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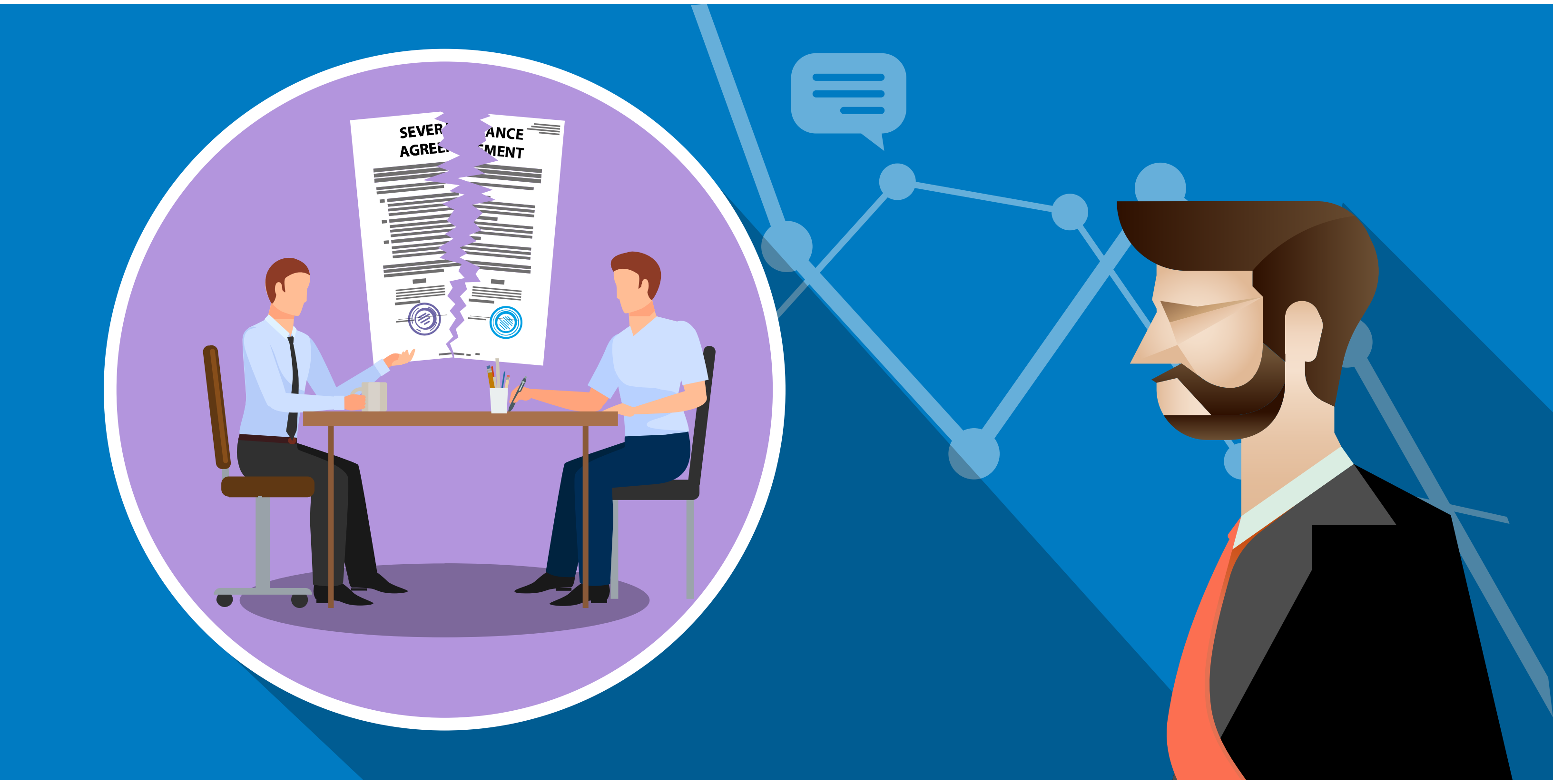

SEVERANCE PACKAGES: WHY EMPLOYERS NEED TO CONSIDER THEM

Why California employers offer severance pay even when the law doesn't require it, and which rights an employee can and cannot be asked to give up.

