

DRAFTING: IMPORTANT NEW RULES ON RELEASES AND WAIVERS

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I. Recommended Separation Agreement Language in Response to CVS Pharmacy, Inc.

In 2006, the EEOC brought suit against Kodak by alleging that Kodak's release agreement violated Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA) because it prevented employees from assisting other employees from bringing discrimination claims against the employer. *See EEOC v. Eastman Kodak Co.*, No. 06-cv-6489 (W.D.N.Y. 2006). In a consent decree issued one week later, Kodak agreed to use express language provided in the decree. Employers have been using the explicit language provided in the consent decree in release agreements. However, in its Strategic Enforcement Plan for fiscal years 2013-2016, the EEOC launched another attack on standard release agreements by stating that it would "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts" and specifically noted that it would focus on "overly broad waivers, settlement provisions that prohibit settlement provisions that prohibit filing charges with the EEOC." *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016*, p. 6, 8 (Press Release September 4, 2012).

First, in *Equal Employment Opportunity Commission v. Baker & Taylor, Inc.*, the EEOC brought suit in May 2013 by opposing the company's severance agreement. In a consent decree with the EEOC, Baker & Taylor agreed to use agreed upon language which notably stated in part that "[e]mployees retain the right to participate in such any action and to recover any appropriate relief." No. 13-cv-03729 (N.D. Ill., May 20, 2013). The employee's right to recovery of "appropriate relief" is at odds with the Kodak consent decree where the EEOC held that an employee could waive in a release agreement the right to recover monetary damages in a post-settlement actin.

Second, on February 7, 2014, the EEOC brought a second suit alleging that the severance agreement violated employee's rights in *Equal Employment Opportunity Commission v. CVS Pharmacy, Inc.* In CVS, the EEOC alleged that the language in the severance agreement was "overly broad, misleading and unenforceable." No. 14-CV-0863, p. 1 at ¶1 (N.D. Ill.). On September 18, 2014, a judge dismissed the suit but the EEOC's increased attacks on severance agreements provides a warning to employers to revise their separation agreements to avoid becoming the EEOC's next target. In CVS, the EEOC alleged that the "five-page single spaced Separation Agreement" interferes with employee's rights to make claims to the EEOC and state fair employment practice agencies. (emphasis in original) *Id.* at p. 2 ¶8. Specifically, the EEOC targeted CVS' provisions on cooperation, non-disparagement, non-disclosure of confidential information, general release of claims, no pending actions; covenant not to sue, and employee breaches. The EEOC argued that a "single qualifying statement" that was only found in the covenant not to sue clause was not sufficient to communicate to employees that they could still initiate communications with the EEOC or state agencies. *Id.* at p. 2 ¶8(e).

Even though the EEOC appears to have gone overboard in its enforcement efforts and despite the absence of clear court rulings requiring the practice, we recommended that employers provide greater specificity in the provisions that the EEOC attacked in the CVS suit and to expressly state employee's rights under the NLRA and the right to pursue redress through the EEOC and/or a local government employment agency. Some commentators recommend repeating the employee's rights in full in every paragraph of the separation agreement that could be interpreted to deter employees from seeking redress. Others recommend stating in one paragraph that the employee maintains their rights and can seek redress even though they sign the separation agreement.

“The Release in Paragraph [X] does not include any claims that cannot be released or waived by law, including but not limited to the right to file a charge with or participate in an investigation conducted by certain government agencies. However, the Employee is releasing and waiving any right to any monetary recovery should any government agency (such as the Equal Employment Opportunity Commission) pursue any claims on the Employee's behalf.

Nothing in this Agreement, including but not limited to the Release in Paragraph [X], is intended to limit, restrict, or interfere with Employee's right to engage in any protected activity, including but not limited to participating in any proceeding before the Equal Employment Opportunity Commission (and/or similar state or federal agency) and/or participating in concerted activity under the National Labor Relations Act.

Nothing in the Release in Paragraph [X] is intended to limit or restrict Employee's right to challenge the validity of this Agreement as to claims and rights asserted under the Age Discrimination in Employment Act.”

