



## ULTIMATE GUIDE TO NEGOTIATING YOUR SEVERANCE PACKAGE (2020)

Welcome to the *single best resource on the internet* on severance packages in Tennessee.

Your employer has been presented you with a Severance Package. In addition to the fear and uncertainty of being terminated you now have mere days to figure out what to do. You are happy about the prospect of severance pay, but should you ask for more? Should you sign the agreement? What legal rights are you giving up? What binding promises are you making to the company? You need answers *fast*.

This comprehensive guide is designed to quickly get you up to speed and to help guide you through the process. It answers common questions and gives valuable tips when you have been offered a Severance Package.

By the time you finish reviewing this guide you will: (1) understand the basic components of a severance agreement; (2) know what, if any, severance terms you want to negotiate; and (3) know whether you should hire a severance negotiation attorney to maximize your exit benefits while protecting your legal interests. In the end, your Severance Package should be tailored to meet your short-term and long-term goals.

The Masker Firm provides comprehensive severance review services tailored to your unique circumstances. Contact us today by phone at 615-823-1737 or via e-mail at [curt@maskerfirm.com](mailto:curt@maskerfirm.com) for a free consultation.

**Disclaimer: The information provided in this guide does not constitute legal advice. All information available in this guide is for general informational purposes only and does not take into account your individual facts or circumstances. You are encouraged to contact a lawyer before making legal decisions.**

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### Part 1. What is a Severance Package?

“Severance Package” usually refers to severance pay along with a severance agreement. A severance agreement is a contract between you and your employer that lays out the terms of your termination. Nearly all severance packages contemplate the same thing: In exchange for you releasing (aka waiving) your legal rights connected to the employment relationship, and making other binding promises, the company agrees to pay you exit money and benefits.

### Part 2. Why do employers offer Severance Packages?

Put simply, employers offer severance packages to increase certainty and reduce the risk of future litigation. This makes smart business sense and is like a form of insurance. Often, employees do not even know they have viable legal claims against the company when they agree to waive all legal claims. This information asymmetry *always* benefits the employer.

Also, companies use severance pay as a hook to get a signed **non-compete** from you. You must consider the practical consequences of a non-compete provision on your future job prospects before signing. Sometimes a non-compete with a 20-mile radius has the practical effect of being a national non-compete in your particular industry.

The key question becomes whether the amount of pay and benefits offered is fair relative to your legal rights waived and promises made. In limited circumstances federal law or an employment contract requires severance pay to employees or executives.

### Part 3. How is severance pay usually calculated?

The amount of severance pay varies significantly depending on a host of factors, including the reason for your departure, length of your tenure, your position, size of the company, industry, and the severance agreement terms.

That said, severance pay usually falls within the range of 1-2 weeks of base salary per year of tenure, but only an experienced severance review attorney can properly assess the above factors as applied to your circumstances. Viable legal claims may significantly increase severance pay.

### Part 4: What is in a typical Tennessee Severance Package?

You need to know exactly what is currently being offered. Severance agreements often contain the following key provisions. Keep in mind, every severance agreement is different and your agreement may differ from the terms below. We always recommend you consult an attorney when making legal decisions.

- **Separation/Severance Benefits.** This states the severance pay you will receive if you sign the agreement. This is also sometimes referred to as “Consideration.” In simple terms, consideration just means that each party is giving up something as part of the agreement. In severance agreements, the company is giving up money, and you are waiving your legal rights. Severance pay is sometimes paid as a lump sum but is often paid out with regular payroll (which may delay your ability to draw unemployment benefits).

- **Benefits/COBRA.** The benefits provision may be separate. It states the date your medical, dental and vision insurance will end. It reiterates that you will receive all required COBRA paperwork, and some companies may provide for company-paid subsidies for COBRA premiums. If your spouse can add you to his or her health insurance, consider asking for the COBRA premiums to be added to your severance pay.
- **Release/Waiver.** This is what the company is paying for. The release must be made knowingly and voluntarily and generally includes a handful of required provisions. You are waiving your legal rights to all legal claims you may have against the company prior to the effective date of the agreement. Many waiver provisions list specific federal and state employment statutes. These release provisions tend to be well-worn and air tight. Never assume you can get a waiver reversed later (although it does happen in rare circumstances). The enforceability of a given release varies from statute to statute.
- **Cooperation.** You agree to be available to answer company questions regarding topics and projects you worked on if a dispute arises after your termination, e.g., litigation. Some companies will agree to pay you hourly compensation for such cooperation as well as your reasonable expenses. But you have to ask!
- **Non-Disparagement.** You agree not to bad mouth the company or its employees (including management, officers, directors, etc.) to anyone regardless of whether or not the statement is truth. Best practice: do not talk badly about the company or former supervisors or co-workers to anyone.
- **Attorney's Fees.** Some of these provisions are written very broadly and require you to pay the company's attorney's fees, which could total well into six figures. Some go as far as to require you to pay for investigator fees even if you have not violated the agreement! Do not agree to such an overbroad provision. A fair attorney's fees provision states the prevailing party gets his/her/its fees or that each party pays their own fees (aka the American Rule).
- **References/Inquiries.** This is important, especially during your job hunt. This provision specifies what, if any, information the company can provide to future

employers. Most employers limit such references to positions held, rates of pay, and length of tenure.