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Kyle D. Smith is a California employment lawyer and the author of the articles on WorkLawyers.com. He represents employees in disputes with their employers, from unpaid wages and misclassification to wrongful termination.

He writes these guides to put the state's labor laws into plain English, in neutral terms, with a citation for every claim.

During the course of business, employers inevitably have to let employees go. In some cases, business just isn't going well; in other cases, there may be a problem with a specific employee.

Whatever the case, employment sometimes must be terminated, and employers need to consider how to go about it. The most important question any California employer faces is whether to offer the departing employee a severance package. In most cases, California law does not require severance, but offering it can be a smart way for an employer to limit its legal risk.

A *severance package* is a payment by an employer to an employee at the time of the employee's termination. It is usually given in exchange for a written promise from the employee that they will not file a lawsuit against the employer.[1] This written promise is usually called a *severance agreement*.[2]

Most employees do *not* have a legal right to receive a severance package when their employment is terminated. But because severance agreements can help reduce an employer's legal liability, many companies offer severance packages regardless of whether they are required to do so.

CH. 01

Why are severance packages a good idea?

Even if an employer hasn't done anything wrong, severance pay can help them from a legal, social, and economic standpoint.

1.1 Legal Benefits

From a legal standpoint, severance pay is a routine way to prevent potentially litigious employees from suing down the road. It's often impossible to tell what kind of grievances an employee might have and how legitimate those grievances might be.

For example, an employee might have been assigned too much work and kept working off the clock without telling anyone. They might have been sexually harassed and not reported it. Or they might feel the termination was based on a discriminatory motive. In each of these situations, an employee might have a lawsuit and the employer wouldn't even know about it. It is also possible that the employee simply dislikes the employer and is willing to make up a story to bring a lawsuit.

So many, if not most, employers will err on the side of caution and provide terminated employees with a severance package.

1.2 Other Benefits

Beyond the legal benefits, severance pay can help ensure a smooth transition. Employees who receive a severance package are less likely to be angry at their employer. They're also less likely to badmouth the employer to clients, friends, customers, or other employees.

If other employees find out about the circumstances of the termination, they may feel more secure in their own jobs knowing that severance pay was provided. Severance indicates to existing employees that their employer respects them, even after they leave, and that it values their commitment to the business. In that way, severance pay can increase employee loyalty.

Finally, from a moral standpoint, severance pay can help alleviate any guilt an employer might feel, because they'll know the employee will have money to live on while finding a new job.

Imagine for a moment that you've just been fired. You're upset, of course, but what are your first thoughts? You might initially think about your family, your mortgage, or your bills. If you have no savings, you might even worry about what you're going to eat.

If these fears are running through your head, your first reaction might be to blame your employer. But if your employer just offered you a nice severance package, it's a lot harder to be angry at them. You're also far less likely to feel helpless if you have enough money to survive until you find a new job.

Overall, severance pay is just the right thing to do.

CH. 02

Are there any risks in offering severance pay?

As with any business deal, there are risks. Offering a severance package could signal to the employee that the employer is concerned about being sued. It could also remind an employee of potential lawsuits they hadn't planned on pursuing.

The most common risk is that an offer of severance pay incentivizes an employee to contact a lawyer to negotiate a higher package. The difficulty in measuring that risk, though, is that it's impossible to tell whether the employee would have contacted a lawyer anyway.

The likelihood is that an overly litigious employee will react the same way to being terminated no matter what. Other employees, by contrast, might be dissuaded from pursuing legal remedies if they're offered severance. So most people who carefully weigh the question of severance packages end up deciding in favor of offering one.

California's Evidence Code also prohibits an offer of severance from being used to prove liability.[3] So even if an employer runs the risk of reminding an employee about a potential lawsuit, the offer itself cannot be used to prove the employer is liable.

CH. 03

Are employers required to provide severance pay?

