Statement of Stephen D. Ellis re: S.83 – An act relating to prohibiting agreements that prevent an employee from working for the employer following the settlement of a discrimination claim.

February 18, 2020

Thank you for considering my comments on S.83. The following comments reflect only my own views based on my experience over three decades representing employers, employees and businesses. I am not speaking on behalf of my law firm, my clients, the Vermont Bar Association, or anyone else.

The goals of S.83 are clearly well intended: To protect individuals who have been the victims of unlawful employment practices against being further victimized by being banned from continued or future employment with the employer. However, as with other legislative initiatives with similar goals, this bill is likely to have significant unintended consequences, some of which are actually contrary to the legislative intent.

It is important to appreciate why these "no future employment" clauses appear in settlement agreements relating to employment claims. An employee who asserts a claim under the Fair Employment Practices Act (FEPA) is engaged in a "legally protected activity," and the FEPA statute expressly protects that employee against retaliation, which is essentially any adverse employment action taken "because" the employee made the claim. 21 V.S.A. § 495(a)(8). This is as it should be.

As a result, however, employers are reluctant to administer lawful and necessary supervision or discipline regarding employees who have made FEPA claims for fear of being accused of retaliation, and some employees who make FEPA claims behave as though they have immunized themselves any unwanted supervision and discipline, and misconstrue any attempts at legitimate, lawful supervision or discipline as unlawful retaliation. This exacerbates what may already be a toxic and dysfunctional relationship, which both the employer and the employee may prefer to avoid by negotiating a separation agreement. Indeed, in some cases, employees who suspect that they may be about to be disciplined or discharged make FEPA claims for the specific purpose of either attempting to avoid the discipline or discharge, or using the threat of a retaliation claim as leverage in negotiating a separation agreement. These are not speculative scenarios; this is what actually happens, frequently.

Prohibiting separation agreements from including agreements that prohibit, prevent or restrict the employee from continuing to work for the employer, or from seeking future employment with the employer, will prevent both employees and employers from entering into separation agreements at all, even when such agreements are clearly in their best interests. Employers will not enter into separation agreements if the employee can claim that the employer's refusal to rehire the employee is unlawful retaliation or that the separation agreement itself is unlawful and unenforceable to the extent it provides for the employee's resignation or termination; employers will certainly not agree to pay the employee much if anything in consideration of such agreement. Employees who would prefer to negotiate a favorable financial severance to

continuing to work for the employer will thus be deprived of that opportunity. Employers who might otherwise be motivated to settle disputed FEPA claims will be compelled to litigate and defend them, and employees who might otherwise have had the opportunity to negotiate a favorable severance may elect instead to simply abandon the claim to avoid the upset, expense and publicity.

Concerns that separation agreements may sometimes shield and perpetuate unlawful employment practices are understandable. However, the public interest in preventing unlawful employment practices and protecting potential future victims should not outweigh the private interests of employers and employees in resolving their existing disputes on terms that they consider to be in their best interests. Moreover, requiring parties to litigate claims which they would both prefer not to, thus placing an unecessary burden on already limited administrative and judicial resources, or motivating the employee to abandon or not report what may be a meritorious claim, is not in the public interest.

And, it is important to bear in mind that employers who have been put on notice of an obviously or potentially meritorious FEPA claims are necessarily highly motivated to self-correct. An employer who enters into a separation agreement with an employee who has been subjected to unlawful harassment is already exposed to multiple future claims, including hostile work environment claims, if the employer fails to take effective action to protect other employees. And the more the employer is compelled to pay for the separation agreement, the greater its incentive to avoid having to pay even more to settle future claims. Furthermore, even separation agreements that preclude future employment cannot prohibit or restrain the employee from reporting information in good faith to law enforcement or regulatory agencies, such as the EEOC, the Department of Labor or the Civil Rights Unit of the Attorney General's Office, who may investigate charge, litigate and remediate unlawful employment practices regardless of any individual separation agreement. I have negotiated multiple separation agreements, representing employees and employees, which expressly acknowledge this.

For these reasons, in the interests of Vermont's employers and employees, I encourage you not to pass S.83. Thank you for giving me the opportunity to share these important perspectives.

Stephen D. Ellis

February 18, 2020

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