



INTERVIEW WITH KIRK NEMER, CAREER PROTECTION

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Big Picture Channel

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Welcome to Total Picture Radio, the first podcast for career advancement, employment trends, recruiting, and leadership development. You'll find us on www.totalpicture.com, [iTunes](#), and now syndicated on jobradio.fm. Tune in and dial-up your career.

Severance Plans Face Squeeze Amid Scramble to Preserve Cash is the title of a recent [Wall Street Journal article](#) by Sarah Needleman. "Some 20% of companies polled in December by Hewitt Associates say they plan to change severance policies and 31% are considering such a move," she writes. "Hewitt survey found that 43% of firms planning severance policy changes expect to reduce cash payments while 21% intend to trim benefits. Similarly, a survey conducted earlier this year by Hay Group shows that 61% of employers planning or considering changes aim to do so by downgrading their offerings to laid off workers."

Welcome to a big picture channel podcast on Total Picture Radio. This is Peter Clayton reporting. Joining us **Kirk Nemer**, CEO of [Career Protection](#), an employment attorney who specializes in employment and severance agreements and has been negotiating them for the past 21 years. As we all know, employees across the United States are being laid off in droves. It seems every day another major company announces another several thousand staff cuts. The number of jobless Americans rose to 12.5 million in February, pushing the unemployment rate to 8.1%, the highest in 26 years.

Kirk, welcome back to Total Picture Radio; it's really great to be talking with you again.

Kirk: Thank you for having me again, Peter.

Peter: Well, based on the preamble that I quoted here from Sarah Needleman's article, how does an employee begin to negotiate a severance package in this kind of an environment, Kirk?

Kirk: The environment has certainly changed, Peter, and you're correct to point that out as companies are strapped for cash. However, there's often room to negotiate the terms of a severance package, but employees need to know what to ask for and how to ask for it to get the best deal. They need to understand from the very beginning that the severance offer is just that, an offer, and all offers can be negotiated. The leverage that employees have to negotiate better terms on their severance package is the release or waiver of claims agreement they are asked to sign in exchange for their severance package. The release or waiver of



claims means that the employer is requiring the employee when they're laid off to give up their legal rights in order to receive the severance pay. This is a contract, and all contracts are negotiable. So, the first step is to understand why companies offer severance packages even though they aren't required by law to do so. When you sign on the dotted line to accept a severance package, you waive your right to bring the employment-related claims, such as age or sex discrimination, against the company. Offering each employee extra pay and benefits is the company's way to head off potential legal trouble down the road.

Peter: One thing we discussed the last time you were on this show, companies will try to get you to sign a severance agreement immediately upon they're telling you that you're going to get laid off. They say something like, "Well, you know Jane, we're really sorry, but we've got to lay you off and we need you to sign this release and we need you to sign it today to make sure that we can get you these benefits that we're going to give you." So, they really try to pressure you into signing right away. What do you recommend?

Kirk: What I recommend Peter is for starters don't sign anything. As a former vice-president in human resources I know that human resources will call you down, in fact, you posted an article that we wrote at Career Protection called Two Hours Notice, and it explains that that's basically how it happens the day an employee is laid off. Human resources will present the employees laid off with documents to sign that very same day, but instead of agreeing on the spot, take the documents home. Chances are you'll be less emotional, you won't be in shock, and you'll have a clear picture of what the severance agreement offers. In fact, it's important for everyone to know out there that federal law requires companies to provide up to 45 days in large layoffs to all employees to review the severance package and release a claim's agreement. In fact, if you're over 40, you have a federal right of 21 days minimum to review the severance agreement before you have to sign it.

Currently, the Older Workers Benefit Protection Act has allowed even more time to negotiate their severance because the WARN Act provides a 60-days notice in compliance with the federal law. So, if you're one of the many company-wide layoffs, your employer is required to give you advanced notice under the new federal WARN act. The WARN requires employers with 100 or more employees to give 60-days notice before closing a particular plant or engaging in a mass layoff from an office or they will have to pay dislocated workers 60 days of wages and benefits. If employers, for example, only give 30-days notice, they must pay 30-days severance. In some states already including Wisconsin, Illinois, and California have adopted their own beefed-up versions of the regulation. New York, for example, increased the notice employers must give to employees to 90 days from 60. It also made the law applicable to firms that layoff only 25 employees at one time compared with the previous minimum of 50.

