

The Danger of Overly Broad Severance Agreements

By Maureen E. Carr, Esq.

Employers frequently utilize severance agreements that release employers from liability in exchange for severance payments to departing employees as a useful tool to limit liability and provide closure with respect to former employees. However, employers should be wary of using overly broad language in severance agreement in light of recent actions of the Equal Employment Opportunity Commission (EEOC).

In 2013, the EEOC filed a lawsuit against Baker & Taylor (B&T) in federal court (Northern District of Illinois, Case No. 1:13-cv-3729) alleging that two provisions in B&T's standard severance agreement unlawfully interfered with an employee's right to file a charge with the EEOC or to cooperate with the EEOC – (1) a clause barring employees from initiating any administrative action against B&T; and (2) a provision prohibiting employees from making remarks about B&T that were “disparaging” or could “reflect negatively” on B&T. Less than two months after the lawsuit was filed, the EEOC and B&T entered into a consent decree under which B&T agreed to revise its severance agreement for future use and to waive the statute of limitations to allow employees who had signed the old severance agreement to file charges with the EEOC.

This lawsuit signals that the EEOC takes very seriously its role in protecting an employee's right to file charges with the EEOC and cooperate in EEOC investigations – even if that role extends to policing private employment agreements. The EEOC has a history of successfully challenging severance agreements that prohibit the filing of charges with the EEOC, but the B&T case suggests that the EEOC is seeking to expand such prohibition to provisions that may have an incidental effect on an employee's dealings with the EEOC – such as non-disparagement provisions, which are frequently included in severance agreements.

Employers that utilize severance agreements should work with their attorneys to scrutinize the language of their agreements in light of the B&T case. While employees may not waive their right to file charges with the EEOC, they *may* waive their right to recover damages in a lawsuit. Moreover, non-disparagement provisions may be modified to address the EEOC's stated concerns. Thus, it *is* possible to provide employer protection through severance agreements without inviting the EEOC's wrath, but the language of the agreement must be appropriately tailored.

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