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SEPARATION ANXIETY: BEST PRACTICES FOR EMPLOYEE SEVERANCE AGREEMENTS

By Benjamin David Williams

Employers deal with employee separations all the time. Back when I was an HR manager for a major airline, when it came time for a layoff or other not-for-cause termination, most of the time I'd just pull the standard form separation agreement off the shelf, customize it a bit, and then work to get the employee to sign it. I confess that I never gave much thought to whether the separation agreement could ever be challenged, or worse, determined to be unenforceable.

Now I know better. While form agreements are certainly convenient, they can easily become outdated by failing to account for recent developments in the law. With the new year underway, now might be a good time to review your form separation agreements and decide whether a tweak or two is in

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order. Why now? Recently, the EEOC, SEC, and other government agencies have started to take a more aggressive stance on separation-agreement provisions—particularly those that are seen, at least from the agencies' points of view, as preventing or deterring employees from reporting employer wrongdoing.

For example, the EEOC has long taken the position that conditioning severance benefits on the employee's promise not to file an EEOC charge could constitute unlawful retaliation, in violation of federal employee-rights statutes.[1] But in a recent shift, the EEOC has become even more strident in its enforcement efforts, and the agency has taken action against even those employers whose severance agreements expressly *carve out* restrictions on filing EEOC charges or participating in agency investigations. Courts have so far been reluctant to accept the EEOC's hawkish position. But with stepped-up enforcement actions on the rise, employers may do themselves a considerable disservice by relying on an outdated form agreement. Instead, it might be a good time to dust off the old agreements with an eye toward deciding whether saving the time and expense of defending an agency action outweighs the inconvenience of implementing a less restrictive separation agreement.

EEOC GUIDANCE "EVOLVES"

Since at least 2009, the EEOC's position has been that, in the context of separation agreements, even those employees who agree to release all claims nevertheless should be allowed to file an EEOC charge and participate in agency proceedings. For example, the agency has said that severance-agreement provisions that limit an employee's right "to testify, assist, or participate in an EEOC investigation are invalid and unenforceable".[2] The agency has said that the "very existence" of an agreement that includes an employee's promise not to file a charge constitutes unlawful retaliation, in violation of federal employment-rights statutes.[3]

The EEOC has decided to step up its enforcement actions against employers who have these no-charge provisions in their separation agreements: In 2013, the agency announced new enforcement priorities, pledging to "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts."[4] EEOC concerns extend to overly broad waivers and settlement provisions that employees might construe as prohibiting them from filing charges or assisting in agency investigations.[5]

TENSION WITH COURT DECISIONS

The EEOC's new aggressive position seems at odds with federal court decisions in these areas. For example, courts routinely hold that employees can properly waive or release accrued Title VII and other claims, so long as the waiver is made voluntarily and knowingly. Title VII rights, "like many other rights created by federal statutory law, may be surrendered through the execution of a release."[6]

Even so, employers should be aware that courts will "closely scrutinize" waivers like these, particularly when an employee is releasing a right that is remedial in nature.[7] Courts have held, for example, that prospective claims cannot be contracted away and that rights to file charges similarly cannot be waived.[9]

This tension between the EEOC's aggressive enforcement priorities and courts' lack of enthusiasm for embracing those priorities leaves employers in the position of trying to make heads or tails of the uncomfortable gray area, as one employer learned too well.

EEOC V. CVS PHARMACY: A CASE STUDY

The EEOC sued CVS in Illinois federal court, alleging that the pharmacy chain improperly tied employees' severance pay to their agreement not to communicate with the agency or file discrimination claims. Specifically, EEOC complained that CVS conditioned severance pay "on an overly broad, misleading and unenforceable" separation agreement "that interfere[d] with its employees' right to file charges" with government employment agencies.

The agency voiced several particular concerns with CVS's severance agreement. Among:

1. The agreement was five pages of single-spaced small print.

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2. It required that an employee promptly notify the company's general counsel if the employee received a subpoena, deposition notice, interview request, or other inquiry related to a civil, criminal, or administrative suit or investigation.

