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Recent EEOC lawsuits challenge language in employer's severance agreements

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When an employer considers ending its employment relationship with an individual, many consider offering the affected employee a severance. Typically, an employer may provide an employee with compensation and benefits in exchange for, among other things, a covenant not to sue the employer, all of which is memorialized in a written severance agreement.

This scenario provides certainty to the employer in avoiding expensive litigation and can foster a more positive ending to the employment relationship by providing additional compensation to the affected employee. While much of the language in these agreements is often considered boilerplate after being accepted and enforced for decades, the EEOC has made waves recently in challenging the validity of commonplace provisions in severance agreements such as covenants not to sue and non-disparagement clauses.

Earlier this year, the EEOC filed suit against CVS Pharmacies in Illinois federal court alleging, among other things, that CVS engaged in a pattern or practice of conditioning receipt of a severance payment on a "misleading and unenforceable" separation agreement that interfered with the employee's right to file a charge of discrimination with the EEOC.

The EEOC's suit also challenged several commonplace provisions, including a covenant not to sue, a confidentiality provision, a non-disparagement clause, a cooperation clause, and a general release of claims. CVS has since filed a motion to dismiss, which the court has yet to decide.

Later this year, the EEOC made clear its intentions regarding severance agreements by suing an employer in Colorado federal court. While the facts of this case are different from the EEOC's suit in Illinois, the thrust of the EEOC's allegations are again that the employer conditioned receipt of severance benefits upon the signing of a severance agreement that chilled and interfered with the employee's rights to file a charge of discrimination and cooperate with the EEOC.

While both of these cases are in the early stages of litigation, even a positive result for each of the employers may not stop the EEOC from continuing to scrutinize severance agreements. Employers are best served by re-examining any form or template agreements on hand and/or consulting counsel before offering an employee a severance agreement.

There are many minor tweaks employers can make to a separation agreement to help counter the issues the EEOC has identified in its lawsuits, including reducing what could be considered difficult to understand legal terminology, shortening the agreement, and clearly outlining the employee's right to file a charge and to cooperate with any government agency.

Amy Habib Rittling and Vincent Miranda are available to discuss how employers can change the form and substance of severance agreements to best ensure that any agreement is enforceable. Click here to read this and other developments in labor and employment law at the New York Employment Law Update.

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