
Employment and Labor

Severance and Non-Compete/Non-Disclosure Agreements

Severance Agreements

Severance agreements are essentially agreements that compensate an employee in exchange for their departure from an employment position. Most employees are considered “at will,” which means they can resign and/or be terminated at any time. When employment ceases, an employer may offer a severance package to an employee in exchange for the employee’s waiver of right to sue. However, employers, in the absence of an employment contract, generally have no obligation to provide employees severance pay. If severance pay is offered, an employer will offer the employee a Severance Agreement.

A Severance Agreement is a contract between an employee and an employer that specifies the terms of an employment termination. Severance Agreements are also offered to employees who are laid off or facing retirement. In addition, depending on the circumstances, a Severance Agreement may be offered to an employee who resigns or is terminated. The Severance Agreement must have consideration -- i.e., something of value to which the employee is not already entitled.

Employers are generally required to provide an employee time to consider the Severance Agreement before signing. An employee typically has a 21-day consideration period to accept an employer’s Severance Agreement unless the employee is over 40 years of age. The Older Workers Benefit Protection Act (OWBPA) requires that an employer provide employees over 40 years of age with a 45-day consideration period and at least a 7-day revocation period.

There are various ways that Severance Agreements are attained:

- An employee is terminated and the employer then offers a Severance Agreement;
- An employee has been terminated, no Severance Agreement was proposed by the employer but the employee approaches the employer seeking one; or
- An employee wants to resign and seeks to negotiate severance.

Some of the issues to consider in a Settlement Agreement may include, but are not limited to the following:

- Financial terms, tax consequences and timing of severance payments
- Continuation of employment benefits
- Rights to unemployment compensation
- Claims to be waived
- Confidentiality
- Non-Disparagement
- Re-employment possibilities
- Scope of non-competition

- Preservation of trade secrets
- References
- Recommendation letters
- Applicable law
- Consequences of violating the Severance Agreement

Severance Agreements often include a General Release or Waiver that stipulates the employee cannot sue his or her employer for wrongful termination or attempt to seek unemployment benefits. Before an employee signs a Severance Agreement, he or she should consult with an attorney to discuss the rights that he or she may be waiving and the terms of the Severance Agreement.

Non-Compete and Non-Disclosure Agreements

Depending on the employee's particular profession, employers may include a Non-Compete Clause within or a Non-Compete Agreement along with a Severance Agreement. A Non-Compete Agreement is a contract between an employee and an employer that stipulates that the departing employee agrees not to enter into or start a similar profession in competition against the employer within a geographic area after he or she terminates employment. The Non-Compete Agreement is usually in effect for a specific period of time and/or limited geographic area after the employment ends.

If an employee accepts a position that a former employer believes is in violation of the Non-Compete Agreement, the former employer may sue the employee seeking a court order to prevent the employee from working. However, some courts (depending on jurisdiction) are reluctant to enforce the restrictions of the Non-Compete Agreements if they inflict an unreasonable hardship on the employee. A former employer must prove, however, that the employee has in fact taken or threatened to take an action in violation of the Non-Compete Agreement. A former employer must also prove to the court that the Non-Compete Agreement is enforceable and reasonable.

Non-Compete Agreements are more likely to be upheld in court if the geographic scope is smaller, the duration is shorter, and the type of position is narrower. Many states recognize and enforce various Non-Compete Agreements, but certain states prohibit Non-Compete Agreements except in limited circumstances. Employers often require employees to sign a Non-Compete Agreement either before or after employment in order to protect the company's existing client base. In addition to Non-Compete Agreements, employers often require employees to sign a Non-Disclosure (Confidentiality) Agreement either before or after employment to protect information regarding the company's confidential material, knowledge, inventions, trade secrets, and processes.

We Can Help

Please [contact Berry & Berry, PLLC](#) to schedule a consultation with an attorney to review and discuss your severance and non-compete/non-disclosure agreements.