3. It prohibited an employee from making disparaging statements about the employer.

4. It prohibited the employee from disclosing the employer's confidential information.

5. It required the employee to release all claims against CVS, including the right to bring charges against the employer—even though it contained a carve-out provision that allowed employee cooperation in agency investigations and actions to enforce discrimination laws.

Though these provisions might seem routine and common, EEOC took exception to them anyway, arguing that employees might construe them as prohibiting all cooperation with the agency. The EEOC therefore sought to enjoin CVS from using the agreement and asked the court to order the company to institute programs that explicitly allow employees to file EEOC charges and participate in agency proceedings. It also asked the court to order CVS to implement required training programs for HR and management personnel.[10]

The EEOC lost the case, but notably, *not* on the merits. The district court entered summary judgment in CVS's favor on procedural grounds, finding that the agency had failed to first engage in required conciliation with CVS before bringing suit.[11] The Seventh Circuit upheld the summary judgment ruling on those grounds, although the EEOC has petitioned for *en banc* review.

The *CVS Pharmacy* case is not the only example of a more aggressive agency enforcement agenda. For example, in *EEOC v. Baker & Taylor, Inc.*, the agency argued that the employer "engaged in a pattern of resistance to the full enjoyment" of Title VII rights by "conditioning employees' receipt of severance pay on an overly broad, misleading and unenforceable severance agreement, which deterred employees from filing charges and interfered with their rights to communicate voluntarily with the EEOC."[12] Remarkably, the EEOC sued even though the

Workplace Use of Internet and Email: In Germany, Leaving the Rules Unwritten Comes at a Price

By Jens Wollesen

Private use of email and the Internet in the work place is a recurring source of controversy in all stages of the employment relationship. For example, is it permissible to access employee email when employees are on sick leave or after they have been terminated? May the employer review the Internet protocol data or business email of an employee who is suspected of leaking trade secrets?

In Germany, these questions lie at the crossroads of data privacy and telecommunications law, along with those laws' respective administrative and even criminal sanctions. The proper rules and best-practice examples have now been recapped in a recent guideline issued by the Conference of Data Protection Authorities in Germany ("DPA Conference").

Stringent telecommunications law applies when employees are permitted to use the employer's IT services for private purposes. Under these circumstances, DPAs view employers as telecommunications media providers who are bound by the rules of telecommunications secrecy. While a number of lower courts disagree with this view, the question has not yet been decided by the German Federal Supreme Court, and

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severance agreement contained an *express* carve-out for filing agency charges—a carve-out that complied with the agency's own published guidance on the issue.

The employer settled and entered into a consent decree, which required it to include more explicit language about employees' rights to participate in agency actions. The employer also agreed to provide EEOC, for the next three years, a list of names of those employees who entered into future severance agreements with the company.

SEC ENFORCEMENT ACTION

The EEOC isn't the only agency assuming a more aggressive enforcement posture. The SEC is, too. Severance agreements commonly include provisions that require employees not to use or disclose any confidential employer information. The SEC has made clear that such provisions could violate SEC Rule 21F-17(a), which prohibits impeding anyone from communicating directly with the Commission about possible securities law violations.[13]

The SEC has warned employers against encouraging whistleblowers to withhold evidence of employer wrongdoing. In addition to promising to curtail such practices by actively looking for problem confidentiality and severance agreements, SEC Whistleblower Chief Sean McKessy promised that "if we find that kind of language, not only are we going to go after the companies, we are going to go after the lawyers who drafted it."[14]

Last year, the Commission made good on its promise and launched an enforcement action against Houston-based KBR Inc. "for using improperly restrictive language in confidentiality agreements with the potential to stifle the whistleblowing process."[15] The SEC said that "KBR required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties" without first obtaining an in-house lawyer's approval.[16] The SEC viewed the confidentiality agreements as antithetical to the purpose of Rule 21F-17(a).

