

# The Five O'Clock News®

from America's Premier Career-Coaching and Outplacement Service

\$4.95

May 2006

A Publication of The Five O'Clock Club®—www.FiveOClockClub.com

Vol. 20, No. 5

*"One organization with a long record of success in helping people find jobs is The Five O'Clock Club."*

FORTUNE

## Just Lose Your Job?

### You May Be Better Off Than You Think

by Elizabeth T. Hill, Esq.

Celebrating 25 years—  
America's Premier  
Career Coaching and  
Outplacement Network for  
Professionals, Managers  
and Executives

**J**ob loss—especially sudden, unexpected job loss—is traumatic. Part of the trauma is money panic: terror that you won't have enough money to pay the bills. A few weeks or months of severance might soften the blow, but most people have lots of obligations—and too much credit card debt. Unemployment can feel like the end of the world.

#### There are laws, programs, and safety nets to help you get through the rough patch.

It's vital to get beyond the trauma and the panic as soon as possible, so it's important to be aware that there are laws, programs, and safety nets to help you get through the rough patch.

This article is an informal summary of the benefits and payments to which you may be entitled when you have been terminated from your job. This is not legal advice regarding your particular situation. Rather, it is information which may indicate that you should consult a lawyer. This information...

- ...may help you to maximize your income during unemployment.
- ...may put you in a position to better negotiate the terms of any agreement that your employer may ask you to sign on your way out the door.

I will first explain the benefits and payments to which you may be entitled. Then I will explain how this knowledge may be used to *improve the terms* of your severance agreement, confidentiality agreement, non-compete agreement, or general release.

These documents are not just paperwork to be signed and forgotten. These agreements commonly ask you to *give up* valuable rights, and you are entitled to something in return. You want to be sure to protect yourself, *i.e.*, get what's

coming to you.

**First, a very important word to the wise:** You should keep all your benefit information documents and your employee handbook *at home*, where you'll have access to them after you've left a job. If you don't have copies at home, when you leave your employment take all information about your benefits with you. These documents are crucial to your ability to obtain benefits and/or negotiate your severance. Sometimes people are escorted from the office right after being fired, with barely enough time to clean out their desks.

*Continued on page 3*



*"I can tell you're over worked and exhausted, Perkins, because when you got me coffee it had sugar in it. You know I take my coffee black."*

#### In this issue

- ◆ The Value of Having a Long-Term Vision
- ◆ Measure the Impact of Human Capital



Elizabeth T. Hill, Esq.

Benefits information and the employee handbook aren't something they usually think about at that moment. *So keep copies at home.*

Most medium-sized and large companies have employee handbooks, manuals or on-line policies, and increasingly, small employers do, too. These handbooks frequently give rise to a contractual claim to the benefits described in them. Even if the handbook says that it is not a contract, your employer will frequently respond positively to a request for benefits based on its policies and/or the threat of litigation based on these policies.

**You should keep all your benefit information documents and your employee handbook at home.**

## The Benefits and Payment to Which You May Be Entitled

### Health Insurance

If you are currently covered by your employer's health care insurance, you are entitled, under COBRA, to 18 months of continued coverage, at a cost to you of 102% of the premium formerly paid by your employer. This is usually a reasonable cost, since employers have relatively low premiums based on group coverage. You are entitled to medical, dental, vision, and prescription drug coverage, so long

as such coverage was offered while you were employed. You have this right even if you were fired "for cause." Only "gross misconduct" waives your right, and gross misconduct is not simply doing your job poorly. Essentially, it is conduct that breaks the law.

Your employer or the administrator of its insurance must notify you of your right to choose continued coverage within 44 days of your termination. You must then mail your request for coverage within 60 days. These deadlines cannot be extended, although your employer can't terminate coverage without 30 days' written notice.

**You are entitled to COBRA coverage even if you were fired "for cause."**

### Pension

You are entitled to the vested portion of your pension, or other deferred compensation, under ERISA, regardless of the reason for your termination. Your balance information is usually supplied by your employer every quarter. The procedure for filing your claim is described in the Summary Plan Description, which your employer is required to provide periodically; it must be made available for review on request. A denial of your pension claim must be in writing and within 90 days of your employer's receipt of the claim. You

then have 60 days to appeal. If your claim is denied, *see a lawyer right away, before you appeal that denial.* The rules regarding appeals from a denial are complicated and there is only a very limited right to contest a final denial in court. If you start appealing your claim alone, believing that you are following simple appeal procedures, you could lose your pension forever.

