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## HRA-GC LEGAL UPDATE JUNE 2014

### NEW EEOC CHALLENGES TO SEVERANCE AND SEPARATION AGREEMENTS

*Recently, the Equal Employment Opportunity Commission (EEOC) has taken an aggressive stance against what it says is employer resistance to the full enjoyment of rights secured by the various civil rights statutes. At issue are commonly used provisions of severance and separation agreements that the EEOC says illegally impede an employee's right to file discrimination charges and cooperate with EEOC investigations.*

#### **Background**

Since 1997, the United States Equal Employment Opportunity Commission (EEOC) has opposed any attempt by employers to "interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding." See *Enforcement Guidance on non-waivable rights under Equal Employment Opportunity Commission (EEOC) enforced statutes*, EEOC Notice No. 915.002 (4/10/97). Of particular concern are employee-signed agreements in which employers try to limit an individual's right to file a charge or participate in an EEOC proceeding.

Beginning in 2013, the EEOC made combating "overly broad waivers" and "settlement provisions that prohibit filing charges with the EEOC or providing information to assist in investigations" a national priority. See *EEOC Strategic Enforcement Plan (SEP) FY 2013-2016* (Dec. 17, 2012). This new, more aggressive posture has resulted in two lawsuits challenging severance and separation agreements: *EEOC v. CVS Pharmacy, Inc.*, Civil Action No. 1:14-CV-863 (N.D. Ill. 2/7/2014) and *EEOC v. CollegeAmerica Denver, Inc., n/k/a Center for Excellence in Higher Education, Inc., d/b/a CollegeAmerica*, Civil Action No. 14-cv-01232-LTB-MJW (D. Colo. 4/30/2014). In each case, the EEOC is

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seeking to enjoin the enforcement of language it says limits a departing employee's ability to file charges of discrimination.

### *The Complaints*

In both the CVS case, which was filed in February, and the CollegeAmerica case, which was filed in April, the EEOC alleges that severance and separation agreements are overly broad, misleading and unenforceable. Specifically, the EEOC objects to provisions that: (1) require employees to notify general council when he or she receives any request to cooperate with a civil, criminal or administrative investigation; (2) prevent employees from making disparaging statements about their employer (non-disparagement clauses); (3) prevent employees from disclosing confidential information without prior written authorization from their employer; (4) require the employee to release employer from any and all causes of action or charges, including any claim of unlawful discrimination of any kind (release clauses); and (5) prevent employees from initiating, filing, or causing to be initiated or filed any action, lawsuit, complaint or proceeding asserting any of the released claims. According to the EEOC, these provisions are illegal because they effectively take away an employee's right to file charges and participate in EEOC investigations.

Moreover, the presence of a simple savings clause is insufficient to allay the EEOC's concerns. For example, the CVS agreement contains language stating "[n]othing in this paragraph is intended to or shall interfere with [e]mployee'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." But according to the EEOC, a single reference in a five-page single spaced document is insufficient to combat the totality of the offending provisions.

### *Bottom Line*

As these lawsuits demonstrate, the EEOC has taken an aggressive approach to challenging agreements it views as interfering with an employee's right to file charges and assist the EEOC. And though many of the offending provisions are now commonplace in severance and separation agreements, employers should rethink the inclusion of such language to ensure that their agreements are enforceable.

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