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Drafting Severance and Confidentiality Agreements Amid Continued SEC, EEOC and NLRB Scrutiny

Avoiding Agency Challenges to Confidentiality/Whistleblower, Non-Disparagement, Cooperation, No Rehire, Covenants Not to Sue

WEDNESDAY, JUNE 5, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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SEC Position Regarding Confidentiality & Separation Agreements

History

- 2010 – Dodd-Frank Wall Street Reform and Consumer Protection Act
- 2011 – SEC adopts Rules implementing Whistleblower Program
- 2015 – Chair White referred to the SEC as the “whistleblower’s advocate” and described the program as a “game-changer.”
- 2016 – Director of SEC’s Enforcement Division declares the program “transformative”
- 2017 – Whistleblower awards equal $162 million

Exchange Act Rule 21F-17(A)

- No action may be taken "to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing or threatening to enforce, a confidentiality agreement . . . with respect to such communications."
- Liberal view of what "impedes" employee

Exchange Act Rule 21F-17(A)

Company right to maintain the confidentiality of its proprietary information

v.

Individuals' right to provide confidential company information within their control to the government in support of a tip or complaint.

OCIE Risk Alert (Oct. 24, 2016)

- OCIE is going to look for language in agreements that
- purports to limit the types of information that an employee may convey to the Commission or other authorities;
- requires employees to waive their rights to any monetary recovery in connection with reporting wrongdoing to the government;
- requires an employee to represent that he or she has not assisted in any investigation involving the registrant;
- prohibits any and all disclosures of confidential information, without any exception for voluntary communications with the Commission concerning possible securities laws violations;
- require an employee to notify and/or obtain consent from the registrant prior to disclosing confidential information, without any exception for voluntary communications with the Commission concerning possible securities laws violations; or
- purport to permit disclosures of confidential information only as required by law, without any exception for voluntary communications with the Commission concerning possible securities laws violations.

Failure to Comply

- SEC penalties
- Plaintiffs' attorneys – claim companies that have not remediated their exposure have breached their fiduciary duties to shareholders and seek damages or legal fees for spotting the issue and prompting corporations to correct.
- Personal liability

KBR Inc. (2015)

"I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment."

Chilling effect

$130,000

Suggested Language (KBR)

"Nothing in the agreement prohibits the signor from reporting possible violations of law to the government, without the prior authorization of or notification to the company."

Health Net. Inc. (2016)

- Severance agreements required outgoing employees who wanted to receive severance payments and other post-employment benefits to waive the ability to file applications for SEC whistleblower awards
- Never enforced the agreements
- $340,000 penalty and consent to the entry of an order finding that the company violated Rule 21F-17

BlueLinx (2016)

"Employee further acknowledges and agrees that nothing in this Agreement prevents Employee from filing a charge with…the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Securities and Exchange Commission or any other administrative agency if applicable law requires that Employee be permitted to do so; however, Employee understands and agrees that Employee is waiving the right to any monetary recovery in connection with any such complaint or charge that Employee may file with an administrative agency."

NeuStart (2016)

- Severance agreements prohibited employees from engaging in any communication that disparaged NeuStar with, among others, the SEC.
- Employees would forfeit all of severance if they breached the clause
- No evidence of enforcement

BlackRock Inc. (2017)

- Separation Agreements included a clause requiring departing employees to waive recovery of incentives received for reporting misconduct to the government under Dodd-Frank or other provisions.
- Never enforced it
- Removed it before being contacted by SECt
- $340,000 penalty

Drafting Guidelines

- Do not draft blanket prohibitions on disclosing information about interviews during internal investigations.
- Do not restrict what information employees may voluntarily disclose to the SEC.
- Do not require employees to provide notice or obtain permission before sharing confidential information with the SEC.
- Do not require employees to waive their rights to a monetary award if they provide information to the SEC or other authorities.
- Do not require employees to pay liquidated damages or forfeit severance compensation if they disclose information to the SEC.

