

Severance Agreements Can Prevent Wrongful Termination and Discrimination Claims

Unfortunately, the construction industry remains sluggish. Construction activity is down again and the economy actually shrunk last quarter. For many companies, this means more layoffs, which are never pleasant. Layoff decisions are often made more difficult by the fact that there are some employees that may retaliate against a layoff by filing a lawsuit or complaint with a government agency alleging some form of discrimination. If a company intends to proceed with a layoff of an employee whom it thinks might file a discrimination claim, it has two choices. First,



it can lay the employee off and wait to see if he/she files a complaint or lawsuit. If they do, the costs of defending the lawsuit or responding to an investigation by an agency that investigates discrimination complaints (e.g. PA Human Relations Commission, EEOC), can be significant. The second option – and the focus of this article – is to offer the employee a severance payment in exchange for waiving potential claims for discrimination or violation of other rights. Offering a severance payment to an employee does not mean the company must offer one to all employees who are laid off. It can either offer it across the board or only to those employees whom it suspects might make a claim against the company.

For an attorney experienced in this area of the law, severance agreements are fairly easy to prepare. However, it is not something you should attempt on your own. Courts will generally enforce the waiver of claims in a severance agreement, but if the employee challenges the enforceability of the agreement, a court will scrutinize the agreement to make sure there was no overreaching by the employer and to ensure that the employee fully understood the potential claims being waived. Therefore, severance



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agreements must be carefully drafted to make sure all requirements are satisfied; otherwise, the waiver and release aspects of the agreement will not be enforced and the wrongful termination or discrimination lawsuit can proceed (and the former employee still gets to keep the severance payment).

The general requirements for enforceability of waivers in severance agreements are that the employee must have been given something of value in exchange for the release. Notably, if you ordinarily offer severance packages to employees who are permanently laid off without a requirement that they release claims, you will have to give something of additional value to an employee who is asked to sign an agreement waiving and releasing claims. The agreement must also clearly identify the rights the employee is waiving. The employee should be afforded plenty

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of time to review the proposed severance agreement. Note that special rules apply to age discrimination claims. If the employee is over 40 years of age, the Older Workers' Benefits Protection Act contains special requirements. The employee must be given at least 21 days to consider the agreement. If the employee signs the agreement, he/she can revoke acceptance within 7 days.

Some companies are concerned that if they offer a severance package to one employee, every employee will demand one when they are laid off. Some also are concerned that offering a severance agreement with release language will send a message to the employee that the company has something to hide, or that it is worried about its potential liability – which may cause an employee to file a claim when it otherwise might not. These are concerns that should be addressed by management along with counsel before offering a severance agreement to a particular employee(s). Each situation should be judged on a case-by-case basis.

If the employee signs a properly drafted agreement, it is a very effective way to prevent future claims. The government automatically investigates all complaints of discrimination regardless of merit. While companies are usually not pleased about incurring legal costs to prepare the severance agreement or to pay employees after they have been laid off, these costs can be a fraction of the costs of responding to an agency investigation.

The preceding article was written for informational purposes only and does not constitute legal advice. Before taking any action related to the issues addressed above, you should consult with legal experts.

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