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Confidentiality, Non-Disclosure and Non-Disparagement Provisions in Employment Agreements

Drafting Enforceable Provisions to Protect Proprietary Information and Corporate Reputation

THURSDAY, AUGUST 22, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Confidentiality, Non-Disclosure and Non-Disparagement Provisions in Employment Agreements

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Confidentiality, Non-Disclosure and Non-Disparagement Provisions

Recent Regulatory Trends

- NLRB Rulings
- EEOC Enforcement

NLRB Rulings

Legal Context: National Labor Relations Act

- **Purpose:** To protect employees' ability to engage in activities such as unionizing and bargaining collectively by equalizing bargaining power between employers and employees. NLRA § 1; 29 U.S.C. § 151.
- **Section 7:** "Employees shall have 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 for the purpose of collective bargaining or other mutual aid and protection*…" NLRA § 7; 29 U.S.C. § 157.

NLRB Rulings

What is "Concerted Activity"?

- An employee's activity is concerted if the employee:
  - Acts with or on the authority of other employees
  - Seeks to initiate, induce, or prepare for group action
  - Brings "truly group complaints" to the attention of management
- Mere personal griping is not concerted, protected activity
- Activity must concern a term or condition of employment (wages, hours, working conditions)

NLRB Rulings

- **Million Dollar Question:** How does the NLRA relate to non-disclosure and non-disparagement provisions?

- **Answer:** The NLRB has recently turned its attention to reviewing employers' work rules to determine whether they unlawfully interfere or prohibit "concerted activity"

- **Section 8:** "It shall be an unfair labor practice for an employer– (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act." NLRA § 8; 29 U.S.C. § 158(a)(1).

NLRB Rulings

The Test: A work rule is unlawful if it would "unreasonably tend to chill employees in the exercise of their Section 7 rights."

This happens when the work rule:

- Explicitly prohibits protected activity (*e.g.*, "no unions allowed");
- Would be interpreted by an employee to restrict protected activity;
- Was promulgated in response to union activity;
- Has actually been applied to restrict protected activity.

NLRB Rulings

Recent Case Studies:
American Medical Response of Conn. (2010)

- Employee criticized supervisor on Facebook
- Terminated for violating social media policy that prohibited making disparaging, discriminatory, or defamatory comments about the company, superiors, co-workers, and/or competitors
- NLRB found policy to be overbroad and unlawful
- Could prohibit employees from discussing terms and conditions of employment

NLRB Rulings

Recent Case Studies: *DirecTV U.S* (2013)

- NLRB invalidated four of DirecTV's policies
  - Media relations
  - Communicating with law enforcement
  - Non-disclosure
  - Company information
- Board held that policies were overbroad, vague and failed to make clear that employees could engage in concerted activity protected by Section 7

NLRB Rulings

And now . . .
Quicken Loans, Inc. (June 2013)

- Employees required to sign an Employment Agreement
- "Proprietary/Confidential Information" clause: employees must maintain in strictest confidence all confidential information, including information about coworkers
- "Non-Disparagement" clause: employees are prohibited from criticizing, ridiculing, disparaging, or defaming Quicken or its products, services, policies, directors, officers, shareholders, or employees

NLRB Rulings

Quicken Loans, Inc. (June 2013)

- Garza, a non-union mortgage banker, resigned from Quicken in 2011
- Quicken sued Garza for violating various restrictive covenants in the Agreement, including the no contact/no raiding and noncompete provisions
- Garza filed an unfair labor practice charge with the NLRB

NLRB Rulings

Quicken Loans, Inc. (June 2013)

- **ALJ:** "The line between lawful and unlawful restrictions is very thin and often difficult to discern."

- Explained that the appropriate inquiry is "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights," *regardless of whether the rules had ever been enforced*

NLRB Rulings

Quicken Loans, Inc. (June 2013)

- **ALJ:** Proprietary/Confidential Information provision unlawful because it prohibited the disclosure of all information relating to personnel, including "personal information of co-workers … such as home phone numbers, cell phone numbers, addresses and email addresses."

NLRB Rulings

Quicken Loans, Inc. (June 2013)

- **ALJ:** Non-Disparagement provision unlawful because "[w]ithin 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."

