Employers Beware when Drafting and Proposing Severance Agreements

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Recent litigation by the Equal Enforcement Opportunity Commission ("EEOC") and related decisions from several federal courts serve as notice that employers must carefully review their severance agreements to ensure they comport with federal discrimination laws.

For obvious reasons, employers often condition the provision of severance benefits on the recipient's agreement to release all claims he/she has or may have against the employer. It is not uncommon for employers to include in a release a promise by the employee that he/she will not file a charge of discrimination with the EEOC. Such a clause seems reasonable given that the employer is providing benefits to which the employee would not otherwise be entitled to receive. Employers should take notice, however, that the EEOC is vigorously challenging such clauses on the grounds that they are inherently "retaliatory" under federal discrimination laws. One such case where the EEOC raised this argument was settled on terms favorable to the EEOC, with the employer agreeing to strike the offensive clause from all former employees' agreements signed since 2003. See Equal Employment Opportunity Commission v. Ventura Foods, LLC, Civil Action No. 05-663 (RHK/JSM) (D. Minn. September 1, 2006) (docket entry 52, Consent Decree). Another lawsuit by the EEOC against the Sara Lee Corporation remains pending in the Southern District of Ohio.

Courts Are Split

In those cases where there are reported court decisions, the EEOC has had mixed results. In U.S. Equal Employment Opportunity Commission v. Lockheed Martin Corporation, the EEOC filed an action on behalf of an employee who was terminated after twenty years of service. 444 F.Supp.2d 414 (D. Md. 2006). The *acquiring* company (Lockheed Martin) notified the employee that she would be terminated and would receive severance benefits under the *acquired* company's plan only in exchange for signing a release. She declined to sign the release and filed a charge with the EEOC, alleging her termination was discriminatory. Lockheed Martin refused to provide the severance benefits unless she dismissed her pending EEOC charge against the company. The employee refused to do so and she was terminated.

The EEOC argued that Lockheed Martin's refusal to provide the severance benefits unless she dismissed her EEOC charge constituted retaliation. The EEOC also argued that the release was facially retaliatory because it prohibited the employee from filing an EEOC charge.

The court agreed with the EEOC in both respects. Lockheed Martin's ultimatum that she withdraw the EEOC charge or forfeit her severance benefits was retaliatory. Additionally, the release itself was held to be facially retaliatory because its broad language impinged on the protected activity of filing a charge with the EEOC.

The Sixth Circuit Court of Appeals reached a different result when faced with a similar challenge. See Equal Employment Opportunity Commission v. Sundance Rehabilitation Corp.

("Sundance"), 466 F.3d 490 (6th Cir. 2006). In Sundance, an employee was notified that she would be terminated due to a reduction-in-force. The employee was offered eighty hours of severance pay in exchange for signing a separation agreement and general release. Under the terms of the release, she would agree not to commence any proceeding in any administrative forum relating to her employment.

The employee wished to file a discrimination charge with the EEOC, thinking she had been denied a promotion and terminated due to her sex. She believed she could not sign the severance agreement because it prohibited her from filing an EEOC charge. It also permitted the employer to sue her for the return of her severance benefits if she signed the agreement and then subsequently filed a charge with the EEOC. She requested that these provisions relating to the filing of a charge be stricken. This request was denied. She did not sign the agreement and filed a charge with the EEOC. Although the EEOC issued a no-probable cause finding as to her discrimination claim, it filed suit against the employer on the grounds that the proposed covenant prohibiting the filing of a charge of discrimination constituted a preemptive strike against future protected activity and thus was facially retaliatory. Unlike the court in Lockheed Martin Corp. the Sixth Circuit held that the mere offer of the separation agreement does not amount to facial retaliation. Employees could accept the agreement and then later argue that parts of it are unenforceable. But simply offering the agreement was not retaliatory, the majority held.

Significance

Employers should carefully consider the implications of these cases as they draft and offer severance agreements to their employees. Employers must take heed of the zeal that the EEOC has recently shown for pursuing unlawful severance agreements. While employers should seek a release that is as comprehensive as possible, they must be aware that an overly broad release may expose the company to claims of retaliation. Thus, it is recommended that employers specifically acknowledge in a release that the employee retains the right to file a charge of discrimination, but relinquishes any right to any monetary award.

If you are an employer and are considering terminating an employee, it is highly recommended that you consult with counsel about the legal implications of your actions and any issues regarding the enforceability of your company's severance agreements.