

Crafting Severance Agreements

A Well-designed Document Can Help Employers Avoid Lawsuits

By PAUL ROTHSCILD

An unfortunate reality of any business, especially in the current economic climate, is that an employer will, at some time, have to terminate an employee. Employers must carefully navigate this process to avoid the numerous pitfalls that can result from the need to terminate employees.

Terminated employees may challenge the legality of their termination, often by contending that they were discriminated against, constructively discharged, or even retaliated against for acting as a 'whistle-blower' regarding the practices of the employer. Even if these claims are unfounded, the employer will incur some legal fees responding to any allegations.

Severance agreements are a useful tool that employers may wish to consider when making the decision to terminate an employee. Such agreements are designed to avoid litigation by providing former employees with valuable consideration in exchange for a release of certain claims against the former employer. However, if the severance agreement is drafted incorrectly, it can also be the cause of litigation. Further, employers must take into consideration several federal laws that protect the rights of employees. Failure to do so can render a severance agreement unenforceable despite the value the employer has already given to the former employee.

There are many important factors that must be taken into consideration when negotiating a severance agreement: provisions for wages, taxes, continued health care, other benefits, assistance in locating future employment, and, of course, the all-important release. These provisions should be specifi-



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cally detailed in the agreement with regard to the amounts being paid to the employee as well as rights and responsibilities. Broad or over-generalized statements should be avoided because they can lead to unintended consequences that may negate the employer's protections under the agreement.

The severance amount can be paid either as salary or in one lump-sum payment. The agreement should specify the manner of payment, along with what portions of any payment represent normal wages, back pay, and any other sums that are included. Emotional-distress damages are often included as well, which raises important tax questions for the employer and the employee. Emotional-distress damages are not subject to the same tax withholdings as wages, which generally shifts the burden of paying these taxes to the employee, rather than being deducted and paid by the employer.

Care must be taken in explaining this to avoid misleading the employee. The employer will need to include the wage portion in the employee's W-2, and issue a 1099 for any non-wage payments.

Provisions providing for continued health care benefits must also be carefully drafted. These provisions should explain the

duration of continued coverage, which party has responsibility for premiums, and the employee's COBRA rights. Ancillary benefits, such as accrued vacation time and retirement, must also be dealt with.

Releases must be carefully drafted to achieve their expected results. Employers should be aware that certain claims cannot be waived under Massachusetts law. These claims include worker's compensation claims, unemployment benefits, and payment of wages. Additionally, the protections of certain federal statutes, such as the Fair Labor Standards Act, cannot be waived, either. Including language in the agreement that purports to waive an employee's rights in these protected areas could itself expose an employer to liability.

Other employee protections can be waived, such as age-discrimination claims, but employers must be sure to meet the technical requirements for these waivers to be effective. For instance, the federal Older Workers Benefit Protection Act (OWBPA), which sets requirements for an effective release of claims under the federal Age Discrimination in Employment Act (ADEA), requires that releases be written in plain and understandable lan-

guage, that individual employees are provided with at least 21 days to consider the waiver and 45 days in the event of a group reduction in force, and that the employee has seven days to rescind the agreement, so that it does not become effective until the eighth day after it is signed by the employee.

Additionally, the employee should be notified that it is his right to seek the advice of counsel before signing the release. Failure to follow the technical requirements of OWBPA will leave an employer open to litigation despite the consideration already given by the employer. The release may also provide that, even if someone else pursues a claim on behalf of the employee (such as the EEOC), the employee will not seek to be paid any monies by the employer other than those received in the settlement.

Although properly worded severance agreements will cost the employer some money in the short run, they can serve as an effective insurance policy for the employer against claims by discharged employees, whose claims may or may not have merit, but at the very least, will cost the employer legal fees to defend them.❖

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