NLRB Rulings

Quicken Loans, Inc. (June 2013)

- Quicken ordered to:
  - Cease and desist enforcement of provisions
  - Rescind both provisions
  - Notify all affected employees that provisions are void
  - Affirm to employees that it will not prohibit them from discussing the terms and conditions of their employment in a protected manner
- On appeal, the Board:
  - Affirmed that the "Non-Disparagement" provision must be rescinded in its entirety
  - Modified order so that only offending portions of the "Proprietary/Confidential Information" provision must be removed

NLRB Rulings

Implications of the *Quicken* Decision

- *Any* employer documents governing the employment relationship are potentially subject to NLRB scrutiny:
  - Employment agreements
  - Handbooks/policy manuals
  - Performance evaluation forms
  - Applications
  - Severance/release agreements?
- Policies found void even if never enforced in a way to chill Section 7 rights
- Quicken's lawsuit against Garza? EFFECTIVELY OVER

SIO Law Group

INTEGRATING LAW, INFORMATION, & WORK

EEOC ENFORCEMENT OF NON-WAIVABLE EMPLOYEE RIGHTS

Presented by

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EEOC ENFORCEMENT

EEOC History of Non-Waivable Rights

Right to Waive Recovery

- Employee may waive right to recover for a Title VII claim. EEOC v. Waffle House, Inc., 534 U.S. 279, 304 (2002) ("If an employee signs an agreement to waive or settle discrimination claims against an employer, for example, the EEOC may not recover victim-specific relief on that employee's behalf.")

EEOC ENFORCEMENT

EEOC History of Non-Waivable Rights

Right to File Charge

- Title VII provides "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge" under Title VII. *42 U.S.C. § 2000e-3(a).*
- Employers may not interfere with an employee's right to file an EEOC charge or participate in an EEOC proceeding. *EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes*, No. 915.002 (April 10, 1997)("Guidance"); EEOC v. Cosmair, 821 F.2d 1085 (5th Cir 1987) (employees may not waive the right to file a charge with the EEOC).

EEOC ENFORCEMENT

EEOC History of Non-Waivable Rights

- A strong ***public policy interest*** prohibits interference with the right to file a charge with EEOC.
- "'Congress has made it clear that it wishes all persons with information about [unlawful practices] to be completely free from coercion against reporting them to the [government.]' ... This complete freedom is necessary ... 'to prevent the [government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'") Guidance citing NLRB v. Scrivener, 405 U.S. 117, 121-22 (1972)

EEOC ENFORCEMENT

EEOC History of Non-Waivable Rights

- The primary purpose of a charge of discrimination filed with the EEOC is to "place the EEOC on notice that someone ... believes that an employer has violated [one of the anti-discrimination statutes]." EEOC v. Shell Oil Co., 466 U.S. 54 , 68; see also EEOC v. Cosmair, Inc., 821 F.2d 1085, 1089 (5th Cir. 1987)
- Separation agreements "that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the ***anti-retaliation*** provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission." Guide.

EEOC ENFORCEMENT

EEOC History of Non-Waivable Rights

- EEOC v. Trinity Health Corporation (N.D. Ind. 2012) - Employer had a practice of withholding severance pay from any severed employee who filed an EEOC charge.
- Trinity paid $25,000 in a settlement with the EEOC. EEOC Release.
- "It is unlawful for an employer to punish employees who exercise their right to file a charge of discrimination with the EEOC. Such alleged retaliation violates Title VII of the Civil Rights Act of 1964 as well as the Age Discrimination in Employment Act (ADEA)." EEOC Release.
- The EEOC argued that the waiver in Trinity's severance agreement protecting it from "any and all legal claims or demands, known or unknown, based on employment with and separation from Trinity" constituted an unlawful employment practice under Title VII.

EEOC ENFORCEMENT

Right to Disparage?

- ***Issue: Does a non-disparagement clause in a separation agreement contravene public policy?***
- In EEOC v. Baker & Taylor, Inc. ("B&T"), (N.D. Ill, E Div. 2013), employee signed an agreement:

  I agree that I will not make any disparaging remarks or take any other action that could reasonably be anticipated to damage the reputation and goodwill of Company or negatively reflect on Company. I will not discuss or comment upon the termination of my employment in any way that would reflect negatively on the Company.

