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## Recommendations in Response to the EEOC's New Lawsuit on Severance Agreements

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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). This ASAP will address the background to this lawsuit, describe the EEOC's new and aggressive position toward severance agreements, and provide recommendations for employers.

### Background

In 2006, the EEOC entered into a consent decree (the Kodak Consent Decree) with Eastman Kodak Company (Kodak), which it had sued one week earlier, alleging that Kodak's 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, *inter alia*, containing language that explicitly prevented 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 Kodak Consent Decree contained express language that Kodak was required to use in any future release agreement, to wit:

Except as described below, you agree and covenant not to file any suit, charge or complaint against Releasees in any court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with Kodak or separation therefrom. You further represent that no claims, complaints, charges, or other proceedings are pending in any court, administrative agency, commission or other forum relating directly or indirectly to your employment by Kodak.

Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or lawsuit filed by you or by anyone else on your behalf.

Given that the EEOC had blessed the above-quoted language as the gold standard for release agreements, many employers have since that time included such language in their release agreements. Notwithstanding that thousands of such release agreements subsequently have passed muster when reviewed by the EEOC in connection with settlements of discrimination charges and lawsuits alleging violations of Title VII and/or the ADEA, the EEOC recently stated, in its Strategic Enforcement Plan for FY 2013-2016, 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).

In May 2013, the Chicago District Office of the EEOC, which has developed a reputation for taking particularly aggressive positions on issues that the EEOC generally, and the Chicago office specifically, deem significant, sued Baker & Taylor, Inc. in the U.S. District Court for the Northern District of Illinois, alleging that the company’s severance agreements interfered with employees’ rights to file charges with the EEOC and other fair employment practices agencies (FEPAs). *Equal Employment Opportunity Commission v. Baker & Taylor, Inc.*, civil action no. 13-cv-03729 (N.D. Ill., May 20, 2013). In a sweeping consent decree entered in July 2013, Baker & Taylor agreed to include the following language in any future release agreement. See *Equal Employment Opportunity Commission v. Baker & Taylor, Inc.*, documents #1 and 14 (N.D. Ill. July 10, 2013):

Nothing in this Agreement is intended to limit in any way an Employee’s right or ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission (“EEOC”) or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. Employees retain the right to participate in such any [sic] action **and to recover any appropriate relief**. Employees retain the right to communicate with the EEOC and comparable state or local agencies and such communication can be initiated by the employee or in response to the government and is not limited by any non-disparagement obligation under this agreement [sic].

(Emphasis added). Clearly, such language in the Baker & Taylor Consent Decree was a departure from the language that the EEOC had determined—in the Kodak Consent Decree—to be in full compliance with Title VII and the ADEA, notwithstanding that neither statute had been amended since 2006. Particularly questionable is the language stating that employees retain the right “to recover any appropriate relief” in an EEOC action, since the EEOC expressly agreed in the Kodak Consent Decree that an employee can be required to waive in a release agreement any right to recover monetary damages in any post-settlement EEOC action.

### ***EEOC v. CVS Pharmacy, Inc.***

As mentioned above, the same district office of the EEOC brought suit on February 7 of this year in the same court against CVS Pharmacy, Inc. (the Company), claiming that the Company’s severance agreement (the Agreement)—which contained language modeled after that which was approved by the EEOC in the Kodak Consent Decree—violates Title VII because it is “overly broad, misleading and unenforceable....” 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 FEPAs.

In a February 7, 2014 press release (available on the EEOC’s website), EEOC regional attorney John C. Hendrickson proclaimed:

Charges and communication with employees play a critical role in the EEOC’s enforcement process because they inform the agency of employer practices that might violate the law. For this reason, the right to communicate with the EEOC is a right that is protected by federal law. When an employer attempts to limit that communication, the employer effectively is attempting to buy employee silence about potential violations of the law. Put simply, that is a deal that employers cannot lawfully make.