FOIA & Privilege Complications

- Employee may share Trade Secrets
- Will not request such a treatment under FOIA
- Company will not receive notice and will miss opportunity to contest the release of the information through FOIA
- Consider more carefully who has a need to access confidential or legally privileged information within a company.
- Implement a system for marking privileged documents & train those employees who engage with counsel.

Thank You

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Drafting Severance and Confidentiality Agreements Amid Continued SEC, EEOC and NLRB Scrutiny:

EEOC Scrutiny Examined

presented by Natalie M. Koss, Managing Partner

Key EEOC Severance Cases

- ***EEOC v. Eastman Kodak Co., No. 06-cv-6489 (W.D.N.Y. 2006)***
  - EEOC alleges that Eastman Kodak "violated Title VII and the ADEA by providing that employees who sign them cannot 'assist' the EEOC, other 'person[s],' or any other 'entity' in bringing Title VII or ADEA lawsuits, by mandating that employees tenderback all severance payments if they breach them by assisting the EEOC and others, and by requiring that employees pay all of Kodak's legal fees and costs if they breach them by assisting the EEOC and others."
- ***EEOC v. Baker & Taylor, Inc., No. 13-cv-03729*** (N.D.Ill, May 20, 2013)
  - EEOC alleges that Baker & Taylor required employees to sign a release agreement that could have been understood to bar the filing of charges with the EEOC and to limit communication with the agency.
- ***EEOC v. CVS Pharmacy, Inc., No. 14-cv-0863 (N.D.Ill.)***
  - EEOC alleges that various provisions contained within CVS Pharmacy's severance agreement "interfere[s] with its employees' right to file charges with the EEOC."

EEOC Requirements

1. Employer may not interfere with the protected right of employees to file a charge or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by EEOC.
2. Employees can still file a charge with the EEOC even if they have released the Company. No agreement can limit the employee's right to testify, assist, or participate in an investigation, hearing or proceeding conducted by the EEOC. Any provision in a waiver that attempts to waive these rights is invalid and unenforceable.

EEOC and other administrative agencies have statutory mandates requiring enforcement of specific statutes. *https://www.eeoc.gov/policy/docs/waiver.html*

EEOC Requirements Cont'd.

3. Waiver in a severance agreement is valid when employee ***knowingly and voluntarily*** consents to the waiver;
4. Rules for waivers are governed by statute;
5. ADEA/OWBPA (21 days/7-day revocation period, tender back, etc.);
6. Title VII the rules are derived from case law;
7. Must be consideration;
8. Not require waiver of future rights; and
9. Comply with state and federal laws.

Elements of Severance Agreement

- General Release;
- Severance Benefits;
- Non-Disparagement;
- Cooperation;
- Confidentiality;
- Covenant not to Sue;
- Time to Consider Agreement;
- Breach; and
- Governing Law.

EEOC: Knowing and Voluntary

1. Written in a manner that was clear and specific for an employee (non-lawyer) to understand;
2. Induced by fraud, duress, undue influence or other improper conduct by the employer;
3. Waiver must specifically refer to rights or claims arising under the ADEA;
4. Waiver must provide the employee with at least 21 days to consider the offer; 7 days to revoke;
5. Employee had a enough time to read and think about the advantages and disadvantages of the agreement before signing it;
6. Consultation with an attorney encouraged;
7. Employee's negotiation; and
8. Employer offered the employee consideration that exceeded what was required by law.

Kodak: Release and Waiver

Per the Kodak Consent Decree:

"Except as described below, you agree and covenant not to file any suit, charge or complaint against Releasees in court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with Kodak or separation therefrom. You further represent that no claims, complaints, charges or other forum relating directly or indirectly to your employment by Kodak. Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or complaint, or lawsuit filed by you or by anyone else on your behalf." EEOC v. Eastman Kodak, No. 06-cv-6489 (W.D.N.Y. 2006).

