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CLIENT ALERT

EEOC Continues to Adopt Novel and Aggressive Enforcement Positions in Litigation and Compliance Investigations

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The EEOC has been widely criticized by the employer community in the last year or so for taking a number of novel enforcement positions. Despite taking it on the chin in some widely-publicized cases, all indications are that the EEOC is continuing to pursue an aggressive enforcement agenda. It includes challenging several common, long-standing employer practices and policies. This article summarizes a few of these challenges that are of particular interest to mining companies.

EEOC Challenges to "Overly Broad" Language in Separation Agreements

On February 7, 2014, the EEOC filed a Title VII pattern and practice lawsuit in Chicago against CVS Pharmacy. (*EEOC v. CVS Pharmacy, Inc.*, No. 14-cv-863 (N.D. Ill.).) The complaint alleges that a standard separation agreement used by CVS is unlawful. The EEOC challenges five different paragraphs in the separation agreement:

- **A cooperation clause, requiring the employee to notify CVS's General Counsel of any interview request or "inquiry" regarding an "administrative investigation."**
- **A non-disparagement clause, prohibiting the employee from making "any statements that disparage the business or reputation" of CVS or its officers, directors, or employees.**
- **A non-disclosure clause, prohibiting the employee from disclosing any "confidential information" about CVS to any third party, including information about CVS personnel.**
- **A general release provision, releasing all claims including "any claim of unlawful discrimination of any kind."**
- **A covenant not to sue, preventing the employee from initiating or filing any lawsuit or complaint with any court or agency. The covenant not to sue specifically carves out the employee's right to participate in, and cooperate with, any federal, state, or local agency investigation enforcing discrimination laws.**

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The EEOC contends that these provisions violate Title VII because they interfere with employees' ability to communicate voluntarily with the EEOC and other enforcement agencies. It is noteworthy that the EEOC asserts that the above-referenced "carve out" in the covenant not to sue is not enough, because it is not repeated anywhere else in the agreement.

Just last month, the EEOC filed a complaint in federal court in Denver making similar allegations against a private for-profit college, challenging its separation agreement under the Age Discrimination in Employment Act. (*EEOC v. CollegeAmerica Denver, Inc.,* No. 1:14-cv-01212 (D. Col.).)

These lawsuits are the latest in a series of periodic challenges by the EEOC to what is often thought of as "standard boilerplate language" in separation agreements. The current initiative should be seen as consistent with the agency's "Strategic Enforcement Plan for FY 2013 – 2016," which includes a goal to "target policies that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts."

This is not an entirely new issue for employers. In *EEOC v. Cosmair, Inc.,* 821 F.2d 1085 (5th Cir. 1987), the court upheld the agency's position that a separation agreement barring an employee from filing a charge with EEOC violated Title VII. The court reasoned that such language would have a "chilling effect" on the agency's principal function as a law enforcement agency. More recently, the agency's position on cooperation with EEOC investigations was endorsed by the First Circuit in *EEOC v. Astra USA, Inc.*, 94 F.3d, 738, 742 (1st Cir. 1996). There, the employer obtained settlement agreements and releases from employees that prohibited the employees from assisting the Commission in investigating any sexual harassment charges against the employer. The EEOC sued for injunctive relief, and the district court granted the agency's request. The First Circuit affirmed. The court noted that the EEOC has a duty to vindicate the public interest in preventing unlawful employment discrimination and observed that "if victims of or witnesses to [employment discrimination] are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered . . . . ."

The latest complaints seek to extend these existing principles in ways that will be problematic for employers. The language in the CVS agreement, or some variation of it, is likely familiar to many lawyers working for mining companies. While it's always wise to take a periodic look and update the language in standard form agreements, the specific allegations made by EEOC make it difficult to revise standard agreements to address the agency's chilling effect theory. This is particularly so with respect to certain provisions that are typically viewed by employers as valuable consideration in exchange for payment money to resolve pending claims. The willingness of employers to settle litigation, after all, is highly correlated with the ability to have reasonable certainty that the matter is, in fact, resolved. The bottom line here is that, until there is more guidance from courts on this issue, many separation agreements are susceptible to challenge.

