



You're Fired... now get out... oh but wait... please sign this Severance Agreement first and here is your check for \$5,000,000 so that you don't sue us!

The idea behind a severance agreement is that an employee agrees to take something of value to which he/she is not otherwise entitled — additional compensation, continuation of benefits, or other “in kind” consideration — in exchange for agreeing not to sue the employer.

An employee determined enough to sue his/her employer will do so, and the company will end up spending a good amount of cash defending even a meritless claim by an employee who is terminated.

That's where the severance agreement comes in.

A severance agreement that includes a full release of claims is the only way an employer can stop the **HOPING APPROACH** and be reasonably sure it won't be dealing with the terminated employee again. Of course, peace of mind has a price.

### **When should an employer offer an employee a severance package?**

The risk factors of firing or laying off an employee need to be evaluated to determine whether a severance agreement is worth the expense.

- Is the employee in a protected category under an EEOC law (e.g. Age 40 or older)?
- More significantly, is he/she likely to be replaced by someone not in the same protected category?
- Has the employee recently engaged in protected activity such as taking leave under the Family and Medical Leave Act (FMLA), filed a workers' compensation claim, or met with HR to report an issue or blowing the whistle on his/her employer?
- Is there an employment contract in place?
- Is the employee privy to confidential trade secrets or intellectual property of the Company?

When any of these above factors are involved, a release of claims may make sense and minimize the employer's risks of dealing with a wrongful termination claim. The triggering event that led the employer to decide to terminate the employee should also be taken into consideration. For example, it's probably not beneficial to offer a severance agreement to an employee who was caught stealing, engaged in insubordination or committed some form of harassment, even if he/she is in a protected class or seems like a high risk to sue. *Reason:* If it becomes known that employees who engage in egregious behavior are essentially "paid off" on their way out the door, overall workplace conduct and morale are likely to be affected.

### **Other considerations when offering a severance agreement**

Employers can't *force* employees to sign a severance agreement. All an employer can do is offer a severance agreement. However, simply presenting an agreement can prompt an employee to view his/her employment relationship in a whole new light. An employee who never had a thought about filing a claim against their employer may start to think about things differently once he/she sees the agreement. He/she may look at the list of claims in the release and wonder if any apply to him/her. He/she may wonder why their employer went through all of the trouble to pay an attorney to draft such a nice, official document if they weren't worried about something.

Also, for the severance agreement to be enforceable, the employee must be given a reasonable amount of time to review it and seek counsel if desired. This "reasonable" amount of time can be up to **45** days!

Before an employer provides a terminated employee with a severance agreement, we recommend that they consult with McCloskey Partners, LLC to ensure they are covering all bases. Feel free to contact us at 215-716-3035 or [admin@mccloskeypartners.com](mailto:admin@mccloskeypartners.com). To learn more about McCloskey Partners, visit our website at [www.mccloskeypartners.com](http://www.mccloskeypartners.com) or follow us on social media.