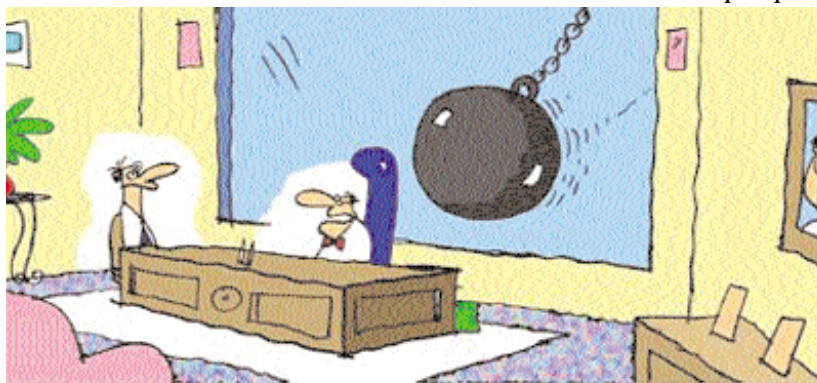
### Severance Pay

The amount of severance and the payment method may already be clearly defined by your employment contract and/or your employee handbook or employment policies. Your severance rights, like your pension, may be protected by ERISA. Frequently, severance benefits will be protected by ERISA if they are described in your employer's ERISA Summary Plan Description. So, if you are not successful in convincing your employer to provide you with the severance provided in its employee policies, ask for the ERISA Summary Plan Description, and file a claim for benefits based on the plan and the procedures described in it.

Don't discount the possibility that an employer may be responsive to a well-reasoned argument for severance—appealing to fair play, for example—even if there is no formal policy about severance. Anyone who was coaxed away from another job, or who was asked to move a thousand miles to accept a position, can sometimes get severance by making a case for decent and fair treatment. By the same token, most employers do not provide severance when employees have been terminated for cause or have resigned.

### Your Last Paycheck

You are always entitled to your last paycheck. If you live in New York State, and your employer withholds your final pay-



*"I'm quite surprised. This morning when I called Johnson a lazy bum, and fired him on the spot, he took it quite well."*

check for any reason, you may file a claim with the New York State Department of Labor. An explanation of this process and a claim form are available at [www.labor.state.ny.us/work-protection/labor\\_standards/workerprotection/wp\\_forms\\_documents.shtm](http://www.labor.state.ny.us/work-protection/labor_standards/workerprotection/wp_forms_documents.shtm). The New York Department of Labor will then collect your wages/salary for you. This procedure is less expensive than hiring a lawyer. No matter what state you live in, you can probably find similar help.

---

### **Your employer may owe you double the amount of unpaid commissions as a penalty for failure to pay.**

---

#### **Unpaid Commissions**

Commissioned salespeople and sales representatives are usually entitled to commissions that were earned before termination. You must, however, have been an employee. Independent contractors do not enjoy the same protection. New York residents can file a claim to collect unpaid commission with the Department of Labor. Its role is to collect the commissions for you. Again, you should access the above website in order to file a claim with the New York State Department of Labor. You may also want to consult an attorney, if significant money is due to you. New York State law, for example, provides that, in some circumstances, your employer may owe you *double* the amount of unpaid commissions as a penalty for failure to pay.

#### **Your Year-End Bonus**

You are sometimes entitled to your year-end bonus, pro-rated to the number of months served before your termination. You are generally entitled to the bonus when your employer, in your offer letter, the employee policies manual, or elsewhere, has put into writing that the bonus will be paid based on the preceding year's performance and/or according

to some set formula, such as a percentage of your division's annual profit.

Usually, however, you cannot collect the bonus if it is true *incentive* compensation based on the employer's discretion alone, for the purpose of inspiring better work in the future. A statement in writing by the employer that the bonus is discretionary is not necessarily the end of your rights. For example, a court may be particularly inclined in the employee's favor when the employee has been fired immediately before the bonus was due to be paid.

#### **Stock Options**

Stock options may be considered wages, but it is unlikely that they will be treated as wages if the employee receives a set salary. They may be considered deferred compensation and come under the protection of ERISA if they are granted in the format of a pension, *i.e.*, intended to be accessed only upon retirement. Virtually all employee stock options are granted purely by the terms

of the stock option agreement that is provided to employees at the time of the grant. Be sure to read this agreement closely; it will tell you the terms of the grant. For example, some portion of the stock may already be vested and may be taken with you on termination of employment.

---

### **A court may be inclined in the employee's favor when the employee has been fired immediately before the bonus was due to be paid.**

---

#### **Unemployment Compensation**

You are entitled to unemployment compensation if: (a) you were not fired "for cause," or (b) you did not resign. Even if you believe that you were fired for cause or that the employer considers that you resigned, you should file for unemployment. Sometimes, there is a *difference* between the understanding of

## **Should You Ask for Outplacement?**

*by Kate Wendleton*

When you lose your job, one of the first questions that comes to mind is, "How long will it take me to find my next job?" Naturally people worry most about when the next paycheck will come. So one of your primary concerns should be: What can be done to keep the between-jobs status as brief as possible? The research at the Five O'Clock Club is unequivocal: *people who get career coaching as soon as possible after losing their jobs spend far less time in the job market.* The coaching helps them search *effectively* and *avoid making costly mistakes.*

Hence one of the best benefits that a company can provide is *outplacement*, which can be simply defined as *job-search coaching that is paid for by your former employer*; it is a departing benefit to help people get through the rough patch. If you find that outplacement is not included in your package of departing benefits, ask for it! Get help from a coach on how to do this. If you marshal your arguments well, and take a conciliatory approach — "I'm a fair person, you're a fair person" — you may get it. Everybody wins, in fact: You win because you'll have a shorter time in the job market, and your former company wins because its remaining employees get the message that the company cares, and providing outplacement builds goodwill in the community.