An employer is not required to provide severance pay. Even when it is in the employer's best interest to do so, there is usually no legal requirement to offer any kind of severance package. Offering severance also generally will not jeopardize the employee's unemployment benefits: California's Employment Development Department does not treat true severance pay as wages that reduce or delay those benefits, though pay characterized as wages "in lieu of notice" is treated differently.[4]

The exception to this rule is where an employment contract or other agreement provides for severance or other benefits on termination, retirement, or discharge. In that situation, the employer may be contractually bound to pay severance when the employment ends. These kinds of packages, however, are often reserved for executives or other high-profile employees.

CH. 04

How much severance pay should be provided?

The answer to this question changes in every case. From a purely pragmatic standpoint, the employer should ask how much is necessary to convince the employee to sign the severance agreement. Some employees may need the money more than others and may be willing to sign for less.

At the same time, the employer should consider how much is fair. If the employer is concerned about the employee saying negative things to clients or coworkers, a fair severance offer can help ensure the employee leaves satisfied.

The employer should also adopt some ascertainable standard for determining what kind of severance package to offer. For example, an employee may find out that a coworker was offered a severance substantially different from their own.

If the offers are not fair and relatively consistent, the employee may reject the offer or even be offended by it. Adopting a consistent standard for severance offers avoids much of that problem.

One standard that many employers adopt is based on how long the employee has been with the company. An employer using this approach might offer two weeks of severance pay for every year of service, and may also continue the employee's health coverage for a period. In practice, continued coverage usually runs through COBRA, for employers with 20 or more employees, or Cal-COBRA, for those with 2 to 19, which the former employee normally pays for, though an employer can agree to cover the premiums for a set time as part of the package.[5]

Whatever amount an employer settles on, the payment has to be real consideration: something the employee is not already entitled to.[6] Final wages, accrued and unused vacation or PTO, and earned commissions belong to the employee no matter what, and are due on their own strict timeline, so they cannot serve as the severance.[7] Rolling them into a single "severance" payment is a common and avoidable mistake: an agreement that offers only what the employee was already owed may lack the consideration needed to make the release enforceable.

CH. 05

Common Rights That May Be Waived

Only claims for civil violations, not crimes, can be legitimately waived in a severance agreement.[8] While many legal rights can be waived, these are the ones most commonly seen in severance agreements:

- The ability to sue for wrongful termination, harassment, or defamation.[9]
- The ability to sue for unlawful discrimination on the basis of the employee's gender, race, sex, age, religion, sexual orientation, and similar protected characteristics.
- The right to keep the amount of the severance payment confidential.[10]
- The right to discuss the employer's trade secrets.[11]
- The right to say negative things about the employer (a *non-disparagement* provision), within the limits California law places on such clauses.
- The ability to discuss the circumstances that led to the departure, so long as those circumstances do not involve unlawful conduct in the workplace.[12]
- The ability to sue for other known and unknown claims.[13]

An important limit applies to several of these items. Since 2022, California's Silenced No More Act has barred a severance agreement from prohibiting the employee from disclosing information about unlawful acts in the workplace, such as harassment, discrimination, or retaliation, or any other conduct the employee has reason to believe is unlawful.[14] A confidentiality or non-disparagement clause that touches on workplace conditions is unenforceable unless it also states, in substance: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."[15] An employer may still keep the amount paid confidential and may still protect genuine trade secrets.[16]

A separate, federal layer can also apply. The National Labor Relations Board has held that offering a nonsupervisory employee a severance agreement with an overly broad confidentiality or non-disparagement clause may itself violate the National Labor Relations Act, though the current Board has signaled it may reconsider that rule.[17]

Of course, there are many other potential issues an employer might ask an employee to waive.

CH. 06

Are there any claims that cannot be waived?

Yes. Several types of claims cannot be waived in a severance agreement. The most common examples include the following:

- The employee's right to pursue violations of California's wage and hour laws, such as the right to claim earned wages, unemployment insurance, minimum wage, or overtime pay.[18]
- An employer may *not* require an employee to sign a severance agreement before paying owed wages.[19] Employers must pay any owed wages whether or not the employee signs the severance agreement.
- The employee's right to report crimes.
- The right to file a charge with, or take part in an investigation by, the EEOC or the California Civil Rights Department. An employee can be asked to give up the right to personally recover money through such a proceeding, but not the right to file the charge or cooperate.[20]
- Any promise that would require the employee to break the law, such as committing perjury if called to testify against the company in court.[21]

