

Northern New England

MONDAY MORNING MINUTE

March 17, 2014

EEOC Brings Suit Based Upon Employer Severance Agreement

On February 7, 2014, the Chicago District Office of the Equal Employment Opportunity Commission brought suit in the U.S. District Court for the Northern District of Illinois against CVS Pharmacy, Inc., claiming that a severance agreement used by the company violates Title VII of the Civil Rights Act of 1964 because it is "overly broad, misleading and unenforceable...." *Equal Employment Opportunity Commission v. CVS Pharmacy, Inc.*, civil action no. 14-cv-863 (N.D. Ill., February 7, 2014). The EEOC asserts in the lawsuit that the Agreement violates Title VII because it interferes with employees' rights to file charges, communicate voluntarily and participate in investigations with the EEOC and other Fair Employment Practices Agencies (FEPA's).

The lawsuit alleges that the Company required exempt, non-store employees to sign "the *five-page single spaced separation agreement*" (emphasis in original) upon termination in order to receive severance pay. The EEOC identified the following sections of the Agreement in asserting violations of Title VII:

- A cooperation clause that required employees to promptly notify CVS' general counsel by telephone and in writing when they received any inquiry regarding an administrative investigation (for example, an EEOC investigation);
- A non-disparagement clause that prohibited the employee from making any statements that disparaged the business or reputation of CVS or its officers, among others;
- A confidentiality clause that prohibited disclosure of personal information unless they received written authorization from CVS' chief human resources officer;
- A general release of all claims of discrimination;
- A covenant not-to-sue CVS, but included a carve-out of the employee's right to participate in or cooperate with any state or federal agency discrimination investigation or proceeding; and

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- An attorney's fee provision requiring the employee to reimburse CVS should the employee breach the agreement.

The EEOC alleges in the lawsuit that the above-identified restrictions are limited only by a "single qualifying sentence" in the covenant not to sue and "not repeated anywhere else in the Agreement." However, the referred to sentence clearly stated that nothing in the covenant not to sue was "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." Despite that provision, the EEOC claims that the terms of the Company's standard Agreement constituted a pattern and practice of denying employees full exercise of their Title VII rights, including limiting their rights to file charges and cooperate with the EEOC and FEPA in investigating charges of discrimination.

The EEOC seeks in the lawsuit:

- a permanent injunction enjoining the Company from restricting the right to file charges or participate in agency proceedings;
- reformation of the Company's standard Agreement;
- corrective communications, not only to those who signed the Agreement but to the Company's entire workforce "informing all employees that they retain the right to file a charge of discrimination and to initiate and respond to communication with the EEOC and state FEPAs and are not required to keep certain information confidential in those communications" or to notify the Company about such communications, as well as training for human resources and management personnel who negotiate separation agreements; and
- three hundred additional days for any former employee who signed the Agreement to file administrative charges.

As the lawsuit was only recently initiated, it is not known what positions, if any, taken by the EEOC will be binding on employers. However, many, if not most, employers have used provisions similar to those above with which the EEOC has taken issue. Therefore, employers should take note of these recent developments and consider taking prophylactic action to ensure that their severance agreements do not run afoul of the positions taken by the EEOC. Based on this case, employers may wish to reevaluate their separation and settlement agreements and ensure that strong disclaimer language applies to all clauses in the agreement and assures employees of their rights to file discrimination charges and to communicate with the EEOC.

For additional information regarding this, or any other labor or employment law matter, please contact the attorneys in the Portsmouth, New Hampshire office of Jackson Lewis P.C.

ON MARCH 19TH, Portsmouth Managing Shareholder **Debra Weiss Ford** will be presenting at **Exeter Inn**

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There is no cost to attend this program, but space is limited so [click here](#) to register today!