employee's rights to file administrative charges and participate in agency investigations.