Potential Dangers in Everyday Employment Documents

Attorney Steve Bond, Brouse McDowell

Sometimes, being thorough as lawyers can create problems we didn't know we had.

General practitioners, as well as those of us who focus on employment law, frequently have a need to deal with employment-related documents, generated by our business clients' situations, that we consider routine. There may be a tendency to consider these as situations calling for 'boiler plate' language; or, if we give them serious thought, we may be inclined to be extremely thorough in our wording, attempting to account for every possible contingency. Unfortunately, we can unintentionally run afoul of federal agencies which enforce the rights of employees - agencies which, some would argue, have been be more aggressive flexing their muscles in recent years. Here are three examples of which you should be aware.

Work Rules

Last year, Quicken Loans (a non-union employer) ended up with a complaint before the National Labor Relations Board1, stemming from boilerplate language in their employment agreements - clauses which must of us would think are fairly routine - and a routine non-compete dispute. Six mortgage bankers apparently left Quicken Loans and went to work for a competitor. Quicken Loans responded with a lawsuit alleging violations of clauses in their employment agreements. One of these employees countered with a complaint to the NLRB that language in their employment agreements violated her rights under federal labor law. The focus of the Board's analysis was on this language:

Section D: Proprietary/Confidential Information
2. You agree that:
(a) You shall hold and maintain all Proprietary/ Confidential Information in the strictest of confidence and that you shall preserve and protect the confidentiality, privacy and secrecy of all Proprietary/Confidential Information;
(b) You shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity . . .

* * *

(e) You shall take all necessary precautions to keep Proprietary/Confidential Information secret, private, concealed and protected from disclosure, and shall follow and implement the Company' privacy and security procedures . . .

Attachment A
A. 'Proprietary/Confidential Information' ñ For purposes of this Agreement, 'Proprietary/Confidential Information' means: (a) non-public information relating to or regarding the Company' business, personnel, customers, operations, or affairs; (b) non-public information which the Company labeled or treated as confidential, proprietary, secret or sensitive business information . . . 'Proprietary/Confidential Information' includes, but is not limited to, the following categories of information, irrespective of the medium in which it is stored . . . :

* * *

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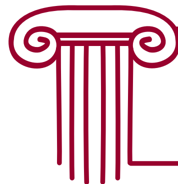

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* * *

Section K: Additional Terms and Requirements

2. Non-disparagement. The Company has internal procedures for complaints and disputes to be addressed and resolved. You agree that you will not (nor will you cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through the use of a pseudonym). You agree to provide full cooperation and assistance in assisting the Company to investigate such statements if the Company reasonably believes that you are [the] source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies.

Not surprisingly, Quicken Loans contended that it had invested time and money in these employees and had required these clauses to protect that investment. This employer right would be contrasted with the employees' legal rights to confer with one another, to share their complaints about the workplace, etc. As the Administrative Law Judge stated in his ruling: 'The line between lawful and unlawful restrictions is very thin and often difficult to discern.'

The test of whether the work rule goes too far is this:

a Does the rule explicitly restrict one of the employee's rights under federal law?

b Even if it doesn't,

1 Would employees reasonably construe it as prohibiting them from exercising those rights?

2 Was the rule promulgated in response to union activity?

3 In practice, has it been applied to restrict the exercise of employee rights?

The Board held that the language quoted above went too far. With respect to the confidentiality clauses, it said:

The Proprietary/ Confidential Information rule requires employees to maintain this information "in the strictest of confidence" and "you shall not disclose [it] to any person, business or entity." The Agreement defines proprietary and confidential information as "non-public information relating to . . . the Company's business, personnel . . . all personnel lists, personal information of co-workers . . . personnel information such as home phone numbers, cell phone numbers, addresses and email addresses." There can be no doubt that these restrictions would substantially hinder employees in the exercise of their Section 7 rights. In complying with these restrictions, employees would not be permitted to discuss with others, including their fellow employees or union representatives, the wages and other benefits that they receive, the names, wages, benefits, addresses or telephone numbers of other employees. This would substantially curtail their Section 7 protected concerted activities.

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And, with regard to the non-disparagement language, the Board reached the same conclusion:

There can be no doubt that an employee reading these restrictions could reasonably construe them as restricting his rights to engage in protected concerted activities. Within certain limits, employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometime do so in appealing to the public, or to their fellow employees, in order to gain their support. A reasonable employee could conclude that the prohibitions contained in the Agreement prohibited them from doing so. The Non-Disparagement provision therefore violates Section 8(a)(1) of the Act.

