1.

What is severance pay?

Severance pay, also called separation pay, termination pay or continuation pay, is money that an employer gives to an employee when that employee is laid off or fired. Severance pay is sometimes given when an employee resigns.

2.

Do I have the right to receive severance pay?

Depends. The law normally does not *require* employers to give severance pay. However, there are certain exceptions:

Exception #1: Severance pay required by an employment contract. Workers with employment contracts (either written or oral) that require their employers to pay severance have the right to receive the amount of severance promised in the contract. A contract for severance pay does not have to exist before the worker is laid off or fired. In fact, many employers agree to a severance contract at the time of termination.

A severance contract is not legally enforceable unless the worker promises to do something or give up a legal right in exchange for the money. For example, a worker might agree to continue working for two weeks in exchange for severance pay after being told about a layoff even though he has the right to walk off the job as soon as he learned he was going to be laid off.

Exception #2: Severance pay required by a policy or practice. If your company has a policy manual or practice that provides for severance, you may have the right to recover this money.

Some severance policies have “strings attached.” For example, a policy might say that employees must give at least two weeks notice before quitting the job in order to get severance pay.

Exception #3: Severance pay in exchange for a release of legal claims. Sometimes employers negotiate with employees to give up (or “release”) their actual or potential legal claims (such as discrimination claims) in exchange for severance pay. Whether these releases are valid depends on the language in the release and the types of claims that the employer asks the worker to waive. See below for more information on releasing legal claims.

Exception #4: Mass layoff or plant closing without adequate notice. Under a law called the W.A.R.N. Act, if a company closes down or has a “mass layoff” of a large number of employees in a short period of time without giving at least sixty (60) days notice, the company may have to continue paying wages after the employees are laid off for up to sixty (60) days. (For more information about what is a “plant closing” and a “mass layoff,” see our Fact Sheet, The W.A.R.N Act: Mass Layoffs or Business/Plant Closings.)

3.

How much severance pay do I get?

No set amount of severance pay is required unless specified in a union contract, company policy manual, or employment contract. However, severance pay is frequently based on length of service. (For example, a severance agreement might give each worker the right to one week’s pay for each year of service to the employer.) Other benefits, such as job counseling, might be included in an overall severance “package.”

If you are protected by the W.A.R.N. Act (see section 2, Exception #4, above), the amount of severance will depend on how much notice you received. For example, if you only receive 5 days notice before being laid off, your employer must continue your wages for 55 days after you leave.

Since severance pay is usually part of a legal contract; you have the right to either accept it, reject it, or negotiate a different contract. Keep in mind, however, that if you make a “counter offer,” the initial offer from your employer has been rejected and your employer is under no obligation to make the offer again.

4.

What happens if I'm owed severance pay, but my former employer refuses to pay me?

If you are covered by Exception 1, 2, or 3 (see section 2, above), you can file a claim with the California Division of Labor Standards Enforcement (also known as the "Labor Commissioner") or go to in court to get your severance pay.

If an employer's severance pay policy is paid for by a fund that is covered by the Employee Retirement Income Security Act (E.R.I.S.A), the Labor Commissioner will not accept a case to enforce this agreement. For example, if your employer has a voluntary separation plan that is filed with the federal Department of Labor and that allows you to resign and collect monthly severance payments and health benefits, such a plan might be covered by E.R.I.S.A. If you are not sure whether your plan is funded under E.R.I.S.A, you can still file with Labor Commissioner and let the Labor Commissioner decide whether it will hear the case. If the Labor Commissioner will not hear your case, you can go to court.

If you are protected by the W.A.R.N. Act (see section 2, Exception #4, above), and your employer refuses to pay continued wages or severance, you will have to go to court, not the Labor Commissioner, to recover the money.

5.

Can I get severance pay and still collect unemployment benefits?

Normally, yes. Severance pay is not considered "wages" that would otherwise count against your right to unemployment benefits. However, sometimes there is a *temporary* delay in eligibility for unemployment insurance depending on how the severance is paid. If severance is paid in a lump sum, it will probably not affect your unemployment benefits. However, if severance is paid over time as if you are still on the payroll, it may delay your ability to collect unemployment.

6.

What is a release of claims?

Your employer may decide to give you severance pay only if you sign a release of claims. A release of claims is a contract "waiving," or giving up, any potential legal claims you may have against the employer, either now or in the future. These contracts are generally legal and enforceable.

7.

Doesn't my employer have to pay me in exchange for me to give up my legal claims?

In order for a release to be enforceable, there must be "consideration," which means that both you and your employer are required to "give something up." In the case of a release, the employee normally gives up the right to file potential legal claims, although the consideration given by the employee could be something else, such as simply agreeing to work extra hours, or stay on the job longer, when he/she is not legally required to do so. In return, the employer pays the employee something to which she is not already entitled, such as severance pay. Your employer cannot ask you to release your claims in exchange for paying you for hours you have already worked, or give you benefits you are already owed.