- A provision that unlawfully restricts an employee from working for the former employer's competitors, often called a "non-compete clause."[22]
- Waivers so broad or vague that they would bar the employee from seeking employment at all.[23]
- If the employee is 40 or older, a waiver of age-discrimination claims will not be valid unless the employee is given enough time to consider it: at least 21 days for an individual severance agreement, or at least 45 days if the severance is offered to a group of employees as part of a termination or exit-incentive program, along with at least 7 days after signing to revoke.[24]

Beyond these rules, an employer may not induce an employee to sign a severance agreement through fraud, duress, or undue influence.[25] Nor may a severance agreement contain terms that are unconscionable. Each of these terms has a specific legal meaning, explained below.

6.1 Fraud

Fraud can occur where the employer deceives the employee about an important fact, or makes a promise it has no intention of keeping. It can also occur when the employer conceals an important fact that it has a duty to disclose.[26]

A severance agreement will often be unenforceable if it was signed as a result of the employer's fraudulent misrepresentations.[27]

6.2 Duress

Duress occurs when an employer threatens an employee in a way that compels the employee to sign the severance agreement out of fear.[28] The threat usually must be an unlawful one to meet the standard of duress.[29]

A severance agreement entered into under duress can sometimes be rescinded by the employee.[30]

6.3 Undue Influence

Undue influence is a legal phrase describing a type of coercive persuasion.[31] It occurs where an employer exerts excessive pressure on an employee to sign, exploiting the employee's mental, moral, or emotional weakness.[32]

An employee who has been induced to sign a severance agreement by undue influence can sometimes rescind it.[33]

6.4 Unconscionability

The legal doctrine of unconscionability is somewhat complicated. In general, courts look at two aspects of a severance agreement to decide whether it is unconscionable:[34]

- **Procedural unconscionability.** If one party has significantly more bargaining power, or the circumstances of the agreement were unfair to the employee, the agreement is more likely to be found unconscionable.[35]
- **Substantive unconscionability.** If one or more promises in the contract are one-sided or harsh, a court may find them substantively unconscionable.[36]

When a contract is unconscionable, courts have the power to refuse to enforce all or part of it.[37]

6.5 Additional Concerns

Beyond these requirements, other legal limitations may apply. For example, the employer must give the employee time to review the agreement. When a severance agreement includes a release of claims under the California Fair Employment and Housing Act, which most general releases do, the employer must tell the employee in writing that they have the right to consult an attorney and must give them at least five business days to do so.[38]

There are also special rules for severance agreements that release claims of age discrimination, discussed above.

Finally, a severance agreement may be unenforceable if it violates public policy.[39]

If you are unsure whether the waivers in your severance agreement are valid or enforceable, discuss the terms with an experienced California employment or contract lawyer.

References

1 See, e.g., *Skrbina v. Fleming Cos.* (1996) 45 Cal.App.4th 1353, 1366 ["In general, a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence."]; *Hill v. Kaiser Aetna* (1982) 130 Cal.App.3d 188 [discussing severance pay].

2 *Skrbina v. Fleming Cos.* (1996) 45 Cal.App.4th 1353, 1358 [discussing a situation where an employee signed a written release agreement in exchange for $8,000 in severance benefits].

3 Evid. Code, § 1152, subd. (a).

4 California Employment Development Department, Benefit Determination Guide (treatment of severance and dismissal pay).

5 Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §§ 1161–1168 (employers with 20 or more employees); Cal-COBRA, Health & Saf. Code, §§ 1366.20 et seq., and Ins. Code, §§ 10128.50 et seq. (2 to 19 employees).

6 Civ. Code, § 1605 [good consideration requires a benefit to which the promisor is "not lawfully entitled"].

7 Labor Code, §§ 201, 202, 203; see also § 206.5, subd. (a) [a release may not be required as a condition of paying wages that are due]. See our guide to waiting-time penalties.

8 Civ. Code, § 1668 ["All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."].

9 See, e.g., *Arthur v. City of Sacramento* (9th Cir. 2001) 250 F.3d 1289 [the jury found the employer had discriminated in violation of FEHA, but the

employee recovered nothing because he had released his claims in a severance agreement].

