



# Newsletter

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# **DRAFTING EFFECTIVE SEPARATION AGREEMENTS TO WITHSTAND EEOC SCRUTINY**

*Robert S. Nichols and Amy Karff Halevy<sup>1</sup>*

Legal developments impacting employee release agreements have made it essential that employers reevaluate their agreements. A consideration of those legal developments, together with a discussion of important drafting guidelines given those developments, are key to an effective reevaluation of those form agreements.

## **I. Increasing Government Scrutiny of Separation Agreements**

In the 1990s, with the proliferation of lawsuits over terminations, businesses increasingly turned to arrangements in which discharged workers were provided with severance pay and benefits in exchange for a release of any known or unknown claims. These contractual arrangements, often referred to as severance or separation agreements, for many companies have become a standard part of reductions in force as well as individual terminations.

Two trends associated with the use of separation agreements, however, have led to increasing litigation over enforceability and, in some instances, over whether certain provisions may constitute unlawful retaliation.

The first trend leading to increased litigation has been the regulation and scrutiny of these agreements by the federal government - most notably the Equal Employment Opportunity Commission (EEOC).

The second trend that has led to more legal challenges and controversy over releases is the inclusion by employers of additional - sometimes aggressively worded - provisions, usually intended to prevent the employee from engaging in communications or other conduct after leaving employment that might damage the employer's interests. These provisions include, for example, non-disparagement, cooperation, and broad confidentiality clauses. Also, the inclusion by some employers of what is termed a "covenant not to sue" has led to litigation.

Regulation of the terms of separation agreements began in 1990 with the passage of the Older Workers Benefit Protection Act (OWBPA).<sup>2</sup> Congress, concerned about employers presenting releases to older workers without adequate protections to assure the releases were truly knowing and voluntary, imposed minimum requirements for releases of claims under the Age Discrimination in Employment Act (ADEA).

That enactment, for instance, required that employees be advised in writing to seek the advice of an attorney before signing the agreement and required the employer to allow certain periods of time for the employee to review and, once signed, revoke the agreement.<sup>3</sup> The OWBPA, in addition to imposing a variety of minimum requirements for agreements waiving ADEA claims, also required employers engaging in group termination programs to provide certain disclosures to impacted employees about the ages and job titles of workers selected, and not selected, for the program.

In the 1990s, the EEOC, through regulation and guidance, began effectively imposing additional restrictions on employers with regard to separation agreements.

For example, in 1997 the EEOC issued guidance instructing that employers could not include provisions that prohibited the employee from filing a charge with the EEOC or a state or local anti-discrimination agency.<sup>4</sup>

In 1998, the Agency issued regulations explaining the OWBPA minimum requirements for an ADEA waiver.<sup>5</sup>

In 2000, the EEOC issued additional ADEA waiver regulations intended primarily to address the unenforceability of tenderback and ratification provisions.<sup>6</sup> Importantly, however, these regulations also effectively imposed limitations on employers' use of covenant not to sue provisions, as well as clauses imposing potential attorneys' fees and other penalties on employees who sue in violation of a separation agreement.

In the preamble to those 2000 regulations, the EEOC, while concluding that covenants not to sue are not per se unlawful, expressed concerns that the covenant could have a chilling effect on employees' exercising their rights under the ADEA, such as to file a charge or challenge the enforceability of a waiver agreement.<sup>7</sup> In that preamble, the EEOC further explained:

Although ADEA covenants not to sue (absent damages) operate as a functional equivalent of waivers, they carry a higher risk of violating the OWBPA by virtue of their wording. An employer could read 'covenants not to sue' or 'promise not to sue' as giving up not only the right to challenge a past employment consequence as an ADEA violation, but also the right to challenge in court the knowing and voluntary nature of his or her waiver agreement. The chance of misunderstanding is heightened if the covenant not to sue is added to an agreement that already includes an ADEA waiver clause. ... [The covenant's] language would appear to bar an individual's access to court.

Id.

The EEOC accordingly warned in the preamble that "[e]mployers therefore must take precautions in drafting covenants not to sue so that the employees understand that the covenants do not affect their right to test the knowing and voluntary nature of the agreement in court under the OWBPA." Id. Labor attorneys have come to understand these instructions from the EEOC to mean that an employer could only include a covenant not to sue if the employer effectively explained to employees, in the agreement, that the covenant did not prevent the employee from bringing a legal challenge over whether the release complies with the OWBPA requirements.

