



NORTH RISK PARTNERS™

The Pros and Cons of Severance Agreements

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TOPICS INCLUDE:

- Pros and Cons of Severance Agreements
- Older Workers Benefits Protections Act (OWBPA)
- Worker Adjustment and Retraining Notification (WARN) Act
- Model Severance Agreement for Employees Over 40



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Pros and Cons of Severance Agreements

Introduction

Letting an employee go can be one of the most difficult aspects of being an employer. Whether it's laying off a long-term employee or firing of a nuisance worker, handling a termination is difficult. Among the many issues that employers must address is whether to offer a severance package. If you are thinking about a severance agreement, here are some pros, cons, and other important considerations.



Introduction

Employers who pay out severance to their employees run certain risks that need to be considered beforehand. Private employers can still run into hot water when trying to sever employment relationships.



What's Involved?

Before we look at the risks, let's define what we're looking at. Broadly, a severance agreement is any contract that is entered into between an employer and a departing employee, usually providing some form of compensation to the departing worker in exchange for something.



What's Involved?

Some employers pay employees a lump sum at the end of their tenure in order to tide them over until they find a new job, and never enter into a contractual agreement with them.



What's Involved?

This is perfectly legal, but it should be seen as a gift and nothing more. That employee is free to sue the employer for any reason and the severance payout has no legal significance at all.



What's Involved?

There are some employers that choose to make the "gift" payout because they believe it is the right thing to do, or because it is a standard practice. Some of these employers also hope that this will help convince the employee that the company is a good and professional employer, less likely to be the target of a lawsuit by that employee.



What's Involved?

But most employers who use severance payouts ask their employees to sign a document essentially releasing the company from any and all legal liability upon acceptance. This way, the relationship can be considered to be completely and forever severed, each party moving on in the world, never again to have to deal with each other.



Pros and Cons

What are the pros and cons to entering into such an agreement? The pros are fairly obvious.



Pros and Cons

For a simple payout and a signature, the employer avoids possible messy legal action in the future. It can get rid of the headache by buying some freedom, or at least buy some certainty that a lawsuit will not follow. A good night's sleep, free from the worry of a threatened lawsuit, is the clear upside of such agreements.



Pros and Cons

But severance agreements are not right for every employer and every situation, and the following considerations should be taken into account.



Pros and Cons

First off, how much is enough to induce the employee to sign? This is one of the most common questions we receive from clients. Unfortunately, there is no local standard, and most industries have no such standard either. It is a case-by-case situation, usually tied to either some round figure that sounds enticing enough for the employee to sign, or sometimes tied to a number of weeks or months of the employee's pay.



Pros and Cons

Employers may consider the following circumstances when determining how much severance to offer:

- Pay level/salary received prior to termination
- Duration of employment
- Position at company
- Performance



Pros and Cons

Second, will the employee sign the document? This is the big question. Many times, if the employment relationship is rocky, and the employee is fearful, and possibly litigious, offering them a severance agreement could be a bad step.



Pros and Cons

The employee might start to think that "where there's smoke, there's fire," and begin believing a conspiracy theory exists where you must be trying to hide something by buying them off. Sometimes we recommend that you simply terminate the employee and cross your fingers, for fear that handing them a severance agreement will plant ideas in their head that you must be covering up something.



Pros and Cons

Third, what happens if they don't sign the document? The employee might take the unsigned document and try to use it as evidence in a legal proceeding later on. You can imagine an employee arguing to a jury, "Hey look – if they didn't have anything to hide, why were they trying to shut me up and keep me out of court?" For these reasons, employers must be cautious in using a severance agreement.



Pros and Cons

The final consideration to take into account is the age of the employee. If departing employees are age 40 or above, they receive special legal protections when it comes to severance agreements under a law called the Older Worker Benefit Protection Act (OWBPA).



Pros and Cons

The severance document must contain certain language advising the employees of their rights under federal law, and must advise them to take the document to a lawyer to have it reviewed.



Pros and Cons

Also, the OWBPA provides for a mandatory waiting period of at least seven days between the time you originally enter into the agreement and the time when the agreement can be countersigned and the severance paid.



Pros and Cons

This cooling-off period could be used for the employee to go to a lawyer, who might advise them of their opportunity to file a legal claim or threaten a lawsuit instead, when the payout might be much higher.



What to Include

If you decide to offer an agreement, what should it say?
Most attorneys say it should cover:

- The severance payment and terms the employee will receive on signing.
- A general release from future litigation.



