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Do Your Severance Agreements Adequately Protect You?

When employees are discharged, employers often enter into agreements with such employees providing severance in exchange for a global release of all potential claims and a promise not to sue the company for anything related to their employment or discharge. But employers must be careful and ensure their severance agreements do not go too far.

Many employers have seen (and probably used) agreements that require an employee to waive every claim, known or unknown, that relates to the individual's employment, including claims of discrimination, failure to provide leave or accommodate, breach of contract, and even constitutional claims. Employers rely on these agreements to give them peace of mind that a former employee cannot sue the company after execution. But can these waivers have the opposite effect?

According to the Equal Employment Opportunity Commission (EEOC), they can. As part of its "Strategic Enforcement Plan," the EEOC named protecting employees' access to the legal system as one of its top priorities. To achieve this objective, the EEOC is targeting overly broad waivers that limit an individual's right to interact with the EEOC. The EEOC has challenged releases that prohibit an employee from filing his or her own EEOC charge, or assisting the EEOC in prosecuting a charge on behalf of the employee or another individual. So what does this mean for employers?

Two recent examples demonstrate what can happen and serve as a reminder and warning to employers. In early 2018, the EEOC found that the Coleman Company violated the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII) – not based on any finding of ***actual*** discrimination, but because the company required an employee to sign an overly expansive release. To receive severance pay, the former employee was prohibited from filing a future administrative charge, communicating with the EEOC or accepting relief achieved by the EEOC. The EEOC required the company to hire an outside consultant to fix the waiver's language ***and*** required the company to amend all severance agreements between 2013 and 2015 to permit employees an opportunity to file charges of discrimination with the EEOC.

Consistent with this approach, the EEOC also aggressively pursued a hospital that required employees to give up their rights to file claims of discrimination with state and federal agencies in order to receive a severance payment. The EEOC required the hospital to not only revise the agreements, but also to identify and permit all individuals who had signed the agreements ***over the past decade*** to file charges or cooperate with the EEOC to obtain any relief to which they would be entitled.

Given the EEOC's continued scrutiny of release agreements, employers should ensure their agreements include state-of-the-art language and appropriate carve-outs notifying employees of their rights to participate and/or cooperate in EEOC proceedings. Without appropriate disclaimers and language, an employer risks not only having the agreement rendered invalid but also facing EEOC scrutiny and the accompanying legal fees and expenses associated with the defense and remediation of such issues.

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