Additionally, we recommend adding the following sentence after each of the provisions the EEOC attacked in the CVS suit including the non-disparagement, release, confidentiality, and cooperating clauses: “Note: the limitations outlined in this provision should not/do not limit Employee's rights that detailed in paragraph ____.” Employers should also review separation agreements to ensure that the language is “written in a manner calculated to be understood by such individual, or by the average individual eligible to participate” to ensure the agreement is enforceable pursuant to OWBPA.

II. NLRB Strikes Down Confidentiality Agreements that Prohibit Employee Communications

The repercussions of failing to abide by the requirements imposed in confidentiality agreements was illustrated in *Gulliver Schools, Inc. v. Snay* where a Florida appeals court held that an employer did not have to pay settlement fees in an age discrimination case. No. 3D13-1952 (February 16, 2014). In *Gulliver*, the Court found that the employee had materially breached the confidentiality agreement when the employee told his college-aged daughter that a settlement had been reached in his case and that he was happy with the outcome. In response, the daughter broadcast the success of her father's age bias claim on Facebook to 1,200 of her Facebook friends by posting: “Mama and Papa Snay won the case against Gulliver. Gulliver is

now officially paying for my vacation to Europe this summer. SUCK IT.” The confidentiality provision of the settlement agreement required that the parties keep the settlement confidential and required Snay not to disclose either “directly or indirectly” the terms of the agreement to anyone excluding his attorneys and spouse. As a result, the Court held that Snay’s disclosure to his daughter who then publicized his settlement success was specifically the type of disclosure the confidentiality was designed to prevent. Gulliver, consequently was not required to pay \$80,000 as required by the settlement agreement but did still have to provide \$10,000 in back pay and \$60,000 in attorneys’ fees.

In a series of cases, the NLRB has aggressively been bringing suit against employers for drafting overly broad confidentiality policies that it finds to be unfair labor practice pursuant to § 8(a)(1) of the NLRA. Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the NLRA. In § 7 of the NLRA, the NLRB provides employees with the right to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities.” In analyzing whether a confidentiality agreement violates employees’ rights, the NLRA determines whether the language in the provision could be “reasonably construe[d]” to restrict employee’s rights to engage in “concerted activities” and thus chill employees in exercising their § 7 rights. Repeatedly, the NLRB has broadly interpreted the “reasonably construe[d]” language to find that broad and vague language is an unfair labor practice.

First, in *Quicken Loans, Inc.*, an ALJ found that the confidentiality agreement at issue “reasonably tend[ed] to chill employees in the exercise of their Section 7 rights.” No. 28-CA-75857 at 4 (Jan. 8, 2013). The language of the confidentiality agreement at issue defined “Proprietary/Confidential Information” to include:

“any non-public information relating to or regarding the Company’s...personnel” which included “personal information of co-workers...such as home phone numbers, cell phone numbers, addresses, and email addresses” and “personal financial information...background information, personal activities, information pertaining to work and non-work schedules, contacts, meetings, meeting attendees, travel.”

The ALJ in *Quicken Loans* acknowledged that the “line between lawful and unlawful restrictions is very thin and often difficult to discern.” No. 28-CA-75857 at 4 (Jan. 8, 2013).

In a similar case, the NLRA attacked the confidentiality agreement of Flex Frac because it found that the agreement violated § 8(a) of the NLRA. The Fifth Circuit ruled in *Flex Frac* that the confidentiality agreement had the effect of restricting employee’s § 7 rights even though the language did not expressly “reference wages or other specific terms and conditions of employment” by reasoning that such broad terms of “financial information” and “personal information” inherently prohibited employee discussions of wages. In reaching this conclusion, the Fifth Circuit stated that such broad language did not communicate to employees that protected activities, such as wage discussion, was not exempt from the prohibited conduct. Further, the *Flex Frac* Court reasoned that the agreement improperly enjoined employee discussion of all personal information instead of exempting discussion of personal confidential

information. Most recently, the NLRB waged an attack on the confidentiality agreement of Hoot Winc LLC (“Hooters”) in concluding that the agreement was over-broad, barred discussion of terms and conditions of employment, did not provide examples of prohibited conduct, and failed to exempt employees from engaging in protected activity under § 7.