EEOC ENFORCEMENT

Right to Disparage?

B&T (cont.)

- EEOC's Position: A severance agreement that bans "any disparaging remarks" about the company or the termination because it could "damage the reputation and goodwill" or "reflect negatively" on the company, reflects a "resistance to the full enjoy of rights secured by Title VII" and unlawfully interferes with employees' rights to cooperate with the EEOC in administrative investigations.

EEOC ENFORCEMENT

Right to Disparage?

B&T (cont.)

- Employee also agreed:

  never to institute any complaint, proceeding, grievance, or action of any kind at law, in equity, or otherwise in any court of the United States or in any state, or in ***any administrative agency*** *of the United States or any state, country, or municipality, or before any other tribunal, public or private, against the Company arising from or relating to my employment with or my termination of employment from the Company …*

EEOC ENFORCEMENT

Right to Disparage?

B&T (cont.)

- EEOC argued that the language "run[s] afoul of the **anti-retaliation** provisions" in Title VII.
- "Covenants not to sue differ from general releases because they prohibit employees from suing on claims after the execution of the severance agreement, whereas general releases immediately discharge existing claims or rights." EEOC Facebook (July 1, 2013).
- "The EEOC is focusing on policies and practices that allegedly discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede the EEOC's investigative or enforcement efforts. ... [T]he EEOC is targeting covenants not to sue in severance agreements." EEOC Facebook.

EEOC ENFORCEMENT

Right to Disparage?

B&T (cont.)

- B&T agreement also provided that "nothing in this waiver and release shall limit my right . . to file an administrative charge with [any] agency."
- Even language allowing the employee to truthfully respond to a subpoena or to "otherwise comply[] with a government investigation" did not save the non-disparagement clause.

EEOC ENFORCEMENT

Right to Disparage?

B&T (cont.)

- Court entered consent decree on July 10, 2013.
- EEOC entitled its Press Release,

Consent Decree Makes Clear That

Civil Rights Law Protects Communications With EEOC

EEOC ENFORCEMENT

Right to Disparage?

Retaliation

- "It shall be an unlawful employment practice for an employer to discriminate ... because an employee opposed any [unlawful] practice ... , or ... made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [under Title VII]. 42 USC 2000e-2a.
- According to the EEOC, retaliation, "occurs when an employer, employment agency, or labor organization takes an adverse action against a covered individual because he or she engaged in a protected activity" (Equal Employment Opportunity Commission [EEOC], 2005).

EEOC ENFORCEMENT

Right to Disparage?

Retaliation

- "Burlington N. & S. F. R. Co. v. White, 548 U. S. 53, 63 (2006) - Retaliation is adverse action that is harmful to the point that could dissuade a reasonable employee from filing or supporting a discrimination charge.
- Univ. of Texas Southwestern Medical Center v. Nassar – Court adopted a "but for" standard of causation for Title VII retaliation claims.
- Must retaliation be adverse to something?

EEOC ENFORCEMENT

Right to Disparage?

- *Does anti-retaliation protection of right to disparage extend to related 3rd parties*?
- Thompson v N.A. Stainless ("Thompson"), 131 S. Ct. 863 (2011): In 8-0 decision by Scalia, the Court ruled that firing an employee for a charge filed by co-employee fiancée
  - constituted unlawful retaliation, and
  - provided a cause of action (standing issue).
- "Title VII's anti-retaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Id., at 868 citing Burlington, at 68.

EEOC ENFORCEMENT

Right to Disparage?

Thompson (cont)

- The Court asked, "[B]ut what about firing an employee's girlfriend, close friend, or trusted co-worker?"
- Court declined to adopt a categorical rule that third-party reprisals do not violate Title VII or to identify a fixed class of relationships for which third-party reprisals are unlawful.
- "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize." Id, at 868.

EEOC ENFORCEMENT

Right to Disparage?