Baker & Taylor: Release

"Nothing in this Agreement is intended to limit in any way an Employee's right or ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. Employees retain the right to participate in such an action and to recover appropriate relief. Employees retain the right to communicate with the EEOC and comparable state or local agencies and such communication can be initiated by the employee or in response to the government and is not limited by any non-disparagement obligation under this agreement." *EEOC v. Baker & Taylor cf. EEOC v. Kodak* (finding that the severance can include a waiver of compensation through an administrative filing).

Release

CVS Pharmacy: "Employee hereby releases and forever discharges CVS Caremark Corporation…from any and all causes of action, lawsuits, proceedings, complaints, charges, debts, contracts, judgments, damages, claims, and attorneys' fees against the Released Parties, whether known or unknown, which Employee has ever had, now how or which the Employee…may have prior to the date [of] this Agreement…The Released Claims include…any claim of unlawful discrimination of any kind."

Reflecting EEOC Concerns:

> The Release above does not include any claims that cannot be released or waived by law, including but not limited to the right to file a charge with or participate in any investigation conducted by certain government agencies, including but not limited to the EEOC, NLRB, SEC and any other local, state or federal administrative agency.

Release

- Nothing in this Agreement, including the General Release in Paragraph [A], is intended to limit, restrict, or interfere with the Employee's right to engage in any protected activity, including but not limited to participating in any proceeding before the Equal Employment Opportunity Commission, NLRB, SEC or other administrative agency.
- Nothing in this Release contained above is intended to restrict an Employee's right to challenge the validity of this Agreement as to claims and rights asserted under the Age Discrimination in Employment Act.

Cooperation

CVS Pharmacy: “In the event Employee receives a subpoena, deposition notice, interview request, or another inquiry, process or order relating to any civil, criminal or *administrative investigation,* suit, proceeding or other legal matter relating to the Corporation from *any investigator*, attorney, or any other third party, *Employee agrees to notify the Company’s General Counsel by telephone and in writing.*”

Reflecting EEOC Concerns:

Should the Employee be presented with a subpoena or other inquiry from a third party relating to any civil, criminal or administrative investigation, nothing herein shall be construed to prohibit Employee from testifying honestly in any legal and/or administrative proceeding, nor shall it limit Employee’s ability to cooperate, communicate or assist with any federal, state or local government agency enforcing its statutory authority, or other administrative statutory laws, including but not limited to the EEOC, SEC, NLRB or any other administrative agency.

Non-Disparagement

CVS Pharmacy: “Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director, or employee of the Corporation.”

Reflecting EEOC Concerns:

Employee agrees not to defame or disparage Employer in any manner whatsoever, except as may be specifically protected or required by law.

Employee agrees to refrain from making defamatory or disparaging statements, verbal or written, about Employer, except for truthful statements required by legal process issued by a court or tribunal of competent jurisdiction, and/or to any federal, state, or local government agency.

Non-Disparagement

Mutual Non-Disparagement. Parties agree that they will not to do or say anything, directly or indirectly, that reasonably may be expected to have the effect of defaming or disparaging each other.
Notwithstanding the foregoing, the parties agree that nothing in this Agreement shall be construed to prohibit the exercise of any rights by either party that such party may not waive as a matter of law. The Parties agree that if subpoenaed or otherwise compelled by law, they will respond truthfully.

Non-Disclosure of Confidential Information

CVS Pharmacy: ”Employee shall not disclose to any third party or use for himself or anyone else Confidential Information without the prior written authorization of CVS Caremark’s Chief Human Resources Officer.” “Confidential Information includes…skills, abilities and duties of the Corporation’s employees, wage and benefit structures, succession plans or planning, information concerning vendors and suppliers, information pertaining to lawsuits and charges…”

Reflecting EEOC Concerns:

Employee covenants that s/he shall not use or disclose or reveal to any person or organization, confidential information obtained by Employee during the course of Employee’s employment (“Confidential Information”). [Include definition of “Confidential Information”] Employee can disclose the terms of the Agreement to Employee’s attorney, accountant, spouse and immediate family members. Notwithstanding the language contained herein, the Employee shall not be prohibited from responding to legal process, providing cooperation and/or filing a complaint with the EEOC, SEC, the NLRB or any other administrative agency enforcing its statutory authority.