## Part 5: Key provisions to watch out for in your Severance Agreement.

In addition to the provisions above, the following provisions need to be carefully reviewed before you sign the agreement because they can result in legal liability and may impact your ability to obtain another job in your industry.

- **Penalty Provision aka Liquidated Damages.** If you breach the agreement (especially the confidentiality and non-disparagement clauses), you may be required to pay back some or all of the severance pay. Sometimes the penalty amount is calculated on a per-breach basis.
- **Confidentiality.** Employees can quickly get into trouble in this area. This provision will usually include a definition of what constitutes “confidential” information. You are likely acknowledging receipt of confidential or proprietary information that may include articles, records, customer and vendor lists, supplier lists, pricing information, marketing plans, forecasts, financial statements, budgets and projections, just to name a few. Read the entire provision. If you think this provision may impact your future employment you should contact a lawyer. You are also agreeing not to share any terms of the severance agreement with anyone outside your family, lawyer, accountant, or any government officials or entities (including courts).
- **Restrictive Covenants** (aka Non-Compete and Non-Solicitation). This clause may be one long provision or it may be broken up into separate provisions.
  - Non-Compete: This will restrict your ability to go work for a competitor of the company based on the type of industry or geography or both for a set period of time. If the termination is through no fault of your own, you should ask for this provision to be removed from the agreement or at least limited to the severance pay period. Courts generally disfavor non-compete provisions because they harm competition. Tennessee courts use an overall “reasonableness” test in determining the legality of non-compete provisions. This test is highly fact specific and considers factors such as the

company's legitimate business interests, consideration given for the restrictions, economic hardship on the employee created by the covenant, public interest, and the scope of the restrictions.

- Non-Solicitation: You agree not to directly or indirectly steal any of the company's employees, customers, etc. Often includes a broad definition of "Competing Business" or "Competitor." Be sure to think about what you want your next job to look like and think through how the restrictive covenants could negatively impact your career trajectory. If you are unsure, pay an employment lawyer a relatively small fee to explain the full scope this provision and how it may impact your short-term and long-term career goals.

Keep in mind the language in your severance agreement may vary from the foregoing examples.

## Part 6: Special Considerations

Importantly, you legally **cannot** waive your rights to: (i) unemployment insurance or workers' compensation benefits; (ii) vested ERISA-covered employee benefit plans as applicable on the date you sign the severance agreement; (iii) claims that may arise after you sign the severance agreement; or (iv) reimbursement of expenses under the company's expense reimbursement policies.

In addition, you cannot legally waive your right to bring a complaint or participate in an investigation with the Equal Employment Opportunity Commission, National Labor Relations Board, Securities & Exchange Commission, or other similar governmental entity. **However, the release will very likely preclude you from recovering any award of damages for such claims.**

If you are 40 years old or older and you are waiving claims for age discrimination, the Older Workers Benefit Protection Act (OWBPA) requires the agreement to: (a) be written in a clear manner that is free from legalese; (b) specifically refer to rights or claims under the ADEA; (c) advise the employee to consult with an attorney before accepting the agreement; (d) provide 21 (or 45) days to consider the offer; (e) give you seven days to

revoke; (f) state the waiver does not apply to claims arising after the effective date of the waiver; and (g) be supported by additional consideration that the employee is not otherwise entitled.

In addition to the OWBPA requirements above, if your termination is part of an exit incentive plan or other termination program, the employer must provide you with: (h) the “decisional unit” – the class, unit, or group of employee from which the employer chose the employees who were and who were not selected for the program; (i) eligibility factors; (j) the time limits applicable to the program; and (k) the job titles and ages of all individuals who are eligible or ineligible (note that bands broader than one year (“55-60”) do not satisfy this requirement);

## Part 7: When should you negotiate your own Tennessee Severance Package?

These are the most common reasons why someone may decide against hiring an attorney:

- You want to quickly move on with your life;
- You are happy with the money and benefits already on the table;
- You are confident the Severance Package is fair;
- You cannot afford to spend money on an attorney;
- The company is not requiring you to sign a confidentiality, non-compete, or non-disparagement provision; and
- You are already familiar with the terms of your severance agreement.

If these factors apply to you, then you may be ready to negotiate your own severance package.

