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EMPLOYMENT LAWSCENE ALERT: SEVERANCE AGREEMENTS REMAIN IN EEOC'S CROSSHAIRS

In February 2014, the EEOC filed suit in Illinois federal court against CVS Pharmacy, Inc. alleging that the company's separation agreements constituted a pattern or practice of unlawfully discouraging employees from exercising their rights under Title VII of the Civil Rights of 1964 to communicate with the EEOC or to file discrimination claims. The EEOC's complaint stated that CVS had used a five-page, single-spaced separation agreement that included, among other things, a requirement that employees notify CVS if they became part of an administrative investigation, a promise to not disparage the company or its officers, directors, or other employees, a non-disclosure agreement, a release of claims, and a covenant not to sue. Although the agreements contained express language stating that nothing in the agreement was meant to interfere with the employee's right to participate in any legal proceedings or cooperate with an agency's investigation, the EEOC claimed that that language was not sufficient because the non-disparagement and nondisclosure provisions made cooperation impossible.

In April 2014, CVS filed a Motion to Dismiss the EEOC's complaint calling their severance agreements "run-of-the-mill" and stating that they did not violate the law. CVS further argued that the agreements, even if they restricted employees unlawfully, were not a pattern or practice of interfering with employees' rights but merely constitute unenforceable contracts. CVS' Motion to Dismiss was given support by an *amicus* brief filed by the Retail Litigation Center, Inc., which said that the language used by CVS was substantially similar to agreements used by employers nationwide and a ruling for the EEOC could result in the invalidation of agreements far beyond CVS and result in a flood of litigation.

The federal district court judge dismissed the EEOC's suit, however, not on its merit. The EEOC's case was dismissed because the EEOC failed to meet its pre-suit conciliation efforts before bringing the lawsuit. The federal district court found that the EEOC did not engage in any conciliation procedure and, as a result, was not legally authorized to commence suit. The EEOC, in response, acknowledged that it had not engaged in any pre-suit conciliation efforts but argued that it was proceeding under a portion of Title VII that did not require the agency to conciliate.

The EEOC has appealed the district court's decision to the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin. Given that the federal district

court dismissed the case on procedural grounds, it is very unlikely that the Seventh Circuit, on appeal, will address the merits of the EEOC's claim regarding the legality of CVS's severance agreements. If the EEOC is successful with its appeal at the Seventh Circuit, then it would be most likely that the case will be remanded back to the district court for further proceedings.

This leaves the question open of whether the EEOC will stay the course and continue to press its case against CVS or whether it will select another employer as its target in pursuing its claim that "run-of-the-mill" severance agreements violate Title VII in preventing individuals the full enjoyment of rights afforded by Title VII.

Until a decision on the merits is reached on this issue, it is recommended that employers include explicit and express provisions in their severance agreements that make clear (i) that employees are allowed to participate in agency proceedings that enforce discrimination laws; (ii) that the waivers and releases are not to be construed to interfere with the EEOC's rights and responsibilities to enforce federal anti-discrimination statutes under its jurisdiction or those rights of any state administrative agency; and (iii) that the employee has the protected right to file a charge or participate in an investigation or proceeding conducted by the EEOC or any state administrative agency charged with the authority to enforce anti-discrimination laws.