In response to the plethora of attacks the NLRB has made on employers’ confidentiality agreements, employers should revisit and carefully draft such agreements to prevent a personal NLRB attack. Employers should refrain from using overly broad prohibitions that can be construed to limit an employee’s ability to communicate and discuss terms and conditions of employment. A disclaimer could also insulate employers from liability by providing a disclaimer in their confidentiality agreement that states that none of the provisions of the agreement should be interpreted to limit or prohibit an employee’s § 7 rights. To provide further clarity to employees, employers could provide specific examples of the types of activities the employer seeks to prohibit under the agreement and the employer’s specific interests that it seeks to protect in requiring compliance with the confidentiality agreement. Examples of specific activities that an employer may seek to specifically identify and prohibit disclosure of include: “information regarded as trade secrets and/or confidential and/or proprietary information by Employer and/or under any applicable law, regulation, rule and/or ethical guideline” and “employees may not post or displays comments about co-workers or supervisors that are vulgar, obscene, or threatening.” See *Model Separation, Release, and Waiver of Claims by Husch Blackwell, LLP* (revised 2014); NLRB Judge Rules on Confidentiality and Non-Disparagement Provisions, Labor and Employment Practice http://www.morganlewis.com/pubs/LEPG_LF_NLRBRulesOnConfidentialityAndNon-Disparagement_31Jan13 (accessed October 17, 2014). An employer may also consider adding an explicit disclaimer that states that none of the provisions of the confidentiality agreement are intended to prohibit or chill employee’s rights to engage in rights protected by § 7. Any disclaimer should be stated in plain English to further emphasize to employees that the employer does not seek in any way to constrain employee’s conduct in protected activities.

III. Releases and Waivers in Employment Applications

Employment lawyers and HR professionals may have recently seen articles promoting an employer’s opportunity to contractually shorten the limitations period by which an employee must bring claims. Commentators have trumpeted an employer’s right to limit such claims through a provision in employment applications. Missouri and Kansas employers should be wary.

A. Shortening the Statute of Limitations in Claims Arising Under Federal Law

Whether an employer may include an enforceable contract provision in an employment application that shortens the statute of limitations that an employee may bring suit largely depends on whether the administrative review process is implicated. The general rule is that parties may contractually agree to limit the time to bring an action that is less than the applicable statute of limitations as long as the shorter period is a “reasonable period” and there is not a “controlling statute to the contrary.” *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 608 (1947). Generally, a waiver is considered to be valid where the employee has a sufficient opportunity to investigate the claim and file an action; the time period

is not too short to prevent the employee from effectively filing a claim; and the employee is not barred from bringing a claim before they can ascertain their loss or damage. *See Mazuriewicz v. Clayton Homes, Inc.*, 971 F.Supp.2d 682, 686 (S.D. Tex. 2013). Courts have repeatedly held that shortening the statute of limitations to a duration that is as short as six months is reasonable. *See Badgett v. Fed. Express Corp.*, 378 F.Supp.2d 613 (M.D.N.C. 2005); *Caimi v. Daimlerchrysler Corp.*, 4:07-CV-1681, 2008 WL 619220 (E.D. Mo. March 3, 2008).

Because of the potential abrogation on an employee's ability to seek redress when they bring claims that require the administrative process, courts have generally found that such claims cannot be validly shortened in employment provisions. For claims that do not require the administrative process before proceeding to file a complaint, it is undisputed that employers may contract to reduce the statute of limitations that employees may bring suit under claims such as § 1981 claims, state statutory claims, breach of contract, negligent hiring/retention, assault and battery, intentional infliction of emotional distress, and defamation. In comparison, however, courts are split on whether shortened statute of limitations that appear in employment applications in claims arising under ERISA, FLSA, FMLA, ADA, Title VII, or EEOC claims are enforceable. For FMLA claims, a majority of courts find that parties may effectively shorten the statute of limitations. *See Badgett v. Fed. Express Corp.*, 378 F.Supp.2d 613 (M.D.N.C. 2005) (holding six-month waiver was enforceable to bar FMLA claim); *but see Lewis v. Harper Hosp.*, 241 F.Supp.2d 769 (E.D. Mich. 2002). Because employees must engage in the administrative process before filing a complaint, a majority of courts have held that employment provisions that seek to shorten the statute of limitations period of EEOC claims are not reasonable. *See Salisbury v. Art Van Furniture*, 938 F.Supp. 435 (W.D. Mich. 1996) (stating that a six-month waiver is in effect a "practical abrogation of [an] applicant's right to file" under the ADA); *but see Taylor v. Western & Southern Life Ins. Co.*, 966 F.2d 1188 (7th Cir. 1992) (finding a contractual six-month limitation was valid because the employee could have requested a stay pending his receipt of an EEOC right to sue letter for the § 1981 claim). Additionally, a majority of courts have upheld contractual provisions that reduce the statute of limitations period for Title VII claims. *See Taylor v. Western & Southern Life Ins. Co.*, 966 F.2d 1188 (7th Cir. 1992); *Mazuriewicz v. Clayton Homes, Inc.*, 971 F.Supp.2d 682, 686 (S.D. Tex. 2013); *but see Ellis v. Daimler Chrysler Corp.*, 4:03CV00546, 2005 U.S. Dist. LEXIS 46641 (E.D. Mo. March 9, 2005). Finally, a majority courts find that employment provisions can validly reduce the statute of limitations period in FLSA claims. *Mazuriewicz v. Clayton Homes, Inc.*, 971 F.Supp.2d 682, 686 (S.D. Tex. 2013).

