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3 Tips For Separation Pacts That Won't Draw The EEOC's Fire

By **Ben James**

Law360, New York (November 06, 2014, 7:52 PM ET) -- The U.S. Equal Employment Opportunity Commission's recently dismissed a Title VII suit over a CVS Pharmacy Inc. separation agreement that allegedly interfered with workers' rights to file EEOC charges is making employers rethink how those agreements are drafted, lawyers say.

U.S. District Judge John W. Darrah granted CVS' bid to dismiss the EEOC's case because the agency hadn't tried to reach a conciliation agreement with the employer before filing the lawsuit. But he didn't fault the anti-bias watchdog's theory that the company was liable for a pattern or practice of deterring the filing of charges and impeding workers' ability to communicate voluntarily with the EEOC — a theory CVS has called "unprecedented."

“Oftentimes, the mere fact that the EEOC has taken a position and filed suit has enough of a chilling effect to get the result the agency wants,” Meyers Roman Friedberg & Lewis partner Jonathan Hyman said. “In my view, it was a bit of a paradigm-shifting approach to how Title VII rights need to be protected in these types of agreements.”

Lawyers have differing styles for drafting employee separation agreements, and they don't always agree on exactly what should or shouldn't be included. Different employers — and different situations, like the settlement of an active lawsuit as opposed to a deal with a worker who hasn't actually leveled a claim — may call for different approaches.

Nonetheless, attorneys pointed to three steps employers would be wise to take in light of the EEOC's stance in the CVS case.

Emphasize the Carveout for EEOC Charges

Perhaps the most obvious takeaway from the CVS case is that severance agreements need to make it clear to workers that by signing, they are not giving up their right to file an EEOC charge or to participate in an agency investigation.

The CVS agreement had such carveout language in it, Hyman said. According to the agency's February complaint, a “No Pending Actions, Covenant Not to Sue” section included language saying that nothing in that paragraph would interfere with the right to participate in a proceeding with federal, state or local anti-discrimination agencies, and that the agreement did not prohibit cooperation with such agencies.

But from the EEOC's perspective, the scope of the CVS agreement's limitations were "at best, unclear to a reasonable employee." One thing employers can do to do help make clear what rights workers are retaining is make sure any carveout language is prominently featured.

For instance, Hyman says that in the past, he put disclaimer language stating that the right to file EEOC charges and cooperate with the agency in a sub-paragraph that followed a clause releasing any claims and waiving the right to sue. But that's not the case anymore, he said.

“What I'm doing now is breaking that out into a separate section in the agreement to make it more prominent. I haven't gone so far as to bold it yet, but that's another way to make sure it sticks out,” Hyman said.

Employers still can and should condition severance payments on an employee's agreement to waive the right to file or pursue litigation in court, and give up the chance to recover any money based on a claim filed with the EEOC, lawyers say.

Make It Short and Sweet

The EEOC pointed out in its complaint against CVS that the separation agreement it was challenging was five pages long and single-spaced. Companies would be wise to keep their agreements short and work to make them easily understandable for rank-and-file workers, lawyers say.

While the principle that workers need to understand what they're signing predates the CVS complaint, the EEOC's lawsuit underscored that requirement and showed that a lengthy contract could land an employer in trouble.

“There's going to have to be some legalese, but we really do try to write it in such a way that the audience we're aiming it at is going to be comfortable reading and understanding it,” Parker Poe Adams & Bernstein LLP partner Jonathan Crotty said.

Crotty said that although there isn't a hard-and-fast length limit, employers should be able to get what they need into two or three pages. After that, the benefit of additional language is questionable, he warned.

“Employers generally need to keep an eye on this area,” Crotty said. “The releases we're using right now may not be the ones we're using a year from now.”

Review Agreements to Ensure They're Up-To-Date

Employers would be well-served to review their separation agreements and make sure all the clauses they contain are necessary and apply to the circumstances the agreement is supposed to cover, according to Mayer Brown LLP counsel Kim Leffert.

“I get concerned when I send a template to a client and the client simply reuses it, over and over, without thinking about whether all its provisions are applicable to the particular situation,” Leffert said.

A review of a separation agreement not only gives an employer a chance to tailor it to a particular situation, but also provides a chance to strike any language deemed unnecessary or to tweak the contract to lessen the chances that it will be interpreted as unlawfully encroaching on workers' rights.

Even potentially problematic provisions can safely be included in separation agreements if they are explicitly referenced in the carveout language and it's stated that a clause prohibiting something like disclosing confidential information doesn't infringe employee rights to talk to the EEOC, Hyman said.

In the CVS case, the EEOC said that a “cooperation” provision — requiring employees to notify the company's general counsel if they receive any inquiry related to an administrative investigation — as well as nondisclosure and nondisparagement clauses limited communications with the workplace bias watchdog.

“If an agreement had all three of those provisions, you would want to think about whether all of these three provisions are needed,” she said. “It's possible that the cooperation provision may be the one that's viewed as least needed, and therefore, an agreement could be viewed as acceptable without that.”

--Editing by Kat Laskowski and Chris Yates.