So, take your time with the severance agreement. Do not sign it right away. The key piece of these agreements is the money and benefits, but employees much also watch out for restrictive covenants such as a non-compete or non-solicitation



clauses. These may also be in the employees' old employment agreement which remains binding, so they must be knocked out in the severance agreement when they leave the company. It's very important Peter that all employees must review the entire severance package to be certain you are receiving all the compensation and benefits you're legally entitled to receive, and we know those elements because at Career Protection we have an exclusive 20-year data base of severance agreements. So, we know what the companies have given others in previous layoffs. The most important thing to remember is that no severance package is a take-it or leave-it situation. Your severance can be structured to provide more beneficial tax treatment and better opportunities for benefits.

There are many aspects and parts of a severance package. It's not just simply about severance pay and insurance benefits. There's an entire package, and many employees forget this and leave elements and perks off the table when they're negotiating their severance packages.

Peter: Well, you know Kirk, many severance agreements state that employees should seek the advice and consult of an attorney. Should they?

Kirk: Well, yes. They should definitely have an employment attorney review their agreements and contracts before they sign them, but getting attorneys involved is problematic. So, employees must be very careful because you don't want to legally escalate your exit, which will definitely burn bridges with your company when they get a letter on legal letterhead from a law firm. At Career Protection we have a unique way of handling severance package negotiations and still protecting employees' legal rights without directly having an attorney get involved. Career Protection suggests keeping lawyers out of the equation. If you don't, the company must drag its attorneys into the discussion, and human resources cannot handle it, which complicates and legally escalates the entire severance package process. The key is, Peter, that the best severance deals come from your friendly human resources department, and as employment attorneys and former vice-presidents of human resources of fortune 500 companies who specialize in employment severance agreements only for the past two decades, we know at Career Protection the secrets of how to get the best severance packages from companies.

Peter: You have a really interesting article on your website, careerprotection.com, which is titled The Eight Biggest Severance Package Mistakes, and I'd like you to respond to a couple of these Kirk because they really took me by surprise. First of all, number one I'm an at-will employee, so I cannot get severance pay.

Kirk: Right. Many people are told by their companies, "Well, you're an at-will employee, so you have no rights." Well, at-will employment simply means that you are employed for an unstated duration not for a fixed contract period of time. It means that you can leave at any time and your employer can terminate your employment at any time, but a termination must be for legal reasons and a layoff must be performed legally. Being in an at-will employment state or having an at-



will employment contract does not mean you cannot obtain severance pay and the great severance package because you have leverage.

Peter: What kind of leverage do you have?

Kirk: The biggest piece of leverage as I mentioned before is the release agreement. All companies expect to negotiate severance packages in exchange for a separation and release agreement.

Peter: You brought up something earlier Kirk that I'd like to go back to because I have a good friend who is just being laid off, actually be the city New York, who had signed a non-compete agreement with her employer. I'm telling her that she needs to get that revoked. How do you go about doing something like that?

Kirk: You're signing a new agreement, and instead of an employment agreement coming in the company which your friend is being bound by and would still be bound by, having a company offer a release agreement, a release of claims in exchange for the severance that is the leverage your friend has to negotiate and get the exit terms of the package on good terms, on her own terms. That is why it's so important to negotiate and look at the entire release of claims and separation agreement. When a company is fearful of negative publicity, complaints from former employees, possibility of being sued, and the disruptive time and expense of litigation or anyone just speaking ill of the company, companies want you to go away quietly and stop any possible controversy. So, with the release in hand and with that leverage, that is how they can, and especially during these economic times, courts frown upon and the states laws even in the country frown upon non-compete and restrictive covenants because they're taking away someone's way of life.

Peter: Back to your top eight Kirk, my company is bankrupt or is being acquired, so no severance pay.

Kirk: That's totally false, and that is, as you're looking at our severance pay biggest mistake number four, most severance packages, almost all of them, are provided when companies have no money, when they file bankruptcy, or simply cut costs through layoffs. That is what we're seeing in this country today. So, it's a big mistake to think, "Oh, my country's in financial trouble, so there is no severance pay." In fact, severance packages provided during these unfortunate times are usually the most generous.

