PERSONNEL ISSUES

A Daily Reporter

SMALL BUSINESS GUIDE

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PERSONNEL ISSUES

Contents:

The Daily Reporter's 2004 Small Business Guide Series includes our annual Central Ohio Business Resource Guide and publications focusing on:

- *Banking, Loans and Investments*
- *Legal Concerns*
- *Green Building for Responsible Businesses*
- *Personnel Issues*
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PERSONNEL ISSUES
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Businesses must take measures to protect employees' information

By SEAN CASEY
Daily Reporter Staff Writer

Almost every manager keeps company equipment and cash safely protected under lock and key, but not enough businesses are properly securing another potential target for theft – employees' personal information.

According to the Federal Trade Commission, 90 percent of all business record thefts involve employees' information, compared to 10 percent of cases in which customers' data is procured.

Failure to keep personal information secure can lead to major problems for a company's employees as it can leave them vulnerable to identity theft and financial damage.

In fact, a 2002 study issued by credit reporting agency TransUnion found that the stolen personal information of employees is the No. 1 cause of identity theft.

An employee's unprotected personal information can lead to some major problems for employers as well.

According to Kara Spooner, a senior accountant with an international privacy consulting and technology firm, some companies have been found liable on grounds of negligence for damages incurred by employees whose identities had been assumed by perpetrators who used information obtained from company records.

Additionally, a 2003 study conducted by the Theft Resource Center found that those who have had their identities stolen work an average of 600 hours to try and rectify the situation.

"It is doubtful that the amount of work associated with identity theft would all be completed in nonbusiness hours," Spooner said.

"In addition, the emotional toll of having one's identity stolen provides a cumbersome distraction for workers, dealing with the frustration and personal violation felt by many victims trying to reclaim their lives."

The problem is on the rise, but business managers can utilize some simple measures to protect both their employees and themselves from the threat of record theft, according to the Better Business Bureau.

"If you don't need it, don't collect it," the BBB said. Many businesses compile information extraneously, and the more information that a company's records contain, the juicier a target they become for identity thieves, the organization said.

Also if the information already has been utilized for its intended purpose, companies are advised to properly discard these documents, the BBB said.

For example, job applications contain a wealth of personal information, so the applications for those who do not get hired should be disposed of.

Any information that is necessary to keep on file needs to be kept secure, according to the BBB. This not only means locking the filling cabinet, it also entails ensuring that computer databases containing employees' personal information are password-protected.

Also, access to these records should be granted on a need-to-know basis, and the data should be kept in a location that is inaccessible to customers and other unauthorized persons, the BBB said.

Business managers should limit the access of temporary workers to employee records and should pay particular attention to their activities, Spooner added.

Temp workers are often the culprits in business record theft because they have free access to company files and can utilize any stolen information once they have exited employment agreements with companies, making them harder to track down, she said.

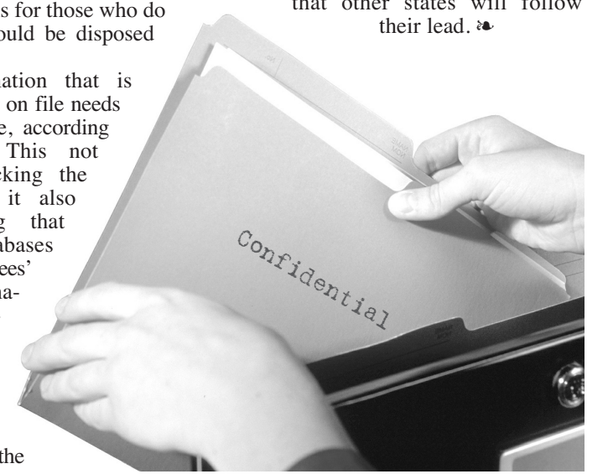
This means businesses should only hire temps that have had background checks, she added.

Companies should also refrain from using Social Security numbers as employee identification numbers or health plan identification numbers, Spooner said.

It is important to ensure that computer systems are adequately protected against hackers by installing all of the necessary security software, a lot of which is available free online or at minimal cost in retail outlets.

