

## It's Time for an Audit

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*Date: July 24, 2020*

Most faith-based nonprofit employers (“Employers”) are pleased by the United States Supreme Court’s recent opinions strengthening legal protections for religious employers. Given the alternative possibility, that reaction is quite understandable. Employers may have already begun to update their policies and practices to ensure that the organization does not inadvertently waive these protections. Now is the time to do a more thorough audit of employment practices so that Employers comply with the many applicable state and federal laws.

What should the audit cover? Below are some basic best practices. Be aware that state laws vary, so it is crucial to work with an attorney to understand the specific obligations applicable to the nonprofit you lead.

### Policies, Agreements, and Practices

- ***Review and Update Your Employee Handbook***

Every year employment laws change, often dramatically. Employers should calendar a time each year to review the organization’s Employee Handbook to ensure that it has kept pace with the changes. Not performing this update can lead to litigation.

The review should focus on whether the Employer is inadvertently waiving the protections that religious organizations have from a variety of federal and state laws (either because of the Ministerial Exception or provisions in the laws themselves). For example, the Employer’s Handbook probably has a section stating that the entity follows all laws relating to equal employment opportunity. If that statement is not qualified, it could be used to argue that the nonprofit has waived applicable religious liberty and similar protections. This waiver can be avoided by including in that same section (and possible other sections of the Handbook) a

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statement that the laws are followed to the extent they apply to religious non-profit entities in accordance with applicable federal and state law and religious freedom protections provided by the United States Constitution and similar state constitutions.

- ***If You Don't Have an Employee Handbook, Get One***

Employee Handbooks have become essential for almost any entity. They should contain essential information about the Employer, including the organization's religious purpose, the rules and policies that govern employment at the company, how claims are made and investigated, and the benefits provided to employees. Besides being an effective way to communicate to employees, an Employee Handbook can provide a valuable defense against legal claims, or limit the amount of damages, if a lawsuit is filed.

- ***Review and Update Your Employment Agreements and Job Descriptions***

Courts carefully examine job descriptions and employment agreements in determining whether protections such as the Ministerial Exception will apply. To avoid costly misunderstandings, if any employees are carrying out aspects of the Employer's religious mission, that role should be expressly stated in job descriptions and employment agreements. Likewise, if there are religious qualifications for a position (such as being a practicing Catholic in good standing), that requirement should be in the agreement and job description.

***Written employment agreements and written job descriptions are essential. Handshake agreements or oral understandings will not work.***

- ***Ensure That Your Practices Line Up with Your Policies***

A written policy or agreement, no matter how complete, will be of no use if the protocol described in the document is not actually implemented. If a policy is important to the mission of a nonprofit, or if the duties and qualifications of an employee are essential, the organization must make certain that the policy is adhered to in practice. For example, if an Employer expects employees to be role models of the faith, the Employer should include this standard in the organization's annual employee reviews. If an Employer has a policy against harassment, the Employer should diligently respond to all complaints. Importantly, the Employer should document employment-related actions. Part of any audit should be a review of the Employer's personnel files to ensure that they contain all documents that are required by law, and that employee performance and/or conduct issues are properly documented.

- ***Check Your Posters***

Federal and state laws require that all Employers prominently display a variety of posters containing information covering a range of employment laws. These posters can be obtained from government websites, and many third party suppliers package the posters, which can be ordered online. However, as with equal employment policies, some of those posters may suggest that the religious Employer is waiving protections afforded to religious entities. To avoid inadvertently waiving such protections, religious Employers should work with legal counsel to create and display a customized poster that clearly states that, as a religious nonprofit entity, certain laws are not applicable based upon federal and state law and constitutional provisions.

- ***Make Certain That You Understand What Law Apply***

As organizations change in size, employment laws which did not previously apply may become applicable. For example, the Americans with Disabilities Act (ADA) does not apply until an Employer has at least 15 employees. Likewise, the Family and Medical Leave Act (FMLA) usually does not apply until an Employer has at least 50 employees, although the FMLA applies to schools regardless of the number of employees. There are other threshold requirements before laws such as these (federal and state) become applicable (including the important Ministerial Exception). A review with legal counsel can help an Employer determine if and when a particular law does apply.

### Payroll Practices

- ***Review How You Have Classified Employees***

Under Federal and state laws, certain employees are exempt from overtime and other wage and hour laws. This exemption primarily applies to executive, administrative and professional employees who are paid a salary, but the details of the exemptions vary from state to state. And just paying a salary is not enough to qualify for the exemption. The employees also have to actually perform the usual duties of an executive, administrator or professional employee.

