

Don't Skip the Boring Part: Nonprofits Can't Afford to Ignore HR Issues

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How can your organization avoid costly lawsuits?
Here's invaluable advice from the experts.

The road to hell is paved with good intentions. Nowhere does that saying ring more true than in the nonprofit sector. Nonprofit corporations, like any other enterprise, face a myriad of organizational and financial challenges. It's easy, when the urgent focus is on fundraising, engagement, and communication, for human-resource issues to slip into the background. This can be dangerous, considering that employment-related claims and lawsuits are on the rise, and nonprofits are only exempt from taxes, not lawsuits.

Nonprofits face the greatest HR liability in the following three areas:

1. Wage & Hour Issues

Just as in the for-profit sector, nonprofits can face exposure for failing to meticulously follow state and federal wage and hour laws. Common issues include:

- **workers not receiving (or taking)** mandatory meal and rest periods
- **staff working overtime** without being properly compensated.

Compliance with these laws can be frustrated by inadvertent (or intentional) misclassification of workers as "exempt" employees who would be ineligible to receive rest and meal breaks or overtime compensation. The laws are evolving. Applying them properly can be a challenge.

Take the following example: Your organization's receptionist helps prepare for your annual fundraiser, works at the silent auction, and secures payment at the end of the evening. In her normal workday, the receptionist works 7.5 hours and receives regular meal and rest breaks. For the fundraiser, however, she works continuously for 12 hours.

Because she's on salary, you incorrectly assume she's not entitled to overtime wages. This could be a costly mistake.

Eight months later, after a financially necessary layoff, the receptionist sues for wrongful discharge and wage and hour law violations. Suddenly, what would have been a defensible matter has become a major lawsuit that could spark a rash of similar claims among past and current employees. Ouch! Your nonprofit is potentially on the hook for unpaid wages, penalties, and attorney's fees.

2. Discrimination, Accommodation, & Retaliation Claims

Claims of employment discrimination are growing, and nonprofits aren't immune. Discrimination occurs when one or more workers are treated differently based on a protected characteristic, such as age, gender, race, religion, or disability.

Harassment is one kind of discrimination. People may feel harassed if they're the target of unwanted and annoying actions by a person or group. Claims of harassment are often included in a complaint about discrimination.

Your organization's leaders must take steps to prevent discrimination and harassment from occurring. In addition, they must take affirmative steps to accommodate special needs occasioned by a worker's disability or religious preference.

Avoiding claims can be complex because issues sometimes arise in unusual or unexpected ways. Consider, for example, the laws in many jurisdictions that forbid employers from discriminating against workers who dress or follow grooming practices dictated by their religious preferences. Not only is it impermissible to refuse to hire or terminate workers for following these practices, but efforts at reasonable accommodation cannot include segregating workers outside the public's view.

Employers must also guard against conduct that may give rise to claims of retaliation. According to the Equal Employment Opportunity Commission (EEOC), retaliation claims are filed more frequently than any other charge of discrimination.

Retaliation occurs when a worker is subjected to an adverse employment action (such as demotion, discipline, or firing) as a consequence of engaging in a protected activity (such as making a worker's compensation or disability claim or complaining about a separate instance of discrimination or harassment). Nonprofits can inadvertently commit acts that are later construed to be retaliatory.

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An example: An employee of your organization suffers an on-the-job injury and brings a worker's compensation claim. While he's on leave for the injury, your organization needs to lay off staff, including the injured worker. It's not uncommon for the worker to claim either retaliation or disability discrimination — sometimes both! The burden will fall on your organization to prove that the layoff was legitimate and not a pretext for a discriminatory firing. This can be difficult if the layoff isn't handled carefully.

3. Termination Issues

Most employment relationships are “at will,” which means an organization can terminate a worker at any time, without cause. You may wonder: *Why are there so many wrongful termination lawsuits?* The answer lies in the fact that, if the terminated worker was the victim of discrimination or retaliation, the termination becomes unlawful.

There are two interrelated ways you can protect your organization from wrongful termination claims:

- **Be candid with workers if you discharge them for cause.** Tell them the truth about why they're being fired. Don't use the term “laying you off” when you mean “terminating you for cause.” You can be candid while still being compassionate. Workers who are treated honestly and given an opportunity to communicate are much less likely to sue
- **Use a progressive discipline policy.** Here's how it works: On the first violation, give a verbal or written discipline. Document it in the worker's personnel file. The second (and potentially third) instances of discipline should be in writing and clearly communicate the consequences of further transgressions. Ask workers to acknowledge receipt of the disciplines, in writing. If the conduct continues and a worker is terminated, the personnel file will provide valuable evidence that the termination was justified and not based on discrimination. This progressive-discipline practice also helps to avoid feelings of shock, surprise, or unfairness that may cause people to react to a termination by seeking legal counsel.

SOUND WAYS TO PREVENT EMPLOYMENT CLAIMS & LAWSUITS

There are scores of lawyers eager to capitalize on HR practices that are unlawful or just sloppy. They make no distinction between for-profit and nonprofit companies. Reduce your chances of being targeted by an employment claim or lawsuit by following a few simple suggestions:

- **Develop sound HR policies.** Addressing issues on an ad hoc basis, without clear, evenly followed policies, is asking for trouble.
- **Keep an up-to-date employee handbook.** Update it annually to reflect changes in your organization, policy, and the law. Put it on your calendar as a “recurring event” every February, right after the start of the year.
- **Ask a human-resources professional to manage hiring, evaluation, discipline, and termination.** If your organization isn't large enough to maintain such a person in-house, consider using an outside HR consultant.

- **Maintain caring relationships with your staff.** Discuss issues as they arise. Ask for feedback, and listen to what your employees have to say. Follow up on any concerns they may have. Make it clear that you care about them and their lives.
- **Seek legal advice.** One of the wisest things you can do is to establish a relationship with an attorney knowledgeable in employment issues so that you have someone to call whenever issues arise that could trigger an employment claim. 

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Your HR Legal Toolkit

See these and other articles about avoiding employment claims and lawsuits at NonprofitWorld.org/members:

- **Don't Be Sued for Negligent Hiring** (Vol. 21, No. 3)
- **How to Write Effective Anti-Bias Policies** (Vol. 30, No. 4)
- **Are You Risking a Negligent-Retention Lawsuit?** (Vol. 27, No. 2)
- **When It's Time to Say Good-by: How to Discharge Workers without Legal Hassles** (Vol. 23, No. 2)
- **Do You Need a Grievance Policy?** (Vol. 26, No. 1)
- **Your Duty to Investigate Workplace Complaints** (Vol. 19, No. 3)
- **The Most Likely Lawsuits—and How to Protect Yourself** (Vol. 19, No. 1)
- **Do You Think Sex When You Hear Harassment?** (Vol. 24, No. 4)

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