



## Is Your Severance Agreement Reducing Risk or Inviting EEOC Litigation?

By Todd S. Aidman,<sup>i</sup> FordHarrison LLP

Most employers wisely utilize severance agreements as a means of mitigating risk. However, based upon recent EEOC action, employers should carefully scrutinize the agreements they are using to lessen the risk that questionable terms could invite EEOC litigation.

In October 2014, the Northern District of Illinois dismissed the Equal Employment Opportunity Commission's lawsuit against CVS Pharmacy. *Equal Employment Opportunity Commission v. CVS Pharmacy, Inc.*, civil action no. 1:14-cv-00863, (N.D. Ill, October 7, 2014) (“10/7/2014 Memorandum and Order”). This lawsuit involved the EEOC's challenge of standard terms most employers use in their severance agreements. While a temporary win for employers, the EEOC's recent enforcement efforts should be a call to action for all in-house counsel utilizing severance agreements.

### Background

In 2006, the EEOC entered into a consent decree with Kodak claiming its template release agreement violated Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA) by preventing employees from assisting other employees with their claims of discrimination. See *EEOC v. Eastman Kodak Co.*, no. 06-cv-6489 (W.D.N.Y. 2006). The Consent Decree contained specific language that Kodak was required to use in any future release agreement. In summary, the required language in the release had a carve out showing it did not prevent an employee from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or other fair employment practice agency. As a result of this well-publicized decision, many employers have fashioned their severance agreements with similar language, and countless such agreements have passed with EEOC blessing.

Following the consent decree in *Eastman Kodak*, the EEOC stated that it intends to “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.” See *EEOC Strategic Enforcement Plan FY 2013-2016* at p. 10 (December 17, 2012).

Most employers viewed the *Kodak* language as the “gold standard” until the EEOC sued CVS Pharmacy claiming that many provisions of CVS' standard release of claims violated Title VII because those provisions interfered with an employee's right to file charges, communicate voluntarily, and participate in investigations with the EEOC. Specifically, the EEOC took issue with provisions regarding cooperation, nondisparagement, nondisclosure of confidential

information, the general release of claims, pending actions, and the covenant not to sue. The EEOC also took issue with the length (5 pages, single spaced) of the severance agreement.

The court eventually dismissed the EEOC's lawsuit against CVS because the EEOC failed to engage in conciliation procedures that the judge found were required by Title VII. Since the case was dismissed over the issue of conciliation, the judge did not address the merits of the EEOC's claims beyond two footnotes.

## **Recommendations**

It is now no secret that the EEOC is searching for opportunities to challenge standard terms in separation agreements that arguably limit rights under Title VII and the ADEA. Until these issues are solved, we recommend taking the following steps:

- Review every separation agreement to ensure it adequately addresses an employee's right to file administrative charges and participate in agency investigations even though the employee is releasing all claims. However, do not simply limit this to actions brought before the EEOC. We recommend including all federal, state and local investigative agencies such as the National Labor Relations Board (NLRB) and Florida Commission on Human Relations (FCHR).
- We recommend that each severance agreement contain a specific paragraph in bold reciting the employee's protected rights. This paragraph should specifically refer to each paragraph containing restrictions on an employee's rights.
- The agreement should contain language noting that if the employee does file a charge, they are waiving their right to recover monetary damages or other individual relief.
- The agreement should not limit the employee's right to communicate/cooperate with an agency during an investigation.
- Employers should seek to reduce the length and complexity of their separation agreements. The EEOC specifically noted that the agreement in the *CVS Pharmacy, Inc.* lawsuit was five single-spaced pages. It is important to note that under the Older Workers Benefit Protection Act (OWBPA), for releases to be enforceable they must be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." Thus, too many fancy "lawyer words" may be problematic.
- Employers may want to consider language stating that if any particular provision is found not be valid, the whole agreement is not invalidated.

---

<sup>i</sup> Todd S. Aidman is a partner in the Tampa office of the law firm of FordHarrison LLP. He can be reached at (813) 261-7810 or [atrehan@fordharrison.com](mailto:atrehan@fordharrison.com).