KBR agreed to settle the action, paying a $130,000 penalty and voluntarily amending its confidentiality

employers are well advised to follow their DPA's interpretation. As a consequence, access to email or Internet protocol data is strictly prohibited without the employee's consent. In the case of email, DPAs have, in the past, also required the third party's consent. While in practice sanctions are limited to fines, in theory improper access may even lead to criminal liability. Interestingly, the DPA Conference now suggests that employers may dispense with the consent of the sender, which is naturally hard to obtain in practice. When access to email is required by the course of business, the DPA Conference suggests, the employer can rely solely on the employee's consent.

To the extent that email and Internet use for private purposes is banned or restricted, only data privacy law applies, and the employer is entitled to access the employee's email and protocol data. But even in these cases, access may not extend to total surveillance. Unless there is a reasonable basis for that a crime has been committed, that employer may only conduct spot tests to verify compliance with the company's corporate policy.

The DPA Conference highlights the importance of providing written rules for workplace use of information and communication technologies. Absent a written policy, courts may interpret tolerance of private use as implied permission.

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provisions to clarify that employees are free to report possible SEC violations.[17]

Whereas there is some dissonance between the EEOC's enforcement position and that of the courts, the same is not true with respect to the SEC. Indeed, court decisions in this area actually *bolster* SEC's position. Courts have observed the "strong public policy in favor of protecting whistleblowers who report fraud against the government."[18] "Obviously, the strong public policy would be thwarted if [employers] could silence whistleblowers and compel them to be complicit in potentially fraudulent conduct."[19]

So where does all of this leave employers?

SEVERANCE-AGREEMENT BEST PRACTICES

Given the government agency crackdown on broad waivers and confidentiality provisions that exist in many severance agreements, employers may well benefit from a quick review of their existing form agreements, keeping these suggested best practices in mind:

1. **Pay attention to the length and complexity of the agreement.** A five-page, single-spaced agreement proved too dense for EEOC's taste in *CVS Pharmacy*. Use plain, straightforward language that the target employee easily can understand. Courts will often take an employee's education, experience, and sophistication into account when deciding whether a separation agreement is enforceable, so you should too. The more straightforward and decipherable your agreement is, the better.[20]

2. **Decide whether your severance agreements should contain stronger clauses preserving the employee's right to file charges and participate in agency investigations.** The EEOC apparently believes that express carve-outs—even those that ostensibly comply with EEOC's own early guidance—are now insufficient on their own, when other language in the agreement otherwise might deter employees from pursuing their rights. Although courts may be reluctant to embrace an overly aggressive EEOC position, employers must nevertheless weigh the risks of defending a CVS-type lawsuit against the benefit of a more restrictive release provision.

3. **Review clauses mandating cooperation with the employer in connection with litigation; consider whether to include an express exception for EEOC charges, investigations, and other agency actions.** Clauses that require a separating employee to first notify the employer before participating in an investigation, suit, or other proceeding may draw agency ire. Weigh the benefit of adding language that expressly excludes such a requirement for employees filing EEOC charges.

4. **Consider whether to set off a statement of the protected-rights provisions in a conspicuous paragraph.** For example, consider noting in bold language that the employee is giving up certain legal claims by signing the agreement.

   Example: **Please read carefully. You are giving up certain legal claims that you might have against [employer] by signing this agreement. You should consult an attorney before signing it.**

5. **The language concerning employee waivers should be unmistakably clear.** The key has always been to make sure that an employee who is waiving his or her rights does so knowingly and voluntarily.[21] But EEOC apparently now insists on more specificity than was necessary before.

6. **Provide a reasonable revocation period or sufficient time in which to consider and execute the agreement.** Although there is no bright-line test for what constitutes a sufficient timeperiod for an employee to consider a release before executing it, courts have found that, absent some reason for urgency, 24 hours is too short.

