



SEVERANCE AGREEMENTS IN CALIFORNIA: WHAT EMPLOYEES SHOULD KNOW

This article explains California's laws on severance agreements and packages, including which rights can be waived and which cannot.

CONTENTS

What Do Severance Agreements Do?

Common Rights That May Be Waived

Limitations on Severance Agreements

Is Severance Pay Required By Law?

How Severance Pay is Usually Calculated

What to Look for in a Severance Agreement

Should You Negotiate Your Severance Pay?

A Lawyer Can Sometimes Help

References

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



Not everyone leaves a job on his or her own terms. For whatever the reason—be it a firing, company downsizing, or a lay-off—being let go from a job can be a stressful experience. To make things less stressful, employers sometimes offer severance packages to departing employees.

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.

The rest of this article takes a closer look at the law governing severance agreements in California. If you have been asked to sign a severance agreement, it is often a good idea to have an employment lawyer take a look at it first.

What Do Severance Agreements Do?



As mentioned above, a *severance agreement* is a contract that an employer may ask an employee to sign when they are terminated from a job. In a severance agreement, the employer offers the employee a sum of money in exchange for the employee giving up certain rights, such as the right to sue the employer.

Severance agreements arise because, under California and federal law, workers have the right to sue their employers for many types of legal violations.³ Employers can prevent these types of lawsuits by obtaining a release of the employee's existing claims. This incentivizes employers to “buy” this release from employees at the time of their termination.

EXAMPLE

An employer terminates a worker and asks her to sign a severance agreement stating that she will not sue the employer for wrongful termination. In return, the employer pays her \$10,000.

In general, severance agreements are legally valid and will be upheld by courts, as long as the agreement was entered into voluntarily and the terms are legal.⁴ This is true even if it seems that the employer is getting the better deal.

Severance agreements may also ask employees to limit their behavior in other ways. For example, the severance agreement may require the worker to not talk about why they were terminated, to not speak poorly about the company, or to not share trade secrets.

As with an employee's agreement to waive a lawsuit, a severance agreement that limits the employee's post-employment behavior will often be upheld in court.

Common Rights That May Be Waived



Only claims for civil violations—not crimes—can be legitimately waived in a severance agreement.⁵ While it is possible that many legal rights can be waived, these are the most commonly seen in severance agreements:

- ✓ The ability to sue for wrongful termination, harassment, or defamation.⁶
- ✓ The ability to sue for unlawful discrimination on the basis of the employee's gender, race, sex, age, religion, sexual orientation, etc.
- ✓ The right to discuss the terms of the severance agreement or other matters with third parties (this is called a *confidentiality* provision).
- ✓ The right to discuss the employer's trade secrets.
- ✓ The right to say negative things about the employer (this is called a *non-disparagement* provision).
- ✓ The ability to openly talk about the situation leading up to the employee's termination.⁷
- ✓ The ability to sue for other known and unknown claims.⁸

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

Limitations on Severance Agreements



3.1 Unenforceable Provisions

There are several legal rights that *cannot* be waived in a severance agreement. Those include, but are not limited to, the following:

- ✓ A waiver of the employee's right to pursue violations of California's wage and hour laws—like their right to claim earned wages, unemployment insurance, minimum wage, or overtime pay.⁹
- ✓ An employer may *not* require an employee to sign a severance agreement before paying owed wages.¹⁰ Employers must pay their workers any owed wages whether or not they agree to the severance agreement.
- ✓ A waiver of the employee's right to report crimes.
- ✓ Any promise that would require the employee to break the law (like committing perjury if called to testify against the company in court).¹¹

- ✓ An agreement that unlawfully restricts an employee from working for the former employer's competitors (often called a "non-compete clause").¹²
- ✓ Waivers so broad or vague that they would bar the employee from exercising their right to seek employment.¹³
- ✓ If the employee is 40 years or older, the employer will sometimes be prohibited from requiring the employee to waive claims related to age discrimination unless the employee is given at least 45 days to consider the waiver (and at least 7 days to revoke it).¹⁴

In addition to these rules, an employer may not induce an employee to sign a severance agreement through fraud, duress, or undue influence.¹⁵ Nor may a severance agreement provide terms that are unconscionable. Each of these words have a specific legal meaning, which are explained below.