Peter: Really?

Kirk: Absolutely. When they are dealing with laying off during a time and a recession as we're in now, and they know it's going to take an employee several months, many months to get a new job, they tend to be a little more generous with transition and outplacement services, with continued severance pay, etc., so they don't want their employees on the street or homeless. They want their employees



to have a good transition package. This economy will turn around, and if companies don't treat employees the right way and reasonably, companies are going to have a very difficult time recruiting employees in the future. If the word goes out as we've seen in the newspapers and on the news recently, when some companies don't treat their employees right on the way out with good severance packages, there's a lot of negative publicity, and believe me, most people will not want to work for those companies in the future.

Peter: How does severance pay affect unemployment compensation?

Kirk: Well, that's an interesting question, and we're asked that so often Peter because many people, even some companies, illegally try to get people to waive their unemployment compensation. First, severance pay is not considered wages that would count against your right to unemployment benefits. However, with that said, some states have a temporary delay in eligibility for unemployment insurance depending on how the severance is paid out. If the severance is paid in a lump sum payment, it probably will not affect any employee's unemployment benefit. However, if severance is paid out over time such as in a salary continuance and the employee remains on the payroll, it may delay your ability to collect the unemployment, but severance pay like vacation pay payout when you are laid off will not count against nor even be deducted from your unemployment compensation. It will simply delay your unemployment payments until after the severance pay has been exhausted by you.

Peter: If someone is listening to our show who wants to discuss their situation with your firm Kirk, how much does an initial consultation cost?

Kirk: We offer a free consultation at Career Protection. Your listeners can simply go to our website at careerprotection.com and fill out an information request or they may simply call us at 877-HRLAW-4U, which is 877-475-2948 and receive a free consultation. It will cost them nothing.

Peter: If they decide to go ahead with bringing your firm into helping them negotiate, what is a typical cost of doing this?

Kirk: We have a one fixed fee for total service. Unlike other law firms, we do not take a percentage of the severance nor do we bill by the hour, and it really depends on their circumstances. We help people write them during their free consultation. If there's just a few amendments to make, we'll tell them, and we'll tell them what to write and they can go ahead and do it at no cost. They can go to our website and see. We have packages depending on where they are in the company, whether they're a senior professional, a regular professional, or at the C level on executive. We have different fixed fee packages which will fit the situation of a person.

Peter: Kirk, recently in the papers, in the Wall Street Journal here, they were discussing a large company on the east coast that is laying off 5000 workers, and they're actually replacing those workers with people in India. The thing that I



found just incredible is that the company is requiring the US-based employees to train these people in India to take their jobs. What do you know about this?

Kirk: Well, we do know about it Peter. There are several major fortune 500 companies that are having their laid off employees do this during the WARN Act period of 60 days. So, what's happening is they're saying, "Hey, employee, you're going to be laid off in two months. This is your 60-day WARN Act notice. You'll get your severance after that, but before we give you your severance, you must work in the next 60 days and train people," and many of these companies are outsourcing as you said to India, to Philippines, and to other countries and requiring their laid off employees to train these people who will be replacing them. What we have heard Peter is that this is not a true layoff. It's not a true position elimination when these companies are replacing these employees with foreigners or with anyone else for that matter, and this is going to lead, and we have heard already, this will lead to many class actions from these laid off employees that their companies replaced them with other employees.

Peter, there are going to be a lot of class action suits from these laid off employees, and we're hearing about it now because these employees did not truly get their positions eliminated, they were replaced by new hires for a lower wage and by foreigners. This is going to cause huge class action litigation which you will be hearing about later this year throughout the nation.

Peter: I think this is just incredible to add insult to injury. Dear employee. After 20 years of service, we're going to throw you out the door, and by the way, you've got to train the person from India who's going to be taking your job at a third of your pay.

Kirk: And on top of that Peter, not only are we seeing long term employees being replaced, but these long term employees are even signing their separation or release agreements without realizing that this is going to cutoff their retirement and their pension and their access to retiree health insurance. If they do not negotiate within their severance and separation agreement, they're cutting off their nose to spite their face because they may be giving up rights – and you're right, I've had employees that have worked two to three decades for major companies in this country that have been laid off just prior to their vesting of their retiree pension and their retiree health. This is a violation of the federal Older Workers Benefit Protection Act, and that's more litigation which is going to hit these companies down the road this year.