- *EEOC's Sample Settlement Agreement* - Non-Disparagement Clause
- "The parties agree that neither they nor their representatives will disparage the other party. Disparage as used herein shall mean any communication, or written, of false information or the communication of information with reckless disregard to its truth or falsity. The agency also agrees that it shall not make any statements, either internally or externally, that reflect adversely on appellant's job performance. In the event of a request for employment references, the agency will confirm appellant's dates of employment, **[his/her]** last job position, and **[his/her]** annual salary at termination."

Arnall Golden Gregory LLP

Attorneys at Law

Best Practices

Presented by:
Ashley Steiner Kelly

Best Practices/Drafting Tips

Best Practices for Drafting Non-Disclosure and Non-Disparagement Provisions

NLRB: "Even if a rule is not intended to reach protected conduct, its lawful intent must be clearly communicated to the employees."

NLRB: "Employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition."

Best Practices/Drafting Tips

Best Practices for Drafting

- Avoid general and vague language
  - Ambiguity in provision will be construed against the employer
  - Be specific about what is – *and is not* – prohibited
  - Give examples
- Use clear and understandable language, *not* legalese

Best Practices/Drafting Tips

Best Practices for Drafting

- Focus on confidentiality of business-related information
  - "Trade secrets"
  - "Information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications"
  - "Company business and documents"

Best Practices/Drafting Tips

Best Practices for Drafting

- Do *not* prohibit discussions of terms and conditions of employment
  - "Personnel information and records"
  - "Employee records"
  - Employee contact information
  - Wages, benefits, disciplinary records

NLRB: When employee information is included, "the fact that the 'Confidentiality' provision also covers 'information about customers,' 'company business,' and other listed items cannot save it from condemnation."

Best Practices/Drafting Tips

Best Practices for Drafting

- Avoid discouraging concerted activity
  - Do not prohibit all disparagement of the employer
  - Do not prohibit all communications with other employees
  - Do not prohibit all contact with the media
  - Do not require employees to confer with employer before communicating with law enforcement

BEST PRACTICES

Presented by

E. Ray Stanford Jr.

BEST PRACTICES

- EEOC and other agency positions on non-disparagement clauses and broad covenants not-to-sue demonstrate the difficulty in drafting a meaningful and enforceable employment agreement, severance agreement, employee handbook, or other workplace documents.
- The Administration and federal agencies continue to issue regulatory positions that immediately face legal opposition.
- Should an employer immediately comply with the latest regulatory announcements or take a pragmatic approach and hope that the legal fighting produces a more certain direction before an employee blows a whistle or an enforcement officer knocks on the door?

BEST PRACTICES

- As currently announced, the EEOC's anti-retaliation position regarding no-disparagement and broad not-to-sue covenants could result in Title VII violations whenever an employer document restricts (or "chills") an employee's right or opportunity:

  1. to communicate with a supervisor or other persons in management about a charge, claim, or other whistleblower act concerning activity of or related to the employer;

  2. to file or communicate a charge, claim, or other whistleblower act with the EEOC or any other governmental body;

  2. to communicate or cooperate with any investigation or activity of the EEOC or any other governmental agency;

  3. to criticize internally or publicly an employer, supervisor, and an employer's workplace practices; and

  4. to access, use, and disclose information via social media.

BEST PRACTICES

- *Consider* including in appropriate agreements consideration received by employee shall be the sole relief provided to the Employee for claims released by the employee.
- *Consider* adding a declaration – "Notwithstanding any term or provision of this Agreement, the Employee shall retain the right to cooperate and participate in an investigation or proceeding conducted by the EEOC or other federal or state regulatory or law enforcement agency?"
- *Consider* Zipper clauses – Countless severance agreements contain zipper clauses despite the existence of other workplace agreements and direction that an employer desires to retain.
- *Consider* use of boiler plate language – Scope and significance of boiler-plate language should be discussed with the client whether drafting a severance agreement.

BEST PRACTICES

- *Consider* stating in appropriate agreements - The consideration received by Employee "shall be the sole relief provided to the Employee for claims released by the employee."
- *Consider* adding a declaration – "Notwithstanding any term or provision of this Agreement, the Employee shall retain the right to cooperate and participate in an investigation or proceeding conducted by the EEOC or other federal or state regulatory or law enforcement agency?"
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