

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Connie Elder Carrigan](#) is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

## EEOC Focusing On Severance Agreements

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The Equal Employment Opportunity Commission (EEOC) has stepped-up its activity with regard to severance agreements, announcing in February that it will go to court to challenge specific terms it believes may unfairly limit the legal rights of the departing employee.

Severance agreements are a tool often used by employers to facilitate a more amicable separation when an involuntary termination occurs. As employers are typically not obligated to provide severance pay, the severance agreement acts essentially as a contract in which the employer receives some “consideration” back from a departing employee in exchange for the severance payments. A common form of consideration received from the employee is their agreement to refrain from engaging in certain behaviors the employer would consider detrimental (see the listing below for prominent examples). The EEOC is zeroing in on such terms within these agreements that may unfairly limit the legal rights of the departing employee.

In February, the EEOC sharpened their efforts with a lawsuit against CVS Pharmacy, alleging the company's severance agreement interfered with an employee's right to file discrimination charges or to communicate and cooperate with the EEOC. The EEOC is challenging a number of provisions in CVS' agreement that are commonly used by employers in severance agreements, including:

- The *cooperation clause*, which requires the former employee to notify the former employer's general counsel if he or she receives a subpoena or other request pursuant to a civil, criminal, or administrative investigation, suit or other proceeding;
- The *non-disparagement clause*, which forbids the former employee from making any statements that would negatively reflect on their former employer or any of its officers, directors or employees;
- The *confidentiality clause*, forbidding the disclosure of any confidential information, including information about personnel, wage and benefit structures, succession plans and affirmative action plans;
- The *general release clause*, which releases the employer from any and all causes of action, lawsuits, and charges, including any claim of unlawful discrimination of any kind; and
- The *covenant not to sue*, in which the former employee agrees not to initiate or file

any lawsuits against the former employer and requires the former employee to pay their former employer's legal fees for breach of this covenant.

While it is too soon to tell what will come of the EEOC's lawsuit, there is no question that the enforceability of severance agreements is under fire, and that change is likely.

**In the meantime – what should an employer do while this lawsuit is pending?**

Here are a couple of steps employers can take to reduce the risk their severance agreement may be found to be unenforceable:

#1 – Include a *severability clause* in a severance agreement stating that any provision in the agreement which is found to be overbroad or illegal will not affect the enforceability of the remainder of the agreement.

#2 – Add a *carve-out provision* to clarify that the employer is not attempting to limit any legal right or obligation the employee might otherwise have under current law. This language should be carefully crafted after consultation with a qualified attorney.

As the enforceability of severance agreements continues to evolve, it will be important for all employers to monitor the EEOC's actions regarding this important tool and seek legal advice accordingly.

*If you have questions or concerns about this issue or other legal matters, please contact Smith Debnam attorney Connie Carrigan at [ccarrigan@smithdebnamlaw.com](mailto:ccarrigan@smithdebnamlaw.com).*

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