Improperly classifying employees can be costly, resulting in substantial damages if a lawsuit is brought, in addition to penalties and having to pay the employee's legal fees (not to mention your own counsel's fees). Moreover, in some instances, ***owners, managers and directors can be personally liable***. If you have any questions about this, a review with experienced HR professionals or legal counsel is essential.

- ***Review Your Use of Independent Contractors***

Over the last several years, many lawsuits have been filed against companies (including schools) claiming that companies have misclassified workers as contractors. This has been especially the case in states (such as California) which have adopted a more stringent test than the one commonly used under federal law. When successful, those challenges have resulted in substantial awards of damages, penalties and attorneys' fees. While there is some administrative ease (and cost savings) in using contractors, the costs can far outweigh the benefit if the classification is found to be illegal. Given the downside to using contractors, a review with legal counsel, again, is essential.

- ***Other Wage and Hour Issues***

Employers may have to comply with the wage and hour laws of several states depending on ***where your employees perform their work***. For example, an Employer may be based in Texas, but if an employee primarily works in California, the employee's wage statements will have to comply with the detailed requirements of California law. An Employer also cannot contract around this result by including in the employment agreement a "choice of law" provision because where work is performed usually determines which laws apply. Using an experienced outside payroll company can help in ensuring that these rules are not violated.

### Training

- ***Training May Be Required, and Can Be Useful***

Many states require that employees receive periodic training on various types of workplace issues, such as sexual harassment. In some states, only supervisors have to receive such training, but the trend is to expand training to all employees. Failing to provide such training can be a statutory violation and expose an Employer to penalties and fees. It also can result in the loss of crucial defenses in the event of litigation

Even if not required by law, employee training can be very helpful in improving the workplace environment. For example, in addition to training on harassment and discrimination issues, you can provide training on how to work with employees with disabilities, how to supervise and discipline employees, and when and how to document actions. Training also has improved from what it was 20 years ago, when it often was viewed as an accusation of wrongdoing, and resented. Approached the right way, and with the right instructor, training can be a valuable human resources tool and actually reduce employee costs.

- ***What Do Your Personnel Files Look Like?***

Before a lawsuit is filed, there usually is a demand for a copy of the employee's personnel file. Besides wanting to determine if, for example, the reason for termination is documented, the employee's attorney also is interested to see if the file contains documents that are required by law. If they are not in the file, you may be facing more than just a wrongful termination claim.

This all comes down to basic documentation. Employers should make certain that the organization designates a person who is responsible for keeping and maintaining documents that are legally required, and that the organization retains these documents for the required periods of time. Besides legally required documents, reviews and disciplinary actions should be documented. Also make certain that documents that must be segregated (such as medical records) do not get commingled in personnel files.

***Remember: If an Employer contends that an employee violated a company policy, but there is no documentation in the employee's file that reflects the violation, a court will view the situation as though the violation never occurred.***

### Insurance

No matter how well run an organization is, employment lawsuits must be expected. Lawsuits are expensive to defend, even for organizations which have policies and practices in place to minimize exposure to litigation. These lawsuits consume time that would be better spent on the organization's actual mission. Moreover, some employment claims can be brought against both the organization and those running the organization, which can raise the stakes substantially.

When employment lawsuits began increasing in the 1990's, it became difficult to obtain insurance to cover such lawsuits, but that has changed and it is common for insurers to offer policies that cover employment claims. If you lead an organization which does not already have employment insurance consider the following basic coverage:

- ***Employment Practices Liability Insurance***

General comprehensive liability insurance usually does not cover employment claims, so an Employer should consider Employment Practices Liability Insurance (EPLI). EPLI likely will be a separate endorsement, and the amount of the premium will vary depending on the deductible. Working with an experienced broker, here are some basic questions to ask of any insurer:

- How much coverage is recommended given the size and nature of my organization?
- What claims are covered?
- What claims are excluded?
- Are the attorney fees and costs incurred by a claimant covered?
- Who is covered (just the company or other persons who may be individually liable)?
- Is the amount of coverage self-depleting (by defense costs)?
- Who has the right to select defense counsel?
- Who has the right to settle claims?

- ***Coverage for Wage and Hour Claims***

Most standard EPLI policies do **not** automatically cover wage and hour claims, which are among the most frequently brought, especially in more litigious states like California. An additional endorsement will, therefore, be required, and the same questions should be asked.

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