Many people have asked their companies to provide Five O'Clock Club outplacement, and even companies that have not commonly offered this benefit have initiated the practice. Many companies that have used the traditional (expensive!) providers have switched to us because the price is right and the coaching provided to clients is superior!

Full information about Five O'Clock Club outplacement can be found at the back of this magazine and on our website, [www.fiveoclockclub.com](http://www.fiveoclockclub.com).

## JUST LOSE YOUR JOB?

the employee and the employer's official record of the reason for termination. Once you have filed, your employer has the opportunity to contest benefits. And sometimes even employers who have fired you for cause may not choose to contest benefits.

If you were laid off and your employer contests payment of benefits, you may appeal the denial of the claim. The Unemployment Appeals Board strictly limits the amount of money that a lawyer may charge for this appeal, making it an affordable option. The fact that you are receiving severance does not necessarily preclude payment of unemployment benefits. You may receive unemployment if your severance payments, by their terms, do not stop in the event that you obtain new employment. Severance that stops in the event of your re-employment is considered salary by the Unemployment Office and precludes payment of unemployment.

**Sometimes even employers who have fired you for cause may not choose to contest benefits.**

### A Few Thoughts on Severance Agreements

Employees will often be asked to sign a severance agreement as a condition for receiving severance. While severance payments may be conditioned upon the signing of this agreement, *you should be aware that you are generally entitled to the other benefits and payments described above regardless of whether you sign a severance agreement and/or general release of your rights.* You may not have to sign the agreement to obtain some of the benefits and payments described in it.

Severance agreements favored by employers frequently include:

- confidentiality agreements
- non-compete agreements
- and general releases that waive your

right to sue your employer for any reason, including violation of civil rights laws by such behavior as sexual harassment and race discrimination.

**The right to compete may be important to you, and non-compete clauses can be too restrictive.**

Review these agreements or clauses with great care. For example, the right to compete may be important to you, and non-compete clauses can be too restrictive. The severance agreement will generally list what the employer is providing to you in return for the non-compete agreement, etc. Is the employer promising you benefits that you would enjoy regardless of signing an agreement? Evaluate how much the severance payments offered are *worth* compared to the rights you are relinquishing.

If you want to negotiate a better deal, get a lawyer to review your agreement, evaluate your existing rights to benefits and/or payments and help you to negotiate with your employer. Remember that your employer cannot compel you to sign a severance agreement or release; remember also that severance is rarely a take-it-or-leave-it process. *Negotiating* is usually an option. ●

*Elizabeth T. Hill, Esq., practices law in New York City and specializes in employment law and litigation. Ms. Hill holds a J.D., as well as an LL.M. in Employment and Labor Law, both granted by New York University School of Law. She has published several articles on employment law and is a member of the Labor and Employment Sections of the American Bar Association and the New York State Bar Association, a member of the New York County Lawyers' Association's Committee on Employment and Labor Relations, and a member of the Association of the Bar of the City of New York.*

## The Job-Search Buddy System

**D**o you wish you had someone to talk to—fairly often and informally—about the little things?



“Here’s what I’m planning to do today in my search? What are *you* planning to do? Let’s talk tomorrow to make sure we’ve done it.” You and your job-search buddy could keep each other positive and on track, and encourage each other to do what you told the small group you were going to do: Make that call, send out those letters, write that follow-up proposal, focus on the most important things that should be done—rather than (for example) spending endless hours responding to job postings on the Web.

With your buddy, practice your Two-Minute Pitch, get ready for interviews, bounce ideas off each other. Some job-search buddies talk every day. Some talk a few times a week. Most of the conversation is by phone and e-mail.

Sometimes, people match themselves up as buddies. Just pick someone you get along with in your small group. Sometimes, your coach can match you up. However you do it, stay away from negative people who talk about how bad it is out there. They will drag you down.

The small group changes over time: people get jobs; new people come in. If you lose one buddy who got a job, get another buddy.

Your buddy does not have to be in your field or industry. In fact, being in the same field or industry could keep you focused on the industry rather than on the *process*. But you *do* have to get along! The relationship may last only a month or two, or go on for years. Some buddies become friends.

Of course, you should see your Five O’Clock Club career coach *privately* for résumé review, target development, salary negotiation, and job interview follow-up. It’s usually best to get professional coaching advice for these areas. ●