No Pending Actions; Covenant Not to Sue

CVS Pharmacy: "Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed, or initiated, any complaint, claim, action or lawsuit of any kind against any of the Related parties in the federal, state, or local court, or agency. Employee agrees not to initiate or file, or cause to be initiated or file, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties…Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this Agreement by Employee."

Reflecting EEOC Concerns:

Notwithstanding the language contained herein, the Employee shall not be prohibited from responding to legal process and/or providing cooperation or filing a complaint with the EEOC, SEC, the NLRB or any other administrative agency enforcing its statutory authority.

Employee Breaches

CVS Pharmacy: “Employee acknowledges that a breach…will result in irreparable injury to some or all of the Corporation…In the event that a court issues a temporary restraining order, preliminary injunction, permanent injunction, or issues any other similar order enjoining Employee from breaching this Agreement, or awards CVS any damages due to Employee’s breach of this Agreement, Employee agrees to promptly reimburse the Company for all reasonable attorneys fees incurred by CVS.”

Reflecting EEOC Concerns:

However, nothing in this Agreement shall prevent, prohibit or limit the Employee’s ability to participate, cooperate, or file charges, complaints with any federal, state or local government agency enforcing discrimination laws, such as the EEOC, and, therefore, such action shall not constitute a breach of this Agreement.

Special Considerations: ADEA/OWBPA

- "An individual alleging that a waiver agreement, covenant not to sue, or other equivalent arrangement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency acting as an EEOC referral agency for purposes of filing the charge with EEOC..." 29 CFR §1625.23(a).
- "No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit." 29 CFR § 1625.23(b).
- *Franchesca V. v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120170632 (Mar. 23, 2017)(determining that "the settlement agreement violated the Older Workers' Benefits Protection Act (OWBPA) by including a tender back requirement as a condition for alleging breach.").

Additional Considerations

Neutral Reference. Should a prospective third party employer contact the Company related to a reference for the Employee, the Company will only provide dates of employment and position held.

Cooperation with the Company. Employee agrees to cooperate with the Company and to provide information and/or testimony regarding any current or future litigation arising from actions or events occurring during your employment with the Company.

Non-Release of Future Claims. This Agreement does not waive or release any rights or claims that Employee may have under the Age Discrimination in Employment Act which arises after the date that Employee signs this Agreement. The parties agree that the decision to conclude Employee's employment was made prior to the execution of this Agreement.

Additional Considerations

No Rehire Provision: The Parties agree that the Employee will not reapply to Employer and that Employer will not re-hire Employee at any time after the execution of the Agreement.

- EEOC discourages no-rehire provisions.
- Courts have upheld no-rehire provisions. *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261 (10th Cir. 2007) (employee's waiver of right to rehire was legitimate nondiscriminatory reason for employer's refusal to subsequently consider former employee for another position); *Franklin v. Burlington Northern & Santa Fe Ry.*, 2005 WL 517913 (N.D. Tex. Mar. 3, 2005).
- Check state requirements as some states limit no rehire provisions.

Additional Considerations

Reporting:

- IRS/State and Local Taxing Authorities
- Indemnification
- Government/FBI/Security Clearance Issue/FSO

WARN Act:

- Reductions in Force
- 45-day notice

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THANK YOU

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NLRB's Challenges To Severance Agreements

Applicable to Union and Non-Union Employers

Focus is on Sections 7 and 8 of the National Labor Relations Act of 1935

"RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of** collective bargaining or **other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]." (Emphasis added)

"Concerted activities" is set forth by the National Labor Relations Board to be the right of employees to act together to try to improve pay and working conditions, with or without a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away.