Over the last 10 years, in addition to bringing a number of suits challenging whether an employer's form releases complied with these OWBPA requirements, the EEOC has brought suits, under both Title VII of the Civil Rights Act of 1964 (Title VII) and the ADEA, contending agreements unlawfully included provisions that either explicitly prohibited the employee from

filing an EEOC charge or effectively suggested the employee could not file a charge, participate in EEOC investigations or exercise other non-waivable statutory rights.<sup>8</sup>

For instance, in 2006, in *EEOC v. Sundance Rehab. Corp.*, 466 F.3d 490, 500 (6<sup>th</sup> Cir. 2006), the agency challenged a separation agreement which offered a terminated worker “severance pay in exchange for, among other things, promises not to sue or file an administrative charge and not to make any statement or take any action that would reflect negatively on the [employer].” The EEOC argued in its suit that the provisions at issue were not only unenforceable but also constituted unlawful retaliation under Title VII. After the trial court granted summary judgment for the EEOC, the Sixth Circuit on appeal, while agreeing the charge filing ban at issue appeared to be unenforceable, concluded that the inclusion of this language did not constitute retaliation.

In the years that followed, the EEOC brought other suits challenging separation agreement provisions that barred employees from filing charges or otherwise suggested an employee could not freely complain to the EEOC or participate in its investigations.<sup>9</sup>

Then, in February of this year, the EEOC filed a highly publicized lawsuit against CVS, the major drugstore chain, over the company’s form separation agreement that it utilized with non-store exempt employees. Specifically, the EEOC alleged that CVS was interfering with the rights of employees under Title VII by including provisions in the separation agreement that the EEOC believed had a chilling effect on employees’ understanding of their rights to file a charge and otherwise participate in EEOC proceedings. Specifically, the EEOC challenged provisions concerning “cooperation,” “non-disparagement,” “non-disclosure,” and a covenant not to sue and broad release language.

Soon after the lawsuit was filed, CVS filed a motion to dismiss arguing that the EEOC’s contention that the provisions at issue unlawfully interfered with employee’s Title VII rights failed as a matter of law. On October 7, 2014, the federal district judge in Chicago granted the motion to dismiss the EEOC’s case in its entirety based on procedural grounds. Specifically, the judge found the EEOC, prior to filing suit, failed to engage in the conciliation process mandated by Title VII.

There appears to be little doubt that the EEOC will appeal the judge’s dismissal of the CVS suit to the Seventh Circuit Court of Appeals. Even more importantly, it is clear that the EEOC will continue to bring challenges to separation agreements that include provisions that the agency believes may lead employees to believe that they are prohibited from filing a charge, participating in an EEOC investigation or otherwise exercising non-waivable rights.

## **II. Drafting Guidance**

Accordingly, employers should take reasonable steps to craft the language of their agreements so as not to draw challenges by the EEOC or individual plaintiffs. Some specific steps that employers should take include:

1. Covenants Not to Sue. Based not only on EEOC suits like the CVS case, but also the OWBPA waiver regulations, employers would be well advised to generally not include a covenant not to sue in separation agreements. Generally speaking, traditional release language alone is sufficient to assure that the employee has

relinquished the right to bring a suit and, therefore, the covenants not to sue language is superfluous. Some labor lawyers have turned to these covenants as a vehicle for the recovery of attorneys' fees if an employee sues in violation of the agreement. Any value to be gained by such a covenant, however, arguably is outweighed by the risk that it will form the basis for an argument that the release has been rendered unenforceable as a result of the chilling effect that the covenant's language may have on employees' understanding of their rights.

2. Cooperation Clauses. Reasonable cooperation clauses, such as those that simply call for the former employee to assist with business-related questions that may arise after the employee's departure, are plainly lawful. However, cooperation clauses that go much further and, for instance, prohibit employees from assisting other employees with suits against the company or bar or limit the rights of employees to participate in government investigations or litigation are almost certainly unenforceable and also may constitute a violation of discrimination laws. As is the case with many of these commonly challenged provisions, one key is for the employer to be reasonable in drafting the provisions at issue and not overreach.
3. Non-Disparagement Clauses. The existing case authority indicates that there is no absolute prohibition on non-disparagement clauses. Again, however, there is certainly the opportunity for employers to be overly aggressive and include language that would suggest to employees that they cannot file an EEOC charge or assist another employee in pursuing a discrimination claim because they would be effectively "disparaging" the employer.

