



Can You Be Paid in Lieu of a Pension?

If it's time to retire and you don't have a pension plan, can your organization compensate you in some other way to ease your "golden years"?

Q: I've spent most of my career as executive director of an organization that till recently operated on a shoestring budget. I'm facing retirement and, frankly, it's scary. I never made enough money to put away for retirement, and the organization never had the money to fund a pension plan. I'm wondering if there's something the organization can do at this point to provide compensation in lieu of a pension that can take me through, or at least ease, my "golden years." I can't be the only one in this boat.

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A: To answer your question I consulted four preeminent nonprofit attorneys. Unfortunately, the consensus is that while you might want to hire the best labor attorney around, your chances of being compensated at this late date are limited. There are several reasons.

First, warns Stephen Nill, J.D., founder and CEO of CharityChannel, is the concern that compensating you will appear to be a case of private inurement, where you *as a result of your position* gain a benefit not available to others – in this case, the rest of the staff.

Of similar concern, the situation could trigger a claim of excess benefit. Excess benefit, as you may know, is what's paid – or provided as a benefit – above the norm for the organization's size, type, and situation. Under Intermediate Sanctions Rules, the IRS can charge you, the organization, *and* each board member personally an excise tax up to 200% over the amount that's considered "excess." Given this risk, few board members are going to want to stick their necks out for you on this matter, and I'm not sure anyone would blame them.

Since you worked for years at the low salary you did, Elaine Leichter of Jeffer, Mangels, Butler & Marmaro, LLP, in Los Angeles says the presumption is likely to be that you were paid a fair wage. And, unless meeting minutes through the years show the board recognized that similar organizations paid pensions, wanted you to have one, and planned to pay you one as soon as enough money was available, anything they offer you now could be considered above the norm and subject to the excise tax.

Each of the attorneys spoke to the fact that issues of compensation planning for nonprofit charitable organizations are extremely complex. And Frank Somerville of Weyer, Kaplan, Pulaski & Zuber, P.C., of Texas warns that the new Section 409A of the IRS Code makes things even tougher. Designed to prevent abuses, Section 409A says that any deferred compensation – even one-time bonuses or compensation based on employee agreements – could be subject to accelerated taxation and a 20% excise tax.

Barnaby Zall, counsel at Weinberg & Jacobs, LLP, in Rockville, Maryland, suggests you might ask for a severance package. Again, however, that's regulated compensation and subject to excess benefit. Any severance package would have to be based on some objective criteria and offered to all other employees in similar circumstances. Zall does think there's a chance this approach might fly, if it's structured properly and the amount is minimal. But that may not help you enough to be worth the effort. And, he warns, severance packages usually aren't brought up at the time of retirement but rather at the time of contract.

The long and short of it is: You'll need truly competent help if you decide to move forward. Since you probably don't want to spend the money to hire such help, Zall suggests approaching a law or accounting school or a bank or insurance company that might be willing to donate services.* But even if you have to pay, be sure to seek legal counsel. As Zall says, any cost will be less than if you do the wrong thing and have to pay penalties!

Note that I'm not a lawyer, and the lawyers who responded to your question were careful to say they weren't providing legal advice. Also, while the four lawyers generously gave me points to consider, I took great liberty in expanding on their points, and any mistakes in interpretation of the issues and laws to which I refer are mine alone. Despite these disclaimers, though, I hope this answer gives you an idea of what you are up against. I'm sorry the answer isn't more in line with what you'd have liked to hear. ■

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*See "Where to Find Free Legal Assistance," *Nonprofit World*, Vol. 26, No. 2, www.snpo.org.