

Is the EEOC Confused?

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Practices: Employment, Labor & Benefits

The Equal Employment Opportunity Commission ("EEOC") appears to be giving cross-signals. The EEOC is the agency of the federal government responsible for investigating complaints of discrimination brought by applicants, employees and former employees against companies and other entities. Prior to conducting an investigation, the EEOC will mediate a dispute between a former employee and the company at which he worked.

As we recently reported, the EEOC filed suit against CVS Pharmacy, Inc., alleging that its severance agreement violated federal anti-discrimination laws. See *EEOC v. CVS Pharmacy, Inc.*, Case NO. 14-cv-863 (B.N.D. Ill), pending in the United States District Court for the Northern District of Illinois. CVS Pharmacy has now filed a motion to dismiss the case and the Court is expected to rule within the next several weeks. In the Complaint filed in Court, the EEOC attacks a number of provisions in the severance agreement. One of these provisions is a "covenant not to sue," which states as follows: "Employee agrees not to initiate or file, or cause to be initiated or file, any action, lawsuit, complaint or proceeding." The employee received monetary consideration in exchange for that promise.

However, the EEOC's action is not consistent with its own mediation settlement agreement. The EEOC gives this agreement to the parties at mediations held at the EEOC's office. The very first paragraph of the agreement states as follows: "In exchange for the promises made by RESPONDENT pursuant to Charge No. _____, CHARGING PARTY agrees not to institute a law suit," In response to a question about this language in light of the CVS Pharmacy suit, the mediator said that the language in the mediation settlement agreement was not negotiable.

The solution is to enter into a non-EEOC settlement agreement that does not include the covenant not to sue. Importantly, the EEOC has not attacked language in agreements in which charging parties release claims they may have against respondents. A release of claims is different than a covenant not to sue. Human resources professionals should monitor the CVS Pharmacy case, and review the agreements they are using to ensure that they are effective releases of claims and do not contain unlawful language.