

Negotiating Executive Severance: Five Factors for a Better Package

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One day you may be asked to leave your position, whether or not it is good for the company, or fair to you. At such a time, it is essential that you put your own interests in the fore-front and prepare for the severance negotiation. In doing so, our experience points to an evaluation of at least five key factors: the precedent, the law, the equities, the optics and the future.

I. The Precedent

In negotiating executive severance, precedent matters. Lawyers talk about three types of law: the law of the land, the law of the industry and the law of the shop. The latter two are not really “laws” in the conventional sense – they are not written up as such in lawbooks – but they may be enforceable on various theories of law. More importantly, they tend to be followed simply because they are “the rules” by which an organization operates. Therefore, if at all possible, learn what others in an industry and in the company have received. An evaluation of employment agreements of others – which may contain severance provisions – as well as separation agreements, should be attempted. It has been our experience that such information may be uncovered from a number of sources, including through various regulatory filings. If you believe that what you are being offered is seriously out of line, you might suggest that an expert in executive compensation be retained to review the matter.

II. The Law

While the general rule in the United States is that bad, unkind and even unfair business decisions are not necessarily unlawful, the law often remains a key factor in the severance analysis. To be unlawful, the decision essentially must be unlawful in motive and/or means. For example, if you were terminated to make way for someone younger, that may implicate the unlawful motive of age bias. As another example, if you were terminated in violation of your employment contract and/or the company conducted itself in a manner that violates the implied covenant of good faith and fair dealing (which applies even in the so-called “at-will” employment context) that may implicate termination by an unlawful means. If, however, you were terminated because of a good faith disagreement regarding business strategy, you have less with which to work. That does not mean that the termination was lawful, or that the participants in the decision are without liability. For example, “succession planning” may be age discriminatory and “company politics” may be tortious interference and/ or defamatory.

Also, even if a termination was otherwise "lawful", the failure of a company to provide certain severance payments or benefits (or other "earned" payments) may itself be unlawful based on a variety of legal theories. These include statutory claims (i.e., laws on the "books", including wage claims, discrimination and ERISA), and those based on common law theories (i.e., breach of contract).

III. The Equities

Even if a company has insulated itself from a "legal" claim, however, many organizations are still cognizant of the actual and perceived inequities/equities of a decision. Presuming that the situation is relatively amicable and that there is a history of acknowledged contribution and/or the executive had been placed in a difficult situation prior to departure, it is possible that the company will want the executive to "feel" fairly treated. Indeed, the Board of Directors, or important members, may have mandated fair treatment, and may want to be kept informed. In such case, it should be stressed that the executive needs (both economically and non-economically) to be left with a sense of fair dealing. Treating the individual fairly also may have a residual benefit to a company which desires to continue attracting top talent.

Fair treatment may take a variety of forms, including a recognition of past contributions, such as the forward vesting of equity and long term bonus entitlements, and addressing future needs, through pension enhancements and enhanced executive retirement benefits.

IV. The Optics

For many companies, especially public, a key concern in making a management change is how it will be viewed internally and externally. Change is almost always disruptive (indeed, it can be chaotic and demoralizing) and may also be seen by industry analysts as a sign of trouble or instability. For many companies, the opportunity to choreograph an executive's departure is an important factor in severance negotiations. The executive may be asked to remain in place for a certain amount of time – for which he or she may request a retention bonus – or to leave as quickly as possible. A key consideration may also be that the company secure a "non-disparagement agreement" – insuring that the executive does not criticize the company – and an agreed upon statement as to the reasons for the departure. Many companies also want agreement regarding terms of a press release or an agreement not to speak to the press. In short, the manner and tone of the departure may have a significant impact on the company's investors, employees, and customers. Indeed, while the "optics" are important to the departing executive, the stakes may be even higher from the Company's standpoint.

V. The Future

If the company has an on-going need for the executive's services, or needs the executive not to provide those services to others, the executive may have an opportunity to negotiate the terms of an on-going cooperation / consulting or the terms of a non-competition clause. If these terms are being requested by the company, there is no reason not to ask for additional compensation. Likewise, these terms are vehicles by which a company may

increase severance without appearing to be exceeding prior precedent or the terms of its severance plan.

VI. Conclusion

In any given situation, you may not know what is most important to the company. Therefore, as with any negotiation, it is imperative to be prepared on all fronts: the precedent, the law, the equities, the optics and the future. Chances are that on one or more of those fronts you will hit on what concerns the company and will gain a negotiation advantage.