

Managing risk starts with paperwork

By Ian Harvey

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Small and medium businesses are often their own worst enemies when it comes to managing and mitigating risk, a panel discussion at the Financial Executives International SME Conference 2011 heard.

One of the first mistakes small and medium enterprises (SMEs) can make is in not managing growth itself, said Joe Milstone, owner and founder of virtual law firm Cognition LLP. He was joined by Sherrad Kuzz LLP's Shana French and David Street, a partner at Lerner LLP, in a breakout session looking at what businesses should be doing to manage their risk.

"Companies grow and they hire more people," Milstone said. "At first, they may just put everyone down as a consultant, but they don't start paying attention to this risk until much later."

The pitfalls are numerous, he warned, not just in terms of business liability but in how the Canada Revenue Agency sees the relationship between the person employed and the company employing them.

On the business side, working without a contract is a risk because nothing is defined, including who owns the work created.

"You have to have an agreement, one signed in advance, one which sets a scope of contemplate work and returns, how it can end and what are the terms," he said. "And what about non-disclosure agreements and non-compete clauses?"

Just leaving the "employee" as a consultant makes them a vendor, with spinoff issues including IT access, taxes, privacy and insurance. However, if the CRA deems the "consultant" to actually have been on staff, the employer is responsible for CPP, EI and taxes, which should have been remitted.

Milstone also cautioned against "DIY" law: "A single comma out of place can be expensive."

The infamous Rogers Communications "comma case" was illustrative, in which a contract's validity turned on the placement of a single comma. In 2006, Rogers was ordered to pay Aliant Inc. \$2.13 million for use of utility poles because a comma's placement made it appear the

five-year contract could be cancelled at any time.

The ruling was overturned when Rogers' lawyers produced the properly-punctuated French version of the contract.

Contracts must always be read, scrutinized for hidden meanings and fully understood, he said, especially in the case of open source software that many SMEs use.

"Essentially, open source software is something someone creates and then says, you can use this for free," Milstone said. "It's been used for years and it's very left wing, in that it is provided under free licence."

There is a limit to that freedom, however, when open source is used to make a product intended for sale. Most terms for open source require anything made or containing open source programming or code must also be made available as free, open-source software, eliminating the possibility of sale-for-profit. Sometimes, companies find out too late and lose a great deal of money in the process.

French, an employment law specialist, echoed Milstone's warning, saying the lack of clear, written employment agreements means "uncertainty on key issues" and is one of her five deadly SME sins.

"Without a clear, written termination clause, termination defaults to common law," she said — and that usually means severance payments above and beyond the one week per year called for in the Ontario Employment Standards Act.

French said the courts look at age, length of employment at the company, the state of the economy and how long it will reasonably take for that person to find new employment at an equivalent level.

"It could be three to four weeks per year or more," she said, with payouts of two years' salary not uncommon. "It is better that termination is not left to negotiation on the way out because you'll end up spending \$200,000 to defend litigation from terminated employees, and since employees' lawyers can operate on contingency fees it can drag on for months before it gets to court."

In a similar vein, a lack of written employment policies in place is another SME sin.

"You have to have a policy regarding workplace violence under Bill 168," she said, noting that overtime policies, vacation scheduling, sick-leave entitlements and the like can seriously undermine the workplace culture and could trigger a union drive.

Written policies are a must, she said, because you can't enforce expectations about workplace behaviour unless they are clearly articulated.

"It adds up to predictability and cost savings," she added.

The third biggest mistake employers make is in not understanding Ontario's ESA, which sets standards for hours of work, overtime and lunch breaks, among others.

Contrary to some perceptions, salaried workers are entitled to overtime and generally all workers get overtime at 1.5 times their hourly rate whether they opt for time in lieu or payment.

She also said too many workplaces neglect to track workers' hours. If the employee keeps good records and the employer can't counter them, the latter may end up paying out a huge lump sum for unpaid hours on termination.

Occupational Health and Safety issues account for the fourth biggest mistake, French said, advising SMEs to ensure they have posted safety and workplace harassment policies in place, and perform due diligence such as conducting training programs and documenting those in attendance.

Finally, the fifth error is in handling terminations themselves.

"Whether layoff or firing, the treatment under the law can be the same," French said, adding companies should be prepared to pay full benefits during the so called "notice of termination" period.