

USE OF SEPARATION AGREEMENTS PROS, CONS AND PRACTICAL GUIDANCE

INTRODUCTION

For many employers, an employee termination triggers an almost knee jerk reaction: offer the employee severance pay and a separation agreement with a release of claims to avoid a potential employee lawsuit. Other employers offer severance but do not seek a release. Although there are advantages to the use of separation agreements to prevent prospective legal headaches, such agreements may not be appropriate in all instances. Moreover, a form is often used with little thought regarding whether it is suitable under the circumstances or has been updated. This edition of the *Employment Law Advisor* discusses the pros and cons of separation agreements and offers some practical guidance on drafting and implementing them.

IS A SEPARATION AGREEMENT APPROPRIATE?

Whether to offer a terminated employee a severance package in return for a release of claims depends on a number of employer specific factors, such as employer policy, practice and employee relations philosophy. Generally, providing severance in exchange for a release can be a worthwhile investment, as the amount of severance generally is insignificant when compared to the cost of defending an employee claim. Severance agreements are particularly useful when the termination is a difficult one or the separated employee is viewed as the type of person likely to assert a claim. Severance agreements are also effective tools to prevent litigation in the context of layoffs, where there are risks of multiple claims.

However, there are sometimes factors that militate against offering severance. For example, out of fear of litigation many employers offer severance to nearly all employees, regardless of the reason for termination, needlessly driving up the overall costs of employee terminations. Moreover, offering severance to an employee fired "for cause" may send the wrong message to other employees, i.e., that they will get severance no matter what the infraction.

Further, offering an employee a severance agreement, which by necessity will contain at least some "legalese," may unintentionally generate claims. When provided with an imposing legal document, a terminated employee may feel compelled to consult an attorney (indeed, the severance agreement may advise the employee to do so). Especially if the severance offered is relatively modest, the offer may do no more than cause the employee to consult counsel and consider asserting claims when he or she might otherwise not have done so.

Finally, employers should carefully consider any precedent established by selective offers of severance. Terminated employees occasionally have claimed "reverse discrimination" and argued that the employer engaged in unlawful discrimination by offering severance only to terminated employees in a protected category.

PRACTICAL ADVICE

Assuming that a separation agreement is to be used, the following are some practical tips for drafting and implementation.

1. *Have you offered the employee additional consideration?*

A severance and release of claims agreement is only enforceable if it offers the employee something of value to which he or she is not already entitled. Thus, an employer cannot withhold payment of vacation pay or expenses until the employee signs a separation agreement, or require a release when a severance policy omits such a requirement. We recommend that you review any policies requiring severance and consider amending them to provide that as a condition to the receipt of severance the employee sign a full general release. While employers must offer additional consideration above and beyond what the employee is entitled to by policy, practice or law, such additional consideration need not always be money. The offer of a mutual release, favorable references, outplacement, and/or confidentiality regarding the circumstances of the termination might be enough.

2. *Have you carefully defined the scope of the release?*

The scope of the release is an important consideration that is sometimes overlooked. In most cases, the release should be a "general release", releasing all claims of any nature, not just claims arising out of the termination of employment. Additionally, employers should be careful in defining who is being released - the employer and its employees, directors, and related entities should be included.

3. *Is the release "per se" retaliatory?*

Releases typically contain language whereby the employee waives the right to file any type of claim against the employer. Although an employee can waive the right to file claims of discrimination *in court*, a recent case holds that any release that purports to waive the right to file a discrimination claim with the Equal Employment Opportunity Commission (EEOC) is "void against public policy." Indeed, the EEOC takes the position that such a release is "per se" retaliation. As such, separation agreements should be reviewed and potentially revised to address this issue. One approach is to distinguish between prohibiting the employee from filing an EEOC charge (which is

not lawful) and prohibiting an employee from collecting monetary damages in connection with the charge, or filing a lawsuit in court (which is lawful). However, this approach may suggest to a disgruntled ex-employee that he or she should accept the severance pay and then file a baseless EEOC charge to harass the former employer. We suggest addressing the issue by including language in the release that avoids the “per se” retaliation problem but does not needlessly highlight the issue for employees (or their counsel). In addition, all releases should contain a “severability” clause that allows a court to enforce the remainder of the agreement even when one provision is found invalid.

4. *Does the separation agreement preclude cooperation with the EEOC?*

If a separation agreement overtly or even implicitly suggests that an employee cannot cooperate with the EEOC in connection with an investigation, the employer runs the risk that its separation agreement and the release will be void. This problem generally arises in overbroad confidentiality provisions that require the terminated employee to maintain complete confidentiality of the severance arrangements. Consequently, separation agreements should not suggest (directly or indirectly) that the employee is precluded from cooperating in an EEOC or state agency investigation.

5. *Does your separation agreement comply with OWBPA?*

Employers should ensure that any release offered to an employee age 40 or older complies with OWBPA (Older Workers’ Benefit Protection Act). A compliant agreement must include the following provisions (among others): (i) a 21 day consideration period; (ii) a 7 day revocation period; and (iii) advice to consult with an attorney prior to executing the agreement. Otherwise, the release will *not* release age claims under federal law. Moreover, employers should be aware that in situations involving the termination of 2 or more employees special rules apply to release federal age claims, including additional time for consideration (45 days) and detailed informational disclosures.

6. *Does your separation agreement address specific and sometimes overlooked issues?*

Cooperation

It may be useful to make the payment of severance contingent on employee cooperation in providing certain deliverables or assisting in the transition of duties. Similarly, an employer may want employee cooperation in defense of ongoing litigation.

References

It may also be wise to include a provision on how references, if

any, will be handled so that misunderstandings - and future disputes - may be avoided (such as a claim of defamation).

Outplacement/Unemployment benefits

Often outplacement services can be of real value to a terminated employee and therefore may be perceived as enhancing the worth of a severance package. An employer’s agreement not to contest any application for unemployment compensation may have the same effect.

Future employment

Unless employer policy is to the contrary, the separation agreement should make it clear that the terminated employee is not subject to rehire and the employee expressly agrees not to seek re-employment with the company. These provisions help prevent the employee from manufacturing claims by applying for positions and then alleging retaliation for an alleged failure to rehire.

Confidentiality

Most employers prefer that amounts paid for severance are kept confidential, so separation agreements usually contain such provisions (as noted above, care should be taken to ensure the provision is not overbroad). Employers should also consider whether to include “liquidated damages” clauses which provide for the payment of a pre-determined amount to the employer in the event of a breach of the confidentiality promise.

Return of company property / Reaffirmation of restrictive covenants

We recommend including a provision requiring the employee to return all company property. Employers should also consider whether to have the employee reaffirm existing non-compete agreements or other restrictive agreements (such as a non-solicitation or anti-piracy covenant). Where they did not obtain such an agreement at the outset of employment, employers might seek to have employees sign such a restrictive covenant in the context of a separation agreement.

Covenants not to sue / Tender back provisions

Two other provisions frequently contained in separation agreements merit close attention. “Tender back” provisions (which require an employee who signed a separation agreement to “tender back” the severance paid under the agreement if the employee files a claim) and covenants not to sue (whereby the employee agrees not to sue the employer on claims released in the separation agreement) are considered by the EEOC to be “per se” retaliatory (similar to release agreements that preclude the filing of an EEOC charge). Consequently, these provisions should only be included after careful analysis and consultation with counsel.

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