

No Such Thing as a Risk-Free Termination

BY ANDREW GOULD, ESQ.

A CLIENT AND I recently discussed the merits of offering a group of laid-off employees additional compensation in the form of “severance compensation.” This is typically additional money or extended employee benefits in exchange for securing a general release, such as a binding contract barring someone from pursuing recovery for known and even unknown claims.

The president, wanting to show his appreciation and to help the laid-off workers transition to other work, was in favor of making the additional payments. Like most advisors, I explained the pros and cons of such offers. We finished the conference call without a decision one way or the other, but it occurred to me that in these challenging economic times, similar discussions were likely taking place between company leaders and their attorneys across the country. In fact, it is not just employers grappling with such issues.

Employees who have been shown the door are likely facing the question of whether to accept severance in exchange for relinquishing rights or potential claims against their former employer.

WROUGHT WITH PITFALLS

From the employer’s standpoint, the driving impetus behind the decision is peace of mind. There is no such thing as a risk-free termination decision. By its very nature, telling another person that they are being fired is wrought with pitfalls: is the explanation for termination valid; does the employee distrust the employer and view the decision as unfair; if it’s performance-based, was adequate opportunity for improvement necessary and/or given; if it’s based on the results of an internal investigation, was the investigation fairly conducted, and was the individual given adequate opportunity to put up a defense; was the termination meeting handled professionally, etc.

Everyone knows that an employee determined enough to sue his employer will do so, and the company will incur attorneys’ fees defending even a borderline meritless claim.

Like most business decisions, other factors must be considered. Most notably, companies must decide whether presenting a legal document to a former employee will make the person think twice about the offered

explanation for termination. The issue becomes even more complicated when the former employee is 40 years of age or older because, under a federal statute known as the Older Worker Benefit Protection Act, additional protections for such individuals must be included in the release, including notification in the document to seek counsel.

(i.e., the prospect of pursuing a lawsuit and recovering more money as a result) and whether there is something questionable about the circumstances of separation.

Whether you are an employer or employee, the decision to offer severance (or to accept such an offer) is not just about the money and can have unintended (and unanticipated) conse-

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Companies must also evaluate the precedent it sets by offering severance, and whether the dollar amount (assuming the offer is additional compensation) is reasonable or will be perceived as too little or too much (prompting an employee to believe the company is concerned about the termination).

quences down the road. For that reason it is always best to seek counsel whenever severance and release agreements are involved. □

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