
EEOC Takes Aim at Employee Releases That Bar Assisting Others With Their Own EEOC Charges

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Employers have routinely asked employees who sign separation or settlement agreements to agree that they will not encourage or assist other employees in filing lawsuits or charges, subject to the caveat that the employee may of course testify truthfully in response to legal process. Until recently, field offices of the U.S. Equal Employment Opportunity Commission regularly approved settlement agreements that included such provisions. Now, however, the EEOC has targeted these kinds of provisions. The agency adopted a new national Strategic Enforcement Plan (“SEP”) on December 17, 2012, instructing its field offices to reject such provisions as impermissible barriers to the EEOC’s investigation and enforcement efforts. In light of the new enforcement drive, employers should review their standard release agreements to ensure they will pass muster under the EEOC’s new initiative.

The EEOC Sets New Enforcement Priorities

Courts have consistently recognized that individuals possess a non-waivable right to file charges with the EEOC. As a result, separation agreements cannot prohibit an employee from filing an EEOC charge. Moreover, federal regulations do not give employees who have already filed a charge the unilateral right to dismiss a pending charge. Rather, a charging party can only submit a request to the EEOC to withdraw the charge. Nonetheless, because separation agreements can require employees to waive their rights to any personal recovery, employees who sign release agreements have little incentive to file an EEOC charge. The EEOC, in turn, has little reason not to dismiss a charge that the filing employee has asked to withdraw, unless there are allegations of broader unlawful conduct that may affect other employees or the settlement agreement at issue is patently unfair to the employee or imposes unlawful conditions.

Although employers may understand these caveats, when an employee releases potential claims against the employer, either as part of a separation or settlement agreement, the employer expects finality. The possibility that a former employee will release his or her own claims, only to turn around and incite other employees to bring their own claims against the employer, is a significant concern. Employers have addressed this concern by including provisions in their standard release agreements that bar former employees from encouraging or assisting any other employees to litigate claims or file administrative charges against the employer, absent a subpoena or similar compulsory legal process. In light of prior EEOC enforcement guidance and court cases, the prohibition on “assistance” needed to make an exception for an employee’s right to participate in legal proceedings in response to compulsory process. Otherwise, the provision could impede EEOC enforcement of the civil rights laws and be deemed void as against public policy.

In the new SEP, however, the EEOC has targeted agreements that limit assistance to other employees. The SEP adopts six national enforcement priorities, with the fifth being a focus on preserving access to the legal system.¹ Specifically, the SEP states that the EEOC will “target policies and practices that . . . impede the EEOC’s investigative or enforcement efforts[, including] settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination[.]” In the weeks since the issuance of the SEP, EEOC field offices have already begun to reject proposed settlement agreements with assistance bans that include carve-outs for responding to compulsory legal process. In fact, the EEOC now takes the position that the mere inclusion of a ban on assistance in a release agreement is itself a violation of the law.

Recommendations

Employers should immediately remove any language from their template separation agreements that would ban assistance with administrative charges against the employer brought by other employees. Fortunately, the new enforcement priority leaves room for a carefully crafted alternative approach that prohibits employees from attempting to stir up trouble for the employer by inciting others to file charges, while still permitting the employee to cooperate voluntarily with EEOC investigations that have been independently initiated by other employees. More far-reaching attempts to deter assistance with EEOC charges, however, are likely to result in rejection of the proposed settlement agreement by the EEOC.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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¹ The other national priorities identified in the plan are (1) eliminating barriers in recruitment and hiring; (2) protecting immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; and (5) preventing harassment through systemic enforcement and targeted outreach. See <http://www.eeoc.gov/eeoc/plan/sep.cfm>

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