Severance Agreements: Frequently Asked Questions

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Q. I just lost my job and my employer gave me a severance agreement to sign. Why?

A. Employers sometimes give severance agreements to employees leaving voluntarily, and more often to employees they are firing or laying off.

The agreements contain some fairly standard clauses:

(a) additional pay or benefits or both, as consideration for the severance agreement and to make it enforceable.

(b) a release of all claims against the employer, its officers, managers, employees, Board of Directors, shareholders, and so on, whether the claims are known or unknown, with an exception for claims that cannot legally be released (such as Workers' Compensation cases in many States);

(c) a noncompete agreement;

(d) a "no bad-mouthing" clause called a nondisparagement clause so that former employees do not say unpleasant things about the employer and the others mentioned above;

(d) provisions on the final payments, unused vacation leave, sometimes unused sick leave, etc.;

(e) provisions on preserving the employer's intellectual property, confidential information, trade secrets, customer lists, etc.;

(f) provisions on returning company property;

(g) time to consider the agreement if the employee is 40 years old or older, usually at least 21 days (see below);

(h) time to reconsider and revoke the agreement after signing if the employee is 40 years old or older, usually 7 days (see below); and

(i) the effective date.

Employers are interested in getting releases from departing employees. This may also be the time when the employer gets a noncompete agreement, or reminds the departing employee that there is already a noncompete agreement. In addition, the severance agreement documents a standardized means of taking care of a lot of end-of-employment questions.

Q. Sounds reasonable. Why would I want a lawyer?

A. If you have a potential claim against the employer, the employer will be more interested in getting a release and may be willing to pay more money or make other changes to resolve the matter.

Once you sign a valid severance agreement and get the additional money and benefits, with rare exceptions you **will** be bound by the agreement and will not be able to bring any later claim or lawsuit.

Q. What if I did not know about the possible claim at the time I signed the agreement?

A. That usually makes no difference, but State laws sometimes provide exceptions.

In some States there may be an exception where the employer misled you or did something to prevent your knowing about the claim.

Environmental risks may also be in a separate category in some States.

Q. Are there any common problems with these agreements?

A. Yes. Some of these agreements were drafted by lawyers for the employer a long time ago, and have not been updated to reflect new court decisions or other changes in the law.

Since they are drafted by lawyers for one side, the tendency was to make the employer's protections as broad as possible. Sometimes, they went too far.

Q. How can a confidentiality clause go too far?

A. An extreme example, but a fairly common example, is a confidentiality clause that forbids the former employee to say anything about the agreement, where the agreement also forbids you from telling a new employer that you have a noncompete agreement and cannot try to get business from certain companies for a period of time, or cannot work on certain things. Your old employer ("Acme") may sue your new employer ("Chesapeake") for causing your breach of contract and profiting from it even though Chesapeake did not know anything about it. Regardless of the confidentiality provision, Chesapeake will not be happy that you did not tell it of the risks.

Q. Whoa! That really does go too far. What about these nondisparagement clauses? Can they go too far?

A. Of course. Anything put together by humans will go off the rails unless it is tempered by judgment.

Nondisparagement clauses have a thoroughly reasonable goal, but you do not want to sign anything saying that you cannot say anything negative about your old employer, Acme, or its managers, etc.

- What if you later go to work for Chesapeake, a competitor, and want to say that your new employer's products are the best available? That could be considered negative.
- What if you are called as a witness in a case against Acme? You have to be able to tell the truth.

These are the kinds of questions where lawyers can help.

The usual penalty clauses company lawyers like to insert make these questions very important.

Q. Not so fast! *Penalty* clauses?

A. Yes. Many draft severance agreements say that a violation of any provision, including the nondisparagement clause, will require you to return to the company all of the pay and benefits you received from signing the agreement.

You definitely should retain a lawyer before signing any contract with a penalty clause.

Q. Can an employer get upset and just withdraw its offer if I try to negotiate?

A. Certainly, but usually employers understand that employees will want to make counter-offers. After all, the draft severance agreement advises you of your right to get legal advice.

Q. Has it ever happened that an employer just withdrew its offer?

A. It has never happened to one of my clients, but it has happened locally at least once.

The thing to remember is that while you want the pay and other provisions, the employer wants the release. If you present evidence that you have a claim you might win, it will want a release even more.

Q. Why aren't your answers more definite? Why do you keep saying, "it depends"?

A. This is the most common complaint first-year law students make about their teachers: they never give the "real answers."

There are no guarantees in life, except for the guarantee that unpredictable things sometimes happen. One of the greatest Justices of the Supreme Court, Oliver Wendell Holmes, Jr., said in an 1897 article in the Harvard Law Review:

> . . . The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and

> nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for the determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. . . .

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harvard Law Review 457 (1897).

Q. Are you saying that the legal answers to the same question may be different for different people in different circumstances?

A. Exactly.