

Severance Agreements: Key Components for Employers and Employees

By Kathleen Davidson and Beth Deragon



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In the first instance, employers are not required to offer severance to departing employees, unless contractually obligated to do so. Employers typically consider offering severance when the terminating employee is a long-term employee, the circumstances of the termination were not the fault of either party, or when there is legal risk associated with the employee's termination. Employers are often hesitant to offer severance, as they see it as compensating an employee who may not "deserve" it or worry it will set a precedent and other employees will come to expect it. Severance, however, is an important tool that employers can use to mitigate their risk of being sued and to reaffirm other agreements such as non-solicitation, non-competition, trade secret, and confidentiality agreements.

When an employer offers severance, they can, and should, have the employee

waive any potential claims they have against the company via a release contained in the severance agreement. If the employee is over 40 years old, the ADEA requires that specific language be contained in the agreement to validly waive claims under that act and that that the employee be given up to 21 days to consider it and seven days to revoke it.

Severance agreements also give the employer an opportunity to have an employee reaffirm their obligations under non-solicit or non-compete agreements. This is important because if a prior non-compete agreement did not comply with the law (for example, if it was not presented to the employee prior to the employee accepting the job) then the severance payment can be the consideration that makes the non-compete agreement enforceable.

Businesses can also use severance agreements to prevent an employee from disparaging the company or disclosing confidential information. Often, the risk of having to pay back a severance will entice an otherwise disgruntled employee from retaliatory actions that he or she was otherwise considering taking. Employers need to be cautious, however, with broad non-disparagement clauses and requirements that the employee keep the agreement confidential. On February 21, 2023, the NLRB ruled that such clauses impermissibly attempt to deter employees from engaging in protected concerted activity.

There are some claims that cannot be released in settlement agreements or severance agreements, but creative language in a severance agreement can still protect an

employer. For example, the employer can have the employee affirm that they have been paid all wages to date and that they are not aware of any unreported workplace injuries. If a former employee later tries to claim that they are due wages, the employer can use this affirmation to impeach the employee and to show that as of that date, the employee considered themselves paid in full.

Likewise, while an employer cannot prevent an employee from cooperating with an EEOC or HRC investigation, a severance can prevent an employee from receiving any monetary award from the results of said investigation, thus, usually disincentivizing the employee from pursuing such a claim.

If an employer has a protracted negotiation with an employee over the severance amount, the employer should be sure to determine whether the employee received unemployment in the interim, determine whether any overpayment is due to the New Hampshire Department of Employment Security, and as part of the severance offer, include repayment of that overpayment from the severance.

While employers' main objective in presenting severance agreements to employees is to protect it from liability, for employees receiving the severance agreement the main objective is to receive a fair amount relative to the value of the claims being waived and ensure that they will be receiving all amount owed pursuant to contractual terms and policies and practices. Employees can also use a severance negotiation to try to receive an employer-paid continuation of benefits such

as healthcare.

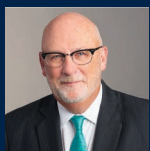
Before signing a severance agreement, employees should review all relevant employment documents such as offer letters, employment contracts, handbooks, and any other company policies and procedures related to the terms and conditions of employment. For at-will employees, offer letters should provide the terms of conditions of employment, including bonus or commission information and payout of time off policies. While employees cannot waive wage and hour claims in a release, employers will insert language in the agreement stating that the individual agrees that all owed wages have been paid.

Often, employers believe erroneously that amounts otherwise due to a departing employee (e.g., wages, bonus, commission, vacation time) are included in the severance amount offered. This is not the case. The severance is consideration for the employee waiving claims and does not include amounts that otherwise would have been paid to the employee at termination of employment.

