

Termination: 13 Do's & Don'ts for Negotiating a Severance Release



What's At Stake

Every time you terminate an employee, you run the risk of costly and wasteful litigation. That's why employers typically offer terminated employees a severance package if they sign a release promising not to sue the organization. More often than not, getting a release is effective in ensuring closure and peace of mind. But employees are apt to have a change of heart and sue even after signing a release. And thanks to the so-called rule of "unconscionability," they have a good shot at getting the court to set the release aside and let the case go forward.

The Rule of Unconscionability

Unconscionability is a rule made up by courts to invalidate unfair contracts between parties with a gross disparity in bargaining power. Severance agreements are a frequent target for unconscionability because employers are far more powerful than employees. And because termination is such an emotionally devastating experience, the imbalance in power is even more pronounced during severance negotiations when employees are particularly vulnerable and easy to take advantage of.

Rule: Courts will find a release to be unconscionable and thus unenforceable if:

- The terms are grossly unfair and one-sided in the employer's favour; and/or
- The employer uses threats, coercion, intimidation or deception to get the employee to sign the release.

13 Do's & Don'ts to Protect Yourself from Unconscionability Risks

HR directors need to be keenly aware of these rules when negotiating severance and release deals during the termination process. Here are 13 things you should and shouldn't do to minimize the risk of a court's ruling your own agreements to be unconscionable:

1. **DO** ensure that employees receive consideration, i.e., something of genuine value, in exchange for signing the release.
2. **DO** recognize that termination notice, vacation pay and other amounts you're required to pay under employment standards (or the terms of the employee's employment contract) don't count as consideration and that you must provide something more in exchange for the release;

3. **DON'T** make termination pay and other statutory or contractual entitlements conditional upon signing the release.
4. **DO** make it clear that employees will receive these payments regardless of whether they sign the release.
5. **DON'T** make statements to persuade the employee to sign like "this is a very good deal," especially when they're not true.
6. **DON'T** promise employees a reference if they sign the release or threaten not to provide a reference if they don't.
7. **DO** treat employees with dignity and respect and recognize that they may not be thinking clearly at the time of termination.
8. **DO** consider offering employees access to a counsellor for emotional assistance.
9. **DON'T** demand that employees sign the release on the spot.
10. **DO** advise employees to talk to a lawyer and get independent legal advice before signing the release.
11. **DO** give employees at least 3 days to get the release reviewed and decide whether to sign it.
12. **DO** allow employees to ask you questions while they're making up their mind.
13. **DO** get a person to act as a witness when and if the employee signs the release.