7. **Beware of provisions that could be seen as deterring whistleblowers.** Review form agreements to ensure there are no provisions that could be seen as unduly restricting an employee's or former employee's ability to report securities-related violations to the SEC. For example, provisions that condition the receipt of employee

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benefits on keeping whistleblower complaints in-house risks SEC enforcement action—and potential attorney discipline for the lawyers who drafted the troublesome language. Also avoid using language that might be interpreted as offering incentives or rewards for keeping securities-related whistleblower complaints in-house.

8. **Include a severability clause.** To ensure your severance agreement remains valid and enforceable even if a particular *provision* is deemed not to be, be sure to include a serviceable severability clause.

CONCLUSION

It's not clear whether EEOC or other agencies will have much success in pursuing their aggressive enforcement agendas when it comes to separation agreements. But in any case, it might be worth the while to review standard form agreements to decide whether they should be updated, to avoid drawing agency action.

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1 EEOC, Notice No. 915.002, Enforcement Guidance on Non-Waivable Employee Rights (Apr. 10, 1997), http://www.eeoc.gov/policy/docs/waiver.html ("Agreements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission.").

2 EEOC, Understanding Waivers of Discrimination Claims in Employee Agreements, http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

3 EEOC, Notice No. 915.002, Enforcement Guidance on Non-Waivable Employee Rights (Apr. 10, 1997), http://www.eeoc.gov/policy/docs/waiver.html.

4 EEOC, Strategic Enforcement Plan FY 2013–2016, http://www.eeoc.gov/eeoc/plan/sep.cfm.

5 *Id.*

6 *Cában Hernández v. Philip Morris USA, Inc.*, 486 F.3d 1, 8–9 (1st Cir. 2007); *see also Hampton v. Ford Motor Co.*, 561 F.3d 709, 714–15 (7th Cir. 2009); *Puentes v. United Parcel Serv., Inc.*, 86 F3d 196, 198 (11th Cir. 1996) ("When an employee knowingly and voluntarily releases an employer from liability for Title VII and § 1981 claims with a full understanding of the terms of the agreement, he is bound by that agreement.").

7 *Stroman v. W. Coast Grocery Co.*, 884 F.2d 458, 461–63 (9th Cir. 1989).

8 *Richardson v. Sugg*, 448 F.3d 1046, 1055 (8th Cir. 2006) ("An employer cannot purchase a license to discriminate.").

9 *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490, 499 (6th Cir. 2006) ("There can be little doubt that the filing of charges and participation by employees in EEOC proceedings are instrumental to the EEOC's fulfilling its investigatory and enforcement missions."); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987).

10 Complaint, *EEOC v. CVS Pharmacy*, Case No. 1:14-cv-863 (N.D. Ill., Feb. 7, 2014).

11 *EEOC v. CVS Pharm., Inc.*, 809 F.3d 335, 336 (7th Cir. 2015).

12 *EEOC v. Baker & Taylor, Inc.*, No. 1:13-cv-03729 (N.D. Ill., filed May 20, 2013).

13 17 C.F.R. § 240.21F-17(a).

14 Brian Mahoney, "SEC Warns In-House Attorneys Against Whistleblower Contracts," *Law360*, available at http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts. Under SEC Rule of Practice 102(e), the SEC can censure a person or deny attorneys "the privilege of appearing or practicing before" the Commission. SEC Rule of Practice 102(e), March 2006.

15 EC Press Release, *Companies Cannot Stifle Whistleblowers in Confidentiality Agreements*, April 1, 2015, available at https://www.sec.gov/news/pressrelease/2015-54.html.

16 *Id.*

17 *Id.*

18 *United States v. Cancer Treatment Ctrs. Of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004).

19 *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012).

20 *See Cában Hernández*, 486 F.3d at 8–9.

21 *See generally 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009) (upholding a clear and unmistakable arbitration clause).

22 *See Puentes*, 86 F.3d at 199.

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