Severance agreements are an important way to reduce legal risk in the event an employee leaves your organization, whether voluntarily through resignation or involuntarily through termination. But severance agreements not only provide peace of mind for the organization that litigation risk has been minimized. They can also benefit leaving employees by providing a financial cushion between jobs and create a more favorable last impression of the organization.

Severance agreements come in many forms and under many titles: letter agreements; severance, termination, or separation agreements; and releases, waivers, or covenants not to sue. A severance agreement, like all contracts, must be supported by consideration. Consideration offered to the leaving employee in exchange for the waiver of the right to sue must be something above and beyond any benefits or payments already owed, such as pensions or accrued vacation and sick leave. If an employment contract requires a certain amount of severance pay, the organization must provide additional payment above and beyond the contractual sum to support the waiver of the right to sue.

To be valid, the leaving employee’s waiver of the right to sue must be “knowing and voluntary.” Severance agreements should be clearly written and avoid technical or legal jargon and long, complex sentences. A waiver cannot include future rights or claims that may arise after the agreement is executed because those rights or claims are not yet known.

A waiver of the right to bring an age discrimination claim must comply with certain statutory requirements to be "knowing and voluntary" under the Age Discrimination in Employment Act of 1967. A waiver of claims under the ADEA must:

- Be written "in a manner calculated to be understood" by the employee;
- Specifically refer to rights or claims arising under the ADEA;
- Not include rights or claims that may arise after execution of the agreement;
- Be supported by consideration;
- Advise the employee in writing to consult with an attorney;
• Provide the employee with at least 21 days to consider the offer, or, if part of a group reduction in force, at least 45 days to consider the offer; and
• Give the employee 7 days to revoke the agreement after execution of the severance agreement.

29 U.S.C. § 626(f). The consideration and revocation periods under the ADEA can add complexity to the process, so be sure to start negotiations for severance early with employees aged 40 or older.

In addition to a release of claims, consider including the following terms in your next severance agreement:

• Non-disparagement – From the perspective of public and donor relations, non-disparagement clauses are essential. The clause can (and most often should) apply to both parties so that neither can make critical, negative or disparaging remarks.
• Confidentiality and Non-disclosure – This clause can keep the fact and terms of the severance agreement confidential. If the leaving employee has previously signed another confidentiality agreement, refer back to the prior agreement specifically. Failure to do so may void the prior agreement so that only the confidentiality clause in the severance agreement remains.
• Return of Property – This is the organization’s chance to ensure that the leaving employee has returned all paper and electronic documents, keys and badges, and other property belonging to the organization.
• No Admission of Liability – Even if termination of the employment relationship has been difficult, it is best to keep the agreement neutral by stating that neither party admits to any liability.
• Non-competition and Non-solicitation – If the leaving employee has access to sensitive information related to your organization, you may want to consider a non-competition clause (that prohibits the employee from working for a competitor) or a non-solicitation clause (that prohibits the employee from soliciting the organization’s clients or donors). Courts generally view non-competition and non-solicitation clauses skeptically, so they should be narrow in scope and be supported by ample consideration.

Finally, don’t be discouraged by a leaving employee who wants to negotiate his or her severance agreement. An employee with a voice in drafting the terms of the severance agreement is more likely to leave with a favorable impression of the organization. Negotiation is also strong evidence of a knowing and voluntary release, making the final agreement more likely to be upheld in court if challenged. Consider terms other than payment terms as bargaining chips. Often, pro-employee clauses, such as not contesting unemployment benefits or departing from the typical neutral reference policy, can help finalize negotiations and cement your organization’s reputation for being fair and reasonable.

Properly negotiated and drafted, severance agreements are "win-win" for the organization and the leaving employee, both reducing legal risk and preserving your organization’s reputation.