

YOU RECEIVED A PINK SLIP AND SEPARATION AGREEMENT—NOW WHAT?

By Daniel N. Janich

Okay. So you have just been notified that your employment has been terminated. Perhaps you just came back from a meeting with the boss, or you received an email or other written notice from the HR department simply informing you to clean out your desk.

Overcoming the Initial Shock

After overcoming the initial shock of this news, you soon realize that you were handed some papers from your employer to sign. Among them is a proposed separation agreement with the terms of your severance package. Upon your brief initial review of the agreement you learn that you will receive your severance only if you agree to sign a release.

What are the issues that you should watch out for before putting pen to paper? Should you sign the severance agreement “as is” or do you believe you have any leverage to negotiate for a better deal and perhaps modify some of its terms? What should you do before signing a separation agreement?

First, before doing anything else, thoroughly read through the entire separation agreement. Make notes if necessary of provisions which may be of concern or which you do not understand or you think you might want to modify or even delete. You should also review any other employment or compensation related agreements that you may have signed with your former employer in the past as well as your Employee Handbook. The purpose of this review is to ensure that all the terms in your separation agreement are consistent with those in other documents. If they are not, your separation agreement will most likely expressly provide that its terms supersede those of any earlier agreement or understanding, thus effectively nullifying these earlier agreements if and when you sign the separation agreement. In such case you need to be keenly aware of exactly just what it is that you are giving up by signing the separation agreement.

If you are at all uncomfortable with any of the provisions in the separation agreement, and there is a big enough severance amount involved in your deal, you will likely benefit by hiring an experienced attorney to review the agreement for you and provide you with an analysis and recommendations. You may also want the attorney to negotiate with your former employer on your behalf. The fees involved may be money well spent because you will be made aware of potential problems with the agreement that you did not spot on your own, and you will be provided with practical solutions that will not only preserve your severance benefits but might also provide you with more favorable terms for your agreement. Additionally, the attorney may also uncover claims against your former employer you may not even been aware you had.

Review the Agreement

Second, regardless of whether you hire an attorney, determine if the agreement presents issues that either need to be resolved or clarified before you are ready to sign it. Here is a list in no particular order of importance—and by no means exhaustive—of the typical provisions in a separation agreement which might cause problems for employees, and therefore, which you should review very carefully:

- Termination date. Your termination will end your participation in the company's benefit plans. When will you be required to transition your health coverage under COBRA? Under COBRA the entire cost of your health insurance premiums under the company's group coverage will generally be paid out of your own pocket. (See COBRA discussion below).
- Severance amount. Is your severance consistent with the company's severance policy and practice? Are you being downsized and perhaps entitled to participate in a company sponsored severance plan? Is the severance amount that is being offered sufficient to justify you signing a release?
- Method and manner severance is to be paid. For how long will you be receiving severance payments? Does the structure of your severance payouts comply with Internal Revenue Code Section 409A's deferred compensation rules? (Ask the company's HR department or your lawyer about this issue as the penalties for non-compliance could be great.) When will severance payments begin and under what circumstances might they end before you receive the entire amount?
- Scope and duration of the noncompete. A noncompete provision in your separation agreement means that you might be prevented from seeking other viable job opportunities in your field within your former employer's industry for a certain period of time and within a designated geographic area after signing the separation agreement. What is the duration of your noncompete? How big is the geographic area? You should ascertain whether you could obtain a waiver of these restrictions if necessary.
- Nondisparagement. Will you be prevented from saying anything negative, even if it is truthful, to anyone either orally, in writing or through social media regarding your former employer or the products and services provided by your former employer? Is this provision mutual, which would prevent your former employer from saying negative things to others about your character or job performance? Should you negotiate receiving a letter of recommendation from your former employer or a positive recommendation if a prospective employer should contact your former one?
- COBRA coverage. When will your COBRA coverage begin? Have you received your COBRA notice and election form? When is your election form due? When is your first premium payment due? You might be able to negotiate that a portion of your COBRA premiums be subsidized by your former employer. Are there any

circumstances that might extend your COBRA coverage, if necessary, beyond the initial 18 months following your employment termination?

- Continuing Cooperation. Are you required under the separation agreement to be available to your former employer if needed as a witness or to participate in a legal investigation on behalf of the company? If so, how will you be compensated for your time and your out-of-pocket expenses? Is there flexibility in the amount of time you are required to provide and when you must make yourself available to your former employer?
- Scope of general release. Is the general release that you are required to sign prepared broadly to cover any possible claim of any kind and at any time in the past, present or future, in connection with your former employer? Or does it address only claims relating to your employment relationship and its termination? When must you sign and return the release? Is this at the same time as the date your separation agreement must be signed and returned?

Some Additional Pointers

If the provisions of your separation agreement require negotiation of its terms, then you should seek at the outset a written extension of time to sign and return the separation agreement and release. In fact, it is a good idea to obtain a written extension as soon as the need for it is apparent to give you sufficient time to resolve issues of concern in the agreement or release without undue pressure to accept terms you might not otherwise agree upon simply to avoid forfeiting the severance amount that was offered to you.

Prior to signing any release you should consider and discuss with your attorney whether you have any potential claims—which would most likely be employment or benefit related—that you would be giving up by signing the release. Your attorney should confirm with you after reviewing your employment related documents, including your written employment agreement if any, and copies of any retirement or welfare plan documents, as to whether the severance payout under the separation agreement is a sum that justifies your signing the waiver of claims under the release. To this end, any compensation and benefits that you already earned prior to the termination of your employment should not be counted as part of your severance amount.

If you are participating in various stock-based compensation plans and programs, you should assess prior to signing your separation agreement whether you are "leaving money on the table" in the form of appreciated but unvested shares, options or units as of your effective termination date. If so, you may consider whether some or all of your unvested interests can be vested as of your termination date, or whether you can receive an extra amount of cash to compensate you for this forfeited benefit.

Your qualified and nonqualified retirement benefits are generally governed by plan documents other than your separation agreement. Again you will need to assess whether and how your employment termination will affect your vested interest in these retirement

plans. Although not of immediate concern, you should also eventually determine whether it might be best to rollover any retirement benefits from your 401(k) plan into an IRA or another 401(k) of your next employer.

Before signing the release you should understand exactly what it is you are signing. Once the release has been signed, you will have permanently given up your rights in exchange for the severance payment agreed upon in the separation agreement. There cannot be any lingering doubts or other second thoughts about whether you should have signed the separation package and release. Once it is done there is no looking back.

This blog post is certainly not intended to be a complete discussion of all potential concerns and issues that may arise in connection with your decision whether to sign the proposed separation agreement. In fact, your circumstance may call for your separation agreement to be dealt with differently from the way your co-worker deals with an identical separation agreement. That is why when your livelihood and rights are at stake, consulting with an experienced attorney may, in the long run, be the right decision for your career.

Daniel N. Janich is a Partner in the Employee Benefits and Executive Compensation Practice Group at Greensfelder, Hemker & Gale, P.C. in Chicago. Dan has extensive experience representing clients in a broad range of benefits and compensation matters, including the drafting, negotiation and litigation of employment agreements and separation packages. dnj@greensfelder.com; 312-558-1070.