Breaking Up With An Employee Is Hard To Do

BY CHERI THOMAS AND LAURENCE STUART

Severance agreements serve several functions. From an employer's perspective, their most important function is avoiding potential lawsuits. Employers may also use severance agreements to soften the blow of termination or reward long-time employees. Employers often use severance provisions to try to silence or restrict conduct of a terminated employee. However, aspects of Texas contract law and recent scrutiny given to severance agreements by federal agencies make breaking up hard to do.

The Equal Employment Opportunity Commission has consistently taken the position that severance agreements cannot affect an employee's right to file a charge with the EEOC or participate in an EEOC investigation or prosecution. Recently, the EEOC has prioritized its enforcement of this position. In its Strategic Enforcement Plan for FY 2013-2016, the EEOC declared it planned to "target policies and practices … [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." Following through, the EEOC has filed at least three lawsuits complaining employers' severance agreements were overbroad and interfered with employees' rights to file charges and/or communicate and cooperate with the EEOC.

In these lawsuits, the EEOC challenged common provisions included in many standard severance agreements, including clauses on nondisparagement, confidentiality, cooperation, release of claims, and covenants not to sue. The EEOC also complained about the length of severance agreements, suggesting that the agreements would not be clearly understood by employees.

The first lawsuit, *EEOC v. Baker & Taylor*, filed in the Northern District of Illinois in 2013, was resolved through settlement. The second lawsuit, *EEOC v. CVS Pharmacy*, filed in the same district in April 2014, was dismissed on procedural grounds in October 2014 by Judge John Darrah. Although Judge Darrah indicated in dicta that the EEOC's claims were without merit, the EEOC's challenges have yet to be resolved on the merits. The third lawsuit, filed in April 2014 against CollegeAmerica Denver, remains pending in the District of Colorado.

Meanwhile, the National Labor Relations Board has also identified provisions commonly included in employers' severance agreements that it con-

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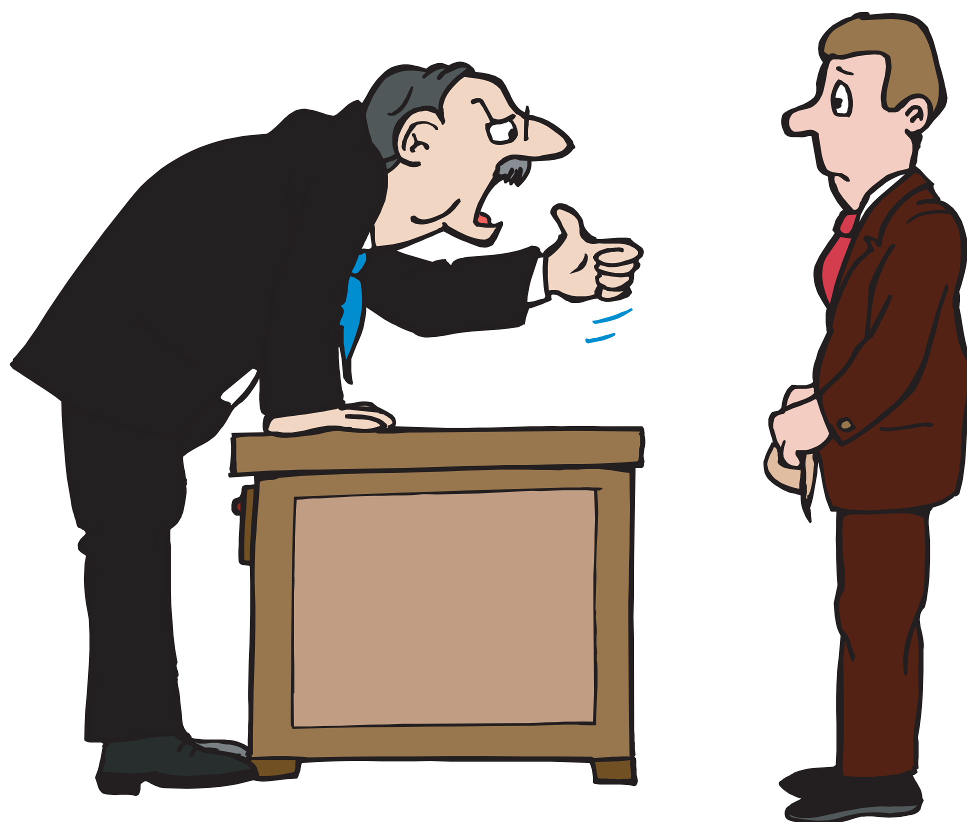
siders unlawful. The National Labor Relations Act §7 permits unionized and nonunionized employees the right to, among other things, discuss terms and conditions of their employment and file charges with and access the processes of the NLRB. The NLRB views confidentiality and nondisparagement provisions, which are included in many standard severance agreements, as problematic because in the NLRB's view they restrict employee communications about wages, benefits, work conditions or criticism of the employer in violation of employees' §7 rights.

Typical language in severance agreements can also have unintended consequences under Texas law. Use of confidentiality language which does not expressly preserve the terms of prior confidentiality obligations may be found to supersede prior restrictions. Similarly, use of a typical integration or merger clause might prevent enforcement of prior-executed restrictive covenants without express preservation of same. Noncompete provisions imposed for the first time in a severance agreement will likely be found unenforceable.



REVIEWING PROVISIONS

To make break-ups more straightforward and slightly less painful, employers should carefully review all provisions of their severance agreements with the following guidance in mind:

1. Clearly preserve employees' rights. Employees can waive monetary damages flowing from an EEOC charge, but not the right to file one. Employers cannot require employees to waive the right to participate in EEOC investigations or proceedings. The EEOC has claimed that past employer carve-outs for these rights were not sufficiently clear. To avoid EEOC scrutiny, employers should take care to make clear that these rights are not waived. For example, an employer might bold a separate statement of protected/preserved rights and refer back to it in paragraphs that could be viewed as restricting an employee's rights (e.g. nondisparagement provisions, confidentiality provisions). Employers should carefully phrase general release and related provisions. A clause prohibiting the filing of any "action, lawsuits, proceedings, complaints, charges" against the company, including "any claim of unlawful discrimination of any kind" likely will be viewed by the EEOC or NLRB as discouraging the filing of a charge. Employers might consider removing or amending a covenant not to sue to make clear that employees' rights are preserved.

2. Clarify nondisparagement provisions. Nondisparagement provisions should be drafted to clearly convey they are not meant to deter employees from filing an administrative charge, participating in an administrative investigation or proceeding, or exercising their rights under §7 of the NLRA. Nondisparagement provisions should specify that sharing true information with an administrative agency or in response to a subpoena is permitted.

3. Focus confidentiality provisions. Confidentiality provisions should focus on specific confidential and proprietary information which is truly confidential. Prohibiting disclosure of information that may relate to an agency charge or investigation (e.g., personnel information) or that may circumscribe §7 rights (e.g. wages, benefits) might draw scrutiny. Consider including language expressly affirming the continuing applicability of prior confidentiality agreements and restrictive covenants.

4. Tailor cooperation provisions. Cooperation language can require providing truthful information and documents in connection with future proceedings, but should not require taking a side in litigation or notifying the employer of communication with one of the agencies.

5. OWBPA requirements. Include language and take steps required by the Older Workers Benefit Protection Act.

Carefully reviewing and revising severance agreements to avoid EEOC and NLRB scrutiny and preserve existing obligations will help employers achieve clean break ups. IHT

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