B. Contract Provisions Shortening the Statute of Limitations Void As Against Public Policy in Missouri and Kansas

As stated above, the general rule allows parties to contractually agree to limit the time to bring an action that is less than the applicable statute of limitations as long as the shorter period is a "reasonable period." *Order of United Commercial Travelers of America*, 331 U.S. at 608. A few states have upheld contractually shortened statute of limitations in the employment context where the court found that the shortened period was "reasonable and does not contravene public policy." *See Rodriguez v. Raymours Furniture Company, Inc.*, 93 A.3d 760, 769 (N.J. Super. 2014) (upholding shortened statute of limitations of six months for retaliatory discharge and disability discrimination claims in employment application); *Hunt v. Raymour & Flanigan*, 105 A.D.3d 1005 (N.Y.App.Div. 2013) (finding employment application enforceable that shortened

the statute of limitations to six months for employment discrimination and unlawful retaliation claims); *Clark v. Daimlerchrysler Corp.*, 706 N.W.2d 471, 473-74 (Mich. Ct. App. 2005) (enforcing employment contract that limited the statute of limitations to six months for alleged age discrimination claim).

In comparison, both Missouri and Kansas have found that limiting the statute of limitations in employment applications violates public policy. First, Mo. Rev. Stat. § 431.030 which was enacted in 1887 to invalidate an insurance policy provision prohibits contractual reductions in the statute of limitations period. Mo. Rev. Stat. §431.030 states in full: “All parts of any contract or agreement hereafter made or entered into which either directly or indirectly limit or tend to limit the time in which any suit or action may be instituted shall be null and void.” In *Lumbermen’s Mutual Casualty Company v. Norris Grain Company*, the Eighth Circuit further emphasized the broad reach of Mo. Rev. Stat. § 431.030 by explaining that the provision encompassed “all parts of any contract or agreement made and entered into after its enactment, i.e. after 1887, which either directly or indirectly limit or tend to limit the time in which any suit or action may be instituted.” 343 F.2d 670, 683 (8th Cir. 1965). The Eighth Circuit further reasoned that the statute’s broad sweep was based on public policy considerations. *Id.*

Kansas also prevents employment provisions from being used to limit the statute of limitations period in the employment context. Recently, on July 1, 2013, in *Pfeifer v. Federal Exp. Corp.*, the Tenth Circuit certified the following question to the Kansas Supreme Court: “Does Kansas law, specifically Kan. Stat. Ann. § 60-501 and/or public policy prohibit private parties from contractually shortening the generally applicable statute of limitations for an action?” No. 11-3064 (10th Cir. 2013). The Kansas Supreme Court answered in the affirmative. *Id.*, citing *Pfeifer v. Fed. Express Corp.*, ___ P.3d ___, 2013 WL 2450531 (Kan. June 7, 2013). Notably, the Court further stated that Kan. Stat. Ann. § 60-501 “did not prohibit the contractual provision at issue” and limited its holding to instances of where strong “public policy interest[s] [were at] issue.” *Id.* Thus, while Kansas does not have a controlling statute in place that bans using employment provisions that shorten statute of limitations periods, Kansas courts are looking to enforce such provisions on public policy grounds.