8.

Are there different types of releases?

Releases are often divided into two types: "general" and "specific." A general release is one that waives *all* of your known or suspected claims. A specific release specifies the claims you waive. For example, a specific release might ask you to release only your age discrimination claims, but make no mention of any other type of claim, such as race or national origin discrimination.

Releases may also be either "unilateral" or "mutual." If your release is "unilateral," it releases your employer from liability for your claims against the employer. A "mutual" release will absolve each side from claims against the other side, which would effectively release you from claims your employer may have against you, such as a trade secret violation.

9.

What types of claims may be released?

A release can require you to waive most “statutory” claims. Statutory claims are those claims that are written into specific laws, and that give you a right to take action against your employer, such as filing a lawsuit. Statutory claims include claims of discrimination. A release stating that an employee “gives up claims pursuant to Federal laws” would waive such claims. In a special exception, however, an employee waiver of a federal claim of *age discrimination* is *not* valid, unless the following requirements are met: 1) the release specifically mentions the Age Discrimination in Employment Act, 2) you are given 21 days to consider the release, and 3) you are given a 7 day “cool off” period to change your mind after signing the release.

“Common law” claims may also be waived. Common law claims are claims not specifically written into any law or statute, but which courts have nonetheless traditionally recognized. These may include claims of wrongful termination, breach of contract, privacy violations, defamation, and intentional infliction of emotional distress.

You may also validly waive “unknown” potential claims against employers, as long as your employer has inserted very specific language mentioning California Civil Code 1542 into the release. If you agree to a release of unknown claims, and later discovers that your employer illegally terminated you, you would *still* not be able to sue the employer. In that case, if, after singing an enforceable waiver, you *do* sue for a previously unknown claim, you may be liable for your employer’s attorney’s fees and costs.

10.

What types of claims cannot be released?

Claims forUnemployment Insurance benefits andWorkers’ Compensation benefits cannot be waived in a general release contained in a severance agreement.

Also, there are certain rules regarding the release of wage claims. Those rules are:

- Your employer can’t put any “conditions” on the payment of wages that are already owed to you.
- Any release waiving minimum wage or overtime pay is unenforceable. (If your employer asks you to sign a release for wages but does not pay those wages, that release is not valid.)

If you disagree with your employer about the amount of wages you are owed, your employer must immediately pay at least the wages it agrees you are owed. Your employer cannot require you to waive the disputed wages in exchange for paying the agreed wages. For example, if you think that your employer owes you $500, but your employer claims that it only owes you $200, then your employer must pay the $200. You can then file a claim to recover the rest. Your employer cannot withhold the $200 to try to get you to waive your right to bring a claim for the other $300.

(Note: If your employer tries to pay you with a check containing the words “payment-in-full,” or something similar, strike out this language before cashing the check. As long as the check is merely for the amount that the employer agrees you are owed (but doesn’t include the disputed amount), then the words “payment in full” should not give up (or “waive”) your right to file a claim for the remaining wages you are owed.)

11.

Do I have time to consider and revoke a release agreement?

Normally, there is no specific time (other than a “reasonable” time) that an employee must be allowed to consider or reject an offer to release claims. However, if you are asked to waive an age discrimination claim under the Age Discrimination in Employment Act, you are entitled to a written statement giving you 21 days to consider the agreement before signing, and 7 days after signing the agreement during which you may revoke your signature.

12.

Can my employer require that I keep my severance pay/ release of claims agreement confidential?

Employers often ask employees to sign confidentiality agreements requiring the employee to keep the terms of the release of claims confidential. These types of agreements are normally valid, unless you are required by law to discuss the agreement, such as at a future lawsuit. Some confidentiality clauses also allow you to discuss the terms of the agreement with your financial advisors or family members.

13.

Can I negotiate the terms of the release with my employer?

Yes. Since a release is a contract you have the right to accept (by signing), reject (by not signing), or try to negotiate a contract with different terms. Keep in mind however, that if you make a counteroffer by trying to renegotiate, the initial contract will be considered rejected and your employer is under no obligation to continue to offer the original terms of the release.

14.

Do I have to sign the release?

Whether or not to sign a release is completely up to you. However, when deciding whether to sign the release, you should weigh the value of the claims you are giving up against the benefit you will receive by signing the release. For example, if you think you have a legitimate claim of age discrimination against your employer, you might not want to waive that claim if your employer is only offering a small amount of severance pay. On the other hand, if you aren't aware of any claims you may have against your employer, then you might be better off signing the release in exchange for severance pay that you otherwise would not be entitled to.

15.

May the terms of the release prohibit the former employee from working for the employer in the future?

Yes.

For further information about your employment rights, contact the Workers' Rights Clinic.

Disclaimer

This Fact Sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society–Employment Law Center cannot ensure the information in this Fact Sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.