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Understanding and Negotiating Employment Severance Agreements

A black and white photograph of the Golden Gate Bridge in San Francisco, viewed from a distance across the water. The city skyline is visible in the background.

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BY EMPLOYMENT ATTORNEY JESSICA JUAREZ

Executives or other senior employees may often be presented with a separation agreement upon hire. Ironically enough, this separation or severance agreement may often be included in the offer letter or initial documents a company has the employee sign at the beginning of the employment. This is the ideal time to negotiate your separation agreement as the relationship between the employer and the employee is fully intact, cooperative and optimistic.



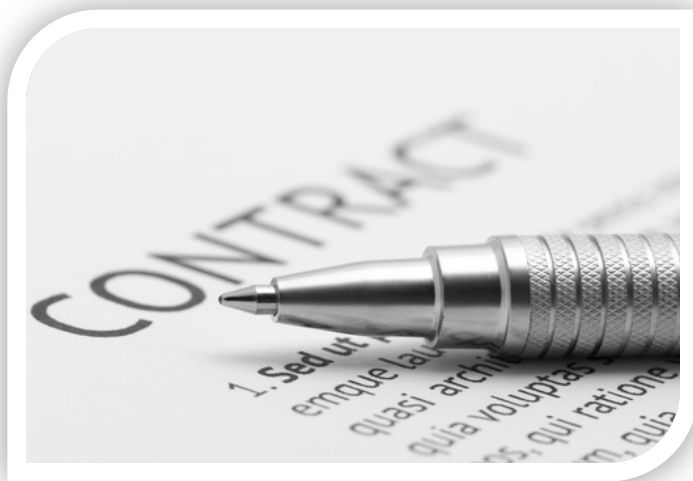
If however, you are an employee or consultant who has been presented with a severance agreement upon termination or separation from your employer, it is important to ensure that you understand the agreement, its terms and any potential consequences that may result from the signing of your severance agreement. An attorney will help push forward mutual cooperation in the negotiation of your severance agreement.



If you are an employee in either situation, the following may help you gain control of the negotiation process and assist you in negotiating a better severance package.

1. UNDERSTAND THAT YOUR SEVERANCE AGREEMENT IS A CONTRACT

As a contract, an employee must understand that there are inherent risks involved in negotiating your severance. By requesting additional or different severance, the employee is thereby, rejecting the severance offer and providing a counter-offer. The counter-offer does not have to be accepted by your former employer. An attorney can help you assess the inherent risks involved in negotiating a severance package and advise you on how to move forward.



2. PAY ATTENTION TO THE DEADLINE FOUND IN YOUR SEVERANCE AGREEMENT

Typically, there is a deadline for which an employee may respond to the offer presented in the severance agreement. Please mark this deadline. In order to ensure that you have enough time to negotiate or review any potential claims you may have, it is important to contact an attorney as soon as possible. The attorney may work with your employer to extend the deadline on your behalf, if necessary or advisable to do so.



3. GATHER & REVIEW YOUR EMPLOYMENT RECORDS

In order to inform the needed assessment of any particular claims, it is important to fully understand the terms of your employment, your performance with your employer and what you are entitled to at the time of termination.

Reviewing your initial offer letter, if any, your performance reviews, the employer handbook, your wage statements, benefits, deferred compensation, arbitration agreements, non-compete agreements, and/or any other memoranda related to your employment is a good place to start. These documents will help shape the negotiation process by understanding the terms of your employment, what you are already entitled to and may help provide leverage for you in negotiation of your severance.



4. SEVERANCE PROVIDED TO OTHER SIMILAR SITUATED EMPLOYEES

If your employer has a practice of provided severance to other employees, it is important to discuss this with your attorney. These practices may give rise to an established standard which the company is now required to provide its employees.



5. CONTACT AN ATTORNEY TO ASSESS THE EXISTENCE OF ANY LEGAL CLAIMS YOU MAY HAVE

An attorney will help you assess whether there are any potential legal claims you may have. For example, there may be an underlying issue regarding your rest breaks and meal periods, you may have been discriminated against on the basis of your age, race, sex, national origin, religion, disability, pregnancy, or subject to a hostile-work environment. In the City of San Francisco, there are various ordinances related to sick leave and health care that may come in play.

The existence of any legal claim may provide the necessary leverage or increase the existing leverage in order to negotiate a better severance package.



6. UNDERSTAND ALL TERMS OF YOUR SEVERANCE AGREEMENT

Terms of Severance



a. Does the severance agreement include a restrictive covenant, non-solicitation or non-compete clause?

