

***Third Thursday* – Crowell & Moring’s Labor & Employment Update**

August 21, 2014

The webinar will begin shortly. You will not hear any audio until we begin. Please stand by.

Today's Presenters



Tom Gies



James Kellett



Christine Hawes

Today's Discussion

Are Your Settlement and Release
Agreements Still Enforceable?

Background and Basics

Basic Principles

- Adequate Consideration
- Scope of Release
- Covered Parties
- “Typical” provisions
- The “knowing and voluntary” requirement

OWBPA Requirements

- Basic Requirements
- Key Provisions in “Programs”
 - 45 days
 - List of ages and titles of eligibles
 - Decisional unit
 - other

RECENT EEOC INITIATIVES

Recent EEOC Initiatives

- *EEOC v. CVS Pharmacy, Inc.*
 - Title VII Section 707 Complaint
 - Status
 - Six Provisions at Issue
 - Cooperation
 - Non-disparagement
 - Non-disclosure of confidential information
 - General release of all claims
 - No pending actions; covenant not to sue
 - Injunctive relief in the event of employee breach

Recent EEOC Initiatives con't

- *EEOC v. Baker & Taylor (N.D. Ill. 2013)*
- Consent Decree language requires employer to include language in severance agreements stating that
 - employees can file a charge with EEOC,
 - participate in an agency investigation, and
 - **“recover any appropriate relief.”**

Recent EEOC Initiatives con't

Baker & Taylor consent decree also states:

“Employees retain the right to communicate with the EEOC and comparable state . . . 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. . . .”

Recent EEOC Initiatives con't

- EEOC v. CollegeAmerica
 - ADEA Complaint
 - Retaliation Allegations
 - Status

CollegeAmerica Agreement

Debbie Potts agrees to:

1. Commencing on Sept. 1, 2012, to refrain from personally (or through the use of any third party) contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica, Denver Inc. and any of its related companies.
2. To direct any complaints or issues against CollegeAmerica, Denver, Inc. or its related entities that may arise with disgruntled staff, students, or the public at large to CollegeAmerica's toll free complaint number 1-877-402-0954.
3. To not intentionally with malicious intent (publicly or privately) disparage the reputation of College America, Denver Inc. or any of its related entities.

EEOC v. CollegeAmerica con't

- EEOC Claims – Provisions at Issue
 - General Release
 - No assistance
 - Bar on filing charges with EEOC
 - A “no claims filed” representation
 - Cooperation
 - Disclosure of all known matters of regulatory non-compliance
 - Non-disparagement



Problematic Provisions and Tricky Clauses

Administrative Charges

- *EEOC v. Cosmair, Inc.* carve-out
- Employee retains right to file charge or participate in investigation of charge
- Express waiver of right to monetary damages
- Separate provision
- Additional references to the carve-out

Cooperation Clauses

- Definition
- Examples
- Issues

Non-Assistance Clauses

- Definition
- Examples
- Issue

Non-Disparagement Clauses

- Definition
- Examples
- issues

Covenant not to Sue

- Definition
- Issue

Current Issues in OWBPA Compliance

- The “Decisional Unit” issue
- Examples

Other Issues

- Two trigger agreements
- Separation of consideration
- Waiver of right to apply for subsequent employment
- Certification of regulatory compliance

Specific Statutory Claims

- Waivers of FLSA and FMLA Claims
- Waivers of substantive False Claims Act claims
- ERISA claims
- Section 7 of the National Labor Relations Act

Selected Authorities and Commentary

- Complaint in *EEOC v. CVS Pharmacy, Inc.*
<http://www.emcglonelaw.com/blog/wp-content/uploads/2014/02/K0364305.pdf>
- EEOC Press Release in CVS matter:
<http://www.eeoc.gov/eeoc/newsroom/release/2-7-14.cfm>
- Complaint in *EEOC v. CollegeAmerica Denver, Inc.*
<http://assets.law360news.com/0534000/534703/CollegeAmerica%20Complaint.pdf>
- EEOC Press Release in *CollegeAmerica* matter:
<http://www1.eeoc.gov//eeoc/newsroom/release/5-5-14.cfm?renderforprint=1>

Selected Authorities and Commentary

- *EEOC v. Baker & Taylor*, C. A. No. 13-3729 (N.D. Ill. 2013)
- EEOC 1997 Guidance –Notice No. 915.002
<http://www.eeoc.gov/policy/docs/waiver.html>
- *EEOC v. Cosmair, Inc.* 821 F.2d 1085 (5th Cir. 1987)
- *Ribble v. Kimberly-Clark Corp.*, No. 09-C-643, 2012 WL 589252 (E.D. Wis. Feb. 22, 2012)
- Crowell & Moring analysis:
<http://www.lexology.com/library/detail.aspx?g=18447315-9692-4aa5-925b-2ad5067ec87e>

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