

Severance Agreement
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In a recent decision, the Washington Court of Appeals held that a CEO could be personally liable for unpaid wages, double damages and attorney's fees arising out of a breach of a severance agreement. In *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1 (2009), a former Chief Operations Officer sued to enforce a severance agreement with his former employer, which entitled him to severance payments in excess of \$167,000. The company's current CEO had terminated the severance payment because the former executive had, in his opinion, violated a non-disparagement clause in the severance agreement by signing a declaration in favor of a competitor in unrelated litigation. That declaration had caused the former employer to settle the litigation. The CEO made this decision to terminate the severance only after consulting with counsel. A non-disparagement clause is a common provision in many severance agreements and can be used protect the employer from future damage inflicted by an ex-employee airing his or her grievances.

In *Moore*, the former executive had sued both the employer and the CEO for breach of contract, unpaid severance, and requested double damages and attorney's fees under Washington wage and hour statutes. The employer, which was bankrupt by the time of litigation, settled the claims against it and stipulated to a judgment, leaving the CEO as the lone remaining defendant in the lawsuit.

The trial court treated the severance payments as unpaid wages even though the former executive was no longer working for the company. That is significant because Washington courts have long recognized a strong public policy in favor of ensuring that employees receive the full amount of wages for which they are entitled and will hold decision-makers personally liable for unpaid wages. Thus, the CEO was exposed to the former employee's wage claim arising from the unpaid severance. The trial court then granted judgment in favor of the former executive against the CEO, finding damages in excess of \$300,000.

The CEO appealed. The Washington Court of Appeals reversed, holding that summary judgment was not appropriate since there was genuine issue of material fact whether the CEO had good cause to terminate the severance because of a violation of the non-disparagement clause. The Court remanded the case to the trial court for trial. Although the CEO escaped liability on summary judgment, the *Moore* court highlights the pros and cons of severance agreements. The purpose of these agreements is to ensure that departing employees release any potential claims and protect the employer from future litigation. Nonpayment of the severance can subject, not only the company, but also individual decision-maker(s), to liability for these unpaid "wages," double damages, attorney's fees and costs plus 12% prejudgment interest. On the other hand, severance agreements also provide certain protections for post-employment conduct by the ex-employee such as disparaging the company, using confidential information or filing a lawsuit arising from the termination of employment.

The take-away from the *Moore* case is that employers should obtain severance agreements from departing employees to ensure that they release their claims against the

company, commit not to disparage or release or use confidential information of the company, and, in certain cases, not solicit or compete. However, if an employer decides not to pay the severance amount because of a perceived breach, it should beware that the ex-employee may have a viable wage and hour claim, not only against the company, but also the decision-makers who may also be found personally liable.