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They Really Mean It: the EEOC Sues Another Employer for Allegedly Overbroad Releases

By Kerry Notestine, Terri Solomon, and Daniel Thieme

Recently, the Chicago District Office of the Equal Employment Opportunity Commission (EEOC) sued CVS Pharmacy, Inc. because CVS required employees to sign a release that the EEOC claims was “overly broad, misleading, and unenforceable” due to provisions in the release which allegedly infringed on the employees’ rights to file charges of discrimination and participate in EEOC investigations.¹ On April 30, 2014, the Phoenix District Office of the EEOC sued CollegeAmerica Denver, Inc. in the United States District Court for the District of Colorado, making similar allegations.² All employers should carefully review their form release agreements in light of these actions by the EEOC, which we expect will continue.

Complaint Allegations

The complaint alleges that CollegeAmerica employed a campus director of its Cheyenne, Wyoming location until she resigned. CollegeAmerica and the former employee signed an agreement on September 1, 2012 in which CollegeAmerica agreed to pay her \$7,000 and support her claim for unemployment compensation in exchange for her agreement not to contact any government agency to file a complaint, to forward complaints from disgruntled employees or students to CollegeAmerica, and not to disparage the company. The former employee later exchanged emails with another former CollegeAmerica employee in which the former employee allegedly disparaged the company. The company claimed a violation of the agreement and demanded the return of the \$7,000 consideration. The former employee then filed an EEOC charge and the company received notice of this charge on March 18, 2013. The company sued the former employee in state district court on March 25, 2013, alleging breach of the September 1, 2012 agreement. She subsequently filed two other EEOC charges alleging retaliation. During the EEOC’s investigation into the charges, CollegeAmerica produced four form agreements that the company apparently used for separation agreements with individual employees and for reductions in force (RIF) involving terminations of multiple employees.³ The EEOC attached the agreement signed by the former employee and the four form releases to its complaint.

1 See Kerry Notestine, Terri Solomon, and Daniel Thieme, [Recommendations in Response to the EEOC’s New Lawsuit on Severance Agreements](#), Littler ASAP (Mar. 4, 2014).

2 See *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 (D. Colo., Apr. 30, 2014).

3 The agreements are referenced as: (i) separation—non-ADEA under 40, (ii) separation—ADEA age 40 and over, (iii) RIF—non-ADEA under 40, and (iv) RIF—ADEA age 40 and over.

As in the *CVS* case, the EEOC asserts in the *CollegeAmerica* matter that provisions of the agreements requiring release of claims, cooperation with the company, and non-disparagement violate the Age Discrimination in Employment Act (ADEA) because those provisions allegedly chill the rights of individuals to file charges of discrimination and participate in EEOC and state agency investigations. The EEOC also challenges additional provisions in the *CollegeAmerica* agreements not present in the *CVS* release, e.g., clauses specifically prohibiting contact with government agencies and/or cooperation with others who filed complaints against the company, a clause representing that the individual has filed no claims to date, and a clause certifying that the former employee disclosed all non-compliance with regulatory requirements (including providing a sheet to list any instances of non-compliance of which the employee was aware). The EEOC further referenced that the form agreement included a severability clause and alleged that *CollegeAmerica* retaliated against the former employee by filing and pursuing the lawsuit after she filed EEOC charges.

Analysis

Littler's March 4, 2014 ASAP provides important background on this issue. All employers should be aware that the EEOC has taken a consistent position since its 1997 Enforcement Guidance: that agreements prohibiting the filing of charges or participating in investigations violate the ADEA and Title VII, as well as all other statutes enforced by the EEOC. See *Enforcement Guidance on non-waivable rights under Equal Employment Opportunity Commission (EEOC) enforced statutes*, EEOC Notice No. 915.002 (4/10/97). Thus, provisions such as that included in the agreement signed by the former employee prohibiting her from filing complaints or grievances with government agencies should be avoided. Note that a waiver of the right to recovery generally remains permissible, and we recommend including such a provision in releases along with a statement that nothing in the agreement prevents the individual from filing a charge or participating in a government investigation.

We noted in our prior ASAP on the *CVS* litigation that the National Labor Relations Board (NLRB) has taken similar, and perhaps even more aggressive, positions attacking various kinds of employee agreements on the basis that they improperly attempt to limit employees' exercise of the right to engage in concerted activity with co-workers granted by Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157. Because of these concerns, we also recommended in our prior ASAP that employers consider including a specific reference to the right to file charges and participate in investigations with the NLRB as well as the EEOC, and the additional statement that nothing in the release affects an individual's right to engage in concerted activity protected by Section 7 of the NLRA.