The EEOC Focuses on Religious Accommodation Issues

EEOC made news last year when it filed a lawsuit against CONSOL, accusing the coal company of violating Title VII's provisions requiring accommodation of sincerely held religious beliefs. (*EEOC v. CONSOL Energy, Inc. and Consolidation Coal Co.,* No. 1:113-cv-00215-FPS (N.D. W. Va.).) The complaint alleges that the company's biometric hand scanner system, installed as part of a new time and attendance control system, violated the religious beliefs of a devout evangelical Christian employee who opposed using the scanning technology based on a Bible passage stating that the antichrist will force people to receive his

mark on their hand or forehead. The complaint alleges that the employee was forced to retire, even though the company had previously made exceptions to the requirement that employees use the biometric scanner system.

The *CONSOL* complaint illustrates a rising trend in claims against employers alleging discrimination on the basis of religion. For example, many claims are being made on behalf of devout Muslims challenging various types of dress code policies. In March 2014, the EEOC issued a new Fact Sheet and Question-and-Answer Guide on religious discrimination and accommodation. This guide indicates that a number of fairly typical employer responses to accommodation issues may now trigger EEOC scrutiny. In particular, an employer cannot defend against a failure to accommodate by saying that the accommodation will, or could, cause an undue hardship – the employer can only justify the refusal to accommodate by showing an *actual* undue hardship caused by the accommodation. Additionally, a customer preference or customer complaint is not a defense to a failure to accommodate unless the employer can show an actual undue hardship. Finally, the EEOC has stated that an employer cannot justify a refusal to accommodate based on its belief that the employee's religious beliefs are not "sincere."

The EEOC's current enforcement position leaves many employers in an uncertain position. These new developments confirm the wisdom of engaging in a good faith, thoughtful assessment of an employee's accommodation request. In cases where the company truly believes that an accommodation cannot realistically be provided, the employer should gather as much concrete support as possible to demonstrate the existence of an actual undue hardship.

Lack of Clarity Regarding EEOC's Obligations Prior to Filing Suit

In late December 2013, the Seventh Circuit, in *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013),held that employers cannot defend against lawsuits brought by the EEOC by contending that the agency failed to undertake its pre-suit obligations, such as attempting to conciliate the dispute. The case began when a woman filed a gender discrimination charge with the EEOC alleging that her multiple applications for "mining positions" (as opposed to office jobs) were denied because of her gender. The EEOC began an informal conciliation process with Mach Mining, after concluding the charge had merit. The agency ultimately determined that further conciliation efforts would be futile and filed a complaint in federal court on behalf of a class of women.

In the district court, Mach Mining asserted an affirmative defense that the case should be dismissed because of the EEOC's failure to conciliate in good faith. The EEOC moved for summary judgment on this issue, which the district court denied. The trial court certified the issue for interlocutory appeal. On appeal, the Seventh Circuit reversed the trial court and determined that the EEOC was entitled to summary judgment on Mach Mining's affirmative defense. The Court noted that there is no provision in Title VII that provides such an affirmative defense and that the statute is clear that conciliation is an informal, confidential process left solely to the EEOC's judgment. There is no guidance in the statute by which to judge the quality of the EEOC's efforts to conciliate a dispute. The court also raised concerns that such an affirmative defense allows employers to manipulate the conciliation process by making a record to support an affirmative defense and thereby shift the focus away from the lawfulness of the employment practices at issue in the investigation.

The Seventh Circuit's decision conflicts with decisions from other courts, including a relatively recent Eighth Circuit decision in *EEOC v. CRST Van Expedited, Inc.*, Case Nos. 09-3764, 09-3765 & 10-1682 (8th Cir. Feb. 22, 2012). In that case, the Eighth

Circuit affirmed the trial court's dismissal of numerous individual discrimination claims, on the basis that the EEOC had not undertaken its required investigation and conciliation duties.

Mach Mining filed a petition for a writ of certiorari with the Supreme Court in late February 2014, and briefing is recently completed, with EEOC supporting the request for review. If the Supreme Court decides to hear this case, its decision could provide helpful guidance to employers as to how far the EEOC needs to go in its pre-suit obligations before it can file a complaint.

Uncertainty Remains Regarding the Permissibility of Background Checks

The EEOC remains focused on employers who conduct criminal background checks of applicants and employees, on the theory that such policies have a disparate impact on African American and Hispanic applicants. This is another of the top priorities listed in the agency's "Strategic Enforcement Plan for FY 2013 – 2016."

