Employment Agreements and Severance Agreements

Written policies and procedures, such as employee handbooks and offer letters, are tried and true staples of good human resources practices. They serve many useful purposes. Usually, however, neither is technically a binding "contract." Indeed, many employee handbooks and offer letters expressly state that they are not contracts. As a result, do you need more protection and, if so, should you use written employment agreements or severance agreements to achieve it?

Written Employment Agreements

There is no requirement in the United States that employers have written employment agreements with their employees. As a result, businesses are free to decide for themselves whether to use such agreements.

Some businesses use employment agreements for all of their employees. That is really overkill. The prudent employer uses them selectively. As a general rule, written employment agreements are most appropriate for high-level managers and for employees who have special skills and abilities.

There are good reasons to use them for such key employees. A business may spend a substantial amount of time and money recruiting and training key employees, so it may want to lock them into a specific duration of employment. Or, key employees may have access to the company's intellectual property, which it needs to protect. Or, a business may want to have more control over how key employees work, which a written employment agreement will certainly do. A good written employment agreement can address these areas and many more.

So, what is usually included in a written employment agreement? They often include the following common provisions:

Duration of Employment Period – The agreement may specify the length of employment, though this is not required. The agreement can say the employee is employed at-will.

Employment Duties Description - Employers will most often want to retain the flexibility to use the employee where needed, especially if conditions change during the term of employment. The employer and employee should understand and agree upon the duties the employee will be responsible for performing. The description of job duties could be specific but may be broadly stated so as to permit the employer to reassign the employee to another position with different responsibilities.

Conflicts Of Interest And Best Efforts – Such a provision makes sure that employees are not distracted from maximum performance because they are "moonlighting" in other jobs, or involved in any other competitive activities.

Employee Compensation and Benefits Description - The agreement should definitively state how much and when the employee will be paid.

Bonuses come in many varieties including a sign-up bonus, a regular periodic or annual bonus, a stay bonus and incentive bonus. The key is to make the determination to pay and the amount of any bonus subject to the employer's sole discretion.

The employment agreement should make the employee aware of the benefit plans available from the employer.

The employment agreement may state how much vacation the employee is eligible for, when it may be taken, and whether the employee will be paid for unused vacation. The employment agreement should also specify the business-related expenses that will be reimbursed to the employee.

Termination of the Employment - The employment agreement should state that the contract terminates upon the death of the employee.

The employment agreement should anticipate that the employee may be unable to perform his or her responsibilities because of a disability. The employment agreement, however, does not supersede the employer's obligations under the Americans with Disabilities Act, Family and Medical Leave Act or similar state laws.

Most employment agreements reserve the right of either party to terminate the employment relationship after a specified notice period. The notice termination provision should expressly provide for the termination of the employer's obligations (except for accrued salary and benefits) and the continuation of the employee's obligation to comply with any non-compete clause or other restrictive covenant.

Employment agreements often specify "cause" for discharge to avoid uncertainty over the circumstances under which the employer, employee, or both may terminate an employment agreement without continuing liability for the balance of the agreement's terms. If the parties to the employment agreement do not specify what constitutes cause, the decision will be left to the court if one party believes the other has done something that violates the agreement.

Restrictive Covenants – The agreement may state that employee will not (i) compete either during or for a specified time period after employment; (ii) induce other employees to leave the employer; and (iii) divulge the employer's trade secrets or confidential information.

Post-Employment Duties - The agreement should require the employee to return all of the employer's property and business-related materials prepared by the employee when the employment relationship ends.

Applicable Law – The agreement should specify the state law that will be applicable to resolving disputes under the employment agreement.

Judicial Forum – The agreement may identify a judicial forum for litigation of disputes concerning the interpretation of the agreement and enforcement of restrictive covenants. The forum should be conveniently located for the employer and offer familiar court rules and procedures.

Modifications - Amendments to the agreement must be in writing and signed by the parties. This clause prevents entanglements that result when a party claims a contract was modified by an oral agreement or understanding.

Severance Agreements

As with written employment agreements, there is no requirement in the United States that employers use severance agreements. As a result, businesses are free to decide for themselves.

What is a severance agreement? A severance agreement is a written contract that an employee signs at the end of his or her employment. In it, the employer promises to give the former employee something of value, most commonly (but not necessarily) a monetary payment. In exchange, the former employee waives and releases his or her right to bring a legal claim against the employer.

Any time an employer voluntarily gives an employee something of value at the end of employment, the employer should consider using a severance agreement. After all, the employer should get something in exchange for what it is voluntarily giving to the former employee. Plus, no employer wants to be sued by an employee that just received a severance payment at the time of termination.

Indeed, avoidance of lawsuits is the most common reason for using severance agreements. Lawsuits are expensive, disruptive to business operations, and can be demoralizing to employees. As a result, paying a little money at the end of employment in exchange for obtaining a release of claims can potentially save a business a lot of money and heartache down the road.

Nonetheless, severance agreements are not bulletproof. For example, by signing a severance agreement, employees cannot waive their right to file a lawsuit under the Fair Labor Standards

Act, which is the federal law governing wages. A severance agreement also cannot prevent an employee from filing a charge of discrimination with an administrative agency, though the employee should not be entitled to any monetary damages under those circumstances.

Lastly, there are some laws that govern how a severance agreement must be written. For example, federal law provides that an employee who is age 40 or older cannot waive and release a potential age discrimination claim unless he or she is given 21 days to consider the severance agreement and 7 days to revoke it. The requirements are more onerous for group terminations, such as a reduction in force.