What to Include

- A provision to keep the terms confidential, with exceptions for spouses, attorneys and accountants.
- A mutual non-disparagement clause that prevents both the employer and the former employee from denigrating each other.



What to Include

- The employee's agreement to return all company property.
- The employer's agreement not to oppose an unemployment compensation claim.



What to Include

- A no-rehire provision, which precludes the employee from applying for or accepting a position with the company in the future. These provisions protect the employer from any claims that the worker either expected or has a legal right to future employment with the business and protects the organization from potential retaliation suits.



What to Include

- An "integration" or "merger" clause that specifies that this is the full and final agreement between employee and employer concerning the employment and termination. The provision protects both parties from any argument that there was—or could have been—an ancillary verbal or written understanding that somehow modified the separation agreement itself.



What to Include

The federal Older Workers Benefit Protection Act, or OWBPA, requires that employees 40 and older be allowed 21 days to review the agreement before signing and then have seven days to change their minds afterwards.



What to Include

In addition, special compensation provisions may be needed if the employer owes the worker commissions or deferred compensation, or if the employee owes the company for excess vacation leave or certain education and training costs.





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Older Workers Benefits
Protections Act (OWBPA)

OWBPA

Are you considering a reduction in force (RIF) that includes a severance package for employees? Are some of the employees included in the RIF over the age of 40? Before you take another step, make sure you know the requirements of the Older Workers Benefits Protections Act (OWBPA) or you could be faced with paying both a severance package and for a lawsuit demanding more money.



OWBPA

The OWBPA, which is part of the Age Discrimination in Employment Act (ADEA), safeguards older workers' employee benefits from age discrimination. Among other things, this means that employers must take certain precautions when seeking a release from older workers that waives rights under the ADEA.



OWBPA

All release agreements that waive an employee's federal age discrimination claims under the ADEA must comply with the OWBPA. Specifically, the OWBPA requires that older workers provide a "knowing and voluntary" waiver of their age discrimination claims. In order to comply with this requirement, a release must, at a minimum:



OWBPA

- Be in writing.
- Be written in a manner reasonably calculated to be understood by the employee.
- Specifically refer to the ADEA.
- Not require the worker to waive claims that may arise after the date of execution.



OWBPA

- Be in exchange for something of value in addition to which the employee is already entitled.
- Advise the worker to consult an attorney before executing the release.
- Allow the worker 21 days to consider the offer.
- Allow the worker 7 days to revoke the agreement after execution.



OWBPA

The OWBPA imposes additional requirements on employers when the release is sought in connection with a RIF of two or more employees over the age of 40. First, the time period that a worker must be given to consider the agreement increases from 21 to 45 days. Second, the employer must provide the over-40 employee with detailed information about the RIF. Specifically, an employer must disclose, in writing:



OWBPA

- The class, unit or group of individuals covered by the exit program.
- The eligibility factors for the exit program.
- The job titles and ages of all individuals eligible for or selected for the program.
- The ages of all employees in the same class who were not eligible or selected for the program.



OWBPA

The OWBPA equally applies to early retirement plans, exit incentive programs, involuntary terminations and RIFs, but it is important to note that the law applies only to the waiver of federal age discrimination claims under the ADEA – it does not apply, for example, to state law age discrimination claims. Further, it is important to remember that the EEOC can always enforce the protections of the ADEA, so a release cannot prohibit an employee from filing a charge with the EEOC or participating in an EEOC investigation.





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Worker Adjustment and Retraining Notification (WARN) Act

WARN Act

The Worker Adjustment and Retraining Notification Act (WARN Act) offers: "protection to workers, their families, and communities by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs."



WARN Act

Why did the country need a WARN Act? It's simple. When an employer lays off a large number of people without warning, the economic impact of the layoff hits the employee and their family members hard. The layoff can have a negative impact on family relationships and on their ability to purchase goods and services.



WARN Act

As a result of the inability of the employee and their family to purchase goods and services, the larger, overall community experiences a negative impact on their economic conditions. This widespread impact caused a domino effect as employees with insufficient funds fail to purchase products and services in their communities.



The WARN Act Requires Employers to Give 60 Days Notice

The WARN Act requires that the employer provide 60 days of written notice of the intention to lay off more than 50 employees during any 30-day period as part of a plant closing.



The WARN Act Requires Employers to Give 60 Days Notice

The notice must be provided to employees; the State dislocated worker unit and the chief elected official of the unit of local government in which the employment site is located, and any collective bargaining unit.



The WARN Act Requires Employers to Give 60 Days Notice

This requirement does not consider the layoff of employees who have worked for the employer less than six months in the past 12 months, or employees who work, on average, less than 20 hours a week.