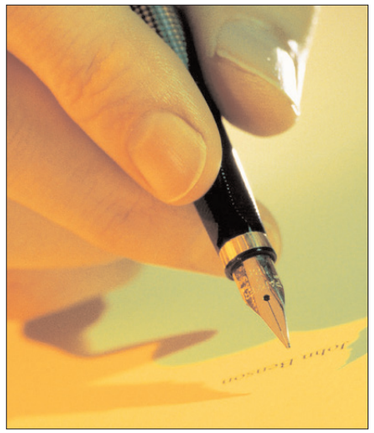
Business owners or managers should regularly audit the network for any suspicious activity, the BBB said.

According to Spooner, a few state governments are beginning to pass legislation mandating security practices for employee information, and there is a high level of likelihood that other states will follow their lead. ❧



Simple rule fosters lawsuit avoidance: Get it in writing

By JEREMY HOLDEN
Daily Reporter Staff Writer



With legal protections, both at the state and federal level, for issues surrounding an employee's ethnicity, gender, physical abilities and action toward the company, the simple act of terminating an employee could become costly. But a basic fact of running a business could forestall any litigation surrounding an early termination of an employment relationship.

With performance issues, from the first instance to the final straw, employers are well served to document every punitive step along the way, according to William H. Prophater, a senior associate practicing labor and employment law at Lane, Alton & Horst LLC.

In a perfect world, employers would have the employee's signature on all disciplinary documents. But reality often dictates otherwise, Prophater noted. At best, managers should have another company official sign as witness to the employee's knowledge. Employers also should make sure the employee receives a copy of all documentation.

"With performance issues, there should be memos in the employment file to show warnings. You don't want to have an employee come back and say he had no notice," Prophater said.

As the recent economic realities have shown, performance issues alone do not force employers to part ways with employees, however. Even in the event that economic realities justify an employment termination, employers should be prepared to give legitimate reasons for such a business decision, in the event an employee files suit for wrongful termination.

Another way business owners can keep the company's attorneys out of the courtroom is by distributing to every employee an employment handbook. By doing so, the employer clearly spells out the company expectations, and the disciplinary steps that ensue from policy violations.

"You want to have a fair and complete employee handbook," Prophater said, noting that a complete handbook would contain an employment-at-will disclaimer, an anti-harassment policy, and instructions on how to complain about harassment.

The harassment issue stems from two 1998 U.S. Supreme Court decisions in which the court extended to employers a defense against litigation if the company could show that it had in place a mechanism to handle harassment complaints and that the employee failed to make use of the mechanism.

In June, the court ruled that even when employees voluntarily leave employment due to a hostile work environment, employers could utilize the affirmative defense if they have a policy in place that went unutilized, and where the employer made no official action to establish a hostile workplace.

By placing workplace regulations against harassment in an employee handbook, and ensuring that employees know how to respond to harassment, employers could establish a mechanism to avoid costly litigation spurred by the acts of one employee against another, Prophater said.

Complete employment handbooks also will contain a disclaimer that Ohio is an employment-at-will state, meaning employees and employers agree to maintain a working relationship only as long as both benefit from the relationship.

"As I counsel my clients, Ohio is an employment-at-will state, but you should be prepared to justify the reason for termination," Prophater added.

With numerous protections at all levels of government, and a requisite number of federal and state agencies set to prosecute violations of workplace protection laws, employees often have a free recourse against employers who terminated the complaining employee.

And while filing a complaint with the Equal Employment Opportunity Commission might be inexpensive for the complaining former employee, the employer must maintain the expense of preparing an answer to the complaint.

While Prophater espoused the benefits of having an effective employment handbook, the very shield employers draft could in turn be used against them by employees.

"If a handbook is improperly drafted, it can be used as a weapon against an employer," Prophater said.

Beyond drafting effective policies to combat the workplace issues that give rise to lawsuits, Prophater also recommended an egalitarian approach to the workforce, where no employee receives a most-favored status.

"Make sure you try to treat all the employees equally. If you have a favorite employee you give a break for some reason, you may need to explain that in the future. Why is second employee not entitled to it?

"That could be basis for a charge of discrimination. Most employers do try to treat everyone equally, but many times this comes down to perception by the employee," he added. ❧

Headhunters help companies track down employees

By BOB PASCEHN
Daily Reporter Staff Writer

Job placement consultants, often known as headhunters, are not unlike bounty hunters. They are given a list of qualifications and specifications from client companies looking to fill vacant positions. The consultant then goes on a manhunt, often searching nationally for the best candidate for the position.

