Understanding Your Severance Agreement

You are summoned to the HR office and told in a perfunctory manner your services are no longer required. At some point in this "meeting" you are handed a Severance and General Release Agreement ("Agreement"). You are not familiar with such a document and find your Agreement confusing and legalistic. What do you do now?

The process of trying to negotiate more favorable severance terms need not be a mere plea for your employer's generosity. This article explains that even in an "at-will" jurisdictions such as New York and Connecticut, where an employer typically does not need to establish just cause for your termination, you have leverage. This article will also walk you through several key provisions found in virtually all severance agreements and identify a number of pitfalls to avoid. Finally, it is important to appreciate that signing your Agreement is only one of your options, albeit in many cases the best option – that is, after you fully understand to what you are agreeing and have negotiated a severance package tailored to your needs.

Your Leverage To Negotiate An Enhanced Severance

If you have an employment contract or are entitled to severance under a company policy or past practice, the first step is to review carefully the extent to which you were already entitled to severance benefits. In addition to reviewing your employment documents *(e.g.,* employment contract, employee handbook and any benefits document or website*)*, ask HR about the severance benefits your employer is contractually bound to provide. If possible, confer with former employees to ascertain what severance benefits your employer has provided in the past. These are, however, only the first steps.

The Agreement you have been asked to sign is, in part, your employer's attempt to obtain certain "benefits" from you. Your task is to understand fully what you are giving up and to negotiate the most advantageous exchange of "benefits." Chief among your employer's objectives is to obtain an unqualified release of all your possible claims. Generally, the release provisions are accompanied by one or more provisions that prohibit you from suing or cooperating with anyone else who sues your employer. Your employer typically will also seek to obtain written confirmation of any restrictive covenants and confidentiality provisions that affect your post-employment conduct. Increasingly, employers also want you to agree to provisions that create an affirmative duty to cooperate with them in the future and that restrict

what you may later say about your employer and fellow employees. Frequently unappreciated is your employer's attempt to bind you to terms relating to the resolution of any future disputes *(e.g.,* agreeing to be bound by arbitration in a location of your employer's choice*)*. Your employer's desire to buy peace, to affirm its restrictions on your future conduct and to enhance its position in any subsequent interaction with you are legitimate objectives and of no little value to your employer. They, along with the goodwill and relationships you have established within your company and among those it serves, are the source of your leverage for negotiating a fair severance package and an even-handed severance agreement. The point is: you do not need to have a written employment contract or other documented right to severance benefits to negotiate your Agreement.

Provisions Of Which To Be Wary

Once you appreciate that you have leverage to negotiate your Agreement, you need to understand its business and legal terms. The business terms vary significantly depending on your industry, position, past compensation, and years of service. However, there are legal terms found in virtually all severance agreements. The first point of which to be mindful is the standard *integration clause* buried in the boilerplate language of your Agreement. It simply states that all promises and understandings have been fully integrated into your Agreement. Innocuous enough! Unless, as is often the case, you were made certain promises and given specific assurances that are not expressly set forth in your Agreement. If any part of your understanding is not clearly set forth in your Agreement, your employer is under no legal duty to honor this understanding. Memories are imperfect, personnel often changes, and it is not unheard of for there to be a clean sweep of management. Your best protection is to make sure your entire understanding is detailed in your Agreement.

As you might expect, the longest and most detailed provision in your Agreement contains your unqualified release of all possible employment related claims. This *general release* raises a variety of potential issues. Often in your employer's zeal to obtain a comprehensive release, you are asked to waive all claims of any kind against co-workers and your right to be indemnified if you are later sued personally for work performed within the scope of your employment. By statute in Connecticut, and under many corporate *By Laws*, you are entitled to be defended by your employer in a lawsuit arising out of your employment. This is a right you do not want to forego unwittingly.

If you are asked to affirm a *restrictive covenant* or a *confidentiality provision*, take care to ensure you are not agreeing to increase the scope of the restriction to which you are subject. It is readily apparent if your Agreement, for example, seeks to increase the term of a covenant not to compete from six to twelve months. Less obvious are severance agreements that greatly expand restrictive covenants by introducing significantly broader definitions of key terms like "customers" and "confidential information." If your employer wishes to expand the scope of a restrictive covenant, it is important that you are aware of this change and are compensated accordingly.

Most severance agreements will seek to create an affirmative duty to cooperate with your employer in the future. Such provisions are best revised to require your future cooperation only at reasonable times and after reasonable notice. As your new job is now to find another job, future demands for cooperation from your employer are likely to be unwelcome. It is also advisable to amend such provisions to address the question of whether you will be entitled to compensation for your cooperation and on what basis *(e.g.,* all out-of-pocket disbursements plus a specified per day fee*)*.

Typically, your Agreement will contain a number of provisions that impose a one-sided restriction on your conduct. The most common are *nondisparagement clauses* that attempt to govern what you may say about your employer and former co-workers. Provisions of this ilk should be made reciprocal so that your employer is bound by a mutual restriction.

While there are many other enhancements a knowledgeable employment lawyer should attempt to negotiate on your behalf, there are two final pitfalls that are worthy of mention. First, many proposed severance agreements attempt to obtain your consent not only to arbitrate any future disputes, but to do so in a foreign jurisdiction. By way of example, the fine print in a recent agreement sought to waive a New York employee's right to a jury, to compel her to submit to arbitration, and to limit the site of the arbitration to San Francisco. Such a provision can have the practical effect of making it impossible for you to enforce your rights under your Agreement.

Second, your Agreement should be reviewed carefully to determine which of your obligations are tied to your employer's obligations to pay you. It is not uncommon for a severance agreement to provide for the forfeiture of a future payment on the basis of your employer's perception of your failure to abide by a restriction. Not only should your employer's right to declare a forfeiture be based on objective criteria, but it should be limited to material

breaches of your performance. Moreover, it is sound to maintain that vested severance benefits to which you are already entitled should not be made subject to forfeiture for nonperformance. For example, if you have a contractual right to six months of outplacement, this right should not be made contingent on your compliance with a nondisparagement provision. Resist attempts to qualify or make contingent any right or benefit to which you are already entitled.

Conclusion

Negotiating an even-handed severance agreement in most instances is your best option. It is not, however, your only choice.

Depending on the complexity of your Agreement and the value of the severance benefits under negotiation, you may choose to seek counsel to understand fully the legal consequences of signing your Agreement and to negotiate the most advantageous Agreement. Similarly, if you believe you have been wrongfully discharged, you may elect to obtain an assessment of your potential legal claim. One Connecticut trial court recently held that an employer violated Connecticut's Fair Employment Practices Act by offering an employee of one gender a less favorable severance package than was offered to employees of the other gender when both were terminated at the same time.

When confronted with a severance agreement, keep in mind that you have leverage to negotiate its terms. It is especially important to obtain a commensurate benefit for each new right and enhanced restriction obtained by your employer. The better you understand the legal terms of your Agreement, the stronger your position to negotiate a favorable Agreement.