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 requiring the employee to “promptly notify the Company’s General Counsel by telephone and in writing” of contacts relating to legal proceedings including an “administrative investigation” by “any investigator, attorney or any other third party....” (Emphasis in lawsuit but not Agreement).
- A **non-disparagement** clause prohibiting the employee from making any disparaging statements about the Company and its officers, directors and employees.
- A **non-disclosure of confidential information** provision prohibiting disclosure to any third party of confidential employee and other information without prior written permission of the Company’s chief human resources officer.
- A **general release of claims** that included a release of all “causes of action, lawsuits, proceedings, complaints, charges, debts contracts, judgments, damages, claims, and attorney fees,” including “any claim of unlawful discrimination of any kind...” (Emphasis in lawsuit but not Agreement).
- A **no pending actions; covenant not to sue** clause where the employee represents the employee has no pending “complaint, claim, action or lawsuit” of any kind “in any deferral, state, or local court, or agency”. The clause prohibits filing of “any action, lawsuit, complaint or proceeding” asserting the released claims, and requires the employee to promptly reimburse “any legal fees that the Company incurs” for breach of the covenant not to sue. (Emphasis in lawsuit but not Agreement).
- A **breach by employee** clause, stating that in the event of the employee’s material breach of the Employee Covenants section of the agreement, the Company would be entitled to obtain injunctive and other relief, including attorney fees.

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, that very sentence clearly stated—in language strikingly similar to that blessed by the EEOC in the Kodak Consent Decree—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, which was given to over 650 employees, 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 FEPAs 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.

## Analysis

While the court may ultimately decline to grant the EEOC any or all of the relief it seeks, employers—most of whom, like CVS, have likely relied upon the Kodak Consent Decree language previously approved by the EEOC—should take note of the EEOC’s new position toward release agreements, review their standard separation agreements, and consider taking prophylactic steps to guard against similar claims.

Most employers are aware of requirements under the Older Workers Benefit Protection Act (OWBPA), which in 1990 amended the ADEA by enumerating certain minimum requirements that a release agreement must satisfy in order for releases of claims of age discrimination under federal law to be effective. In addition, the OWBPA expressly states that “No waiver agreement may affect the Commission’s rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or

participate in an investigation or proceeding conducted by the Commission.” 29 U.S.C. § 626(f)(4). Thus, the OWBPA and associated regulations prohibit any provision in a release of claims which would prevent an employee from filing a charge with the EEOC or from participating in an investigation by the EEOC. See 29 U.S.C. § 626(f)(4); 29 C.F.R. § 1625.22(i). In addition, the regulations issued after the passage of the OWBPA limit covenants not to sue, attorneys’ fee reimbursements and similar provisions that employers often include in separation agreements. 29 C.F.R. § 1625.23.

Significantly, the EEOC did not bring the *CVS Pharmacy, Inc.* lawsuit under the OWBPA/ADEA, but rather under Title VII. While the ADEA as amended by the OWBPA has express language (quoted above) protecting an individual’s right to file a charge with, and to participate in an investigation conducted by, the EEOC, Title VII does not contain such express language. Nevertheless, the EEOC previously has indicated in two major policy statements that many of the same requirements for effective releases that are imposed by the OWBPA/ADEA are equally applicable to releases of Title VII claims: Understanding Waivers of Discrimination Claims in Employee Severance Agreements (July 15, 2009) and Enforcement Guidance on Non-Waivable Employee Rights under Equal Employment Opportunity Commission Enforced Statutes, EEOC notice 915.002 (April 10, 1997).<sup>1</sup> These policy documents, which provide the EEOC’s official position on these same issues, apply restrictions similar to some of those in the OWBPA to other statutes enforced by the EEOC, including Title VII and the Americans with Disabilities Act of 1990.

The courts have consistently denied enforcement of releases that preclude an employee from filing a charge of discrimination with a government agency. See *EEOC v. Lockheed Martin*, 444 F.Supp.2d 414 (D. Md. 2006); *Ribble v. Kimberly-Clark Corporation*, 2012 U.S. Dist. Lexis 21822 (W.D. Wis. 2012). The theory behind these rulings is that the EEOC and other government agencies have statutory mandates to enforce particular employment statutes, and as a matter of public policy private parties cannot agree between themselves to prevent the government from executing such statutory mandates. See Enforcement Guidance on Non-Waivable Employee Rights under Equal Employment Opportunity Commission Enforced Statutes, EEOC notice 915.002 at §III(a). In the *CVS Pharmacy, Inc.* lawsuit, however, the EEOC goes beyond this concept and seeks to invalidate a separation agreement that *expressly permits* an individual to file charges and participate in a governmental investigation.