3.2 Fraud

Fraud can occur where the employer deceives the employee about an important fact, or where they make a promise they have no intention of keeping. It can also occur when the employer conceals an important fact, if the employer has a duty to disclose it.¹⁶

A severance agreement will often be unenforceable if it was signed as a result of the employer's fraudulent misrepresentations.¹⁷

3.3 Duress

Duress occurs when an employer threatens an employee in some way that compels the employee to sign the severance agreement out of fear.¹⁸ The employer's threat usually must be an unlawful one to meet the standard of duress.¹⁹

A severance agreement that is entered into under duress can sometimes be rescinded by the employee.²⁰

3.4 Undue Influence

Undue influence is a legal phrase used to describe a type of coercive persuasion.²¹ It occurs where an employer exerts excessive pressure on an employee to sign a

severance agreement, which exploits the employee's mental, moral, or emotional weaknesses.²²

An employee that has been induced to sign a severance agreement by undue influence can sometimes rescind the agreement.²³

3.5 Unconscionability

The legal doctrine of unconscionability is somewhat complicated. In general, courts look at two aspects of a severance agreement to determine whether it is unconscionable:²⁴

- ✓ **Procedural Unconscionability.** If one party has significantly more bargaining strength, or the circumstances of the agreement were unfair to the employee, the severance agreement is more likely to be viewed as unconscionable.²⁵
- ✓ **Substantive Unconscionability.** If one or more promises in the contract are one-sided or harsh, a court might find them to be substantively unconscionable.²⁶

When a contract is unconscionable, courts have the power to refuse to enforce all or part of it.²⁷

3.6 Additional Concerns

Beyond these requirements, there may be other legal limitations. For example, there are special rules for severance agreements that cover claims of age discrimination.

Likewise, severance agreements may be unenforceable if they are shown to violate public policy.²⁸

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

Is Severance Pay Required By Law?



In most cases, employers are *not* required to provide employees with severance packages. Severance agreements are contracts between private parties and are governed by California contract law. There is no law in California requiring employers to offer severance packages.

An employer is only obligated to give you severance pay if you have a previous agreement to receive it. For example, there may be a severance pay clause in your pre-employment contract, or your union agreement might mandate it. In those kinds of cases, you might have a right to severance pay.

How Severance Pay is Usually Calculated



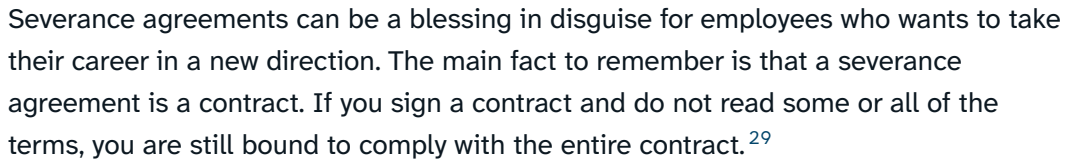
Even though the law does not usually require employers to provide severance packages, there are some general conventions that employers often follow in calculating them. A typical formula for severance pay may be: one week of the employee's regular rate of pay, multiplied by the number of years worked.

If, for example, the employee makes \$500.00 a week and they are let go from a job they have occupied for five years, they might be offered a \$2,500.00 severance package at termination. This is calculated as follows:

$$\$500.00 \times 5 \text{ weeks} = \$2,500.00$$

Of course, some employers will follow a different calculation. Other employers might arbitrarily choose a number they believe is fair. And still others might be bound by a specific calculation laid out in the worker's employment contract or the employer's previously-adopted policies.

More generous severance packages can include two weeks of pay for every year the employee has worked for the business. Some severance packages can also include an offer of one month's salary for every year of employment. The employer may also include benefits other than wages, such as pro-rated bonuses or medical insurance.



6.1 What Is Your Employer Getting?

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In the end, what they are offering may seem like a lot of money, but at what price? If you are waiving important legal rights that would entitle you to even more money, then you may not be getting such a good deal after all. Consider the following tips:

- ✓ If you feel your termination was unfair, you should be cautious about signing the severance agreement.
- ✓ If you are being laid off or quitting your job due to harassment, retaliation, or some other employment law violation, you should consider consulting an employment lawyer about any legal claims you have before signing the severance agreement.
- ✓ If the severance agreement contains a non-compete clause or non-disclosure clause, you should consider not signing the agreement. Although it may be questionable whether these clauses are enforceable, agreeing to a non-compete and non-disclosure clause could significantly limit the work you perform for your next employer and thus make searching for another job much more difficult.
- ✓ If the severance agreement involves admissions of fault, you should consider not signing the agreement. This is especially true if you are admitting or acknowledging workplace problems that you did not commit or weren't your fault. These admissions to fault could harm your future employment prospects and job benefits.
- ✓ If you witnessed wrongdoing in the workplace or you believe your employee rights were violated, you should be cautious about signing the severance agreement.

6.2 Do You Fully Understand the Agreement?

Another red flag to look out for is language that is confusing, broad, or vague. It is important that you understand exactly which rights you are waiving, and which obligations you are undertaking. It is usually unwise to sign a severance agreement without fully understanding its terms.

It might be a good idea to consult an employment attorney to understand if your rights were violated before you accept the severance agreement.

6.3 How Favorable Is the Offer?

Next, look at what you are being offered. It may be worth it to you to get a large severance payout in exchange for waiving your right to seek justice. But you do not have to simply accept what your employer is offering. Severance agreements can often be negotiated—especially if you have a valid legal claim against your employer.

