

EEOC LAWSUIT AGAINST CVS COULD VOID STANDARD SEVERANCE AGREEMENT CLAUSES

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We all know how severance agreements work. An employee suddenly finds herself out on the street. To soften the blow, the employer offers her a few additional weeks or months of salary. In exchange, the employee waives any potential legal claims and agrees to other terms reasonably calculated to protect the employer's legitimate business interests, such as the non-disclosure of confidential information. In most cases, a severance agreement is an obvious win-win. The employee — who probably was not even considering a lawsuit anyway — gets some much needed cash and the employer is insulated against unwanted legal surprises.

The U.S. Equal Employment Opportunity Commission, however, does not view severance agreements in such a sanguine light. Earlier this month, it filed a lawsuit against CVS, alleging that the pharmacy chain has engaged in a pattern and practice of conditioning “employees’ receipt of severance pay on an overly broad, misleading, and unenforceable Separation Agreement...that interferes with its employees’ right to file charges” with the EEOC and other governmental agencies. *Equal Employment Opportunity Comm’n v. CVS Pharmacy, Inc.*, 1:14-CV-863 (N.D.Ill) (Docket No. 1). Among other relief, the EEOC seeks to allow former employees who are subject to the challenged agreement an additional three hundred days to file discrimination charges with the agency. Of course, the EEOC’s complaint says nothing about requiring these employees to pay back the severance that CVS previously paid them in exchange for the releases.

This lawsuit has the potential of becoming a headache not just for CVS. The contract provisions challenged by the EEOC are standard, boilerplate ones, which can be found in virtually any severance agreement. They include, among other items:

- A general release of claims;
- A covenant not to sue;
- A confidentiality clause;
- A non-disparagement term; and
- A cooperation clause, requiring the employee to advise CVS, among other things, of any administrative investigation

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Notably, CVS's severance agreement expressly states that "nothing in" the covenant not to sue clause "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," provided of course that the employee waives her entitlement to monetary and other relief. But this apparently was not enough to appease the EEOC, which insists that the agreement interferes with the employees statutory rights and the agency's enforcement mandate.

Should the EEOC prevail against CVS, the potential for havoc is great. In a worst case scenario, an adverse decision could lead to the unraveling of standard severance agreements used by employers nationwide. Conceivably, plaintiffs would be able to revive long-stale claims that were previously barred by voided agreements.

That said, the EEOC's complaint against CVS stops short of contending that the various challenged terms are each fundamentally void. Rather, the thrust of the EEOC's complaint appears to be that the severance agreement is illegal to the extent its terms taken together deter employee cooperation with the agency. And there are decades of legal decisions that have held the challenged clauses to be generally valid. So, even assuming that the court sides mainly with the EEOC—which itself is hardly a given—the ramifications might be substantially less drastic, such as narrowly reforming the agreement to make clearer the employee's statutory rights to communicate with and seek limited redress from the agency.

It will likely take years for the CVS matter and similar challenges that the EEOC might bring to wind themselves through the courts. In the meantime, employers should consider utilizing unambiguous carve-out language in order to ensure the enforceability of their severance agreements. Severance agreements should thus state broadly that their provisions, neither in isolation nor in combination, should be construed to interfere with an employee's right to file discrimination charges with the EEOC or otherwise communicate or cooperate with the agency, notwithstanding the waiver of monetary and other relief. Employers should likewise avoid narrowing the scope of the carve out, as CVS arguably did, by burying it in another clause or otherwise suggesting that its application is limited. In this way, employers should be able to minimize the likelihood of attracting the EEOC's ire, while continuing to protect themselves through appropriately drafted severance agreements from unwanted legal surprises.