

Employment Law

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EEOC HAS BITTER RX FOR CVS

By Vito A. Gagliardi, Jr.

Last month, the United States Equal Employment Opportunity Commission ("EEOC") filed a lawsuit in Illinois against CVS Pharmacy Inc. ("CVS") over the separation agreement CVS has been using since at least 2011. This lawsuit appears to be a pronouncement by the EEOC that the standard language in releases used by employers throughout the country will come under scrutiny and criticism by the EEOC.

The EEOC specifically claimed that CVS "conditioned the receipt of severance benefits for certain employees on an overly broad severance agreement set forth in five pages of small print." The EEOC's complaint, now pending before the U.S. District Court for the Northern District of Illinois, Eastern Division, singles out for specific criticism the following aspects of CVS's standard agreement:

* **Cooperation:** "In the event Employee receives a subpoena, deposition notice, interview request, or another inquiry, process or order relating to any civil, criminal or *administrative investigation*, suit, proceeding or other legal matter relating to the Corporation from *any investigator*, attorney or any other third party,

Employee agrees to promptly notify the Company's General Counsel by telephone and in writing." (Emphasis added in EEOC Complaint.)

* **Non-Disparagement:** "Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director or employee of the Corporation."

* **Non-Disclosure of Confidential Information:** "Employee shall not disclose to any third party or use for himself or anyone else Confidential information without the prior written authorization of CVS Caremark's Chief Human Resources Officer." Such information includes "information concerning the Corporation's personnel, including the skills, abilities, and duties of the Corporation's employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning ..."

* **General Release of Claims:** "Employee hereby releases and forever discharges CVS Caremark Corporation ... from any and all causes of action, lawsuits, proceedings, complaints, *charges*, debts contracts, judgments, damages, claims, and attorneys fees against the Released Parties, whether known or unknown, which Employee has ever had, now has or which the Employee ... may have prior to the date [of] this Agreement *The Released Claims include ... any claim of unlawful discrimination of any kind*" (Emphasis added in EEOC Complaint.) (Applicable statutory claims were set forth with specificity.)

* **No Pending Actions; Covenant Not to Sue:** "Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed, or initiated, any *complaint*, claim, action or lawsuit of any kind against any of the related parties in any federal, state or local court or *agency*. Employee agrees *not to initiate or file, or cause to be initiated or file, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties Employee agrees to promptly reimburse the Company for any legal fees that*

the Company incurs as a result of any breach of this paragraph by Employee." (Emphasis added in EEOC Complaint.)

After singling out these provisions in CVS's standard severance agreement, the EEOC Complaint notes that the standard agreement "contains a single qualifying sentence that is not repeated anywhere else in the Agreement" noting specifically that "[N]othing in this paragraph is intended to or shall interfere with the 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." Thus, it seems that the EEOC is taking issue with the fact that the standard agreement does not specify with sufficient clarity that, as required by law, the release language would not preclude an employee from making or cooperating with any complaint to the EEOC. Given the provisions identified, the language in italics and the specific criticism for the way in which the typical EEOC carve-out is buried, one might think that the problem with CVS's standard severance agreement could be cured if the disclaimer were clearly repeated in each paragraph and references to agency investigations were refined.

The complaint filed by the EEOC is a critical reminder to reexamine your standard severance agreements from time to time. Indeed, immediate revision to your standard language to address the concerns of the EEOC should be considered, or, at the very least, the case should be monitored for further developments. Hopefully, the EEOC is not seeking to destroy the very purpose of the release in a severance agreement by permitting the possibility of activity that the employer is, in essence, paying to preclude.

Nonetheless, this case will be watched closely by employment lawyers throughout the nation because of its potential impact on standard severance agreements on which employers rely to end disputes with employees, every day.

legal advice in any particular matter.

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