At the beginning of the employment, did the employee sign any such agreement? If so, does the language in the severance agreement match the initial language in the earlier contract? If it does not, or if this is an entirely new provision - of extreme importance here is whether there is enough consideration paid by the employer for adding in this provision. The inclusion of this provision may add leverage in advocating for additional compensation or salary during the restricted time frame.

b. Does the severance include an integration clause?

If there is an integration clause in your severance agreement stating that the agreement is the only agreement between the employer and employee and therefore, supersedes all other agreements, it is important to be sure that you know what you are waiving.

c. Is there a choice of forum provision?

Many severance agreements will include a choice of forum provision. Is this worth negotiating? Is the law related to non-compete clauses more favorable in your state of residence or in your employer's chosen forum?

d. Mutuality in Your Severance

Be sure there is mutuality in your severance. Mutuality comes into play with respect to claims you may have against the company, non-disparagement / non-defamation clauses, confidentiality, attorneys fees, etc.

e. Understanding Penalty Provisions

Oftentimes, a severance agreement will include a confidentiality clause that may have a monetary value attached to it, in case the employee breaches this provision. An attorney can help you assess if the provision is reasonable as worded or if it merits the financial penalty or its extent. Similarly, there may be a breach of contract clause referring to the return of your employer's property and materials.

7. TAILOR & STRUCTURE YOUR SEVERANCE TO WORK FOR YOU AND YOUR SHORT AND LONG-TERM GOALS

Be sure to think through your goals in addressing your severance agreement. Often times, life events or family concerns play into how you advocate for a better severance package.

For example, is health care a concern for you or one of your dependents? How much health insurance is provided? Is this benefit more valuable than a cash payment? An attorney will help you address this issue in your severance agreement.



Are you concerned about receiving unemployment? If so, the language contained in your severance agreement is important to ensure that you are able to collect unemployment.

Will you be unemployed for the foreseeable future? Is seeking job placement assistance a valuable asset for you? How long would someone with your skillset, level of experience and education take to find a similar position?

Is getting a positive reference of employment from your former employer important to you? Are you interested in seeking other employment within the company, or its affiliates?

Are you opening a new business or making a large payment in the near future? Are you concerned about your employer's financial health? If so, your attorney can help structure your severance in a way to grant you access to a one time, lump sum payment instead of being paid over the course of several pay periods.

8. THE WAIVER / RELEASE

By signing the severance agreement, you are agreeing to receive a cash payment or other benefit(s) in exchange for waiving and releasing your right to bring suit against your employer. As the employee, if you think you have been wrongfully terminated because of age, race, sex, religion, or some other discriminatory reason, you should consult an attorney and weigh the pros and cons of signing the contract. An attorney will be able to better assess the likelihood of succeeding in your case and will be able to advise you regarding court costs and whether it is worth the effort and expense of going forward. These considerations should be weighed against your particular goals.



a. Validity of the Waiver

The first step in understanding the waiver of an employee's right to bring suit, is to make sure such waiver is legally valid. A waiver in a severance agreement generally is valid when an employee knowingly and voluntarily consents to the waiver. And, whether a waiver is 'knowing and voluntary' depends on the specific statute under which suit may be brought. Courts generally look at the language found in the waiver and analyze the circumstances and conditions under which the waiver was signed. These include whether the waiver is clear and specific, making it understandable to the employee; whether there was any inducement by fraud, duress, undue influence, or other improper conduct by the employer; whether the employee had enough time to review the severance agreement; whether the severance provides language regarding the fact that the employee has a right to consult with an attorney prior to signing; who wrote the agreement and whether the employee had any input in negotiating the terms of the agreement; and whether consideration is sufficient, meaning whether the employer offered the employee severance pay and benefits that exceed what the employee was already entitled to by law or contract.

b. Who or What are You Releasing?

Additionally, it is of utmost importance that you are clear as to who and what you are releasing in your severance claims. Claims for COBRA, ERISA, workers compensation, EDD and FLSA cannot be waived. If for example, you have been sexually harassed by a supervisory employee, it is important to fully understand the parties you are releasing in your severance agreement.

CONCLUSION

Whether you are offered a proposed separation agreement at the time of hire or severance agreement upon termination, it is important consider what the terms of these agreements mean and where your potential leverage comes from. Knowing the answers to these two questions will allow you to gain control over the negotiation process and produce the best outcome possible. If you have any questions about pre-hire separation agreements or post termination severance agreements, feel free to reach out to San Francisco Employment Attorney Jessica Juarez at jessica@stoll-law.com for help.

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your workplace problems.*

