

SEVERANCE AGREEMENTS

By Charles M. Watkins

AS WE ALL KNOW, the “parting” of an employment relationship isn’t always “sweet sorrow.” Christian ministries employ sinners, and even when people are doing their best to get along and work well, individually and as part of a team, our humanness and persisting sinfulness are such that the relationship simply doesn’t work out as we had hoped.

Just as with employment agreements, it’s often important for both employer and employee to have a well-written severance agreement, expressing the terms of their understanding about how they’ll conduct themselves toward each other *after* the employment relationship ends.

This is particularly true when the employment relationship ends “badly,” e.g., the employee is fired, or quits because of some real or perceived employer misconduct. In these cases, a severance agreement can help the parties refrain from expressing their emotions, often all too close to the surface at such a time, in ways that further damage themselves or future relationships.

In most cases, the employer has the first draft of a severance agreement in hand, hopefully prepared by its counsel, who’s familiar with both federal and state employment law. Some small employers aren’t subject to federal employment law, but are subject to comparable non-discrimination and other provisions of state law. In addition, state law governs such matters as timely payment of wages, and confidentiality and non-competition agreements.

What are the key elements of a severance agreement which protects both the employer and employee?

- Severance pay (subject to employment tax withholding) and/or continuation of benefits, such as health insurance. When will these be paid? In a lump sum, or over what period of time? In some cases, these may be based on the terms of a preexisting employment agreement. If severance payments or other benefits exceed twice the final salary, or extend beyond December 31 of the second year after termination, the agreement must include terms complying with the requirements of §409A of the Internal Revenue Code.

- A requirement that the employee return all employer-owned property and documents, and submit all outstanding expense claims by a specified date. Any claims not timely submitted are waived.

- Mutual releases of all claims for prior violations of fed-

eral, state or local law. In order for such a release to be valid for federal law purposes, the employee must receive compensation or other consideration to which he or she was not entitled in the absence of the severance agreement.

- Mutual confidentiality and non-disparagement clauses. This should not prevent the employer from providing truthful information in response to a request for a reference, particularly if the employee was dismissed for poor performance or misconduct. At the same time, the employer’s management and supervisory staff should understand that the non-disparagement clause will apply to comments they make out of the office, as well as in the workplace.

- In appropriate cases, a clause prohibiting the employee from hiring former colleagues for a year or two.

- Reaffirmation of any preexisting confidentiality and non-competition agreements.

- In order for any release given by the employee to be valid, federal law requires a seven-day period during which the employee can revoke the agreement. The Age Discrimination in Employment Act, applicable to employees over age 40, requires the employee to also have at least 21 days to consider the offer.

- Many ministries or churches will want to include provisions requiring any further dispute to be mediated and/or arbitrated, using, for example, the Rules for Christian Conciliation, published by Peacemaker Ministries (hispeace.org), and often administered by one of its local affiliates.

- The agreement should recite that the employee has been urged to consult with counsel, and if he or she has done so, that should be stated.

- Finally, the agreement should include an affirmation by the employee that he or she has read the agreement, understands it, and is signing it knowingly and voluntarily. Both of these last two clauses will help ensure that, if the agreement is challenged, it will not be voided because the employer effectively forced the employee to accept a one-sided agreement.

In all cases, the employer and the employee should have the agreement reviewed to be sure that, in light of applicable federal and state law, the agreement properly protects their interests.

Although the end of some employment relationships will often be difficult, a well-written severance agreement will help smooth the transition by providing both parties with clear guidance about how each should act.

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