10 Gov. Code, § 12964.5, subd. (e) [a severance agreement may still preclude disclosure of the amount paid].

11 Gov. Code, § 12964.5, subd. (f) [an employer may still protect trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace].

12 *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 528 ["[I]t is possible to waive even First Amendment free speech rights by contract."]; but see Gov. Code, § 12964.5, subd. (b) [a separation agreement may not bar disclosure of information about unlawful acts in the workplace].

13 Civ. Code, § 1542.

14 Gov. Code, § 12964.5, subds. (b)(1)(A), (c), added by Stats. 2021, ch. 638 (SB 331), eff. Jan. 1, 2022. A parallel restriction on settlement agreements appears at Code Civ. Proc., § 1001.

15 Gov. Code, § 12964.5, subd. (b)(1)(B).

16 Gov. Code, § 12964.5, subds. (e), (f).

17 *McLaren Macomb* (2023) 372 NLRB No. 58; applied in, e.g., *Prime Communications, LP* (2026). The National Labor Relations Act generally covers nonsupervisory private-sector employees.

18 *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 365 ["an employer is required to timely pay wages due under Labor Code section 201 or 202 unconditionally and cannot require an employee to sign a waiver as a condition of payment."]; see also Labor Code, § 203.

19 Labor Code, § 206.5, subd. (a) [no release of a wage claim may be required as a condition of payment unless the wages have already been paid]; Labor Code, § 206, subd. (a) ["In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."].

20 U.S. Equal Employment Opportunity Commission, *Understanding Waivers of Discrimination Claims in Employee Severance Agreements*; see also Gov. Code, § 12964.5, subd. (a)(1)(A)(ii) [a "release of a claim or right" may not include the right to file with, or otherwise notify, a government agency].

21 Civ. Code, § 1668.

22 Bus. & Prof. Code, § 16600, subd. (a) ["Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."].

23 *Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407 [a contract must contain discernible duties and limits].

24 29 U.S.C. § 626(f)(1)(F)(i)–(ii), (G) (Older Workers Benefit Protection Act).

25 *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953, 960.

26 Civ. Code, § 1572; *Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal.App.3d 149, 160 ["Actual fraud occurs when a party to the contract intends to deceive another party to the contract or to induce another party to enter into the contract on the basis of a promise made without any intention of performing it or any other deceitful act."].

27 *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 ["[I]t has long been the rule that where a contract is secured by fraudulent representations, the injured party may elect to affirm the contract and sue for the fraud."].

28 Civ. Code, § 1569; *Lewis v. Fahn* (1952) 113 Cal.App.2d 95, 98–99.

29 *Holt v. Thomas* (1894) 105 Cal. 273, 276–277 ["It is not legal duress to threaten to or actually take advantage of the usual remedy for the enforcement of a debt or obligation."].

30 *Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1174 ["A party whose consent to a contract has been obtained by economic duress may rescind the contract under certain circumstances."].

31 *Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 Cal.App.2d 123, 130 ["Undue influence, in the sense we are concerned with here, is a shorthand legal phrase used to describe persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment."].

32 *Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443 ["In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person."]; *Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 Cal.App.2d 123, 130 ["The hallmark of such persuasion is high pressure, a pressure which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion. In this sense, undue influence has been called overpersuasion."].

33 *McDougall v. Roberts* (1919) 43 Cal.App. 553, 556 ["Prompt rescission and offer of restitution are essential to a recovery on the ground of undue influence."].

34 *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486 ["[U]nconscionability has both a 'procedural' and a 'substantive' element."].

35 *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 87 ["Where the parties to a contract have unequal bargaining power and the contract is not the result of real negotiation or meaningful choice, it is oppressive."].

36 *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1322.

37 Civ. Code, § 1670.5, subd. (a) ["If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."].

38 Gov. Code, § 12964.5, subd. (b)(4), added by Stats. 2021, ch. 638 (SB 331). The employee may sign sooner if the decision is knowing and voluntary.

39 *Town of Newton v. Rumery* (1987) 480 U.S. 386, 392.