Experience is often not the only criteria. In addition to a promising resume, the potential new-hire must fit in with the culture of the company, the direction the firm is heading and may need to be flexible enough to move where the company needs him or her.

Often, corporations have in-house headhunters, but more and more, firms prefer to outsource this job in order to be most cost efficient. Small companies almost always use a third-party headhunter.

Contingency headhunters only get paid when one of the client resumes they submit is approved and that person is hired. They can keep claims on resumes for up to, and sometimes more than, 12 months.

If their client takes the initiative to aggressively pursue a job by e-mail or telephone, the headhunter still will get paid if that person is hired, even though the consultant's involvement was minimal.

Contract headhunters generally are hired by employers who want personalized service, and for that reason, they are more expensive.

Employers can tell contract job consultants exactly what type of person they are looking for including salary, experience, qualifications, personality type, etc., and these high-end headhunters will attempt to find the best fit for the company's vacant position.

Since contract headhunters want repeat business, they ensure that the prospective employees have been thoroughly checked and are enthusiastic about the possibility of working with the client company.

Though these contractors play at the higher leagues, they often are more ruthless than their contingency counterparts. The former will cherry pick executives from behind the back of one company to staff them at their clients' companies. Dangle more money, some perks and the possibility of upward mobility and contract headhunters can peel off vice presidents from a company like they are peeling an orange.

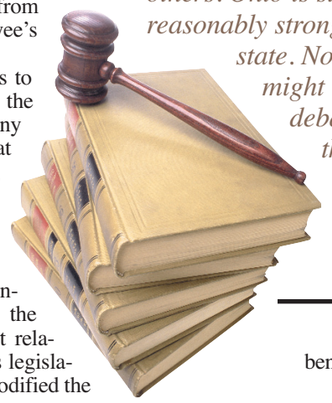
For businesses that need assistance, it's a market-driven system that often works. ❧

Despite chisel work, at-will doctrine remains viable in Ohio

By JEREMY HOLDEN
Daily Reporter Staff Writer

Over the years, courts and legislative bodies have modified to varying degrees the at-will doctrine of labor relations. But to some extent, most states (including Ohio) continue to view employment relationships as voluntary, both from the employer's and the employee's perspective.

At-will employment refers to either party's ability to sever the employment relationship at any time, for any reason, or for that matter for no reason at all, according to Bob Harris, a partner with Vorys, Sater, Seymour and Pease LLP in Columbus.



"Some states are more employee friendly than others. Ohio is still a reasonably strong at-will state. Now, you might get some debate about that."
— Harris

Absent a time-specific contract, at-will employment is the building block of employment relations, but over several decades legislation and court hearings have modified the legal principle to varying degrees.

"Every state has eroded that doctrine in a variety of ways at a variety of levels. Some states are more employee friendly than others. Ohio is still a reasonably strong at-will state. Now, you might get some debate about that," Harris said.

The debate largely centers on the public policy exceptions to the doctrine.

There are two ways that public policy officials can change a legal principle, the most formal being through legislative changes, as when Congressional leaders enact laws prohibiting workplace terminations on the basis of race or gender.

While few employers would question the validity of prohibiting discriminatory firing practices, any protection granted employees by definition restricts an employer's rights.

"All of those protections for employees erode to some extent the concept of at-will employment. A lot of that is noncontroversial," Harris said.

More controversial than gender- or race-based discrimination prohibitions are public-policy issues that touch on less well-defined workplace issues. According to Harris, the classic example of public-policy restricting workplace decisions involves an employee who complains about safety issues in the workplace.

Ohio, through its lawmakers, has enacted a public policy that favors safe workplaces. Thus, an employer terminating the employment of a worker due to workplace-safety complaints has violated stated public policy. Such a decision likely would lead to successful litigation against the employer for wrongful termination.

Initially, Harris said, public-policy exemptions were advanced through statute, but in recent years, judicial decisions have advanced a common law on public policy that impacts the workplace. Courts also have allowed appointed agencies to advance public policy.

"It became a little more controversial. Now, we have judge-made law telling us what the public policy of the state of Ohio is. It has taken some clarity out of it," he added.

