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Dear Clients, Colleagues, and Friends,

This letter is another of my occasional informal updates on employment law issues that affect executives, managers, and professionals. Last year we enjoyed the upside of employment law—employment contracts, stock options, and negotiation strategies. Well, after the fat years . . . employment termination issues are now the main event. My hope is that you find the following brief discussion of severance pay to be of great interest and little relevance.

“Vengeance is mine,” cry many of the fired and laid-off executives who storm into my office. “Sue them!” Usually, I explain that a lawsuit is like a machine which you go into as a pig and come out as a sausage (Ambrose Bierce). For most, litigation is not a good alternative. It takes too long, it is all-consuming, it damages your business reputation, and it distracts from the main goal—a future career. The prime objective for the terminated executive is to move on with his or her life, not revenge. Frequently, the most practical resolution is a good severance package. Severance is not the outlet for supercharged emotions. It should be approached coldly as a dynamic business/legal negotiation process.

The Law. The cruel surprise is that severance pay is not required by law. Most employment relationships are not governed by a contract; the employment is “at will.” The employer or the executive may end it at any time for good reason, bad reason, or no reason at all, just so long as it is not for an unlawful reason. If the employment may be terminated at will, severance is typically not required.

The exceptions are important. Ideally, a written contract, made well before job jeopardy occurs, will require severance. Sometimes a controlling policy in an employment handbook creates a contractual duty to pay severance. Some companies bind themselves to pay severance by establishing a severance program which is governed by ERISA, the basic federal employee benefits law. Severance pay obligations will occasionally be established by the company’s obligation to deal in good faith and fairly. That obligation might arise if a company ends an executive’s employment shortly after uprooting the executive and relocating him.

Finally, an obligation to pay not severance, but lost wages and other damages, arises if the

employer violates an employment statute or judge-made case law. Examples include violations of the discrimination laws, terminations for unlawful retaliatory reasons, workplace harassment terminations, whistleblower-motivated terminations, and the like.

How to Proceed. Preparation for a severance negotiation should begin as soon as a job jeopardy situation arises. Often, it pays to take the initiative in jeopardy situations. Sometimes executives take the initiative and bring the issue of employment separation to their employer's attention before receiving formal notice of separation. This approach may lead to extremely positive severance negotiations. On other occasions, by raising employment issues first, executives win for themselves protection under whistleblowing and anti-retaliation statutes.

Preparation for job jeopardy situations entails keeping careful notes of all significant events that affect the employment relationship. All the critical documents must be assembled. A complete job history, including employment performance evaluations and compensation, should be assembled. All benefits, including insurance, stock options, and pension plans, should be reviewed. It is time also to check into the company rumor mill. Are there company-wide issues leading to the job loss? What has the company done in the past regarding severance? It is important to begin to decide who should be the negotiating partner in the company. Discreetly learn if anyone at the company will serve as an advocate.

The Negotiation Agenda. The executive should have a flexible and realistic negotiating agenda in mind before starting a severance negotiation. Start with the cash. Clients always ask what the "standard" severance package is. Unfortunately, there is no norm. Packages vary from company to company and sometimes from individual to individual executive. I have seen one week per year and one month per year of service formulas. I have seen minimum flat payments of six months and a year. Sometimes, highly compensated executives receive seven-figure packages. Zero is not unheard of. How much cash is only part of the question. Executives will want to carefully consider the timing of payment. Whether to demand a lump sum payment will depend upon many factors, including one's own personal financial situation, the viability and reliability of the company, the need to defer income for income tax purposes, and the need to remain "on payroll" for benefit purposes.

The executive will have to consider whether an event such as new employment will trigger a cessation of severance pay or lump sum acceleration. For many executives, part of the cash equation will include an adjustment for commissions or bonuses not yet paid. Also important is a continuation of benefits, mainly health insurance and pension contributions. Often in severance negotiations, companies can be persuaded to continue medical benefits for a fixed period of time or until new employment. This way, the executive does not have to assume medical insurance costs under COBRA.

The list of other possible severance cushions and arrangements is limited only by your creativity. Under appropriate circumstances, the executive might want to seek extended salary continuation, consultancy or some type of ongoing post-employment relationship at the company, stock options, continued automobile use, relocation expenses, reimbursement for legal expenses, and foreign tax adjustment.

Numerous issues arise in severance that will affect the future direction of the executive's career. The "departure story" can often be tailored to the executive's advantage. References can be obtained. Agreements are typically made to refrain from disparaging comments. Of critical importance for some executives are releases from non-competition restrictions.

The Strategy. While I hesitate to contradict a higher authority, my belief is that the meek inherit little or no severance. Ask for more. The first step in deciding a strategy requires evaluating factors like those I discussed above under "The Law." Was there a contract? Is there a binding ERISA severance plan? Has the executive been fired, or is it a layoff? Is the employment termination linked in any way to unlawful employer conduct such as discrimination or retaliation? Whenever the employer violates a contract or a legal right, the executive's bargaining leverage increases.

What if no right has been violated and no severance obligation exists? Can severance be improved under these circumstances? The answer is, often, yes. The key here is to appeal to the company's own agenda. Typically it has two parts. First, employers want employment terminations to be problem-free. Employers do not want the expense and distraction of employment claims. Also, employers know that disgruntled ex-executives may hurt the morale of the remaining employees and interfere with executive recruitment.

There is usually a second company agenda. The "company" fires and lays off, but individual managers and human resource employees do the dirty work. At the end of the day, it is extremely important to them to feel they have acted "fairly."

Who should negotiate for the executive? If the employment separation raises legal rights or contract violations, I believe that the executive is best served by an experienced employment lawyer. If the appeal to the company, however, is mainly based upon "fairness" and avoidance of disruption, sometimes it is better for the displaced executive to negotiate for herself with the employment lawyer staying in the background and providing guidance. This strategy will vary from case to case.

The Formalities. The wrapup document in the severance negotiation is the Severance Agreement and Release. The Agreement portion spells out the severance benefits and the obligation of the parties to one another, such as nondisparagement. The Release portion mainly concerns the

company, although sometimes the executive will also want to be released from claims. The Release is the bury-the-hatchet part of the agreement. It is the executive's guarantee to the company that in exchange for the severance package there will be no lawsuit or subsequent claim. The executive must be certain not to give up vested benefits or claims for unemployment insurance and worker's compensation.

The standard Agreement gives the executive 21 days to consider it and 7 days to revoke it after signature. The executive need not take the full 21-day period to think about the Agreement, but will rarely be paid prior to the end of the 7-day revocation period. These clauses do not come

from the company's generosity. Federal law states that releases will not bar federal age discrimination cases without the 21- and 7-day periods.

The Other Concerns. Job separation can be a wrenching emotional event. It's not just the money. It may spark a whole range of issues concerning the direction of one's life and career. For many, it becomes a time to take stock. I am not the Pollyanna type, but long experience with executive job loss has led me to believe that when one door shuts . . .

I hope that this letter finds you well. Enjoy the rest of the summer.

Sincerely,

Stephen H. Kahn

<p>You know the rules: this letter is not legal advice. Every situation depends upon its unique facts. Call if you have questions</p>
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