The Board ultimately concluded that these clauses violated federal law and the offensive wording had to be rescinded.[2] Takeaway: if we write a clause on confidentiality or non-disparagement that is broadly worded to avoid leaving a loophole, we may unintentionally give the impression that the employer is attempting to close off an employee's rights under federal law, even in a non-union setting.[3]

Employee Handbooks

In a post-Mer[4] world, we probably all realize that, while an employee handbook may be a good human resources/labor relations tool, it is always out there as the potential foundation of an unhappy employee's breach of implied contract claim - unless . . . we include countervailing language disclaiming the creation of a contract or, for that matter, affirmatively emphasizing that the relationship is purely 'will.'[5] In its desire to draft language which was emphatic, the American Red Cross adopted language intended to drive home that position in an acknowledgment form by which employees acknowledged receipt of, and agreed to abide by, the rules set forth in the handbook, and which also included this statement: 'I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.' The Board took issue with that clause,[6] even though it does not mention union or protected concerted activity, or even the raising of complaints involving employees' wages, hours and working conditions.

[T]he signing of the acknowledgement form is essentially a waiver in which an employee agrees that his/her at-will status cannot change, thereby relinquishing his/her right to advocate concertedly, whether represented by a union or not, to change his/her at-will status. For all practical purposes, the clause in question premises employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship. Clearly such a clause would reasonably chill employees who were interested in exercising their Section 7 rights.

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In contrast, a different conclusion was reached when the Board looked at a different set of clauses in an employee handbook earlier this year[7]:

Employment at [the Employer] is on an at-will basis unless otherwise stated in a written individual employment agreement signed by the [Senior Vice President of] Human Resources. This means that employment may be terminated by the employee or [the Employer] at any time, for any reason or for no reason, and with or without prior notice.

No one has the authority to make any express or implied representations in connection with, or in any way limit, an employee's right to resign or [the Employer's] right to terminate an employee at any time, for any reason or for no reason, with or without prior notice. Nothing in this handbook creates an employment agreement, express or implied, or any other agreement between any employee and [the Employer]. No statement, act, series of events or pattern of conduct can change this at-will relationship.

While it may be hard to appreciate a fundamental difference between how an average employee would interpret this provision, as compared with the sentence that was used by the Red Cross, General Counsel for the Labor Board saw a distinction:

We conclude that employees would not reasonably construe the contested Handbook provision to prohibit them from engaging in Section 7 activity to change their at-will employment status. The Handbook provision describes the employees' current status, which is that they are subject to termination with or without cause or notice and that their terms and conditions of employment may be changed unilaterally by the Employer. It then states that under no circumstances can the Employer's own officials, with the exception of the Senior Vice President for Human Resources, modify an employee's at-will status. The meaning of that statement is clarified by its context, specifically, the subsequent language stating that '[n]othing in this handbook creates an employment agreement, express or implied, or any other agreement between any employee and [the Employer].' Thus, the statement that only the Senior Vice President for Human Resources can modify employees' at-will employment relationship is not directed at employee conduct, but rather was included to protect the Employer against potential legal actions asserting that the Employee Handbook created an enforceable employment contract. Indeed, this clause is harmonious with potential employee attempts to bargain collectively with the Employer because it explicitly designates the Senior Vice President for Human Resources as having the authority to enter into agreements that can alter the at-will employment relationship. The provision then states that '[n]o statement, act, series of events or pattern of conduct can change this at-will relationship.' We conclude that, although this language could be construed to prohibit Section 7 protected efforts to change the at-will employment relationship, it would not reasonably be construed by employees in that manner. The provision is not phrased as a work 'rule' directed at employee conduct, and it does not threaten employees with discipline for engaging in protected activity to change their at-will status. Nor does this clause require employees to agree that their at-will status can never be changed, i.e., to waive their right to participate in future Section 7 activity.

Takeaway: disclaimers in employee handbooks remain viable for purposes of dealing with Ohio contract issues - but one should be careful to try to assure that the wording does not, arguably, create the impression that a future contract negotiated through a union has been foreclosed.

Severance Releases

If we are working with an employer who is wanting to part ways with an employee, and we have reached the point where some settlement appears in the offing, we may be asked to draft a severance agreement - and one of the inevitable motivations is this: if the client is paying 'all this money' to settle this claim, we want to be sure we are getting a release that closes the book on this matter 'once and for all.' But, the desire to be all-encompassing in the verbiage can have unintended consequences.

This is demonstrated by the fact that, just this February, the Equal Employment Opportunity Commission filed suit in Chicago against the CVS Pharmacy chain[8], alleging that the form release it had been using was overreaching in limiting (probably unintentionally, I would guess) rights which the employees had by law and which could not be waived away. The Commission expressly complained about these clauses in the settlement document:

• Cooperation. In the event Employee receives a subpoena, deposition notice, interview request, or another inquiry, process or order relating to any civil, criminal or administrative investigation, suit, proceeding or other legal matter relating to the Corporation from any investigator, attorney, or any other third party, Employee agrees to promptly notify the Company's General Counsel by telephone and in writing.