"UNFAIR LABOR PRACTICES

"Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

"(1) **to interfere with, restrain**, or coerce employees **in the exercise of the rights guaranteed in section 7** [section 157 of this title]; …

"(4) to discharge or **otherwise discriminate against an employee** because he has filed charges or **given testimony under this Act** [subchapter]." (Emphasis added)

Employee Rights

Under the NLRA, employees are protected in activities that work to improve wages and working conditions, with or without a union. This means they can (1) talk about working conditions with co-workers, the public, and the media; and (2) take action to improve working conditions by raising complaints directly to a governmental agency. Overly broad severance agreements risk violating Sections 7 and 8 of the NLRA.

Remember, the NLRB is a political institution with members appointed by different administrations. As we saw under Obama, we are seeing realignment under Trump. This NLRM is more sympathetic to employers' rights.

Severance Agreements – Disparagement & Confidentiality Obligations

A.S.V., Inc. a/k/a Terex and International Brotherhood of Boilermarkers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Cases 18-CA-131987, 18-CA-140338 and 18-RC-128308), 8/21/18 NLRB decision

Here the current NLRB stated that when someone is laid off to avoid unionization or other charges, then the severance agreement seeking to limit the person's rights is non-binding.

The Board said that the severance agreement was part of an "atmosphere of serious, unremedied unfair labor practices." It further said that the severance agreements were "inextricably intertwined with the Respondent's underlying discrimination."

Practice Tip #1 – Don't try to use severance agreements to try to remedy an underlying bad labor practice.

Shamrock Foods Company and Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC (Case 28-CA-150157), 6/22/18 NLRB decision

The NLRB stated that "an employer may condition a settlement on an employee's waiver of Sec. 7 rights if the waiver is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver."

However, it rejected 3 paragraphs in the severance agreement that were not narrowly tailored. Those paragraphs "that would have prevented him from providing assistance to his former coworkers: disclosing information to the Board, including any 'personnel or corporate information', and making disparaging remarks or taking actions now, or at any time in the future, which could be 'detrimental' to the Respondent – none of which is narrowly tailored to the facts giving rise" to the discharge."

Practice Tip #2 – Review your confidentiality section to ensure it is narrow and focuses on protecting customer information and employer trade secrets

Practice Tip #3 – Review your non-disparagement section to focus on false and malicious statements

IGT d/b/a International Game Technology and International Union of Operating Engineers Local Union 501, AFL-CIO (Cases 28-CA-166915, 28-CA-173256, 28-CA-174003, and 28-CA-174526), NLRB decision 8/24/18

The employer in this instance tried to assert that an overbroad disparagement clause was not an NLRA violation because once terminated the former employee was no different than any member of the public receiving the severance agreement.

The NLRB disagreed saying that it is well settled that the term "employee" includes former employees.

Practice Tip #4 – Firing someone before presenting them with the severance agreement does not cure deficiencies in the agreement.

General Contract Law Challenges To Non-disparagement Clauses

Under common law in most states, many such clauses are open to challenge due to vagueness, as often disparagement is not a defined term.

This leads to questions about what then is prohibited.

Can the employee talk about the termination?

Can the employee talk about his employment?

Can the employee talk about the goods and services of the former employer?

Can the employee compare those goods and services to those of a new employer?

Must the employee lie if asked about bad activities at the employer to avoid disparagement?

(Bonus) Practice Tip #5 – Consider using "defamation" instead of disparagement. Defamation has federal and state common and statutory laws that are narrower and better defined. However, they are narrower and may not meet objectives.

Severance Agreements - General Workplace Conduct Policies

Under the Obama NLRB, the *Lutheran Heritage* decision was controlling. There the NLRB asked if a particular workplace policy **could be interpreted to interfere** with a Section 7 right. The Trump NLRB overruled that standard in the *Boeing* decision. The new standard is a determination as to whether the particular policy **would interfere** with those rights.

