



Severance Slip Ups – Some Critical Errors in Giving Out Severance Payments

Client Advisories

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In a world where layoffs and terminations are a possibility for any business, it is essential that employers understand some of the critical mistakes they could make when providing severance payments to employees.

Here are some of the biggest ones we have seen and how to conquer them:

1. **Not having a written agreement with a release** - Yes, there have been instances where an employer provides a severance payment and never required a written release in exchange. Remember, a severance payment, generally speaking, is not due or owing to at-will employees. It is extra, unearned money. For that reason, the company should require something in return from its employees and that is a general release of claims against the company.

Tip: Memorialize your severance agreement in writing and require in exchange a release of claims.

2. **Failing to consider the age of your employee** – The Older Workers Benefit Protection Act (OWBPA) and Age Discrimination in Employment Act (ADEA) and their regulations provide heightened requirements of severance agreements for employees who are forty years of age and older. Two of the biggest oversights in this category are failing to provide the proper consideration period (21 days/45 days) and failing to provide the revocation period of 7 days. There are other requirements under these laws, such as specifically advising an employee of their right to consult with legal counsel.

Tip: Remember to consider the age of the employee when drafting the agreement, and follow all of the ADEA/OWBPA requirements, which varies depending on how many individuals are being terminated at that time.

3. **Improperly including a confidentiality provision** - Some states have restricted the ability of employers to include confidentiality provisions in agreements that conceal the facts underlying claims that form the basis for harassment suits. Employers need to be aware of what the laws governing them restrict and if there are ways to work within those restrictions to still include a confidentiality provision.

Tip: Review the state and city laws in which your employee works to determine if there are any restrictions on confidentiality provisions. It is best to consult with legal counsel.

4. **Including an overbroad/narrow release of claims** - Employers fall on opposite ends of the spectrum here. Sometimes, employers include provisions in their general release that includes “any and all claims.” Others go the distance to include so many claims and instances that the release, read on its face, improperly includes claims that cannot ever be waived by law, such as claims for workers’ compensation, charges with the Equal Employment Opportunity Commission, or unemployment claims. (Remember, non-waivable claims also varies by state). The consequence of a release that is too narrow is that the company provided the employee with a sum of money in exchange for a release that did not go the distance to properly inform the employee of the types of claims he or she was releasing. The consequence of an overbroad release is that a court may determine it is unenforceable completely because it is overbroad in including unwaivable claims.

Tip: Consult with legal counsel. Drafting the proper scope of a release of claims is critical as it is the benefit to the employer in exchange for giving additional monies to the employee. Employers have to make sure employees understand what they are giving up, but cannot require that they give up certain rights.

It is always best to consult with legal counsel in preparing a severance agreement. The laws are constantly changing and an agreement that may have been good a year ago is no longer necessarily up to par the following year.

If you have questions about your current severance agreement template that you are using or about how to draft one, please contact any member of Archer’s **Labor & Employment Group** in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.

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