

EEOC Seeks to Sever Certain Severance Agreement Language

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A severance agreement is a contract in which an employee receives post-employment benefits in exchange for agreeing to certain conditions. These agreements are often effective tools which enable employers and employees to amicably part ways. However, if the United States Equal Employment Opportunity Commission (“EEOC”) gets its say, these agreements may have to undergo a revamping.

The EEOC, a federal agency charged with enforcing federal laws that prohibit employment discrimination, has the authority to file lawsuits on behalf of individuals. Recently, the EEOC filed such a suit against CVS Pharmacy, Inc. (“CVS”) for using an alleged overly broad severance agreement.^[1] The EEOC claimed that CVS’s severance agreement, provided to three former employees, violated the employees’ rights to: 1) file discrimination charges with the EEOC, and 2) communicate with the EEOC and participate in the agency’s proceedings. According to John C. Hendrickson, the EEOC Regional Attorney leading the litigation,

[c]harges and communication with employees play a critical role in the EEOC’s enforcement process because [employees] inform the [EEOC] 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.

Specifically, the EEOC argued that the CVS severance agreement’s “cooperation,” “non-disparagement,” “confidentiality,” “release of claims,” and “covenant not-to-sue” provisions violated Section 707 of Title VII of the Civil Rights Act of 1964. Although these five provisions frequently appear in employers’ severance agreements, the EEOC took issue with the following components of the provisions:

1) Cooperation. This provision in the severance agreement required the employee to promptly notify CVS’s general counsel by telephone and in writing if the employee received a subpoena or other inquiry relating to any civil, criminal or administrative investigation, suit, proceeding, or other legal matter pertaining to CVS from any investigator, attorney, or other third party.

2) Non-disparagement. This provision prohibited the employee from making any statements that disparage CVS and/or any of its officers, directors, or employees.

3) Confidentiality. This provision prohibited the employee from disclosing information pertaining to employees or CVS policies.

4) General release of all claims. The employee had to agree to release all claims against CVS, including claims of unlawful discrimination of any kind.

5) Covenant not to sue. The employee had to represent that he or she had not already initiated a complaint against CVS, and was also prohibited from filing a future action or complaint against CVS asserting any of the released claims, including a claim for unlawful discrimination. Furthermore, the employee was obligated to promptly reimburse CVS for any legal fees associated with bringing such a claim.

If the EEOC's contentions are deemed meritorious, there will be a significant impact on severance agreements moving forward. Bearing this in mind, employers throughout the nation may want to preemptively review and modify their severance agreements that contain any of the above-referenced language. While parting ways with an employee is undoubtedly strenuous, learning that the severance agreement used violates federal law can open an entire avenue of unwanted legal issues.

If you or your company would like more information regarding severance agreements or employment law, email James G. Ryan at jryan@cullenanddykman.com or call him at 516-357-3750.

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[1] See EEOC v. CVS Pharmacy, Inc., No. 1:14-cv-00863 (N.D. Ill. filed Feb. 7, 2014).