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Labor and Employment Alert: Under the Microscope: The EEOC Takes a Close Look at Severance Agreements

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One of the Equal Employment Opportunity Commission's (EEOC) enforcement priorities is to target policies that discourage or prohibit individuals from exercising their rights under employment discrimination statutes or that impede the EEOC's investigative or enforcement efforts. Recently, the EEOC has targeted settlement provisions that appear to prohibit filing EEOC charges or that appear to restrict the ability of an employee to provide the EEOC with information to assist in investigating and prosecuting discrimination claims.

In February 2014, the EEOC's Chicago District Office sued CVS Pharmacy, claiming that a severance agreement that CVS had used with over 650 employees violated Title VII of the Civil Rights Act because it was "overly broad, misleading and unenforceable." In its lawsuit, the EEOC complained that the employees were required to sign a "five-page single spaced separation agreement" upon termination in order to receive severance pay. The EEOC identified several provisions in the agreement that it asserted violates Title VII:

- A *cooperation clause* requiring the employee to notify CVS's general counsel whenever the employee receives inquiries from an investigator about an investigation of CVS.
- A *non-disparagement* clause prohibiting the employee from making any disparaging statements about CVS.
- A *non-disclosure* provision prohibiting disclosure of confidential employee and other information without CVS's prior written permission.
- A *general release of claims* by which the employee releases all causes of action, including claims of unlawful discrimination of any kind.
- A *no pending actions and covenant not to sue* provision in which the employee represents that he or she has not filed or initiated a complaint or charge against CVS and will not do so. This provision also requires the employee to reimburse CVS for any legal fees CVS incurs if the employee breaches this provision. The EEOC was

particularly concerned with this covenant not to sue provision.

The EEOC has long taken the position that an agreement cannot restrict an employee from cooperating with the EEOC or from challenging the knowing and voluntary nature of a release of claims under the Age Discrimination in Employment Act. CVS's agreement expressly 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." The EEOC complained that this provision was buried in the severance agreement. The EEOC contended that CVS's use of this severance agreement constituted a "pattern and practice" of resistance to the rights under Title VII.

In September 2014, the district court dismissed the EEOC's lawsuit. In its October 2014 written opinion, the court stated that the EEOC was barred from bringing this suit because it had failed to first conciliate with CVS. However, the court did not address the EEOC's substantive arguments about the severance agreement.

The practical impact of this decision is twofold. First, because the court did not reach the true merits of the case, the EEOC is likely to raise this issue again (and again and again, as part of the agency's stated enforcement priorities). Second, employers should be concerned about the EEOC's heightened scrutiny because CVS's severance agreement is not all that different from the agreements that many companies use. Given this, employers should take this opportunity to consult their Vorys lawyer to review their severance and separation agreements with an eye to addressing the EEOC's concerns.