In 2013, the EEOC's efforts to limit employer use of background checks were met with tough opposition. For instance, in October 2013, the Sixth Circuit affirmed an award of $752,000 in attorneys' fees and costs against the EEOC in *EEOC v. Peoplemark, Inc.,* 732 F.3d 584 (6th Cir. 2013). In that case, the EEOC sued Peoplemark for an alleged policy of rejecting applicants with felony backgrounds. In discovery, the EEOC learned that Peoplemark in fact had no such policy, but the EEOC continued to pursue its case for a total of nearly 18 months. In affirming an award of fees and costs against the EEOC, the Sixth Circuit noted that it was "unreasonable to continue to litigate the commission's pleaded claim" after learning that there was no blanket policy regarding felony convictions.

In August 2013, the U.S. District Court for the District of Maryland granted summary judgment for the defendant in *EEOC v. Freeman,* No. 09cv2573 RWT (D. Md., Aug. 9, 2013). The EEOC's complaint alleged that the event planner's credit and background checks were discriminatory, but the EEOC never identified any part of Freeman's policy that resulted in disparate impact. The Court described the complaint as "a theory in search of facts to support it." Moreover, the EEOC tried to prove its case with "laughable" expert reports filled with a "plethora of errors and analytical fallacies." The EEOC has appealed *Freeman* to the Fourth Circuit.

Despite these losses, the EEOC is still actively pursuing background check cases. In June of last year, the EEOC filed a class action lawsuit in Chicago against DolGenCorp. (*EEOC v. DolGenCorp LLC,* No. 1:13-cv-04307 (N.D. Ill.).) The same month the agency sued BMW in South Carolina. (*EEOC v. BMW Manufacturing Co. LLC*, No. 7:13-cv-01583 (D.S.C.).) The complaints in both cases allege that the background check policies improperly screened out African American workers even though many of these workers have been employed for years.

These complaints should be read in the context of the March 10, 2014 guidance on background checks issued jointly by the EEOC and the Federal Trade Commission. *See* http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm. Most employer-side commentators have criticized this guidance as failing its stated objective of providing clear guidance to employers seeking to comply with Title VII.

The obvious lesson to be learned here is that employers who conduct criminal background checks must continue to closely follow legal developments in this unsettled area. Background checks should be limited to analysis of information that has a

demonstrable relationship to actual qualifications for the position being filled, so that the employer can defend the use of background checks with evidence that the individual would then be categorically unqualified for the job.

Strict Scrutiny of Employer's ADA Policies

The EEOC remains focused on employer policies that restrict employees' rights under the ADA. The EEOC's longstanding litigation against UPS illustrates the concern. Back in 2009, the agency first sued UPS in Chicago, claiming an ADA violation with respect to its policy providing that all employees will be automatically terminated from employment after they have taken twelve months of leave. (*EEOC v. United Parcel Service Inc.,* No. 1:09-cv-05291 (N.D. Ill.).) The EEOC contends that this policy applies to qualified individuals with disabilities who would be capable of performing their jobs with or without a reasonable accommodation.

After a fair bit of procedural wrangling and a trip to the Seventh Circuit, UPS filed a motion to dismiss on the basis that employees who need more than 12 months of leave are not qualified to work, because "the ability to regularly attend work" is an essential function of any job within the meaning of the ADA. On February 11, 2014, the court denied UPS's motion. The court concluded that, because UPS has a medical requirement that individuals must meet before they are able to return from leave, the Court decided that the policy might actually be a potentially suspect qualification standard rather than an essential function of the job.

The decision serves as a reminder that blanket policies related to ADA accommodations and leave, such as "no-fault" or automatic termination policies, are risky. Instead, employers faced with requests for accommodations should engage in the interactive process with each individual employee and determine whether the accommodation can be made. Each step in this process should be documented.

What's Next

EEOC got off to a fast start in 2014. The developments summarized above signal continued, aggressive litigation and agenda-setting by the EEOC. As these cases move toward resolution, employers – including mine operators – need to remain vigilant about monitoring policies and practices that are on the EEOC's list of enforcement priorities.

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