## Part 8: Risks of negotiating our own Severance Package

But before you try negotiating your own severance package, you should be aware of the risks:

- **Company can refuse to honor the original severance offer.** Responding with new terms is generally a rejection of the company's offer, i.e., you are responding with a new offer that the company can either accept or reject. So the company's offer may no longer legally exist. Usually the company will still honor its original offer even if it rejects your proposed terms, but it is a risk. If an experienced severance lawyer is involved, the chances of this happening are lower.
- **Leaving money on the table.** As mentioned above, this guide cannot tell you if you have viable legal claims. Only talking with an employment lawyer to discuss your unique facts and circumstances can do that.
- **Risk being sued.** For anything from extortion to breach of confidentiality and theft of trade secrets, among others. Although this is rare, it does happen.
- **Making statements detrimental to legal interests.** Statements you make to the company during the severance negotiation process may come back to haunt you if you sue the company. For instance, if you tell human resources the only reason your boss singled you out for termination was because he does not like you personally, the employer will readily admit this during litigation because it is perfectly legal. It will also use your statement to show your termination, at worst, was caused by a personal vendetta due to personality clashes and not an unlawful reason such as discrimination.

## Part 9: Ten Tips for negotiating your Severance Package

You know and accept the risks of negotiation on your own as stated above. The following tips will point you in the right direction to maximizing your Severance Package.

**1. Pay attention to your offer's deadline.** Know when your response is due. Do not be afraid to ask for an extension via a polite e-mail.

**2. Understand what you are giving up.**

Severance is **not** free money. Understanding this fact is key to effective severance negotiation. You are waiving real legal rights and you are making binding promises in exchange for money. Try not to sell your rights at a steep discount. The Severance Package was created by the company's attorney to serve the company's interests!



### **3. Review all of your employment and severance documents carefully.**

You need to know exactly what's on the table. In addition to all severance documentation, review all of your employment records, e.g., performance evaluations, company handbook, paystubs, benefits pamphlets, deferred compensation, arbitration and restrictive covenants. Together, these documents will provide the framework for the negotiation process and may add bargaining chips to the table.

### **4. Be respectful and do not threaten.**

This applies to the entire negotiation process. The old saying 'You catch more flies with honey than with vinegar' is apt. Threatening with empty legal claims may result in extortion charges.

### **5. Understand your bargaining chips.**

There are generally four types of bargaining chips (with varying degrees of persuasiveness):

#### **A. Legal rights have been violated. By far the most powerful bargaining chip.**

The value of your waiver is tied to the value of potential legal claims.

- i. Unlawful Retaliation (fired after opposing or reporting illegal activities)
- ii. Unlawful Discrimination (fired based on protected class or characteristic such as race, age, gender, disability, etc.)
- iii. Violation of Leave of Absence Rights (fired soon after requesting or returning from protected leave such as FMLA or USERRA military leave)
- iv. Breach of Contract or Unjust Enrichment (employment contract; vacation pay policy, stock options supposed to vest, unpaid commissions, fraudulent inducement, etc.)
- v. Other Violations (Defamation, etc.)

#### **B. Extreme unfairness. For instance, if the company would have owed you a significant sum of money had you not been fired. This includes bonuses, commissions, accrued vacation time, ESOP disbursement, etc. Even if the company does not legally owe you the money, raising this issue during severance**

negotiation can significantly increase severance pay. If the amount in question is substantial, you should consult with an employment lawyer to double check that the full amount is not legally owed to you.

- C. Outstanding or essential employee: If the company still needs you for some time to finish up a project, train a replacement, or just finish your usual job duties, etc. Do not hold this over the company's head or threaten to walk off. Do a great job regardless of its response to your severance counteroffer; you likely want a solid history you are proud of. Besides, some employers will pay a bit extra to great employees. In this way, you can leverage your work history if you were extraordinarily productive or accomplished during your tenure with the company.
- D. Dire Need: Personal or family hardship, homeless, cancer, etc. Also, if your termination requires you to relocate across the country.

## **6. Take into account all circumstances of your departure, including your employment records.**

The circumstances of your termination always play a part in severance negotiations. Some common facts to consider include:

- What are your short term goals? Long term? These will depend on your personal and financial circumstances and will necessarily include your family's concerns. Your goals will shape whether money is a key consideration or whether other considerations such as health insurance and outplacement services are important.
- Consider how long you expect to be unemployed. Take stock of your skills, education, experience, and extent of similar position availability.
- Are you being let go through no fault of your own or are you being terminated for performance or other reasons?
- Upon being hired did you sign a restrictive covenant and/or arbitration agreement? If the company wishes to restrict your future career path this can be used as a bargaining chip.
- Are you being let go as part of a mass layoff? Some employers are hesitant to alter severance terms in this context because it may be viewed as illegally treating people differently (raises discrimination concerns).
  - Do you know what similarly situated employees are receiving?

