

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's threatened lawsuit challenges key provisions in severance agreements

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On February 7, the Equal Employment Opportunity Commission (EEOC) announced that it was filing suit against CVS Pharmacy, alleging that it utilized a severance agreement that interfered with an employee's right to file discrimination charges or to communicate and cooperate with the EEOC. While this action is in its beginning stages with no guarantee of success, it will be critical to keep an eye on this announcement as it demonstrates the EEOC's desire to change the current legal landscape regarding the scope and enforceability of severance agreements. Specifically, the EEOC is challenging the use of a number of provisions commonly used in severance agreements:

- 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.

So what should an employer do while this lawsuit is pending in order to avoid such legal challenges to its severance agreements? There are a couple of courses of action that I can recommend. The first is to add a severability clause, which would state 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. The second is to add a carve-out provision to the agreement which might read substantially as follows:

Nothing in this Agreement is intended to, or shall interfere with Employee's rights under federal, state, or local civil rights or employment discrimination laws to file or otherwise institute a charge of discrimination, to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, or to cooperate with any such agency in its investigation of same, none of which shall constitute a breach of the non-disparagement, confidentiality, or cooperation clauses of this Agreement. Employee shall not, however, be entitled to any relief or recovery in connection with any such action brought against Employer, regardless of who filed or initiated any such charge or proceeding.

The state of the law concerning the enforceability of severance agreements continues to evolve and it will be important to monitor the EEOC's position regarding this important tool. If you have questions or concerns about this issue or other legal matters, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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