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A TRAP FOR THE UNWARY: EEOC PUSHES BACK ON OVERLY EXPANSIVE SEVERANCE AGREEMENTS

By Daniel Wilson

A familiar, if unsettling, trend the past four years has been layoffs. The calculus behind them is simple: companies need to cut costs to stay afloat amidst the weak economy, and reducing the size of their workforce is a means to that end. However, shedding jobs may be expensive in its own right, as disgruntled employees seek remedies in the courts for what they believe to be unlawful terminations. To preempt this risk, companies often resort to severance agreements to ward off potential litigation.

In contractually guarding against any claims, companies often take a bold stance. They insert sweeping language declaring that the employee will have no right to sue upon leaving the company and that the company enjoys a complete release of all potential claims. Companies may go further still and restrict the employee from even cooperating in a suit brought against it by another person or entity.

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In exchange for signing off on these and other terms, employees receive severance pay upon their departure from the company. However, such expansive agreements have increasingly run afoul of the Equal Employment Opportunity Commission (EEOC), generating the very same litigation costs the severance agreements sought to avoid. As the complaint in a recently-filed Illinois case, *EEOC v. Baker & Taylor*, makes clear, the agency is intolerant of any restrictions that may interfere with an employee's right to file a charge with the EEOC or to cooperate with the EEOC. The case also demonstrates that the EEOC is not afraid of using the courts to enforce its view of the proper scope of severance agreements and that private settlement agreements don't always stay private.

The Most Recent Fight: *EEOC v. Baker & Taylor*

The EEOC's determination to combat restrictions on what recourse employees have to the agency is evident in *EEOC v. Baker & Taylor*. Baker & Taylor (B&T), the world's largest distributor of books and entertainment media products, as well as "value-added" services for libraries, retailers and educational institutions, was sued on May 20 of this year. Just as the EEOC has alleged in an array of similar suits, B&T "engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII," the landmark statute that outlawed major forms of discrimination against minorities and women. B&T did so by "conditioning the receipt of severance benefits on employees' agreement to a severance agreement that deterred the filing of charges and interfered with their ability to communicate voluntarily with the EEOC. . ."

Much of the severance agreement was commonplace and of no interest to the EEOC, including provisions declaring that, upon leaving, the employee must continue to honor other agreements he or she has with the company – for instance, non-disclosure and non-compete agreements – and must return any company property in his or her possession.

The EEOC objected to the language categorically barring employees from initiating an action with "any administrative agency of the United States" against the company, or discussing or commenting on their termination in a manner that would "reflect negatively on the company." Since, according to the agreement, employees could not receive severance pay unless they complied, the EEOC argued that the employees' hands were unlawfully tied; as a matter of public policy, employees must have the freedom to alert the agency to discriminatory acts, and they possess no such freedom if their employer can "retaliate" against them by withholding or "clawing back" pay. It was not enough, moreover, that B&T's agreement expressly authorized employees to cooperate with or participate in an EEOC investigation – they themselves must be able to file charges.

Based on B&T's alleged violations of Title VII, the EEOC demanded, among other things, a permanent injunction on the use of B&T's current severance agreement, which putatively bound some 25 employees, or any other agreement that would prohibit employees from filing charges with the EEOC.

A similar case, *EEOC v. Trinity Health Corporation*[1], concluded last year in Indiana, gives a sense of the financial cost of resolving such EEOC suits. After withholding an employee's severance pay after she filed an EEOC charge, the EEOC filed suit against Trinity, arguing that the waiver in Trinity's severance agreement protecting it from "any and all legal claims or demands, known or unknown, based on employment with and separation from Trinity" constituted an unlawful employment practice under Title VII. Trinity ultimately paid $25,000 as part of its settlement with the EEOC.

The EEOC and Severance Agreements in a Wider Perspective

Importantly, *Baker & Taylor* and *Trinity* are not anomalies. Instead, they represent the prevailing trend against overly broad severance agreements. While not all courts lend wholesale support to the strict position embraced by the EEOC, there is consensus that any agreement impairing an employee's right to file a charge post-separation is legally dubious, at best. If there has been any pushback from the courts, it has been at the margins. For example, while the Sixth Circuit in *EEOC v. Sundance*[2] overturned the district court's ruling in favor of the EEOC, which had sued on similar grounds as in *Baker & Taylor* and *Trinity*, the Sixth Circuit's decision was based on the fact that the employer had merely *offered* the severance agreement, and it had not been accepted by the employee. Therefore, the case provides little ammunition against the broad conclusion that the EEOC will combat – often with success – any contractual provision impeding the right of an employee to file a future charge.

Lessons for Companies

The most obvious lesson from these developments is that companies need to review their severance agreements. Based on the publicly accessible record from *EEOC v. Baker & Taylor*, it appears likely that B&T did not do so. For example, despite the language in B&T's agreement explicitly blocking employees from initiating any action with government agencies, including the EEOC, elsewhere it stipulates that

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"nothing in this waiver and release shall limit my right . . . to file an administrative charge with [any] agency." The tension between the two provisions is obvious, and the EEOC only considers one legal. That the tension remained in the agreement indicates that B&T did not diligently review its agreement before presenting it to the employee. If nothing else, B&T's litigation testifies to the fact that all companies need to pay assiduous attention to what they offer to departing employees and be especially wary of broad language that might be construed as precluding access to the EEOC.

On the other hand, while the right to file a charge is protected, the right to recover is not. For purposes of reducing financial liability and deterring employees from filing future charges with the EEOC, employers may therefore prevent employees from gaining monetarily from an action taken on the individual's behalf by the EEOC or other employees.

Therefore, although the EEOC[3] has been proactive in bringing suit, employers can still find comfort in the fact that, in many circumstances, reliable and defensible protections can be built into severance agreements. However, if the employer goes too far and attempts to immunize itself against certain activities by the government or the releasing employee, then it is probably asking for trouble.

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1 12-cv-13803

2 466 F.3d 490 (6th Cir. 2006)

3 To ensure complete compliance with EEOC rules, guidelines and best practices, please visit the relevant section of the EEOC website at: www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

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