# Severance Agreements: Protect your interests with key terms

*Legal Alert*

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The Day of Judgment has arrived for far too many employers and employees. Due to the faltering economy, weak profit projections, and past-due accounts receivable, companies are making the decision to cut back their workforces and terminate employees.

If you are facing this prospect for the first time - or the first time in several years - you might want to make sure that your severance agreement is up to date. If employers don't do it right, they may face the consequence of paying an employee severance pay, and then being sued by that same employee because the severance agreement was defective.

Key terms that employers large and small should consider in their severance agreements:

• ***Make sure the release is comprehensive.*** State employment laws vary, and you should be sure the agreement identifies the applicable laws in your state. A New Jersey appellate court held that an agreement that did not identify the specific statutes released did not provide the employee with notice of what claims he was releasing, and therefore the employee could be free to sue for claims not identified in the agreement.

• ***Payments and tax.*** Severance agreements should state how and when the severance payments will be made, and cover any and all payments outstanding. Most employers prefer to pay severance through the normal payroll process over several weeks or months, with taxes and deductions withheld. This method is generally favored by the IRS and protects the employer from tax collection claims. In contrast, if no taxes are withheld and the employer pays the settlement in a lump sum (as many employees prefer), the employer may be liable for any taxes the employee fails to pay.

• ***Older Worker Benefit Protection Act.*** If the agreement is for an employee who is 40 years of age or older, then federal law requires specific language, waiting periods, revocation periods, and waivers for a valid release of a claim under the Age Discrimination in Employment Act. In addition, the ages and positions of employees in the relevant unit who were selected and not selected for termination must be disclosed, if the severance package is part of a group termination program. Strict compliance with these provisions is required for a waiver to be valid, so seek legal counsel if you are not familiar with this law.

• ***Non-disparagement.*** Employers should ensure that any employee who is paid severance agrees not to disparage the employer or its management, or cast them in a negative light. Although these covenants are difficult to monitor and enforce, they act as a valuable preventive mechanism and can be useful in stopping any disparagement that occurs.

• ***Confidentiality.*** Employees should be required to keep the existence of the agreement and its terms confidential. They also should affirm their obligations to keep secret the company's confidential business information, and not retain, use or disclose it after their employment ends.

• ***Non-compete agreements.*** If the company has a noncompete or non-solicitation agreement with the employee, the obligations of such agreement should be confirmed in the severance agreement. Alternatively, the employer may choose to impose such a restrictive covenant as a condition of the severance agreement - although such restrictions may be more difficult to enforce, unless the employer can demonstrate that they are necessary to protect a legitimate business interest and show that the restrictions are reasonably limited in time and scope.

• ***Venue and choice of law.*** Employers have the ability to designate where any lawsuit relating to the severance agreement (e.g., to enforce a restrictive covenant) will be held. Most employers prefer a state or federal court close to their corporate headquarters. Courts generally will honor venue selection and choice of law clauses that are based on the corporation's principal place of business.

• ***No jury trial.*** In severance agreements, as well as other employment agreements, employers can require employees to waive their right to a jury trial. The case will then be decided by a judge, who is generally seen as more predictable and less prone to excessive verdicts.

These are just some of the key terms that should be considered and drafted, as appropriate, for every severance agreement. The beauty of these agreements is that the employer generally can decide what provisions to include, and how simple or complex to make the agreement.

If you are contemplating termination of an employee, be sure your severance agreement is up to date and serves your needs. If you need help, contact us.