EEOC Sues to Limit Protections in Severance Agreements

By L. Steven Platt / Mar 06, 2014

The Equal Employment Opportunity Commission (EEOC) sued CVS/Caremark Corp., over its standard separation agreement. *EEOC v. CVS Pharmacy, Inc.* , Civil Action No. 14 C 0863. The EEOC has accused CVS of violating Title VII of the Civil Rights Act of 1964 by conditioning the receipt of separation benefits on severance agreements that "set forth in five pages of small print" provisions that interfere with their right to file discrimination charges and/or communicate and cooperate with the agency.

"Charges and communication with employees play a critical role in the EEOC's enforcement process because they inform the agency of employer practices that might violate the law," Chicago-based EEOC Regional Attorney John C. Hendrickson said in the statement released on February 7, 2014. "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."

CVS's five page single spaced separation agreement contained many standard provisions which the EEOC alleges violate Title VII, including:

- Requiring the employee to notify CVS's general counsel if the employee is contacted by an administrative agency investigating CVS.
- Prohibiting the employee from disparaging the business or reputation of CVS, its officers, directors or employees.
- Requiring the employee not disclose to a third party information concerning the Corporation's personnel, including the skills, abilities, and duties of the Corporation's employees, wages and benefits structure, succession plans and information concerning affirmative action plans.
- Releasing all "charges" including "any claim of unlawful discrimination of any kind."
- A covenant not to sue the employer on any complaint, claim, action or lawsuit of any kind, or initiate, file or cause to be filed any action, lawsuit, complaint or proceeding asserting a released claim. Under the separation agreement, the employee also agrees to pay the company's attorney fees if the employee violates this paragraph.

The covenant not to sue provision contained a sentence stating "[n] othing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation. "

The EEOC alleges that CVS, through its separation agreement, is engaged in a pattern and practice of resistance to the employees' rights to file a charge and participate and cooperate with investigations by the EEOC or state fair employment practice agency. The EEOC has requested the court enjoin the use of the separation agreement provision and permit employees who signed the agreement 300 days to file charges with the EEOC.

Last year, the EEOC adopted a five year Strategic Enforcement Plan. One of the plan's objectives was to preserve employee's access to the legal system. The CVS lawsuit is an attempt to allow employees to sign separation agreements that preserve the employees' right to file charges and cooperate with the EEOC. The CVS/Caremark case also emphasizes how focused the EEOC is on systemic or class-wide litigation.

This lawsuit highlights the importance of carefully drafting separation agreement to prevent the EEOC from claiming the separation agreement prevents a former employee from cooperating with the EEOC. This includes tailoring the confidentiality clause in such a way that it does not prevent the employee from discussing their own situation with the agency. It also calls into question separation agreements where the employee agrees to waive their right to file charges in exchange for enhanced separation benefits. Most separation agreements contain wavier clauses and if the EEOC's litigation successfully challenges this part of the CVS agreements, it will put employers in a significant dilemma. Should they offer enhanced separation benefits in exchange for a release that may be held partially invalid, or should they release those claims not affected by the CVS/Caremark case and take their chances on the federal discrimination claims? That is why it is more important than ever to have counsel involved early on in the process. Early intervention can prevent significant problems later.

For more information on this matter, please contact L. Steven Platt at (312) 985-5943 or at splatt@clarkhill.com , or another member of Clark Hill's Labor and Employment Practice Group.