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Are Your Separation Agreements Unlawful?

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Employers entering into separation agreements (also called "settlement" or "severance" agreements) has become commonplace. By way of separation agreements, employers generally provide a monetary benefit to outgoing employees, or employees who have asserted claims, and, in exchange, the employees waive certain legal rights to which they otherwise may have been entitled.

Some of the most common separation agreement provisions that bind employees are confidentiality provisions (prohibiting the employee from disclosing the amount of severance money received, and other settlement terms), non-disparagement provisions (prohibiting the employee from making disparaging comments about the employer), releases (the employee forever agrees not to file claims against the employer), and cooperation provisions (the employee agrees to notify the employer upon receipt of information about an investigation or claim against the employer).

In light of a recent complaint filed by the U.S. Equal Employment Opportunity Commission ("EEOC"), the legality and enforceability of existing signed separation agreements could be subject to challenge.

The EEOC recently filed a lawsuit against CVS, a national provider of prescriptions and health-related services, in a federal district court. In the complaint, the EEOC alleges that CVS entered into more than 650 unlawful separation agreements with employees. Specifically, the EEOC alleges that the separation agreements entered into by CVS, which contained the common provisions described above, unlawfully conditioned the employees' receipt of severance pay on: (1) prohibiting the employees from filing charges at the EEOC; and (2) interfering with the employees' ability to participate and cooperate in investigations by the EEOC and other federal agencies.

According to the EEOC's complaint, the separation agreements violate Title VII of the Civil Rights Act of 1964, because they constitute "a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII."

The lawsuit is pending, and the federal district court has not issued any ruling on the merits. Nevertheless, in light of the EEOC's complaint, employers should be mindful of existing and future settlement/ separation agreements, and should review such agreements with their employment counsel to ensure that they comply with the law.