

May an employer fire an employee and then ask the employee to sign a waiver of claims or severance agreement?

Many employers will offer some form of severance payment to an employee who has been fired or laid off, but will make that payment contingent on the employee signing an agreement to release any potential claims he or she may have against the employer, such as for breach of contract or discrimination. Such agreements are generally legal, but are often enforceable only if the employer complies with certain requirements.

For example, the employer must make clear just what potential claims the employee may be waiving in the agreement, such as by listing the various laws (for example, Title VII or the Americans with Disabilities Act) under which the employee will no longer be able to sue. The employer must also give the employee an opportunity to review and consider the agreement and to consult an attorney if he or she wishes to do so. In fact, some laws, such as the Age Discrimination in Employment Act and the Older Workers Benefits Protection Act, specifically require that the employer advise the employee to contact an attorney, and even require the employer to offer the employee up to three weeks to consider whether he or she wants to sign the agreement. An employer, who presents an employee with a severance agreement at the same meeting in which the employee is fired and demands that the employee sign the agreement or do without severance, will have a hard time enforcing the agreement against the employee later.

Likewise, some laws mandate that, in order to effectively waive claims under the law, the employee must be able to rescind or revoke his or her acceptance of the agreement for a period of time after the employee signs it, usually a week or two. This, like the mandatory consideration period, is designed to make sure that an employee is not pressured into signing away his or her rights during the stressful period right after being fired.

Finally, some potential claims simply cannot be waived, even by an otherwise effective severance agreement. For example, claims under the Fair Labor Standards Act (the federal wage and hour law) cannot be waived by agreement between the employer and employee. Instead, the Department of Labor must be allowed to participate in any such agreement, to ensure that employees are treated fairly.

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