

## FEATURE

# Lost Your Job? Put Yourself In the Best Position Possible

By Katherine J. Michon

Your parents may have enjoyed lifetime employment, but in today's marketplace, working with one employer for an extended period of time is a rare opportunity. Statistics show that, one day, you may be faced with unemployment.

Companies frequently downsize. Wrongful terminations are not just things that happen to someone else. Here are some tips to help you protect yourself while you exit your company and to put yourself in the best position going forward.

**1. Determine** the message you want communicated to your staff, coworkers and the outside world.

Upon learning that you are going to lose your job, you may not be thinking clearly. Controlling how your staff is informed of your termination is essential to your reputation and, hence, your livelihood.

It is important to take control quickly and determine what "spin" you want to put on your departure. It may be possible to tell third parties that the decision to leave was a mutual decision or that you decided, for reasons you can explain, to resign.

How the message is delivered, when the message is delivered and who should be told can be crucial. Thinking ahead about these issues is important and may be the key to making sure that your coworkers,



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staff and the outside world believe that it is your decision to leave as opposed to the company's.

**2. Decide** who the best person is to provide you with an employment reference.

Many companies follow the policy that they will not provide official employment references. If someone calls such a company, it will only provide dates of employment, position held and last salary.

Many times, however, a company will permit a job reference, whether written or oral, or both, to be provided for a former employee. Be prepared not only to ask for this reference, but also to draft it yourself so you can be sure it contains the information you believe is important and

relevant.

Keep in mind that written references may not add much value. On the other hand, your job search will be aided by your knowledge of what will be communicated to a potential new employer in an oral reference.

One way to accomplish this is to have the company adopt a written reference letter which then becomes the agreed-upon script for the oral reference.

**3. Determine** whether your termination was unlawful.

You may have your own opinion as to whether your termination was lawful. You should, however, seek advice from an experienced employment attorney who can review the relevant facts and documents to assist you in making an informed decision.

Keep in mind that the general rule is that poor, unkind and unfair business decisions, including terminations, are not unlawful. In other words, most employees in the United States are "at-will." This means that they can be terminated for any reason, even an unfair reason, as long as it is not an illegal reason.

That said, even at-will employees may have recourse under the law since terminations are illegal if they are discriminatory or retaliatory in nature.

For example, under state and federal law, it is illegal to terminate someone because of his or her gen-

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der. The termination decision may also be illegal for some other reason. In another example, the company's actions may be determined to violate the covenant of good faith and fair dealing or a public policy.

Be aware that that the law does recognize that discrimination based on gender or another protected category can be subtle and allows employees to prove their claims with circumstantial evidence, such as a divergence from prior practices, or written or oral policies, as opposed to direct evidence (e.g., in the case of gender discrimination, a comment to the effect that "we are terminating your employment because we want to hire a man instead").

Of course, some employees may have an employment agreement (often stated in the offer letter) which requires the company to provide severance benefits at the time of termination. When evaluating your claims and rights, all employment documents should be reviewed and evaluated by an experienced lawyer.

#### 4. Do your homework:

Understand how the company has treated similarly situated employees in the past. While your termination may not be found to be unlawful, you still may have an opportunity to negotiate a severance package (or a better one than originally offered).

By doing your homework and determining what other similarly situated employees were provided when they exited the company, you can determine if the package you are receiving is not equally generous. This information is often known to coworkers and, of course, when

dealing with a public company, regulatory filings can provide valuable assistance.

5. **Seek** advice from experienced employment counsel before executing a severance agreement.

Most severance agreements contain language that requires you to release all claims against the company before you can receive your severance benefits. Once this document is executed, you will have not only released your rights, you will have lost your negotiation power to improve your package.

Furthermore, many agreements contain other onerous provisions, including non-competition, non-solicitation and/or non-disparagement clauses.

These agreements are often written to protect the company, not the employee. Therefore, before you execute any document, you should understand what you are agreeing to, confirm that the language is not overreaching and ensure that the provisions are drafted to protect your interests as well.

6. **Think** creatively and determine what, other than severance, will be valuable to you as you exit from the company.

When you think of a severance package, you are probably thinking of how many weeks or months of pay the company will provide you. In addition to monthly salary continuation, there are other financial and non-financial terms to which a company might agree to provide to an exiting employee.

For example, there may be small things, like the continued use of the cell phone and computer, that will

assist you in looking for a new job. Bigger things might include continued coverage on the company's health care plan, vesting of options, or assistance with moving or outplacement costs.

Many times the company has let you go without paying you the bonus you were planning on receiving, or without paying you outstanding commissions.

There are also many tax consequences that need to be considered. For example, as Internal Revenue Code Section 409A affects severance pay, employees should be sure that any severance agreement, or for that matter employment agreement, is in compliance with or excluded from this provision, as failure to do so can have adverse financial consequences.

**Conclusion.** Losing a job can be a difficult time in your life. These are just some of the issues that need to be addressed during that period.

You will frequently be offered a severance package that advises you to seek legal advice before signing. Seek such advice from experienced employment counsel soon after you are told you are going to lose your job (or even prior to receiving such notice, if you have a sense that your employment is in jeopardy).

In many cases, there are short time frames within which you may bring particular claims. Understanding all of your rights before you sign those rights away is a smart business decision.

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