While it might be easy to see the benefit of contract-free workplaces to business owners, whereas management can fire labor at its discretion so long as it can prove that the firing was not motivated by forces running counter to public policy, labor also benefits from at-will employment.

In recent years, it has become increasingly common for employees to jump from workplace to workplace, the labor market becoming more and more mobile. Employees with job flexibility have a greater opportunity to chase the highest bidder if states honor the at-will doctrine, Harris said.

"Folks who are more mobile are not complaining about it," he added.

And despite increasing restrictions to the doctrine, employers also are not complaining about the doctrine's place in a 21st century workforce, even if each new restriction leads to more new lawsuits challenging dismissals.

"You often have to spend more money defending yourself. You have to factor in that potential cost, but there are enough claims filed that do have merit that they play a role in policing (the workplace)," Harris said.

The claims that do have merit, however, often serve to expand the overall concept of at-will employment, though in many instances the facts of a specific case are unique.

"Common law is law that emanates from judicial decision, judicial decisions emanate from individual cases. Your primary objective (as a judge) is to decide the case before you, but at the same time you have to be aware of the potential ramifications of the decisions you make. Sometimes it takes off in directions not anticipated. That's how the doctrine continues to expand – the public policy doctrine – individual cases on unique facts," Harris said. ❧

Non-compete agreements must be carefully crafted

By JON GINGERICH
Daily Reporter Staff Writer

Having prospective employees sign a non-compete contract is a practice that has grown in recent years. The problem is, many employers are still unsure if it's the right thing to do.

Non-compete contracts are agreements by which an employee agrees not to work for the company's competition for a period of time after his tenure with the company expires.

The purpose of the non-compete agreement is actually twofold: the contracts are intended to protect companies from losing confidential information such as trade secrets and proprietary protocol, and they keep employers from losing staff to the competition.

A non-compete contract, also referred to as a "covenant not to compete" is commonplace in many industries where competition is stiff and confidentiality means everything.

Web designers and members of the IT industry often have been targets for non-competition agreement, either as a clause in an agreement for employment when a worker starts the job or in a separate contract.

Some companies in these industries view non-compete agreements as a mandatory condition for employment, and it is common that a company may refuse to hire an employee if he choses not to sign this type of contract.

However, the rise in popularity of the non-compete contract has sparked an equal reaction among consumer groups and attorneys specializing in labor laws.

Web sites such as BreakYourNonCompete.com, founded by Virginia attorney Carl Khalil, have become increasingly popular in recent years to help employers legally escape agreements that bind employees to conditions after the term of their tenure at a former company has expired.

And many times, escaping from a non-compete contract is not that difficult. Often, former employees can escape from non-compete agreements by hiring a lawyer to find something in the contract that makes it unreasonable – or in some cases, illegal – to enforce. Contracts can be invalid if the employer is caught performing an illegal activity, which directly leads to the employee leaving the company, or if an employee quits a job because his employer promised an incentive but never came through with the reward, whether it be a raise, bonus or extra vacation time.

Moreover, the legal strength of non-compete agreements varies from state to state.

Courts have generally become leary of an employer who places restrictions on an employees' future job opportunities. At least one state, California, has created statutes that invalidate non-compete agreements, with the exception of very extreme circumstances.

In many states, non-compete agreements can be rescinded if a court can prove that the agreement was used not to protect the company's information, but mainly for the purpose of abating competition.

However, courts can and will enforce non-competition agreements if the employer can prove that it has an obligation to protect itself by restricting its employees' right to work for the competitor.

Both employers and employees who are concerned about such an agreement should consider seeking legal advice. ❧

Workers' comp a necessity, not an option

By JON GINGERICH
Daily Reporter Staff Writer

Since Ohio's workers' compensation act was passed in 1913, the purpose of the program has changed very little: Workers' comp serves to aid employees who are injured on the job.

By the same token, the program also helps employers because it can cover an injured employee's medical bills, lost wages, permanent disability, settlements, and other benefits, removing potentially huge financial burdens from the businesses.

According to Randy Mikes, attorney at Kegler, Brown, Hill & Ritter Co. LPA, paying into workers' compensation isn't a choice – it's the law.