• Non-Disparagement. Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director, or employee of the Corporation.

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• Non-disclosure of Confidential Information. Employee shall not disclose to any third party or use for himself or anyone else Confidential Information without the prior written authorization of CVS Caremark's Chief Human Resources Officer. Such information includes information concerning the Corporation's personnel, including the skills, abilities, and duties of the Corporation's employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning.

• General Release of Claims. Employee hereby releases and forever discharges CVS Caremark Corporation from any and all causes of action, lawsuits, proceedings, complaints, charges, debts, contracts, judgments, damages, claims, and attorneys fees against the Released Parties, whether known or unknown, which Employee has ever had, now has or which the Employee may have prior to the sate of this Agreement. The Released claims include any claim of unlawful discrimination of any kind.

• No Pending Actions; Covenant Not to Sue. Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed, or initiated, any complaint, claim, action or lawsuit of any kind against any of the Related parties in any federal, state, or local court of agency. Employee agrees not to initiate or file, or cause to be initiated or file, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties. Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this paragraph by Employee.

The Complaint noted that, with respect to that last section, the document included this disclaimer: nothing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state of local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation.

Notwithstanding that last disclaimer, the EEOC contends that, to the extent these provisions are limiting an employee's rights to file charges or participate in an EEOC investigation, they are illegal - and, inasmuch as the employer had used this language in more than 650 employee separations, the employer was engaged in a 'pattern of conduct' which it found unlawful.

To be specific, the EEOC contends that employees have the right to file a charge with the EEOC, as well as a right to assist in an EEOC investigation; and any conduct which would deter a reasonable person from enjoying those rights is prohibited by federal law. The EEOC asserts that the language noted above could reasonably be interpreted by an employee to prevent them from filing a charge with the EEOC or to prevent them from communicating adverse information about the employer to the EEOC - moreover, the clause which expressly preserved the employee's right to participate in an EEOC proceeding does not necessarily mean that the employee could file a charge.

CVS has urged that the EEOC is taking a really strained interpretation of hypothetical issues and has taken the wording out of context. Furthermore, even if these clauses are deemed unlawful, they would be unenforceable, not a separate premise for action by the EEOC.[9] The 'Retail Litigation Center,' a trade group which has filed an amicus curiae brief in the case, asserts that this severance agreement uses language which is substantially similar to that used routinely by countless retailers nationwide and which is actually more specific in preserving employee rights than the EEOC's own model form.[10]

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The case remains pending before the Court at this date, waiting a ruling on the employer's Motion to Dismiss.[11]

A related problem is inherent in the drafting of releases which are intended to comply with the Older Workers Benefit Protection Act. Most lawyers are probably aware that, by virtue of that law, in order for release of Age Discrimination in Employment Act claims to be validly waived, the waiver must meet several conditions. One of those conditions is that the waiver be 'part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.'

In Syverson v. IBM[12], IBM conducted a reduction in force which routinely included this language:

In exchange for the sums and benefits received pursuant to the terms of the MICROELECTRONICS RESOURCE ACTION (MERA), [EMPLOYEE NAME], (hereinafter 'you') agrees to release and hereby does release [IBM] . . . from all claims, demands, actions or liabilities you may have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM, the termination of that employment, or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence, or claims for attorneys' fees.

* * *

You also agree that this Release covers, but is not limited to, claims arising from the [ADEA], as amended, . . . and any other federal, state or local law dealing with discrimination in employment, including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status or age . . . . This Release covers both claims that you know about and those that you may not know about which have accrued by the time you execute this Release.

* * *

You agree that you will never institute a claim of any kind against IBM . . . including, but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence. If you violate this covenant not to sue by suing IBM . . ., you agree that you will pay all costs and expenses of defending against the suit incurred by IBM . . ., including reasonable attorneys' fees, and all further costs and fees, including attorneys' fees, incurred in connection with collection. This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM . . . only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorneys' fees and other costs and expenses of defending against the suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission.

* * *

You hereby acknowledge that you understand and agree to this General Release and Covenant Not to Sue. End Note 1 of the agreement explains that '[t]he [ADEA] prohibits employment discrimination based on age and is enforced by the [EEOC].'

The Court found that on the one hand, the release pertained to "all claims" and the covenant not to sue pertained to "claims of any kind," yet, on the other hand, it states that it does not apply to claims based solely on the ADEA; therefore, the Court said, to a lay reader, the language appears to release all ADEA claims, and then appears to preserve them. Notwithstanding IBM's argument that it had crafted this wording in an attempt to comply with the requirements of federal regulations,[13] nevertheless, the

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Court was critical of using both a release and a covenant not to sue in the same document because it created a higher risk of creating confusion in the mind of the employee. 'If an agreement needs clarification, it is not written in a manner calculated to be understood,' said the Court.[14] (And, evidently, a clause by which the employee agrees that he understands the release was not enough to save the release.)

