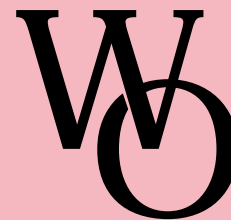


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# Wilson & Orcutt, P.C.

## Business Law Newsletter

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## Some Thoughts on Handling Checks

### The Unsigned Check

Every business which receives payments in the form of checks has had the experience of receiving an unsigned check in the mail, returning it to the sender for a signature, and then waiting an undue time to get a replacement.

An alternative choice is to write or type the word "**OVER**" where the signature would appear and on the back of the check adding an endorsement "***lack of signature guaranteed***" directly above your normal endorsement. This promises the bank that you'll take the check back as a charge against your account if it isn't honored. Most of the time the bank will then process the check and credit your account.

### When is a Payment by Check Considered to Have Been Made?

In many situations (e.g., payment of rent or periodic payments under a promissory note) making a payment on time is the difference between meeting your obligations and being "in default"; and being even in technical default can lead to eviction or acceleration of a note, particularly if the landlord or lender is hostile and looking for an excuse to act.

Since the vast majority of payments are still being made the old-fashioned way, by sending a check in the mail, the question often comes up whether the payment is effectively made the day the check is mailed or the day it is received; and what if it is lost in the mail and never received?

The burden is on the party making the payment to get the payment to the rightful recipient within the designated time frame, unless the recipient has directed or consented that payments be made by mail, in which case the payment is deemed to have been made the date it was mailed. Such direction can be contained in a note or contract with express language ("***Payments shall be deemed to have been duly made when deposited with the U.S. Postal Service***") or may be implied by established course of conduct (i.e., payments are consistently made by mail over a long period of time without complaint by the recipient).

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How do you prove you mailed the check if it is lost in the mail? Often certified mail is too expensive, particularly for companies with large numbers of vendors who are paid regularly. Simply noting a "mailed date" on an account or ledger would constitute a business record which would presumptively establish the act of mailing.

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## Obtaining Releases From Terminated Employees

When terminating an employee for cause, the last thing an employer may want to think about is giving the employee severance pay. Sometimes, particularly when it is paid in exchange for a release of the employee's right to sue, that severance pay can pay for itself a hundred times over by preventing a lawsuit claiming age, sex or racial discrimination, or unfair termination of an employee at will agreement.

Proposed regulations by the Equal Employment Opportunity Commission dictate the form for such a release if it is going to effectively bar the employee from suing for age discrimina-

tion under the Older Workers Benefit Protection Act (the "OWBP Act"). Those regulations are long and complex, but basically require that the waiver be written in plain language which specifically references the OWBP Act. The employee must be given severance pay or something else of value that he or she would not get if they didn't sign.

The same principal applies to other types of lawsuits which the terminated employee might be tempted to bring. Get a written waiver specifically referencing all of the possibilities.

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## Employees have the Right to Review Their Personnel File

Although there is no requirement for an employer to maintain personnel files, as a practical matter virtually every employer does so. The contents of such files and an employee's rights to review and even correct the information contained in their file are governed by statute (G.L. c. 149 §52C).

Employers of twenty or more employees must include in their personnel files all of the following information concerning each employee, to the extent that such information is in written form, and must maintain each file for at least three years after termination of the employee:

1. The name, address and date of birth of the employee.
2. His or her starting date of employment, job title, job description, rate of pay and other compensation.

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3. Any job application or resume submitted by the employee.
  4. All job performance evaluations, warnings and notices and all documents relating to disciplinary actions.

All such documents must be typewritten, in printed form or handwritten in ink. They may not be written by pencil.

All employers, including those with less than 20 employees, must provide their employees with an opportunity to review their personnel records upon written request. The review must be at the place of employment and must take place during normal working hours. An employee may make a copy of their file at the time of such review.

If an employee disagrees with any information in their file, removal or correction of the questioned information shall be mutually agreed upon, or, in the absence of agreement, the employee may include a written explanation of their position in their file.

We recommend that all employers maintain current and accurate personnel files and that all job performance evaluations, warnings and disciplinary actions be in written form and included in those files. We have been involved in many disputes with employees who allege that their termination was an act of discrimination. Far too often, the personnel file fails to include a written record of the employee's shortcomings, making it difficult to effectively defend against unwarranted charges of discrimination.

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## Some Days It Doesn't Pay To Be Compassionate

The Americans With Disabilities Act ("ADA") requires an employer to make reasonable accommodations to employees with disabilities. This might lead one to believe that a disruptive or unproductive employee should be treated sensitively and with compassion. A manager leery of being accused of acting precipitously would be inclined to ask the employee if he or she is having any "problems" that the company could help with. Some companies even have employee assistance programs to help with psychological, social, legal and financial problems.

In a recent case, a federal appellate court ruled that such an employee

could sue the employer under the ADA, reasoning that such an approach by a manager indicates that the employee was "regarded" as having a mental disability. When the company later fired the employee for taking excessive leave, the court reasoned a jury could find that the real reason it fired him was because it *thought* he had a disability. It doesn't matter whether the employee is actually disabled if the company acts because it *thinks* he is.

The lesson is clear. Employers can no longer be caring and understanding toward a troubled employee. The best course is to investigate (and docu-

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ment) the behavior which is causing the disruption or lack of productivity and to act solely on the basis of the behavior without giving the employee a chance to work out his difficulties.

However, the answer is 180 degrees different if the employee notifies the

company of a disability. Then, the company must make reasonable accommodation to help the employee keep his or her job. In other words, the proper response is dictated by whether or not the company knows or has reason to know of a disability.

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## The Truth About Tax Havens and Other Lies

We often are questioned about off-shore tax havens and schemes to protect assets from creditors by people who have learned of such things from suspense novels and movies like *The Firm*.

The reality is that the movies are bigger than life, and that, while there are true off-shore tax havens, mere mortals (as opposed to the truly wealthy) cannot really legally profit from their use.

There are about 50 recognized tax havens (e.g., Cayman Islands, Nevis, Isle of Man, Liechtenstein, Vanuatu) which impose little or no tax on income or investment returns while also providing a high degree of secrecy. However, parking your assets in a trust headquartered in one of these havens

does not mean that the income is not taxable by the IRS. So long as you are a United States Citizen, investment income *no matter where earned* is subject to taxation. The tax haven mystique is more a matter of attitude, and the benefits are largely illegal. Just because your Isle of Man bank account does not issue a 1099 doesn't mean that the income is tax free. It just means that it's harder to catch you if you fail to declare it.

The same thing is true in regard to protecting assets from creditors. You still are required to reveal all of your assets in sworn financial statements and depositions. If you're willing to lie and risk getting caught, you might as well bury gold bullion in your back yard.

### The Wilson & Orcutt, P.C. Business Law Newsletter

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