Because courts have not rendered final decisions in the *CVS* and *CollegeAmerica* cases, it is less clear how employers should address claims that the other provisions of the agreements "chilled" individuals' rights to file charges or participate in investigations. Certainly, employers have legitimate interests in continued cooperation with former employees, non-disparagement, and confidentiality. In order to avoid claims of chilling employee rights, we recommend that releases and separation agreements clearly state that the former employee's continued right to file charges and participate in investigations is not restricted by any provision of the agreement, including release of claims, confidentiality, non-disparagement, covenants-not-to-sue, cooperation, and representations about prior claims and compliance issues.

The EEOC does not specifically indicate in the *CollegeAmerica* complaint why the severability clause in the agreements is problematic. A severability clause provides that an invalid provision should be separated from the rest of the agreement, and the rest of the agreement will be enforceable. The EEOC indicates that this *CollegeAmerica* agreement did not include a severability clause, while the form agreements attached to the complaint did include such a clause. Perhaps the EEOC may take the position that this *CollegeAmerica* agreement is invalid in its entirety because it did not include a severability clause, while certain provisions of the form agreements might be enforceable because such agreements did include a severability clause. Littler will monitor developments in this litigation and provide updates as warranted.

Of course, employers also should be careful to avoid adverse actions in close proximity to protected acts like filing of EEOC charges. According to the EEOC's allegations in the complaint, the employer filed the lawsuit and took certain actions in the litigation immediately after the former employee filed charges of discrimination. Even if the filing of the charges was not the reason for the company's actions, the timing of the litigation likely raises a possible inference of retaliation which *CollegeAmerica* may find difficult to rebut.

Recommendations

The recommendations from our prior ASAP on the *EEOC v. CVS* litigation apply to this new EEOC lawsuit. Here are those recommendations with additional commentary:

- Review every separation agreement form to consider whether to strengthen existing provisions preserving the employee's right to file administrative charges and participate in agency investigations. To avoid potential claims, employers may wish to include greater specificity in these provisions than had been thought to be necessary in the past. We recommend that these rights be specifically stated, and also refer to Section 7 rights under the NLRA as appropriate. Also, prophylactically, we recommend that these rights apply to any government agency charged with enforcement of any law (not just the EEOC and NLRB, and not just employment laws).
- Despite the EEOC's allegations in the *CVS* and *CollegeAmerica* complaints, it is far from clear that an employer must repeat these rights in every paragraph of a separation agreement that could potentially be determined to limit an employee's right to engage in legally-protected conduct. That would seem to make a separation agreement cumbersome and redundant, and may open the employer to challenges if the limitations are included in some but not all paragraphs. In light of the EEOC's now more aggressive posture on these issues, however, we recommend that the employer set off a statement of the protected rights in a separate paragraph of a separation agreement, perhaps in bold. In addition, to avoid any doubt, the employer could specifically refer to each paragraph containing restrictions on an employee's rights (such as confidentiality and non-disparagement provisions) in the set-off paragraph, or begin each such section with language stating "Except as otherwise provided in paragraph **[refer to paragraph protecting employee's right to file charges and participate in investigations]**," thus reinforcing that nothing in any section of the agreement limits those rights.
- Employers should continue to provide in their separation agreements that, despite the employee's retention of the right to file a discrimination charge, the employee is waiving the right to recover monetary damages or other individual relief in connection with any such charge.
- Employers should freshly review any separation agreement provisions mandating cooperation with the employer in connection with litigation and proceedings in light of the EEOC's now more aggressive posture on these issues. Employers may wish to consider modifying terms that might spark concern from the EEOC.
- Employers should consider the length and complexity of their separation agreements. The EEOC specifically noted that the Agreement in the *CVS* lawsuit was five single-spaced pages. Even though the employees asked to sign these Agreements were exempt, non-store personnel who likely are relatively better educated and sophisticated than many non-exempt employees, the EEOC felt it important to highlight the length of the form separation agreement. The EEOC did not make similar allegations relating to *CollegeAmerica's* separation agreements and RIF releases even though those documents also were five to six pages single spaced. Because releases and separation agreements often are much longer than five single-spaced pages, and since one of the OWBPA mandates for enforceable releases is that they be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate," employers are advised to revisit the complexity and language contained in template release agreements.

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