"Any business that has employees has to have workers' compensation," Mikes said, adding that the only exceptions are for those who fall outside the state's standard definition of "employer" such as sole proprietors, dual proprietors or business-operated partnerships, clergy, or an officer of a family farm corporation.

Mikes, an attorney specializing in workers' compensation law, noted that employers who find themselves in trouble with the BWC generally are not trying to dodge the system, they simply have let their coverage slip through the cracks.

"In most businesses that are caught without workers' comp, it is the result of a lapse in coverage, and the owner didn't realize his policy had expired. I have seen situations where there was a lapse for a number of years because the owner simply thought someone else in the company had taken care of it," he said.

"Other times, an employer leaves that state, and for whatever reason, they thought their coverage in one different state extended to another."

According to Ohio law, if an employee becomes injured and his employer does not have workers' comp coverage, the employer is responsible for covering the costs related to the accident.

"Let's put it this way: If an employee of yours has an injury, you'd better have workers' compensation. If you're a non-compliant employer, you're going to be paying dollar-for-dollar back the amount the bureau must pay for the worker's injuries, because you are financially responsible."

Businesses can visit www.ohiobwc.com and click on the "Apply for Coverage" link to complete an online application or to print an application form that can be mailed to the agency. ❧

Job hunters, employers use Internet to find the perfect fit

Daily Reporter Staff

On the Internet today, roughly 14.8 million sites are available to employees and employers who are trying to broaden their horizons by conducting local, as well as national and international, job searches.

With job searches, as in sales, the odds of success increase with each opportunity broached. If employers are able to sell the benefits of their company via the Internet to 10,000 potential employees rather than 100 or even 1,000 employees using more traditional methods, their odds of getting positions filled by the most qualified individual probably are greater than those of other employers.

Employees searching for the perfect job can find legions of listings online, and they often are able to take the information they find in an online job posting and research the companies that have positions to fill. The job seeker not only has the opportunity to study the posting and research the company, but also to research the community to which he or she may be relocating.

For those individuals looking to move away from their current homes and jobs, the information gleaned online about the housing market, school districts and entertainment venues can be the make-it or break-it factors in the decision to take a new job.

In addition, mining the Internet for company and community background is useful for pre-interview brush-ups. Before meeting one's potential boss, it behooves job candidates to familiarize themselves with who the company is, what it has done and where it may be headed.

On the other hand, it also can prove very interesting for employers to use major search engines for learning more about candidates before making a job offer. The process doesn't replace a bonafide background search, but it could provide insight not revealed in a resume.

Keep in mind, however, that there are lots of John Smiths and confusing one with another could prove disastrous, and potentially even set the stage for legal repercussions.

The Internet can well serve both employers and employees, and when it comes time for a face-to-face meeting, it even can provide both parties with information on interview techniques and baseline salaries within industries.

With a little Internet research, informed decision makers are created on both sides of the negotiating table. ❧

Should you require an employment agreement?

An employment agreement can be beneficial to all parties involved, and it outlines expectations so there are few surprises.

Daily Reporter Staff

An employment agreement for a senior level employee generally tends to be pro-employer oriented. Such agreements are used when the company desires to enter into a longer term agreement with the employee or the employee wishes to have certain job security.

Before entering into such an agreement, the employer must carefully consider how long he wants the agreement to last. He can agree to a term of several years, but should include in the contract details of the reasons and costs associated with terminating the relationship. He also may include "non-compete" clauses that prohibit the employee from using his skills and knowledge to benefit a competitor.

The contract should include a list of the principle duties of the employee, along with wording that permits the company to change those duties as it sees fit.

Salary, bonuses and benefits should be outlined, with details concerning the employer's expectations. If bonuses are awarded, the contract should offer information about the formula used to determine the amount. Salary details may include information about when increases can be expected, whether performance reviews will be performed and whether there is a set formula for determining increases.

