



## Is Your Organization Lawsuit-Proof?

*Test yourself. Then follow these steps.*

BY GUNAWAN KOESNADI, MARC FUNDERBURK, & BRIAN KLEINER

**N**onprofits are increasingly being hit with lawsuits alleging sex, race, age, disability, and other kinds of discrimination and harassment. Besides the high cost of legal fees, such suits put the organization's reputation at risk. Even harder to measure are the costs of lost productivity and morale.

You can't prevent legal problems absolutely. But you can lawsuit-proof your organization by creating an environment in which discrimination and harassment can't exist. To do so, follow these steps:

**Understand what's fueling litigation.** The main cause of today's high litigation rate lies in the evolution of legal rules and subtle changes in implementing these rules. Today's litigation explosion can be traced to key changes in the federal Civil Rights Act of 1991. It gave plaintiffs new leverage in discrimination cases and marked the beginning of the employment liability revolution. Before 1991, employees were limited to recovering lost pay and legal fees. The new Act gives them freedom to seek punitive damages and compensation for emotional distress.

Another driving force behind this litigation boom is the American with

Disabilities Act (ADA), which took effect in 1992. Under ADA, discrimination is defined as any impairment that substantially limits a major life activity such as walking, seeing, hearing, speaking, learning, caring for oneself, and performing manual tasks. Based on the ADA, the high court in *Randon Bragdon v. Sidney Abbott* found that an HIV-positive status limits the infected person's ability to reproduce, thus adding reproduction as a major life activity and classifying such an impairment as a disability. This ruling has enormous implications for employers, because it opens the discrimination door to those with other serious conditions such as cancer, multiple sclerosis, and diabetes.

In addition, women, minorities, and older people are having a greater presence in the workplace. When employers start replacing baby boomers with younger workers, age discrimination claims may multiply. The Age Discrimination in Employment Act (ADEA) prohibits organizations with 20 or more employees from discriminating against job applicants or workers who are 40 or older.

Three recent cases have broadened the door for even more lawsuits. In the first case, the Supreme Court ruled that sexual harassment is

actionable in cases involving the same gender. The second case holds that an employer can be liable for sexual harassment regardless of whether a supervisor's threats against an employee were carried out. In the third case, the Supreme Court ruled that an organization is liable for a pervasive, hostile atmosphere of harassment and for its supervisors' misconduct, whether the employer was aware of the harassment or not.<sup>1</sup> This third case in particular reinforces the need to have a strong anti-harassment policy and articulate it to all employees.

**Train all employees.** Aggressively train employees, especially supervisors and managers, about proper conduct to avoid harassment and discrimination. Be certain they know you have zero-tolerance policies for all kinds of discrimination and will promptly punish wrongdoers. Post policies in a prominent place. Create a prevention climate by making sure employees understand the issues and are equipped with solutions. Conduct periodic checks to be sure that employees understand and follow your policies. Be sure supervisors realize they are liable not only for their own conduct but for the behavior of employees they supervise.