Employers also should note that this concept of government mandates to enforce statutes likely applies to government agencies other than the EEOC and to statutes other than the ADEA and Title VII. The National Labor Relations Board (NLRB) has taken similar, and perhaps even more aggressive, positions attacking various kinds of employee agreements on the basis that they improperly attempt to limit employees’ exercise of the right to engage in concerted activity with co-workers granted by Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157. The NLRB specifically identifies restrictions on social media activities and communications in other forums for discussing terms and conditions of employment as examples of overbroad restrictions on Section 7 rights. The NLRB would likely seek to apply these same principles to the kinds of clauses identified by the EEOC in the *CVS Pharmacy, Inc.* lawsuit (*i.e.*, cooperation, disparagement, confidentiality, release of claims, and covenant not to sue). See *NLRB Fact Sheet on the NLRB and Social Media*, available on the NLRB website.

## Recommendations

In other contexts, courts have denied or limited relief sought by the Chicago District Office of the EEOC, which has the reputation of being highly aggressive. Therefore, it seems unlikely that all—or perhaps any—of the positions taken by the EEOC in the *CVS Pharmacy, Inc.* lawsuit will become binding on employers. Nevertheless, employers should take note of the EEOC’s recent pronouncements in the *Baker & Taylor, Inc.* and *CVS Pharmacy, Inc.* lawsuits, and in the EEOC’s highly publicized Strategic Enforcement Plan, and consider taking the following prophylactic actions:

- Review every separation agreement form to consider whether to strengthen existing provisions preserving the employee’s right to file administrative charges and participate in agency investigations. To avoid potential claims, employers may wish to include greater specificity in these provisions than had been thought to be adequate in the past. We recommend that these rights be specifically stated, and also refer to Section 7 rights under the NLRA. Also, prophylactically, we recommend that these rights apply to any government agency charged with enforcement of any law (not just the EEOC and NLRB, and not just employment laws).
- Despite the EEOC’s allegations in the *CVS Pharmacy, Inc.* complaint, it is far from clear that an employer must repeat these rights in every paragraph of a separation agreement that could potentially be determined to limit an employee’s right to engage in

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<sup>1</sup> These policy documents are available on the EEOC’s website.

legally-protected conduct. That would seem to make a separation agreement cumbersome and redundant, and may open the employer to challenges if the limitations are included in some but not all paragraphs. In light of the EEOC's now more aggressive posture on these issues, however, we now recommend that the employer set off a statement of the protected rights in a separate paragraph of a separation agreement, perhaps in bold. In addition, for the avoidance of doubt, the employer could specifically refer to each paragraph containing restrictions on an employee's rights (such as confidentiality and non-disparagement provisions) in the set-off paragraph, or begin each such section with language stating "Except as otherwise provided in paragraph **[refer to paragraph protecting employee's right to engage in protected activity]**," thus reinforcing that nothing in any section of the agreement limits those rights.

- Employers should continue to provide in their separation agreements that, despite the employee's retention of the right to file a discrimination charge, the employee is waiving the right to recover monetary damages or other individual relief in connection with any such charge.
- Employers should freshly review any separation agreement provisions mandating cooperation with the employer in connection with litigation and proceedings in light of the EEOC's now more aggressive posture on these issues. Employers may wish to consider modifying terms that might spark concern from the EEOC.

Employers should consider 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. Even though the employees asked to sign these Agreements were exempt, non-store personnel who likely are relatively better educated and sophisticated than many non-exempt employees, the EEOC felt it important to highlight the length of the form separation agreement. Because releases and separation agreements often are much longer than five single-spaced pages, and since one of the OWBPA mandates for enforceable releases is that they be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate," employers are advised to revisit the language contained in template release agreements.

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