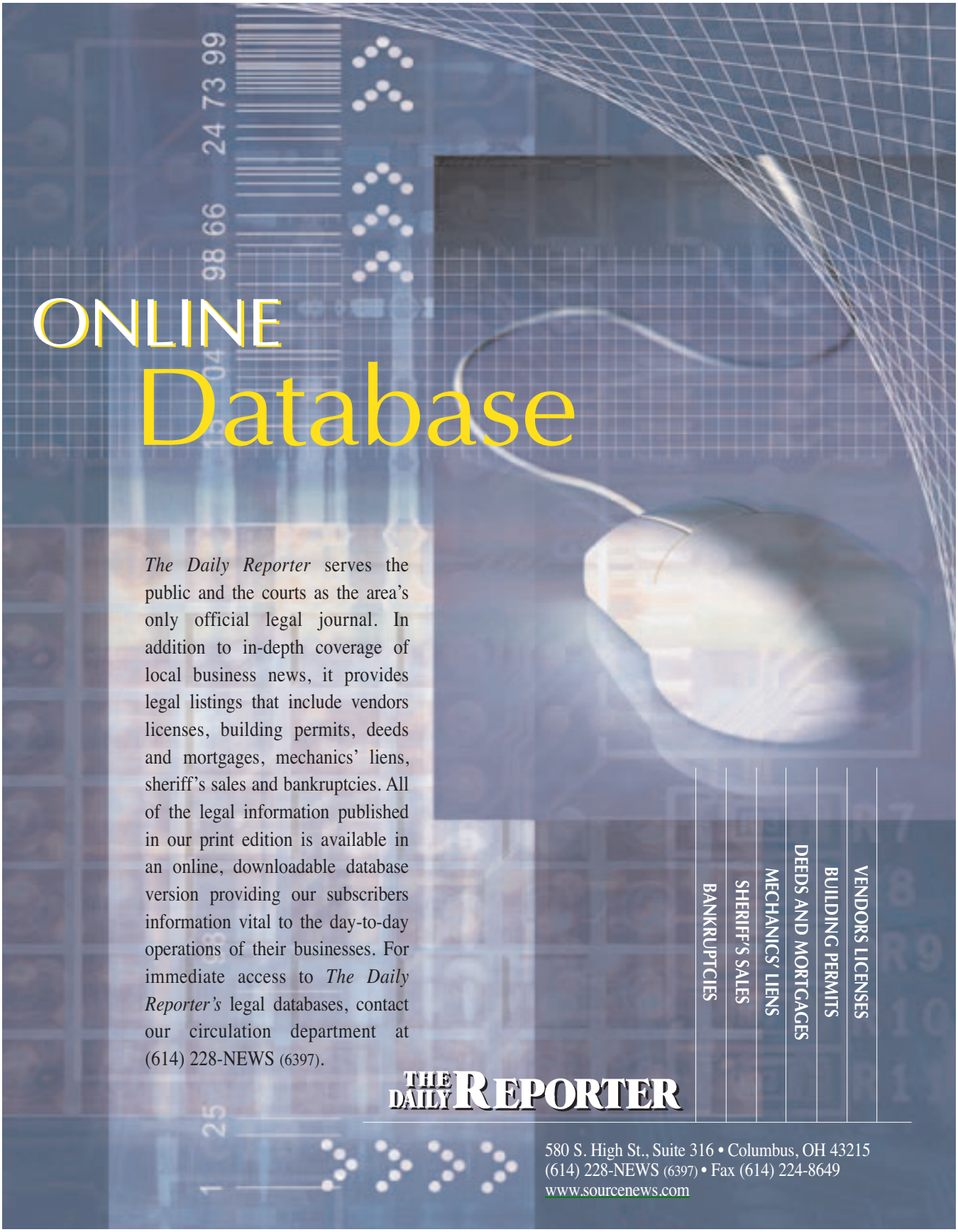
In a publicly held company, benefits such as stock options seem to encourage employees to stay with the organization. By literally having "buy in," the employees do well when the company does well and vice versa. Employee Stock Option Plans (ESOPs) provide the same type of situation.

Employment agreements also should outline the arrangements for terminating the relationship. A section can be included that provides the company the right to terminate an employee for "cause," without paying severance pay. "Cause" generally can be defined rather broadly, and the employee may insist that it be narrowed.

The agreement also can give the company the right to terminate the employee for any reason that is not illegal. If the employee is terminated without cause, though, the employee is entitled to severance pay of an amount specified in the contract.

In addition, employment agreements often include information about how disputes will be settled – through litigation or arbitration.

An employment agreement can be beneficial to all parties involved, and it outlines expectations so there are few surprises. With assistance from an attorney, business owners and managers can structure a contract that protects the company and reassures the employee. ❧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