

Former Employees Who Have Previously Signed A Severance Agreement Do Not Have To Return Their Severance Pay Before Suing A Former Employer

I admit to having to read this several times: the U.S. Court of Appeals for the Sixth Circuit recently ruled that former employees do not have to return their severance pay before suing their former employer, if the reason for wanting to cancel the agreement relates to filing certain discrimination claims under Title VII and the Equal Pay Act.

When employers enter into severance agreements with departing employees, they do so with the expectation that the agreement will prevent any and all legal claims between the two parties. In exchange for additional compensation, the employee promises not to sue the company. The apparent difference here is that the employee may be able to sue and keep the severance money—if the employee claims he/she was coerced into signing the agreement.

A common practice was that before someone can sue and attempt to rescind the contract, he/she would have to return the money received, often called a tender-back agreement. This Sixth Circuit decision held that the tender-back doctrine does not apply to certain discrimination claims and the Court held that a former employee need not return his/her severance pay before filing suit. Not too worry: the Sixth Circuit stated that any severance pay previously paid to the employee could be deducted from any ultimate award in the lawsuit.

What should employers do?

From my non-legal perspective, this decision is unwelcome news because it removes a deterrent to suits by former employees who previously signed severance agreements. Companies spend considerable time and money to craft legal agreements to protect them and thought they had closure!

The silver lining: this decision only relates to whether employees must return severance pay and it does not address whether employees can void the actual severance agreements. Whether former employees can successfully do so does not necessarily relate to the actual legal document but also very much depends on the specific circumstances surrounding how the severance agreement was presented and executed.

It is probably a good idea if severance agreements have not been reviewed recently by legal counsel to insure they contain the appropriate language. However, it would seem that this would be a good time to review the actual practices in delivering the agreement. Consider the following:

- *Provide sufficient time* – For employees over 40 years of age, employers must provide a 21-day period to review the agreement and allow the employee to revoke the agreement within 7 days. This is not a requirement for younger employees. Why not simply adopt this on a universal standard?

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- *Consider having two other employees (managers or supervisors) present the severance offer* – This provides the company with an additional witness in the event the employee raises issues about the meeting and what was actually communicated. Also, it would be prudent to have the employee relaying the severance offer to take notes, regardless of the substance of the meeting. This way if any issue are brought forward, the Company can quickly resolve them.
- *State during every situation that the departing employee may consult legal counsel* – this would help prevent coercion claims against the employer and a consistent practice would also help in a defense. This is clearly better than simply saying: just sign it as it contains legal jargon that you cannot sue us as a condition of getting severance.

It my experience, the goals of a severance are:

- Treat the departing employee fairly
- Protect the company – both in preparing the agreement and presenting the agreement
- Create closure for both sides

Given this, it is important for employers to review their actual severance practices.

[Please share your thoughts!](#)

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