Seven horizontal lines for notes.

Requirements of the WARN Act

Additionally, the WARN Act requires employers to give notice of any mass layoff, that does not result from a plant closing but will result in an employment loss of 500 or more employees during any 30-day period. The Act also covers employment loss for 50-499 employees if they make up at least 33 percent of the employer's active workforce.



Seven horizontal lines for notes.

Requirements of the WARN Act

This requirement does not consider the layoff of employees who have worked for the employer less than six months in the past 12 months, or employees who work, on average, less than 20 hours a week.



Seven horizontal lines for notes.

Penalties of the WARN Act

Under the WARN Act provisions, an employer who orders a plant closing or mass layoff without providing this notice is liable to each unnotified employee for back pay and benefits for up to 60 days during which the employer is in violation of the WARN Act. (The employer's liability may be reduced by the amount of any wages or unconditional payments paid to the employee during the violation time period.)



Penalties of the WARN Act

The employer who fails to provide this notice to the implicated local government is charged a civil penalty of up to \$500 for each day the employer violates notification requirements. Employers can avoid this penalty if the employer pays each affected employee within three weeks after the plant closing or layoff.



Penalties of the WARN Act

A plant employer in Michigan was forced to lay off 26 employees (non-union) during a potential client bankruptcy situation. No sooner did the laid-off employees hit the unemployment offices in the state than the WARN Act officials were on the phone with the company.



Penalties of the WARN Act

Employees told their tales of woe to the unemployment compensation office workers and predicted that the company was in danger of closing completely. They bemoaned their lost coworkers and predicted that everyone would soon become unemployed.



Penalties of the WARN Act

After hearing these stories of fear and concern from many of the laid-off employees, the front line unemployment workers became worried that the stories were true.



Penalties of the WARN Act

The front line workers at the unemployment compensation office notified their supervisors who notified the state. The company was able to tell the WARN Act officials that they had not, and did not intend to violate the WARN Act.



Lessons Learned about the WARN Act

But, the experience was a lesson in how quickly the state reacted to a former employee-spread rumor. It was also a lesson in keeping employees up-to-date by communicating transparently with them over time. Had they received the company's economic data regularly, the layoffs would not have been a surprise. They would have understood that the layoffs were a short-term economic reality measure—not a permanent situation or plant closure.



Lessons Learned about the WARN Act

Since you'll want to hear the end of the story, the short-term cuts helped save the company which is thriving today. No additional employee layoffs were required. The WARN Act was never violated. Several good former employees were rehired.



Lessons Learned about the WARN Act

The lesson for employers? Always follow employment laws that are applicable in your industry, in your community, and as required from all levels of state and Federal government.





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Model Severance Agreement for Employees Over 40

Model Severance Agreement (Over 40)

SEVERANCE AGREEMENT

THIS AGREEMENT IS STRICTLY CONFIDENTIAL

This Severance Agreement ("Agreement") is made by and between _____ ("CO") and _____, ("Employee", and with CO, sometimes collectively referred to as the "Parties").

WHEREAS, CO and Employee desire to terminate their relationship amicably and have agreed to a full resolution of all matters relating to Employee's employment with and separation from CO.

NOW, THEREFORE, in consideration of the mutual promises and covenants established herein, the Parties agree as follows:



Model Severance Agreement Over 40

1. **Payment.** In consideration of and in full payment of all potential claims and causes of action Employee has, had, or may have against CO, CO agrees to pay to Employee a lump sum of _____ Dollars (\$ _____). This amount includes all amounts that Employee claims are owed to Employee. CO disputes that any amounts are owed and CO is not admitting any unlawful or otherwise wrongful conduct or liability to Employee but, in exchange for the consideration set forth herein, shall pay Employee the amounts as provided above. All Parties agree that this payment is, for purposes of this Agreement, considered to be severance paid to Employee by CO in exchange for the releases that are provided herein. Accordingly, this payment shall be taxable and CO shall make the usual and customary withholdings for federal and state income tax, Social Security, and Medicare.

This payment shall be made as soon as reasonably possible following expiration of the rescission period described in paragraph 13 below. Employee agrees and understands that the payment described in this paragraph is the sole payment to be made by CO to Employee or to any of Employee's agents or representatives, and that CO will have no other liability or obligation to make other payments following Employee's execution of this Agreement, except as provided herein.



