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EEOC Challenges Another Employer's Standard Severance Agreement Language

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Employers' long-trusted standard severance agreements are under fire *again* by the EEOC. A few months ago, we told you about the EEOC's federal lawsuit against a nationwide employer in Illinois, where the EEOC attacked language used in a standard severance agreement. On the heels of that case, the EEOC has filed another lawsuit making similar allegations, this time against CollegeAmerica Denver, Inc. in the District of Colorado.

The new Colorado case involves a campus director who entered into a severance agreement with the school when she resigned. The severance agreement contains two clauses the EEOC doesn't like. The first clause prohibits the employee from personally contacting any governmental or regulatory agency to file a complaint or grievance that would bring harm to the school. The second clause includes language prohibiting the employee from intentionally and maliciously disparaging the reputation of the school or its related entities. These are frequently used provisions in separation agreements, where organizations want to bring finality to potential claims. But, according to the EEOC, making severance payments conditional on these provisions would have a chilling and detrimental effect on employees filing charges of discrimination, and would interfere with their ability to communicate voluntarily with the EEOC and similar state agencies.

In the Illinois case, the EEOC attacked a severance agreement that specifically *did not* prohibit employees from participating in agency investigations. The Colorado case involves a severance agreement with takes the opposite approach: instead of carving out an exclusion for agency investigations, this severance agreement drives a stake right through the heart of them. In light of its position on Illinois cas, the EEOC's position on the Colorado case is understandable. But, what may trouble employers more is *the second* provision at issue – the one that prohibits the employee from making disparaging comments against her employer (a very similar non-disparagement language also is an issue in the Illinois case). The EEOC's complaint sheds no light on why the EEOC believes the non-disparagement provision is problematic. Nor does the agency explain why an employer should not be entitled to expect that after having paid severance to an employee, that the employee – in exchange – would not *maliciously disparage* the reputation of the employer.

Undoubtedly, discovery in this case (and the Illinois case too) will reveal those details. Until then, employers should keep these cases in mind when preparing their severance agreements and remember that your friendly neighborhood EEOC may be looking over your shoulder.