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Severance and Confidentiality Agreements

The problem employee; every employer has one. Imagine you want a clean break from that problem employee, so you plan to offer him a severance agreement. Not so easy, you must beware.

Government agencies, such as the Securities Exchange Commission ("SEC"), the Equal Employment Opportunity Commission ("EEOC"), and the National Labor Relations Board ("NLRB") are scrutinizing employer-employee agreements, including severance and confidentiality agreements. The EEOC's strategic enforcement plan identifies as one of its priorities overly broad waivers and settlement provisions.

In light of this, employers should take a closer look at the following provisions often used in severance agreements.

1. Covenants not to sue. Although employees can agree not to sue their employers for claims arising out of their employment, employers cannot prohibit employees from filing a charge or testifying before the EEOC.
2. Non-disparagement clauses. Overly broad non-disparagement clauses can lead employees to believe that participation in a government investigation would breach a severance agreement. And, employees have a right to communicate with each other regarding employment matters (under Section 7 of the National Labor Relations Act ("NLRA")).
3. Non-disclosure of confidential information. Overly restrictive language in a confidentiality clause may impede an employee from actively participating in an investigation with a government agency.
4. Cooperation clauses. Certain language within a cooperation clause may also negatively impact an employee's cooperation in an investigation with a government agency.
5. General release provisions. Employers should avoid overly broad general release provisions.

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Best Practices for Employers:

Employers should add disclaimer language in all agreements saying that nothing prohibits the employee from filing a charge of discrimination, participating in an investigation, or reporting potential violations of law to government agencies. Further, a general release clause is not sufficient when there are multiple clauses that appear to interfere with this right. As such, the disclaimer language should be included within each clause that appears to restrict an employee's right to participate in such activity.

Many employers include a waiver of the employee's right to collect monetary benefits in connection with his/her filing a charge with a government agency. Employers should consider whether such waivers are really necessary. Although the EEOC expressly authorized this practice in *Eastman Kodak Company* (See Consent Decree, 6:06-cv-06489-CJS (W.D. N.Y. 10/11/2006)), more and more agencies have found such restrictions problematic. *See In re Bluelinx Holdings, Inc.*, SEC-3-17371 (August 10, 2016) ($265,000 in civil penalties); *In re Health Net, Inc.*, SEC-3-17396 (Aug. 16, 2016) ($340,000 in civil penalties).

Employers should limit non-disparagement clauses to prevent employees from disparaging customers, suppliers, vendors, etc. And, only prohibit employees from "defaming" an employer.

Employers should consider removing overly restrictive language in confidentiality agreements. When dealing with current employees, employers should beware of Section 7 of the NLRA, even if employees are not unionized. Section 7 says employers cannot restrict an employee's ability to discuss working conditions with other employees. Thus, any confidentiality clauses should avoid overly broad language and specifically carve out these rights.

Employers should avoid language that restricts an employee's right to participate in a government investigation and/or provide documents or information to a government agency. Further, employers should not require notice of an employee's participation in an investigation.

Employers should carefully consider their general release provisions. The EEOC has refused to honor a severance agreement when it contains a general release provision between an employer and an unrepresented party. *See EEOC v. CollegeAmerica Denver, Inc..*, 14-cv-01232-LTB-MJW (10th Cir. 8/24/2016) (EEOC refused to dismiss EEOC charge based on general release provision between employer and an unrepresented party). Moreover, to comply with Section 7 rights, employers should give employees a reasonable amount of time to review any such agreements (45 days was deemed reasonable in *Independent Stave Company, Inc. v. NLRB*, 352 F.2d 553 (8th Cir. 1966)), and inform the employee of his or her right to consult with an attorney or union representative (if applicable).

Finally, employers should consider updating employee handbooks, codes of conduct, and employee training to be consistent with the law.