An example of a release which was successful in avoiding this problem can be found in Ricciardi v. Elec. Data Sys. Corp[15]

In contrast to the Agreement in Syverson, the instant Release provided by Defendant clearly sets out the claims released and the claims not released. The Second section of the Release, entitled 'Complete Release' states that Employee agrees to release EDS from all claims or demands Employee may have against EDS … including, without limitation, a release of any rights or claims Employee may have under the ADEA, as amended. The Fourth section of the Release, entitled 'No Future Lawsuits' states that 'Employee promises never to file a lawsuit, demand, action or otherwise assert any claims that are released in the Second paragraph of this Release (excluding a lawsuit filed by Employee solely for the purpose of challenging the validity of the [ADEA] waiver).' Unlike in Syverson, the Release does not use the terms 'release' and 'covenant not to sue' confusingly. Moreover, the Release sets out in a separate paragraph that Plaintiff releases his right to sue under the ADEA, except for his right to sue solely to challenge the validity of the ADEA waiver. Because of these distinctions, Syverson is not persuasive in the instant case. The instant Release was written in a manner calculated to be understood by the average individual eligible to participate.

Takeaway: it is easy, particularly when representing business clients who routinely enter into settlements with other businesses, to include the 'kitchen sink' with respect to describing all the items that are being released or waived by the other party. But, in this employment context, some subtlety may be recommended, by way of both using terminology that is user-friendly, and in assuring that unwaiveable rights have not been captured within the net of what is released.

Conclusion

In any of these respects, there probably are no right answers or safe harbors. The moral of the story is only that all employees, whether or not part of a collective bargaining unit, are going to have rights under federal law which cannot be waived. If, out of a desire to be complete, we include in our employment documents language that, to an average employee, may appear to restrict those rights, then we risk having the provision, and its enforceability, challenged by that employee, or by a federal enforcement mechanism.

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Endnotes

1 Quicken Loans, Inc., 359 NLRB No. 242, 2013 NLRB Lexis 453.

2 Ironically, the non-compete litigation between the parties in state court was focused on other contract provisions (ultimately decided against Quicken Loans' position); so, this dispute at the NLRB had no real bearing on these employees' activities. Quicken Loans v. Beale, No. 1-CA-CV-13-0053, 2014 Ariz. App. Unpub. Lexis 608 (Div. One).

3 There are a number of these rights under the National Labor Relations Act. The Board attempted to affirmatively require employers to utilize a poster which would inform employees of those rights. While the poster requirement was vetoed by the courts, the underlying rights still exist. As stated by the Board, they are:
Under the NLRA, you have the right to:
• Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
• Form, join or assist a union.
• Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
• Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
• Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
• Strike and picket, depending on the purpose or means of the strike or the picketing.
• Choose not to do any of these activities, including joining or remaining a member of a union.
Under the NLRA, it is illegal for your employer to:
• Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
• Question you about your union support or activities in a manner that discourages you from engaging in that activity.
• Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
• Threaten to close your workplace if workers choose a union to represent them.
• Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
• Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
• Spy on or videotape peaceful union activities and gatherings or pretend to do so.

4 Mers v. Dispatch Printing, 19 Ohio St. 3d 100 (1985).

5 Absent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook. Wing v. Anchor Media, Ltd., 59 Ohio St. 3d 108, 110, Syl.1 (1991).

6 American Red Cross Arizona Blood Services, No. 28-CA-23443, 2012 NLRB LEXIS 43, 63.

7 Lionbridge Technologies, No. 19-CA-115285, 2014 NLRB GCM Lexis 11.

8 EEOC v. CVS Pharmacy, Inc., Case No. 1:14-CV-863 (N.D.Ill.).

9 See, e.g., EEOC v. SunDance Rehabilitation Corp., 466 F.3d 490 (6th Cir. 2006).

10 See, e.g., http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html#B.

11 To be sure, the issue here is not with the fundamental principle that an employee cannot waive his right to file a charge. EEOC has taken that position since at least 1997. See, e.g, http://www.eeoc.gov/policy/docs/waiver.html The issue is how imaginative one need be in looking at language in a release and construing it as attempting to force a waiver which may never have been intended.

12 461 F.3d 1147 (9th Cir. 2006).

13 See, e.g., 29 CFR ß1625.23(b).

14 461 f. 3d, at 1161.

15 No. 03-5285, 2007 U.S. Dist. Lexis 11758, **14-16 (E.D. Pa.).