- Are you a high-ranking employee? This means you probably rose through the ranks via hard work and merit, i.e., you were probably an outstanding employee.
- Are commissions or bonus payments due to you? Are long-term contracts involved? That is, will the company benefit from your hard work long after you are gone?
- Do you have an exceptional work history? You should toot your own horn as long as it is factual. You should thoroughly reiterate your contributions to the company, excellent work history, promotions, awards, recognitions, atta-boys, etc. Remind the company how much value you added during your tenure. Also, read any company policy regarding severance (although many companies do not have such a policy).
- Financial status of company. If the layoff is due to dire financial circumstances, it will be harder to negotiate more pay and better terms. Also, if the company is on the fritz, you probably want a lump sum payment rather than periodic payments aligned with the usual payroll.
- Your personal finances need to be considered as well; how badly do you need the money?

## **7. Be reasonable, but ask for more than what you actually want.**

If you are asking for more severance pay, this request needs to be justified by a sound reason. Sometimes, but not always, basic fairness can help in negotiating with reasonable employers. For example, most would agree that firing an employee two days before \$65,000 in commissions becomes due and payable is extremely unfair (and legally questionable).

But simply asking for more with no justification whatsoever is likely to get you nowhere. Do not ask for a large increase in severance pay (e.g., two years' base salary) because you believe your termination is unfair. **Most of the time unfairness is legal.** You will risk irritating the company and it may decline to honor its original offer if you counter with an unreasonable demand. Have your justifications lined up in advance. If you understand all circumstances of your termination as outlined in **Tip #5**, then you will be ready to go.

Lastly, the company is unlikely to give you what you initially request, so lead with a request more robust (in money and better terms) than you will accept. Negotiating toward a middle ground is normal.

## 8. Consider tax consequences.

For the severance pay and any benefits. Hire a tax professional.

## 9. Decide how to convey your counteroffer.

- **Letter:** It's usually best to put a counteroffer in writing. The letter should be amicable and not overly aggressive. People do not like to be threatened or bossed around. Human resources and legal department personnel are just human; they are generally more receptive to helping employees who they see as being fair and reasonable versus aggressive employees who throw around legal conclusions and make distorted accusations.
- **Phone call:** If you have a good rapport with the company's representative, you may consider calling. This decision also comes down to what approach with which you feel most comfortable. The call should be mostly light and amicable. At some point state that you appreciate the company's severance offer and that you are just looking to make a few good faith tweaks to the offer. Then put the terms in writing.
- **In-person:** An in-person discussion is often not possible since many workers have already been let go and/or the company's representative is based in a satellite office. But if this is a possibility for you, you might consider this option.

## 10. Use your bargaining chips (incl. circumstances of departure) as leverage to negotiate some of the terms below.

### Part 10: When should you hire an attorney to negotiate your Severance Package?

You should hire an attorney when you want to **maximize** your Severance Package. An experienced severance attorney will review your severance documents, gather all facts related to your employment history and can bring negotiation skills to the table. Specifically, a severance attorney will be able to:

- Focus on the most important facts of your situation;

- Understand your short-term and long-term goals (personally, professionally, and financially);
- **Determine whether you have viable legal claims against the company;**
- Negotiate on your behalf or assist you in negotiating yourself (depending on your unique circumstances); and
- Give you peace of mind that you are getting a fair deal and your rights are protected.

Remember, the #1 way to maximize your Tennessee Severance Package is to know what viable legal claims you have against the company. Most employees have no way to determine these factors on their own. You need to have concrete answers to two questions:

(1) Has your employer violated any laws?

(2) If laws were violated, how much is a potential case worth?

If your intuition is telling you something is amiss in your termination (e.g., if you were treated differently than others), immediately contact our firm. Do not underestimate the peace of mind that comes from having an attorney review your Severance Package so you never have to wonder if you had legal claims.

## Part 11: Tips for finding the right severance negotiation attorney.

Hire an attorney:

- Who quickly responds to your inquiry. This means his or she has time available to dedicate to your matter. **The importance of this cannot be overstated.**
- Who you trust.
- Who only practices employment law and is clearly knowledgeable about the subject matter.

## Part 12: We Review Severance Packages

The Masker Firm only practices employment law. We exclusively represent employees in employment disputes. We take pride in our **unparalleled** personal service.

We offer comprehensive severance review services with a 48-hour turnaround from contact to consultation with you. Call us today at 615-823-1737.

### About Employee Rights Lawyer Curt M. Masker

Curt Masker is the founder and managing attorney of The MASKER FIRM located in Nashville, Tennessee. He is a graduate of Vanderbilt Law School and focuses his practice exclusively on representing workers in actions against employers. He is licensed to practice law in Tennessee and Ohio.

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