

10 Common Items to Consider in Drafting a Severance Agreement

By Josh Smith, Employment Law Attorney

Employee terminations happen. It is an unavoidable fact of running a business. To avoid the costs and expense of litigation, many companies offer severance packages to employees in exchange for a release of all claims, actual or potential, through the end of their employment. While these agreements are a great practice for employers, there are many potential pitfalls if a company does not take care in drafting them. Below are 10 of the more common issues which companies should be aware of for purposes of severance agreements. As always, in considering these issues it is best to consult with legal counsel.

1. **Is the employee age 40 or older?**

There are various requirements to validly release claims under the Age Discrimination in Employment Act (ADEA), which protects employees (age 40 or older) from discrimination on the basis of age. Among those is that the employee must be given 21 days to consider the agreement, and 7 days to revoke. If the termination is pursuant to a Reduction in Force (RIF) for a group or class of employees, the employee must generally be provided 45 days to consider the agreement.

2. **Procedure for severance payment(s).**

Consider how/when you want to make the severance payment to the employee. Payments can be made in various forms, including lump sum, payment through ordinary payroll processes, or installment payments. Additionally, consider requiring the employee to pay back such amounts in the event that the employee violates the terms of the agreement.

3. **Vacation/PTO?**

Terminated employees often have accrued but unused PTO/vacation time. Consider whether your company has a policy of paying out such accrued but unused time, and/or if you would like to pay the employee out for the same as part of a severance negotiation.

4. **Contesting unemployment.**

A terminated employee is also likely to file an application for unemployment compensation. Consider whether you will be opposing such benefits, and/or whether the agreement will include a provision that these benefits will not be opposed, to the extent allowed by law.

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5. Confidentiality.

Consider requiring the employee to keep the terms and amount of severance confidential. You may not want your other employees knowing that *Employee A* got a severance in the amount of X, while *Employee B* is receiving a severance in the amount of Y.

6. Non-disparagement.

Consider requiring that the terminated employee not make disparaging statements about the company. Often terminated employees will have ill feelings toward their former employer and may be more than happy to voice their opinions in a public forum either online (Facebook, Twitter, etc.) or otherwise.

7. Incorporate your other Agreements (Noncompetes, confidentiality, etc.).

Non-competes, confidentiality agreements, and any other agreements with the employee need to be incorporated into a severance agreement. Otherwise, a severance agreement could negate these prior agreements, making them unenforceable.

8. Employment references.

Incorporate your company's policy on employment references, including to whom such requests will be made and what is to be disclosed. The safest practice is to simply provide an employee's last position held and dates of employment.

9. Employees can still file charges of discrimination.

Include a provision in your agreement which states the employee is not prohibited from filing a charge with the EEOC, even though they will not be entitled to any individual relief for such claims. While an employee may release all claims of discrimination, they still have a right to file a charge of discrimination. The EEOC has been particularly aggressive in enforcing an employee's right to file such charges, especially where a company has not stated such a right in their severance agreement.

10. No admission of fault.

The agreement needs to make clear that your company is not admitting fault or liability in entering into the severance agreement.

If you'd like to explore this topic further, please contact Joshua Smith via email jms@sspfirm.com or 513-533-6715.

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