Model Severance Agreement Over 40

2. Employee's Release of Claims. As a material inducement for CO to enter into this Agreement and to make the payment described in paragraph 1 above, Employee, on behalf of Employee and Employee heirs, successors, assigns and agents, hereby irrevocably and unconditionally releases, acquits, and forever discharges CO and each of its owners, stockholders, predecessors, successors, assigns, agents, clients, members, directors, officers, fiduciaries, representatives, attorneys, divisions, subsidiaries and affiliates (and agents, directors, officers, fiduciaries, representatives, and attorneys of such divisions, subsidiaries and affiliates), and all persons acting by, through, under, or in concert with any of them on their joint and several behalf (the "CO Releasees"), from any and all known and unknown liability, claims, demands, actions, causes of action, suits, grievances, debts, sums of money, controversies, agreements, promises, damages, back and front pay, costs, expenses, attorneys' fees, medical fees or expenses and remedies of any type which Employee now has or hereafter may have by reason of any matter, cause, act or omission from Employee's first day of employment with CO up to the execution of this Agreement. *(continued)*



Model Severance Agreement Over 40

The release shall include without limiting the generality of the foregoing, any and all claims, demands or actions for severance pay, claims for repayment of loans, return of property, conversion, breach of contract claims, promissory estoppels claims, wrongful discharge claims, tortious interference with contract claims, negligent or intentional misrepresentations, defamation or damage to business or personal reputation, assault and battery, negligent or intentional infliction of emotional distress, fraud or fraud in the inducement, discrimination, retaliation, harassment, whistleblowing, breach of implied covenant of good faith, or claims under any of CO's policies or practices, or any claims under the Employment Retirement Income Security Act (ERISA), Title VII of the Civil Rights Act(s) of 1964 and 1991, the Americans with Disabilities Act of 1990, the Fair Labor Standards Act, Family and Medical Leave Act (FMLA), the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, Worker Adjustment and Retraining Notification Act (WARN), Uniformed Services Employment and Reemployment Rights Act, *(continued)*



Model Severance Agreement Over 40

and any other federal, state or local statute or regulation regarding employment, discrimination in employment, or the termination of employment, and the common law of any state, and any and all claims or other liability or damage of any nature whatsoever which have arisen or might have arisen from any acts, omissions, events, circumstances or conditions related to Employee's employment with CO or termination of said employment, including but not limited to, any claims for defamation, unemployment compensation, invasion of privacy, intentional or negligent infliction of emotional distress, or other personal injuries arising under statute or common law. CO similarly releases all potential claims it could have against Employee either known, unknown, or which it should know of through the date of execution of this Agreement.



Model Severance Agreement Over 40

By executing this document, Employee is not waiving any claims to challenge the validity of this Agreement, claims that may arise after the date on which Employee executes this Agreement, or any claims that Employee cannot waive by operation of law, including the right to file a charge with or participate in an investigation conducted by the Equal Employment Opportunity Commission, or other federal, state, or local regulatory or law enforcement agency. Employee nevertheless understands and agrees that, because of the release Employee executes herein, Employee cannot obtain any personal relief from CO Releasees in any such proceeding. Employee also acknowledges that the release Employee executes herein waives Employee's right to file a court action or to seek individual remedies in such action and further agrees that if any person, organization, or other entity should bring a claim against the CO Releasees involving any matter covered by this Agreement, Employee will not accept any personal relief in any such action. Nothing in this Agreement shall alter or affect Employee's vested rights in, or accrued amounts owed by any benefit plan or program currently in effect, to the extent Employee has any such vested rights or accrued amounts owed.



Model Severance Agreement Over 40

3. Unemployment Compensation. CO will not contest any application Employee has made or will make for unemployment benefits in connection with the separation of Employee's employment from CO.

4. Confidentiality. All facts and circumstances related to the facts and circumstances surrounding the existence of and the terms of this Agreement will be treated as confidential by the Parties and may only be disclosed by the Parties to their medical or mental health care provider(s), attorney(s), accountant(s), tax authorities, and any court or governmental agency when required by law to make such disclosure. If asked about the settlement, each party may reply that the dispute has been successfully resolved.

5. Non-Disparagement and Non-Retaliation. The Parties agree to refrain from retaliating against, defaming, disparaging, or besmirching one another. This includes all relationships, both personal and professional, with current or former staff, and with third parties with whom CO had business or with which CO is presently doing business.



Model Severance Agreement Over 40

6. Confidential Information and Trade Secrets. The Parties agree that certain materials including, but not limited to, information, data and other materials relating to customers, development programs, costs, marketing, trading, investment, sales activities, promotion credit and financial data, manufacturing processes, financial methods, plans or the business and affairs of CO and its Affiliates, constitute proprietary confidential information and trade secrets. Accordingly, Employee will not at any time disclose or use for the Employee's own benefit or purposes or the benefit or purposes of any person or organization any proprietary confidential information or trade secrets. Employee further agrees that Employee will not retain or use at any time any trade names, trademark or other proprietary business designation used or owned in connection with the business of CO or any of its Affiliates.



