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SEVERANCE PAY NOT MANDATORY

By Neil Klingshirn

An employer is not obligated to provide severance pay. The only benefit that employers must by law provide is unemployment compensation. If you create a severance plan, however, covered employees are entitled to the plan's benefits. Nevertheless, you can create, modify or abolish a severance plan as you see fit. Most employers, especially small employers, choose to have no severance plan at all.

The mere fact that you, as an employer, gave severance payments to other employees in the past will not, by itself, create a severance plan. However, if you have been so consistent in the past that existing employees can tell how much they will receive and when, they could make a claim for severance benefits. In such a case you should consult legal counsel.

Sometimes, employers condition their severance payments on a release of rights (i.e., a promise not to sue the employer). This is only possible if you do not have a severance plan in place requiring you to pay the same severance without a release. In cases where an employee accepts severance pay in exchange for a promise not to sue for age discrimination, he/she must be allowed a 21-day waiting period to consider the offer. Otherwise, the employee's promise not to sue is unenforceable. Al-

though the waiting period must be observed only in age-discrimination cases, it has been adopted through practice to apply to most releases. This waiting period prevents "gun to the head" decisions by employees. As a legal matter, the employer cannot rescind an offer during the 21-day waiting period. Generally, the employee can accept the offer before the end of the waiting period, if he or she wishes.

If your employee responds to your severance offer by asking for a better package, technically he or she has "rejected" your offer, which you can now accept or reject. If you are willing to accept the employee's counter-offer, you may not have to wait 21 days.

In determining how much to offer in a severance package, an employer should evaluate any claims the employee may have. Find out what the claims are worth if the employee were to win, the chances of winning, and the potential attorneys' fees and court costs. You should then compare this (plus the ag-

gravation and uncertainty of litigating) with the value of your severance offer. An employee should be willing to accept substantially less in severance than what he or she might recover from litigation.

There is really no "rule of thumb" to follow with respect to severance pay. Employers who do offer severance will typically provide one week per year of service to employees below the officer or executive rank, and up to a month per year of service to executives and officers. In addition, some severance plans cap benefits at a specified level. Employers rarely offer severance pay to hourly workers.

For most small employers, severance pay is provided in exchange for a release of rights or to help a valued employee make a transition to new employment after losing a job through no fault of his/her own. In those cases you should look at what is fair and appropriate, and what the employee will accept.

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THE LLC: A USEFUL BUSINESS ENTITY

By Michael J. Stegman

Since the 1994 enactment of legislation in Ohio that gave us the limited liability company ("LLC"), this new form of business entity has become immensely popular. And for good reason. The LLC is a flexible and valuable tool for business owners. In this brief article, I will talk about what an LLC is and how you might make use of it.

The LLC is an entirely separate type of business entity. Although it is not a corporation or a partnership, it can share attributes of each. Like a corporation, the LLC will generally shield its owners (called "members") from the company's

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SPREADSHEETS AND INTELLECTUAL PROPERTY

By Steven A. Hill

Susan, an employee, develops a spreadsheet. She says that she created it at home, on her own time, and using her own computer. While it is beyond the scope of what her employer expects of her, it will be useful to her company.

Susan brings the spreadsheet to work, and it becomes the rave. It is novel and useful, displaying and analyzing crucial data in a new way. It saves the company money, and actually starts making money for the company. Competitors do not have this.

Weeks later, she applies for another position at her company, but it goes to someone else. Susan quits, taking the spreadsheet file with her, and warning her former employer to stop using it, or else. Company managers say it belongs to the company, and that they will use it as long as they want.

Somewhere, an intellectual property trial attorney smiles, and an insurance defense attorney feels a chill. We have copyright, trade secret, and possibly patent law issues here. Problems of proof and discovery abound. Was the work done within the scope of her employment? Whose resources were used? How much money did the company make or save? Was Susan really an employee, or just an independent contractor? Did she register the copyright?

First of all, let us consider what "intellectual property" entails. Intellectual property is something derived from the work of the mind, from human creativity. It includes ideas, inventions (patentable or not), trade secrets, processes, programs, data, formulae, literature, music, art, expression of all kinds, and other activities of human beings.

Secondly, creation of intellectual property is not the exclusive domain of artists, engineers, musicians, or programmers. We are all capable of producing it, and tools available today present a wealth of opportunities. Susan produced something from her mind that proved to be quite valuable. Certainly, that spreadsheet is intellec-

tual property.

So how might this problem have been prevented? One preventive measure is something that technology companies have used for years: agreements that define and assign rights in intellectual property, commonly called "IP agreements." Susan did not sign such an agreement. If she had, the

agreement probably would have defined the intellectual property at hand, assigned rights to the employer, and asked the worker to pledge to cooperate if and when it should be time to register copyrights, seek patents, or take similar steps. Clauses in IP agreements define and use terms such as "software," "algorithms," and "im-

provements." These days, the clauses should also include "spreadsheet" and "database," as well as other works created from ordinary desktop computer tools and adapted for specific tasks. And, everyone who creates intellectual property must sign these agreements.

Not every spreadsheet is as valuable as Susan's, but some are. All companies, not just technology companies, must recognize and protect their assets by having all employees sign IP agreements... not just programmers and engineers.

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OSBA member Steven A. Hill practices law in Reynoldsburg. © 2001, Steven A. Hill

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creditors. The LLC is similar to a partnership in that it can choose to be taxed as a partnership or, in the case of a single-member LLC, as a sole proprietorship. In either case, the LLC will not be a tax-paying entity. Instead, its net income and other tax items will flow through to the members and will be reported on their income tax returns. In this way, the LLC is similar to the Subchapter S Corporation ("S Corp").

Although the LLC is similar to the S Corp, the LLC is more flexible. With the LLC, there are no restrictions on the number or type of owners, and the LLC can have more than one class of ownership (similar to common and preferred stock). For employment tax reasons, however, the S Corp is sometimes a preferable choice to an LLC.

If you currently own a business, you might consider forming an LLC, perhaps with your business partners or family members, to hold newly-acquired real estate, equipment or other assets that can then be leased by the LLCs to the main business entity. This approach protects the main corporation from liabilities associated with the assets. To the extent that family members are involved, this approach might also have income and estate tax planning benefits.

OSBA member Michael J. Stegman practices law in Cincinnati. © 2001, Michael J. Stegman

IN THE HOPPER

Pending state legislation which could affect small business:

UCC Article 9, regarding secured transactions, is an important piece of legislation that is expected to be introduced in the Ohio Senate soon, and must become effective by July 1, 2001 in order to coordinate efforts with other states. Another complex piece of legislation is Senate Bill 32, which proposes revisions to the Ohio Securities Law. To review both pieces of legislation, visit www.legislature.state.oh.us/.

Recently-proposed House Bill 103 would require the Secretary of State to establish, develop and maintain a registry of women and minorities available to serve on corporate boards of directors; and to provide for the publication of a directory of eligible women and minorities.

House Bill 115 would, in general, gradually increase the amounts of certain property interests and rights that are exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order.

From the OSBA Office of Government Relations.