

A photograph of two men in business suits. The man on the left is looking towards the man on the right, who is partially visible in profile. The background is a blurred office setting.

# A Separation Agreement Primer

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**Dictionary.com defines sever** as “putting an end to (a connection or relationship); break off.” As employers know all too well, a terminated employee or even (gulp) an employee that resigned can still sue for wrongful termination or unpaid wages no matter how frivolous the suit may be. In the employer/employee context, a “severance agreement” is used to memorialize that not only has the working relationship ended, but all potential disputes between employer and employee have been resolved as well.

In drafting a severance agreement, employers need to keep in mind several important points to ensure the agreement is enforceable. Employers should consult with counsel on the enforceability of restrictive covenants such as non-recruiting provisions. While each agreement will need to be narrowly tailored to fit the circumstances, at a minimum, employers should ensure the following:

- Employee is given adequate time (e.g. 72 hours) to review the agreement (if the due date falls on a weekend or a holiday, language can be inserted into the agreement extending the deadline to the next business day);
- Employee acknowledges that they read and understood the agreement and is advised that they can consult with an attorney;
- Employee acknowledges that they have been paid all wages (including bonus and vacation payouts) and been reimbursed for all business expenses (if certain commission payouts won't be calculable for a period of time that can be separately carved out of the agreement);
- Employee will not share confidential business information and/or trade secrets;
- Employee will keep the terms of the severance confidential;
- Employee will not disparage the Company in any way; and, of course, that
- Employee is releasing all known and unknown claims arising from employment including termination, harassment, defamation and claims for disputed wages.

For employees age 40 and over, employers need to ensure compliance with the Older Workers Benefits Protection Act (“OWBPA”). The OWBPA has several additional requirements to ensure enforceability. These include (1) specific reference to the Age Discrimination in Employment Act; and (2) that the agreement be written in a manner that can be clearly understood. Most notably, the OWBPA requires that an employee be given 21 days to review and sign the agreement and another 7 days thereafter to revoke their signature. For group separations involving two or more employees, those employees age 40 and over must be given 45 days to review the agreement and another 7 days thereafter to revoke their signature. The impacted employees age 40 and over must also be given a “decisional unit” letter. In broad strokes, the letter provides the job titles and ages of all individuals

who were selected for lay-off along with the ages and job titles of those in the decisional unit who were not selected for lay-off.

Nearly as important as the severance agreement's contents is the messaging accompanying the agreement's presentation. The severance agreement should be presented in the separation meeting. Again, there is no one-size fits all approach to the meeting. Employers should develop a message and stay on point. Each employee should be treated with dignity and respect. If an employee is angry, they should be given time to vent and be heard. Often, lawsuits are brought because an employee felt they were not heard. At the same time, employers should not argue with employees. Employers should instead stick to the message developed prior to the meeting. Finally, if an employee does not return a signed severance by the deadline, a polite phone call or e-mail to remind them of the deadline is appropriate. If the agreement is still not returned, the offer may be rescinded and the employer should gear up for what is likely a lawsuit, though can hope the employee goes away quietly.

By carefully developing a plan to draft and deliver the severance agreement, it can be an effective tool for employers to truly "sever" a working relationship.

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At O'Hagan Meyer we specialize in assisting employers of all sizes ensure they understand and are complying with federal and state laws dealing with employee investigations and separations. Feel free to reach out to us at [msgnilek@ohaganmeyer.com](mailto:msgnilek@ohaganmeyer.com) or [arosenkranz@ohaganmeyer.com](mailto:arosenkranz@ohaganmeyer.com).