The NLRB General Counsel published a Guidance Memorandum explaining the ruling and giving guidance on how to comply.

There are now 3 categories of workplace rules and how they are viewed by the NLRB. These categories are helpful for our purposes of crafting severance agreements that will not be open to challenge.

Category 1 – Policies/rules that are lawful because when reasonably interpreted do not prohibit or interfere with an employee's exercise of NLRA rights, or the potential adverse impact is outweighed by the employer's legitimate justification for the policy/rule.

Examples -

- Civility rules – prohibition against rude behavior, disparaging comments **about other employees**, offensive language
- Insubordination rules – prohibition against being uncooperative, not supporting employer's goals
- Disruptive behavior rules – prohibition against dangerous conduct, roughhousing
- Confidentiality rules – prohibition against disclosure of customer information, business secrets, confidential financial data (**not including employee's personal wage information**)
- Anti-defamation rules – prohibition against misrepresenting products, services, personnel
- Anti-spokesperson rules – prohibition against claiming to speak on behalf of the employer without prior approval
- Intellectual property rules – prohibition against using employer logos or other IP (**not including using the employer name**)
- Loyalty rules – prohibition against conflicts, nepotism or self-enrichment

Category 2 – Policies/rules that require individualized scrutiny as to whether or not they would interfere with an employee's exercise of NLRA rights, and then the potential adverse impact on the employer's justifications.

Examples –

- Broad Duty of Loyalty policies/rules that don't specifically target fraud and/or self-enrichment
- Confidentiality policies/rules that extend to an "employer's business" or "employee information"
- Broad anti-disparagement policies/rules that extend to the employer and not just the employees
- Anti-media policies/rules that prohibit an employee from speaking to the media at all, rather than on just an employer's behalf
- Broad policies/rules against off-duty conduct that would "harm the employer"

Category 3 – Policies/rules that are generally unlawful because they prohibit or limit an employee's exercise of NLRA rights, and any adverse impact is not outweighed by any employer justification.

Examples –

- Confidentiality policies/rules that apply to wages, benefits, working conditions or terms of employment
- Off-duty conduct policies/rules that prohibit joining outside organizations or require employees to not vote on matters concerning the employer

Baylor University Medical Center and Dora Camacho (Case 16-CA-195335), ALJ Decision 2/12/18; NLRB Review Awaited

Interesting as it is an ALJ decision on severance agreements following the Boeing framework.

Camacho was dismissed by Baylor and refused to sign a severance agreement similar to had been signed by 26 other former employees. Camacho challenged three provisions in the separation agreement: 1) no participation in claims against the employer; 2) broad confidentiality provision that included information about employer and employee wages, information; and 3) non-disparagement provision.

No Participation in Claims

The ALJ ruled this was clearly a Category 3 violation as the language ("CAMACHO agrees that, unless compelled to do so by law, CAMACHO will not pursue, assist or participate in any Claim brought by any third party against … [Baylor] or any Released Party….") would have a very predictable impact of banning NLRA protected behavior.

Confidentiality

The ALJ ruled that this was also clearly a Category 3 violation as it would prohibit her from speaking about workplace terms and conditions and exercising her Section 7 rights ("CAMACHO agrees that …. she must … keep secret and confidential and not … utilize in any manner all … confidential information of … [Baylor] or any of the Released Parties made available to her during her … employment … , including … information concerning operations, finances, …, employees, … personnel lists; financial and other personal information regarding … employees; ….").

Anti-Disparagement Language

Interestingly, the ALJ found that this constituted a Category 1 rule/policy regarding civility and it was acceptable ("CAMACHO agrees that she shall not … make, repeat or publish any false, disparaging, negative, … or derogatory remarks … concerning … [Baylor] and the Released Parties … or otherwise take any action which might reasonably be expected to cause damage … to … [Baylor] and the Released Parties ….").

Practice Tip #6 – Scrutinize any no-participation language included in severance agreements.

Thank You