Model Severance Agreement Over 40

7. Waiver of Costs and Fees. With the sole exception of the payment described in paragraph 1 above, Employee hereby waives and gives up any and all rights to demand payment of costs and/or attorney's fees pursuant to state or federal law, regulation or order or as may be available pursuant to the common law of the State of Minnesota or any other state.

8. Governing Law and Venue. This Agreement will be construed and interpreted in accordance with the substantive and procedural laws of the State of Minnesota and federal law (where appropriate), and any dispute arising hereunder shall be venued in the courts of the State of Minnesota, County of _____, which shall have exclusive jurisdiction of any such dispute. Employee consents to the personal jurisdiction of the State courts of Minnesota.



Model Severance Agreement Over 40

9. Entire Agreement. This Agreement constitutes the entire agreement between the Parties. The Parties affirmatively state that they have not been given any promises, representations, or inducements to enter into this Agreement, other than those specifically contained in the Agreement itself.

10. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

11. Severability. If for any reason a court of competent jurisdiction finds any provision of this Agreement to be unenforceable, the offending provision may be amended to the extent necessary to conform to applicable law or, if it cannot be so amended without materially altering the intention of the Parties, it shall be severed herefrom. In either event, the remainder of the Agreement shall continue in full force and effect.



Model Severance Agreement Over 40

12. Other Actions. Employee represents that Employee has not filed any complaints or charges against CO with any court, or with any other local, state, or federal agency and that Employee will not do so any time after the date of this Agreement. Further, Employee hereby represents and warrants that Employee has not previously assigned nor purported to assign or transfer to any person or entity any of the claims or causes of action herein released.



Model Severance Agreement Over 40

13. Consideration Period. Employee understands that Employee has up to twenty-one (21) days from _____, the day on which Employee receives this Agreement, to decide whether to sign it. Employee is also hereby advised to consult with an attorney before Employee signs this Agreement to discuss the release of Employee's rights, including the rights under federal age discrimination law and the Older Workers Benefit Protection Act. Employee understands that Employee may waive this consideration period and sign the Agreement whenever Employee voluntarily chooses to do so.

Employee understands that Employee may rescind this Agreement as to claims under the Age Discrimination in Employment Act within seven (7) days after signing the Agreement. Employee further understands that Employee has fifteen (15) calendar days after signing the Agreement to rescind it as to claims under the Minnesota Human Rights Act, Minn. Stat. Ch. 363. To be effective, Employee's rescission must be in writing and delivered to:

[Contact Name]
 [Address]
 [Address]

(continued) 

Model Severance Agreement Over 40

within the seven- or fifteen-day period. If a notice of such rescission is delivered by mail, it must be: (1) postmarked within the seven- or fifteen-day period; (2) properly addressed as set forth above; and (3) sent by certified mail return receipt requested. Employee understands that CO will have no obligations under this Agreement in the event any such notice of rescission is timely delivered, that any separation payment(s) made or benefits provided to Employee by CO prior to the date of rescission pursuant to this Agreement, if any, must then be repaid by Employee to CO immediately and without condition, and that Employee will then receive no severance payment(s) under this Agreement.

14. Declaration of Understanding. The Parties hereto declare that they have had the opportunity to review the terms of this Agreement with counsel of their choice, that the terms of this Agreement are fully understood, that they voluntarily accept those terms for the purpose of making a full and final compromise of all disputes between the Parties.



Model Severance Agreement Over 40

15. Reemployment or Future Association. Employee hereby agrees that Employee shall not seek reinstatement or apply for future employment with CO or any of its affiliates and subsidiaries; and should Employee apply for reinstatement or re-employment in violation of this paragraph 15, then neither CO nor any of its affiliates and subsidiaries shall incur any liability by virtue of its or their refusal to hire Employee or consider Employee for employment.

16. Successors and Assigns. This Agreement shall bind and inure to the benefit of and be enforceable by Employee, CO and their respective heirs, executors, personal representatives, successors and assigns, except that neither party may assign any rights or delegate any obligations hereunder without the prior written consent of the other party. Employee hereby consents to the assignment by CO of all of its rights and obligations hereunder to any successor to CO by merger or consolidation or purchase of all or substantially all of CO's, provided such transferee or successor assumes the liabilities of CO hereunder.