Peter: Well, Kirk, this has been a terrific conversation, and I really hope people take this to heart and just don't sign something assuming that that's the best that they can get and give you guys a call, and at least it's free to do the initial consultation. Get some ideas of what your real rights are to make sure that you're protected, to make sure that your healthcare benefits are continues, that you get what you should out of your employer before you leave.



Kirk: Right, and that's what we provide Peter in our free consultation at careerprotection.com because we will go over their separation or release agreement, and if it's fine to sign, we tell them that, but they really need to take those agreements seriously and take their time with it.

Peter: Is there anything I didn't ask you in our interview today Kirk that you think is important for our listeners to know about being laid off and navigating this severance issue?

Kirk: Well, the one thing that I neglected to mention is with the unemployment benefit...there's two things actually that I neglected to mention. That with regard to a release of claims in exchange for their severance packages, they have to make sure, and this is federal, the claims for unemployment insurance benefits cannot be waived in a general release or waiver claim. So, people have to make sure that they're not being misled by their companies in thinking that if they accept severance pay that they will not be able to collect unemployment. That cannot even be waived.

In addition, it's important for all your listeners to know, and we often ask for an extension of healthcare coverage in addition to severance pay, but the recently passed new federal Stimulus Act by the Obama administration provides a 65% subsidy to help employees and laid off workers afford the Cobra, which will definitely lower their health insurance premiums. There's just many other items employees ask for.

As I said earlier, it's not simply about severance pay and insurance benefits, you can ask for dollars for an outplacement firm or funds for a residency service or career coach to help you find your next job during this recession. We've asked for cell phone payments to be continued. We've asked for companies to transfer ownership of the computer that the employee used to help them in their job search as well as the acceleration of vesting of stock options, a 401K match. It's also very important, a lot of people on their way out, especially this time of year, accept the severance package and forget to get their annual bonus which is paid out in the first quarter of this year. So, they should not forget to collect their annual bonus and ask to negotiate for it because they've earned it in the previous year and they should be able to get it even though they're being laid off. So, that's another element that they should be negotiating and be careful to not leave perks off the table when negotiating their severance packages.

Peter: You bring up some really interesting ways of negotiating. So many people have personal computers that the company has given, the laptop computers that they use when they travel, and you're absolutely right, if they turn that back in, what is the company going to do with it? Usually, just turn it over to some recycling firm somewhere because it's old, it's several years old, and they're not going to issue it to different employee, so why not?



Kirk: Oh, absolutely. Right, you're correct Peter. People just sign their severance pay. They're afraid to ask for more during these times, and that is the biggest mistake. This is negotiable. It's not a take-it or leave-it situation. We've had people even...companies ask for their property back, but when employees are laid off, if they ask for their cell phone, the company said, "Sure. You know what, we'll even pay the next six months." So, you'll have the continued number to continue your job search, and you're right, the laptops or even the computers that we've asked for on behalf of our clients, the companies just say, "Sure. You know what, bring it in." They do. Their IT department does a sweep and takes off any company proprietary things off the computer, but you're right, they're just going to throw those away. I mean, they're usually older, and they're happy to transfer and simply give it free of charge to the laid off employee.

Peter: Well, Kirk, it's really been great to have an opportunity to catch up with you again, and I'm sure you're extremely busy these days.

Kirk: We are. It's been very sad. I mean, as you mentioned in the introduction, this is the tenth week in the United States where we've hit in a row record number of jobless claims and layoffs. It's keeping us busy, but at the same time, we like to help. This is a very important time for anyone who's being laid off. This is the time to protect their financial future and their career because it is going to take several months and maybe years to get another job that is as good as their position which they were laid off from. It's sad what's happening, but this is the time to fight for a better severance package without burning any bridges, and we know how to do that. We've been helping people every day and every week, and we'll continue to do so during this recession.

Peter: Well, again Kirk, thank you so much for taking time to speak with us today on Total Picture Radio.

Kirk: And thank you again Peter for having Career Protection.