

The Essential Elements of a Severance Agreement

By Maureen E. Carr, Esq.

Employers frequently offer severance payments/benefits to departing employees in exchange for a release of claims, which can be a useful tool to limit employer liability and provide closure with respect to departing employees. The following are the essential elements of most severance agreements:

(1) **Severance payment/benefits.** This provision includes the compensation and/or benefits that the employee will receive as a result of signing the severance agreement. Absent a specific contractual provision or company policy requiring severance, employers are not required to provide severance to employees, so severance is generally considered adequate consideration for the employee's release of claims against the employer. There are no hard-and-fast rules on how much severance should be offered, although severance is often based on the employee's length of employment. Employers may also offer to pay a departing employee's COBRA premiums or other benefits for a certain period of time. Employers should take care to establish consistent severance practices to avoid allegations of discrimination.

(2) **Release.** Severance agreements generally include a broad release of all claims the employee may have against the employer, including claims under specifically-enumerated employment laws, whether known or unknown, up to the date the agreement is signed. This provision limits the employer's liability and is often the employer's primary motivation for offering severance to a departing employee.

(3) **Specific waivers for workers over age 40.** If a departing employee is over age 40, the severance agreement must contain certain provisions to comply with the Age Discrimination in Employment Act and the Older Worker Benefit Protection Act. Most significantly, the agreement must give the employee 21 days to sign the agreement and then seven days to revoke his acceptance. The severance payment should not be made until the expiration of this period.

(4) **Confidentiality and non-disparagement.** Severance agreements frequently require the employee to keep the terms of the agreement confidential and refrain from disparaging the employer. These provisions protect the employer and provide finality with respect to departing employees.

(5) **Cooperation and References.** A severance agreement should address any future interactions that the employer and employee may have. For example, the agreement may require the employee to cooperate fully with any legal proceeding or investigation involving the employer or assist the employer with transitioning specific projects or tasks. In addition, the agreement may establish how references will be handled by the employer (i.e. the employer will provide a neutral reference for the employee to prospective employers, including only dates of employment, position held, and rate of pay).

(6) **Return of property and protection of confidential/proprietary information.**

It is advisable to include in a severance agreement a requirement that the employee return all property belonging to the employer and a reminder that the employee has an ongoing obligation to protect the employer's confidential and/or proprietary information.

(7) **Restrictive covenants.** If the employee is subject to non-competition, non-

solicitation, or other contractual restrictions, the severance agreement should remind the employee of these continuing obligations.

(8) **Integration clauses.** The severance agreement should state that it represents the

entire understanding between the employer and employee (subject to any other written agreements that the employer intends to remain in effect, such as a non-compete).

These are the primary elements of most severance agreements. However, it is advisable to consult with an attorney to prepare a severance agreement that is tailored to the specific needs of the employer and circumstances surrounding the employee's departure.

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