## How Lawsuit-Proof Is Your Organization? Take the Test.

- \_\_\_ 1. Do you conduct events outside the office with the same professionalism as in the office?
- \_\_\_ 2. Do you have a written employee handbook that clearly prohibits any form of discrimination or harassment?
- \_\_\_ 3. Do you keep comprehensive employee records, including want ads, hiring interviews, job descriptions, and discipline problems?
- \_\_\_ 4. If you use employment agencies, do you make sure they don't practice age discrimination or any other type of discrimination?
- \_\_\_ 5. Are you careful that your "help wanted" ads are free of discrimination and aren't separated by gender?
- \_\_\_ 6. Do you post copies of your anti-discrimination and anti-harassment policies where people will see them every day?
- \_\_\_ 7. When hiring new people, do you use the same questions and tests for every applicant, and is every question and test clearly job-related?
- \_\_\_ 8. Are all supervisors aware of laws and policies regarding hiring and termination?
- \_\_\_ 9. Do you deal with employees fairly, consistently, and objectively?
- \_\_\_ 10. Do you give a copy of your employee handbook to every new employee?
- \_\_\_ 11. Do you have an arbitration program in place?
- \_\_\_ 12. Do you promptly investigate and document all complaints?
- \_\_\_ 13. Do you give copies of your employee handbook to every employee once a year, highlighting any changes that have been made during the year?
- \_\_\_ 14. Are your pay, benefit, and promotion practices fair and non-discriminatory?
- \_\_\_ 15. Do you check often to see that people are following policies?
- \_\_\_ 16. Do you have a zero-tolerance policy that prohibits discrimination and harassment?
- \_\_\_ 17. Are all work and break areas free from any materials that could be found offensive to women, minorities, people with disabilities, older people, or any other group?
- \_\_\_ 18. Have you recorded every talk with employees about their behavior?
- \_\_\_ 19. Do you aggressively train all employees in discrimination prevention and policy enforcement?
- \_\_\_ 20. Are you well-versed and up-to-date on laws regarding employees' rights?
- \_\_\_ 21. Is employee performance consistently documented?
- \_\_\_ 22. Do you hold exit interviews, asking people to give up any claims against the organization?
- \_\_\_ 23. Have you had a lawyer check your procedures, policies, and all written materials regarding hiring, firing, and employee practices?
- \_\_\_ 24. Do employees understand that discrimination and harassment are not allowed and that you will punish anyone who breaks these rules?
- \_\_\_ 25. Do you fire employees in a consistent way, in a private setting, with two managers present and written records available?
- \_\_\_ 26. Do you constantly monitor labor laws and legal issues and adapt your policies and procedures accordingly?

Your score: \_\_\_ Yes \_\_\_ No

**Score yourself: 22 or more yeses:** You're practically litigation-proof. Your organization is about as immune from employee lawsuits as it's possible to be. Keep doing what you're doing, and take steps to correct any shortcomings. **12-19 yeses.** There's room for improvement. List your *no* answers and the steps needed to change them to *yes* answers. **Less than 12 yeses:** Your organization is ripe for an employee lawsuit. No matter what your organization's size or mission, an employee-related lawsuit could hit you at any time. Unless you can afford huge losses of money, time, and reputation, begin taking the steps in this article today.



**Create an employee handbook—and make sure people read it.** Your best safeguard against lawsuits is to put your standards for conduct into writing—and have all employees sign a form acknowledging that they have read those standards. Give a copy to every new employee. Every year, recirculate policies to all employees.

**Have good hiring policies.** The hiring process can result in litigation if not performed properly. First, be sure your “help wanted” ads don’t discriminate. Avoid gender-separated want ads unless gender is a bona fide qualification for the job.

Anyone interviewing prospective employees should be trained in good interviewing techniques and questions. Certain questions and unrelated tests can be considered discrimination.

You should be able to demonstrate job relatedness of any test administered. The test should be given solely to judge the ability of employees to perform essential job functions as stated in the ADA requirement.<sup>2</sup> It’s essential that test scores never be curved in favor of any particular individual or group even if those groups are under the affirmative action plan. Any perception of bias can lead to a discrimination or reverse-discrimination lawsuit.

Review all questions to ensure that they will yield only job-related information. To be on the safe side, run the questions by legal counsel. Ask all questions of every applicant. For example, don’t ask questions just to a certain gender.

Don’t risk asking unplanned questions that will haunt you in the future.

Rehearse and have structured interviews. Don’t take a casual interview approach and risk asking unplanned questions that will haunt you in the future. Avoid buzzwords in interviews. For example, avoid saying, “We’re looking for new blood” or “You’re overqualified.”<sup>3</sup> Don’t exaggerate about your organization in your efforts to attract employees.

Monitor any employment agencies you use, and confirm that they don’t practice discrimination against older people or any other group. This will help you stay clear of the many class action lawsuits that have begun arising against employment agencies.