To avoid any argument that a clause has an unlawfully chilling effect, whether it be a non-disparagement, cooperation, or similar clause that restricts an employee's post-employment communications and activities, an employer should consider including in the agreement disclaimer language that instructs the employee that he or she retains the right to file an agency charge, but waives the right to any personal relief arising out of any charge that concerns conduct occurring prior to the time of the employee's release.

When drafting an appropriate disclaimer for inclusion in the agreement, that provision should be written so it is clear that the disclaimer not only applies to the section in which it is included, but applies to all provisions of the agreement. For instance, it should be clear that the disclaimer covers not only a non-disparagement clause, but also applies to cooperation, confidentiality and other provisions in the agreement.

4. Attorneys' Fees and Clawback Provisions. Given the case authority as well as the OWBPA waiver regulations, employers should avoid including provisions in agreements threatening the employee with attorneys' fees if the employee brings a suit or takes other actions in contravention of the agreement. EEOC guidance, as well as the 2000 OWBPA regulations, indicates that employees must feel free to bring legal challenges as to the enforceability of agreements and that penalty

clauses, such as fees provisions, have a chilling effect on employee challenges to the effectiveness of releases. Accordingly, a prudent employer should not include attorneys' fees, liquidated damages, clawback, or other penalty provisions in separation agreements.

5. Use of the Word "Charge". It is apparent from suits brought by the EEOC, that the agency is particularly concerned with separation agreements that utilize the word "charge" in describing the claims or rights being waived by the employee. The EEOC is concerned that the use of the term "charge" will create the impression the employee is prohibited from filing an agency charge. A cautious employer avoids the use of that term in describing the claims and rights the employee waives under the separation agreement.
6. Valuing Simplicity. A concern clearly raised by the EEOC in the *CVS* case and other litigation is that lengthy or complex release language may make it difficult for the employee to effectively understand the provisions of the agreement. Moreover, in the case of releases of age discrimination claims, the waiver requirements established by Congress in the OWBPA specifically require that the agreement be written "in a matter calculated to be understood by [the] individual, or by the average individual eligible to participate."<sup>10</sup> Therefore, it is important to keep an agreement short with a minimum of legalese and complexity.
7. Remember the OWBPA Requirements. Employers also should not lose sight of the importance of drafting the agreement in a manner that strictly complies with the OWBPA requirements for release of ADEA claims. A variety of federal courts have taken the position that "substantial compliance" with these requirements is not adequate, but rather the standard is strict compliance.<sup>11</sup>

### III. Conclusion

The EEOC undoubtedly will continue its vigorous challenges to separation agreements when the agency believes that the employer has overreached with regard to the language included. Accordingly, employers should carefully examine their agreements to assure that the provisions are reasonable and would not lead employees to believe that they are waiving the right to file a charge, participate in a government investigation, or exercise other legal rights that the employee lawfully cannot waive. In sum, employers should avoid overly aggressive post-employment covenants and keep the focus on obtaining an effective release of claims from the employee.

### ENDNOTES

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- <sup>1</sup> Copyright 2014.
  - <sup>2</sup> Pub. L. No. 101- 433, 104 Stat. 978 (1990)
  - <sup>3</sup> 29 U.S.C § 626(f)
  - <sup>4</sup> EEOC Enforcement Guidance on Non-waivable Employee Rights under EEOC Enforced Statutes, #915.002, April 10, 1997, 3 EEOC Compl. Man. (BNA) No. 2345
  - <sup>5</sup> 29 C.F.R. § 1625.22
  - <sup>6</sup> 29 C.F.R. § 1625.23
  - <sup>7</sup> 65 FR 77438, 77443 (Dec. 11, 2000)

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<sup>8</sup> See, e.g., *EEOC v. Lockheed Martin*, 444 F. Supp. 2d 414 (D. Md. 2006)

<sup>9</sup> *EEOC v. CVS Pharmacy, Inc.*, No. 1:14-cv-00863 (N.D. Ill. filed Feb. 7, 2014)

<sup>10</sup> 29 U.S.C § 626(f)(1)(A)

<sup>11</sup> See, e.g., *Blakeney v. Lomas Info. Sys., Inc.*, 65 F.3d 482, 485 (5th Cir. 1995), cert. denied, 516 U.S. 1158 (1996)

**Robert S. Nichols** is a partner at Bracewell Giuliani.

**Amy Karff Halevy** is a partner at Bracewell Giuliani.