Employees with employment contracts face more complicated issues because they and their employer agreed to employ them for a stated period of time unless certain contingencies occurred, and they might be entitled to additional severance if the employer is ending their employment for a reason that is not proscribed under the contract. Furthermore, the employment contract might contain severance provisions that must be ad-

SEVERANCE continued on page 37

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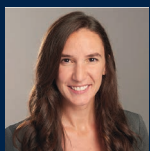
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Termination from page 26

“wrongful demotion.”

Deb: Which brings us to *Donovan v. Southern New Hampshire University*.

Nancy: Another case where the court snatched public policy from the jury.

Deb: *Donovan* holds that after a private college sets its guidelines for student grades, it can require its professors to implement them.

Nancy: Well, it frosts me that an Associate Dean lost her constructive termination claim, because she declined to alter grades.

Deb: The Associate Dean and Senior Associate Dean together had reviewed the course design for a math course and discovered that different instructors used different grading criteria, without communicating that difference to the students. The senior Dean concluded that two students who had failed, should be passed; but the plaintiff wouldn't change the grades.

Nancy: *Donovan* argued that the grade change requests were unethical and violated the school's grading policy, and she invoked the university's Whistleblower Policy (adopted to encourage faculty to raise concerns about “ethical conduct or violations of the University's policies”), to no avail. The employer changed the grades. The plaintiff claimed she was retaliated against by a resulting hostile work environment and her placement on a performance improvement plan (PIP) (albeit void of reference to the grade changes). Then she quit.

Deb: The trial court granted summary judgment, because the plaintiff, “failed

to establish the existence of a public policy that would support her refusal to alter grades in this case,” [because] “the determination of what grading policy to implement in a class, and whether exceptions to that policy should be made on a case-by-case basis, are matters of academic judgment that the Court will not second guess. Further, although the plaintiff believed SNHU's decision to be unethical, the court concluded that “it remained an internal policy determination of a private university.”

Nancy: It seems to me that the Court created an exception to wrongful termination based on its own politics.

Deb: The Court explained, “the plaintiff appears to maintain that public policy protects her refusal to comply with her supervisor's directive because she acted in accordance with the university's internal grading and whistleblower policies;” and that “because she complied with one internal policy - SNHU's Whistleblowers Policy - her refusal to comply with another internal policy - SNHU's alleged departure from its grading policy - constitutes an act protected by public policy.” The court found this argument to be “circular and insufficient as a matter of law to sustain a wrongful termination claim. Put simply, whether the plaintiff complied with the university's Whistleblower Policy has no bearing on whether public policy supports her conduct.”

Nancy: What? The court just broadcast to all private school teachers: “Do what you are told and change Johnny's grade, regardless of if it is deserved!” Why? Because under *Donovan*, any ethical opposi-

tion “would subject the internal grading decisions of a private university to the ethical considerations of a jury and contravene the well-established principle disfavoring judicial intervention in disputes involving academic standards.”

Deb: *Short v SAU 16* set public policy at whatever an elected school board said it was; and *Donovan v. SNHU* removes from public policy whatever a private institution decides.

Nancy: I don't brag about New Hampshire common law anymore. ■

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Severance from page 27

hered to, along with requirements for other benefits such as bonuses, commissions, stock options, and restrictive covenants.

When negotiating the severance amount with the employer, employees should consider the value of the claims they will be waiving. For example, if an employee has a disability and has been harassed by the employer and/or believes that the employer is terminating their employment for a reason related to their disability, the employee could present those arguments to the employer to support their demand for increased severance. When determining the value of the claim waived, employees should look beyond just regular compensation and consider the high value of certain benefits, such as health insurance.

While non-competition agreements are disfavored in New Hampshire, employees may have signed restrictive covenants at some point in their employment. The terms of the restrictive covenant could also be ne-

gotiated during the review of the severance agreement. This is another reason to make sure that the employee understands the scope of the employment related documents that are at issue.

Severance is a valuable tool in an employer's tool belt and can be helpful to employees in their transition to new employment, but like with most legal issues, employers and employees should consult competent employment counsel prior to offering an employee severance and before signing a severance agreement. ■

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