Keep written records at all stages of the employment relationship. Keep want ads, hiring interviews, job descriptions, discipline problems, warnings, evaluations, incidents, and other records on each employee.

**Follow proper termination procedures.** Make supervisors aware of laws and policies regarding termination. Before you discharge an employee for any reason, be sure you have written documentation that supports your version of why you’re letting the employee go. Include notes of complaints, brief summaries of discussions, and descriptions of disciplinary actions. Never terminate an

employee without prior discipline, unless the conduct is inexcusable.

Never discharge an employee “in public,” which may be considered cruel and excessive. Discharge employees with two managers present. Clearly state the reasons, point to written records (warnings, economic need for downsizing, or other legal reasons for dismissal), and permit the employee to leave in quiet dignity.<sup>4</sup>

Also, be careful about *when* you fire someone. Don’t fall into the timing trap by dismissing employees just before they’re due to receive a big commission or soon after they’ve been involved in a worker’s compensation claim. Even if you have a legitimate reason for the termination, employees (and jury members if the case goes to court) will likely see the proximity to these events as the real reason.

**Hold exit interviews.** When employees leave, ask them to sign non-compete agreements, confidentiality statements, and releases giving up any claims against the organization. Remind them of their continuing obligations to the organization after they leave.

**Watch your pay practices.** Pay discrimination has been at the center of many recent lawsuits. As you downsize or grow, be careful that you don’t acquire unfair pay or benefit practices. When you promote and hire people, be sure your procedures aren’t based on race, sex, or age.

**Provide a harassment-free workplace.** The key to determining

Avoid saying, “We’re looking for new blood.”



harassment, according to the courts, is whether the behavior is unwelcome. The intent of the offending party is irrelevant.<sup>5</sup> If workers are uncomfortable with comments about sex, natural origin, or religion, they can claim a hostile work environment. Any such complaint obligates you to investigate the issue. If you find the issue to be genuine, warn the offender that such comments or actions aren't acceptable and can lead to punishment and possible dismissal.

To minimize such complaints, make sure employees' work and break areas don't include materials that might offend people. For instance, a display of sexually suggestive pictures, cartoons, or illustrations can create a hostile work environment.

If your organization sponsors any events, meetings, or other interactions outside the office, conduct these events with the same level of professionalism as in the office. You can be held liable for employee actions occurring outside of work and away from the workplace.

**Try arbitration rather than litigation.** One way to minimize the costs of litigation is to impose a mandatory arbitration program to resolve disputes. Binding arbitration can save time and money.

The downside is that employees generally dislike mandatory arbitration and may challenge it legally. To gain employees' acceptance, educate them about the advantages of arbitration. Emphasize that both sides gain from arbitration in terms of time and cost.

The most crucial concern in designing your arbitration program is to ensure that it's enforceable. Even though the courts have indicated arbitration as an alternative dispute resolution, you can't enforce an agreement that interferes with employees' rights or is unfair to employees. ■

**Footnotes**

<sup>1</sup>These three cases are: *Oncale v. Sundowner, Burlington Industries, Inc. v. Ellerth, and Faragher v. City of Boca Raton Florida*. See "Sexual Harassment: New Rules, Higher Stakes," *Workforce*, by Jennifer Laabs, October 1998.

<sup>2</sup>See Kleiner & Neumann in "References."

<sup>3</sup>See "Discrimination in Job Applications and Interviews," by John Bible, *ASAP-American Management Association Compensation & Benefits Review*, November 1998.

<sup>4</sup>See "The Courts Get You Coming and Going," *ASAP-American Management Association Compensation and Benefits Review*, November 1998.

<sup>5</sup>Orth, John, "Avoiding a Sexual Harassment Suit," *The Orange County Register*, May 11, 1998.

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These resources are available from the Society's Resource Center, 800-424-7367, [www.snpo.org](http://www.snpo.org).

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