A lump sum may seem like a lot of money, but consider your needs, your contribution to the company, and your relative ability to find another job. Will this be sufficient, or can you ask for more? Do you know if others have gotten more?³⁰

6.4 How Restrictive Are the Other Terms?

Finally, you should evaluate the other terms in the agreement. For example, if you have been laid off, you would want your severance agreement to indicate that you were not fired. You may also want to know if you can get a reference or a letter of recommendation from your supervisor or the employer. You may also want to be able to share the details of your severance agreement with future employers, to prove that you were not fired.

Does the agreement, as written, permit you to do the things you might want to do in the future?

Should You Negotiate Your Severance Pay?



Whether you should negotiate your severance pay will depend on a few factors. Unless you have previously signed an employment contract with the terms laid out, there may be room for negotiation.

Consider the following questions when trying to decide if you should negotiate your severance pay:

7.1 Why Are You Being Let Go?

If you are being let go due to your own negative behavior or performance, you are in less of a position to negotiate. If, however, you are a good employee but you are being laid off, you may have more room to negotiate.

You may also get a bigger severance package if your employer knows that you know that you may have a claim against them for wrongful termination or some other wrongdoing.

7.2 **How Long Have You Worked There?**

The longer you have been with a company, the more value you may have. When you leave, you are not just taking your skills away from the employer, you are also taking your specific knowledge, experience, and training, none of which can be easily replaced by a new employee.

7.3 **What Is Your Employer's Current Financial State?**

You may not specifically know your company's net worth, cash flow, or assets, but you can probably make a reasonable guess about how much your employer can afford to pay you.

If you work for a small company with only three employees, there is less of a chance you will get a large severance package than if you work for a large international corporation. However, if you are being laid off because the corporation is closing offices, they may not be willing to give you much money—regardless of their size.

A Lawyer Can Sometimes Help



No matter what your employer tells you, you are not required to sign a severance agreement, and you are not required to do so immediately. You always have the right to consult with a lawyer, even if you are sure you understand the terms.

Being terminated is often an upsetting, stressful event, and you may not be very objective when you are reading the severance agreement. Reading the severance agreement while in an emotional state might influence you to agree to unfavorable terms.

If a severance agreement requires you to give up any right to sue, you should consider consulting with an attorney before signing. An attorney can explain to you whether the severance agreement is legal and, if so, what you will be giving up.

If you are still not sure whether you would like to consult an attorney, consider the following questions when reviewing your severance agreement:

- ✓ Is the language too broad or too vague?
- ✓ Are you being pressured to sign it?

- ✓ Does your employer know that you are in a tight financial spot and need the money?
- ✓ Is your employer refusing to negotiate the terms with you?
- ✓ Are you being asked to give up your rights and receive little or nothing in return?
- ✓ Do you suspect fraud, or that your employer is lying to you?
- ✓ Are you specifically being discouraged from consulting with an attorney?
- ✓ If you are over 40 years old, does your severance agreement instruct you to consult an attorney?

Ultimately, negotiating a favorable severance agreement is like negotiating any other contract: it's an art. This is where a lawyer can greatly help you, especially if you have little experience with negotiation.

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 See, e.g., 29 U.S.C. § 216(b); Labor Code, § 2699, subd. (a); Gov. Code, § 12940; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1117.
- 4 See Civ. Code, § 1541 [“An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration.”]; *Skrbina v. Fleming Cos.* (1996) 45 Cal.App.4th 1353, 1366; *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F.3d 1289.
- 5 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.”].
- 6 See, e.g., *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F.3d 1289 [even though the jury found the employer liable for employment discrimination, the employee was barred from recovery because he waived his right to sue for all discrimination claims].
- 7 *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.”].
- 8 Civ. Code, § 1542.

- 9 *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.
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- 10 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.”].
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- 11 Civ. Code, § 1668.
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- 12 Bus. & Prof. Code, § 16600 [“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.”].
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- 13 *Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407 [a
contract must contain discernible duties and limits].
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- 14 29 U.S.C. § 626(f)(1).
-
- 15 *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953, 960.
-
- 16 Civ. Code, § 1570; *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.”].
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- 17 *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.”].
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- 18 Civ. Code, § 1569; *Lewis v. Fahn* (1952) 113 Cal.App.2d 95, 98–99.
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- 19 *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.”].
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- 20 *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.”].
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- 21 *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.”].
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- 22 *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.”].
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- 23 *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.”].
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- 24 *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486 [“[U]nconscionability has both a 'procedural' and a 'substantive' element.”].
-
- 25 *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.”].
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- 26 *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1322.
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- 27 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.”].
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- 28 *Town of Newton v. Rumery* (1987) 480 U.S. 386, 392.
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- 29 *Smith v. Occidental & Oriental S.S. Co.* (1893) 99 Cal. 462, 470-471 [“The general rule is that when a person with the capacity of reading and

understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding; but it is also a general rule that the assent of a party to a contract is necessary in order that it be binding upon him, and that, if the circumstances of a transaction are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if it can be made to appear that he did not in reality assent to it.”].

- 30 You might not, as it is fairly common for severance agreements to specifically bar talking about how much the severance agreement is worth.
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