

SEVERANCE, NON-COMPETES & CONSIDERATION – An Employee’s Perspective

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In this economy, more and more employees are being shown the door and “asked” politely to sign some form of severance agreement which may include a release of all claims against an employer, in exchange for a sum of money, benefits or a combination of both. Many of these arrangements and releases are worthy of scrutiny and may be used as a bargaining tool if you are aware of some basic facts.

Non-Competes - A very important provision in a severance agreement, both to an employer and employee is the non-compete. A non-compete clause restricts an employee from practicing his/her trade, for a certain period of time within a specific geographical area. In the sales and marketing industry, the term of the restriction typically ranges in duration from one to three years; the scope can restrict selling and direct targeting in an entire industry, working directly for the competition or somewhere in between.

Consideration - If your employer asks you to sign a non-compete whether you are currently working or departing, and fails to offer you anything in return other than dangling over your head the continuation of your employment or other value to which you are already entitled, e.g., unused vacation, comp days, benefits, earned but unpaid wages including commissions, ultimately the non-compete *may not be enforceable* as both parties must receive something of *additional* value in the *new* deal, otherwise known as “consideration”. Accepting what is already expected or owed to you is not something of value under the law and therefore no enforceable agreement is created.

Locked In - If you have already committed to a non-compete, perhaps no adequate consideration was provided at the time of contract, no legitimate business interest is being protected as required by certain states or the market has contracted so much that the geographic or industry restraints are overly burdensome. This non-compete may not be effective.

To Sign or Not to Sign - Courts have ruled that a company’s handbook amounts to a binding implied contract between a company and an employee. Therefore, it is important for an employee to review the company’s handbook or policy on severance payments/packages to determine if it is necessary for the employee to sign a potentially one-sided document while gaining nothing in return if a company policy already requires severance (*See Consideration* above).

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