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ACT NOW ADVISORY

The EEOC Is Scrutinizing Separation Agreements: Does Yours Hold Up?

June 5, 2014

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In its "Strategic Enforcement Plan for FY 2013-2016," the federal Equal Employment Opportunity Commission ("EEOC" or "Agency") identifies "Preserving Access to the Legal System" as one of its six core priorities. The Agency explains:

> The EEOC will also target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts. These policies or practices include retaliatory actions, *overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination*, and failure to retain records required by EEOC regulations (emphasis added).

Employers should be aware that the EEOC is executing on its plan. As we have been reporting, the EEOC increasingly has been focusing on separation agreements, including provisions that are quite common and widely used by employers. The EEOC is asserting that not only are such provisions unenforceable, but also that it is unlawful for employers to include them in separation agreements.

This *Act Now* Advisory discusses the provisions on which the EEOC has been focusing most of its attention and suggests approaches that employers may wish to take in light of these developments.

Provisions Scrutinized by the EEOC

1. *Covenants Not to Sue:* Such covenants generally require that an employee agree not to sue or institute any complaint pertaining to his or her employment or termination therefrom in any forum, including, but not limited to, an administrative agency.

The EEOC's 1997 "Enforcement Guidance on Non-Waivable Employee Rights Under EEOC–Enforced Statutes" ("Guidance") provides that "[a]n employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding under [Title VII of the Civil Rights

Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or the Equal Pay Act]." The EEOC's longstanding position, as recognized by federal courts, has been that, as a matter of public policy, employees may not waive the right to file a charge of discrimination with the EEOC.

2. *Non-Disparagement:* These clauses generally include an assertion that the employee will not make statements that disparage the business or reputation of the employer.

The EEOC contends that such provisions are contrary to public policy as they will lead employees to believe that participating in an Agency investigation or testifying in a proceeding in which they will be critical of the employer would breach the severance agreement.

3. *Non-Disclosure of Confidential Information:* Generally, the confidentiality provisions that the EEOC has challenged are those that require that employees not disclose information pertaining to items such as the company's personnel, including the skills, abilities and duties of the company's employees, wages, and benefit structures, succession plans, information concerning affirmative action plans or planning.

The EEOC maintains that employees must be able to share information in connection with filing or testifying about a charge of discrimination, and such clauses could impede their ability to do so.

4. *Cooperation Clauses:* These clauses generally require departing employees to, among other things, notify their employer upon receiving a subpoena, deposition notice, interview request, or other inquiry regarding proceedings, such as administrative investigations.

According to the EEOC, such provisions will not allow, or could negatively impact the ability of, departing employees to cooperate with the Agency in an investigation or testify in connection with proceedings at the EEOC and state or local fair employment practices agencies ("FEPAs").

5. *General Release Provisions:* These provisions include releasing "charges" as well as claims of unlawful discrimination of any kind.

The EEOC's position is that release language should expressly state that the release does not prevent the employee from filing charges with the EEOC or FEPAs.

What Employers Should Do Now

While there is considerable reason to question whether the EEOC will ultimately succeed in its challenges to employers' use of standard form separation agreement provisions, employers should consider taking the following four actions:

1. Review your separation agreements to determine which sections may be similar to the provisions being scrutinized by the EEOC.

2. To the extent that your separation agreements contain the same/similar sections to those identified by the EEOC as problematic, determine whether those sections should be eliminated, clarified, or otherwise revised.

3. Consider adding a clear disclaimer to the agreement (or disclaimers in connection with each applicable provision) that informs the employee that nothing in the agreement (or that particular provision) prohibits the employee from filing a charge with the EEOC or a FEPA. Be mindful, however, that the EEOC has also challenged the sufficiency of including one such disclaimer in a five-page single-spaced agreement without specifically referencing the clauses to which it pertains.

4. To the extent that such a disclaimer is used, however, consider including an explicit waiver of monetary benefits that could be derived from any such administrative or other charges.

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