

Pitfalls of Severance Agreements

While severance agreements are useful in limiting exposures and bringing an element of finality to a relationship, they are not without pitfalls. The source of much uncertainty comes from the EEOC.

After 2006, a consent decree entered into by the EEOC and a major employer was used as a guide by many practitioners regarding the EEOC's expectations with respect to severance agreements. In 2013 and 2014, the EEOC brought suits against employers whose severance agreements largely comported with the 2006 consent decree. The EEOC was signaling it was not content with the 2006 consent decree.

The 2006 consent decree provided that the employer was to inform the employees that even though they may be releasing claims, charges or complaints against the employer, the employees still had the right to file a charge with the EEOC and to participate in any EEOC investigation or proceeding. While the employees could relinquish individual rights to additional compensation or monetary awards, the employees could not negate the EEOC's statutory authority to investigate claims or prosecute matters in its own name, even if the charges involved the same actions for which the employees provided a waiver of rights.

In 2013, the EEOC pursued a large employer on the issue of severance agreements due to the possibility that employees might interpret the agreement to prohibit the employee from filing charges with the EEOC and to limit the right to communicate with the agency after signing the agreement. In 2014, the EEOC again asserted the release language was not acceptable and the EEOC filed suit against a national employer without any attempt at conciliation. The EEOC objected to provisions that:

1. Required employees to give notice to the employer in the event the employee was contacted regarding legal proceedings or an investigation of employment matters;
2. Prohibited disparagement of the employer;
3. Prohibited disclosure of confidential information;
4. Provided for a release of claims that included "charges", and
5. Permitted the company to obtain injunctive relief and attorney fees if the employee breached the agreement.

It was the EEOC's assertion that a contract provision requiring the employee to give notice to the employer in the event the EEOC investigated the employer required the employee to cooperate with the employer. A limitation on the employee's ability to disclose confidential information was construed by the EEOC as a potential prohibition on the employee providing information to the agency.

In bringing its suit, the EEOC refused to attempt conciliation with the employer, and never asserted that the employer actually discriminated or retaliated against an employee. The Seventh Circuit Court of Appeals ruled in favor of the employer, but did not address specific issues in the case, as it determined that the EEOC was required to attempt conciliation prior to suit being filed and was obligated to plead facts asserting the employer discriminated or retaliated against the employee to bring the suit.

While the EEOC lost in the 7th Circuit, no guidance was provided by the court as to what the law actually required with respect to severance agreements. The make-up of the EEOC and its General Counsel are subject to changes with the new Trump administration. The EEOC's litigation priorities may change, but there is no guaranty a severance agreement will not be the subject of litigation. Careful drafting of severance agreements is required and use of forms for all circumstances should be avoided.