

EEOC WAIVES RED FLAG ON EMPLOYEE WAIVERS

RELEASE AND WAIVER OF CLAIMS CAN'T RELEASE AND WAIVE TOO MUCH

Employee severance agreements often grant severance benefits conditioned upon the departing employee's signing an agreement that includes a general waiver and release of all claims. That's a common and prudent practice. However, a recent complaint filed by the EEOC shows that common release and waiver language can go too far.

COMMON LANGUAGE IS TOO BROAD

On May 20, 2013, the EEOC filed a **complaint** against Baker & Taylor, Inc., alleging that the company had a *pattern and practice* of requiring employees to execute severance agreements that violated Title VII of the Civil Rights Act ("Title VII") as a condition of receiving severance benefits. Here is the specific language of the Agreement that the EEOC alleges interferes with an employee's right to file a charge with the EEOC or to participate in an EEOC investigation:

I further agree never to institute any complaint, proceeding, grievance, or action of any kind at law, in equity, or otherwise in any court of the United States or in any state, or ***in any administrative agency of the United States*** or any state, country, or municipality, or before any other tribunal, public or private, against the Company arising from or relating to my employment with or my termination of employment from the Company, the Severance Pay Plan, and/or any other occurrences up to and including the date of this Waiver and Release, other than for nonpayment of the above-described Severance Pay Plan.

I agree that I will not make any disparaging remarks or take any other action that could reasonably be anticipated to damage the reputation and goodwill of Company or negatively reflect on Company. ***I will not discuss or comment upon the termination of my employment in any way that would reflect negatively on the Company. However, nothing in this Release will prevent me from truthfully responding to a subpoena or otherwise complying with a government investigation.***

The EEOC's complaint cites its own guidance, *EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes*, and asserts that the highlighted language bars individuals from filing a charge or assisting in an EEOC investigation. Thus, the language runs afoul of Title VII anti-retaliation provisions and has a chilling effect on the willingness and ability of individuals to come forward with information that may be necessary and essential to the EEOC in advancing the public interest.

The complaint seeks a permanent injunction against the company from using this language and seeks to extend the statute of limitations period for filing charges with the EEOC.

CAREFUL DRAFTING IS THE KEY

The takeaway from this lawsuit is a reminder to employers that when using waiver and release agreements, employers should take care to avoid any language that may be seen as interfering with an employee's right to file a charge or to cooperate with the EEOC. There are ways, however, to accomplish what the company wants to accomplish - preventing an employee from receiving severance benefits and still being able to recover money damages in law suit. Careful drafting with an eye to the EEOC's position as demonstrated by this complaint is the key.

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.