

Looking Back, Looking Ahead: Employment Law Changes for 2009



By

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Looking back, 2008 was a very big year in the employment law arena. Changes at the federal level included amendments to the *Americans with Disabilities Act* (ADA), the *Family and Medical Leave Act* (FMLA) and INS requirements for verifying whether a worker is authorized for employment in the US. In addition, several states passed laws expanding workers' rights to family leave, internet use by employers and employees grew exponentially; and new initiatives for protecting workers, such as laws addressing gender identity/sexual orientation and bullying at the workplace, moved forward in various state legislative forums.

Looking ahead, is your organization prepared for the impact of these changes?

- If your nonprofit employs more than 50 workers, do your policies and practices comply with the new FMLA regulations, effective January 16, 2009? The new regulations expand the leave rights of service members and their families, and impact everything from how employers provide notice to employees about their right to leave, to what constitutes a "serious health condition." The changes also mandate that employers provide employees with a list of "essential functions" at the time leave is designated before an employer can request an employee to provide a "fitness to return to work" certification. The law firm *Buchanan Ingersoll & Rooney* has summarized the [new regulations](#) in a recent newsletter.
 - The EEOC has also revised the forms that employers/employees typically use to request and track family and medical leave. The new forms include:
 - Certification of Healthcare Provider for Employee's Serious Health Condition (Form WH-380-E).
 - Certification of Healthcare Provider for Family Member Health Condition (Form WH-380-F).
 - Notice of Eligibility and Rights and Responsibilities (Form WH-381).
 - Designation Notice (Form WH-382).
 - Notice to Employee of Rights and Responsibilities (Form WH Publication 1420).
 - Certification of Qualifying Exigency for Military Leave (Form WH-384).
 - Certification for Serious Injury or Illness of Covered Servicemember for Military Leave (WH-385)
 - Several states also are considering or have expanded the requirements for family leave for workers. Both California and New Jersey enacted laws that require *paid* family leave. (Washington State previously passed legislation mandating paid family leave, but the effective date of enactment has been suspended.)
- If your nonprofit employs 15 or more employees (including part time and temporary staff) or offers facilities such as swimming pools, playgrounds and other areas accessible to the public, the new ADA amendments, effective January 1, 2009, should be on your radar screen. The amendments expand the

definition of “disability” and underscore that persons “regarded as disabled” are entitled to the same protections whether or not they actually have a disability. Resources for compliance with the ADA’s public accommodation requirements are available from a special [Department of Justice web site](#). A short summary of the employment related changes imposed by the new ADA Amendments Act of 2008 is available from the [EEOC web site](#).

- The EEOC reported that in 2007 on average over 200 federal employment claims were filed daily. That’s in addition to the number of state law claims that are filed. There is no doubt that the expanded definition of disability will increase the already high number of discrimination claims filed by workers.
- The new definitions are also likely to increase the number of requests for accommodation. Is your nonprofit ready to respond? Remember that a give-and-take with employees to find a reasonable accommodation is not only required, it’s sound risk management.
- When was the last time your staff was trained in harassment?
 - In one poll, 45% of workers reported that they were the subject of abusive treatment at work, such as supervisors yelling at them. Such conduct can have a disparate impact on women because of their response to violence—which can lead to allegations of a hostile work environment and gender discrimination. Tip: Include information on bullying in your harassment training program.
 - In a workplace poll, 76% of workers responded that they think that office romances are more common now than they were 10 years ago. To address the risk that favoritism at the workplace would rise to the level of a harassment claim, consider requiring the disclosure of office romances and training on favoritism. The University of California’s web site provides links to [training resources](#) that are good examples of risk management in action.
- Are staff responsible for hiring new employees aware that a new I-9 Form is required as of February 9, 2009?
 - The revised Form I-9 will soon be posted at the [web site of U.S. Citizenship and Immigration Services](#). The agency will also update *The Handbook for Employers, Instructions for Completing the Form I-9 (M-274)* to reflect the revisions to Form I-9.
- If your nonprofit has contracts with the government, are you prepared to use *E-Verify*, an electronic process for checking the eligibility of worker status?
 - Use of *E-Verify* will be required of all federal contractors and subcontractors as of January 15th however only some contracts are affected. Contracts with the federal government for goods or services for more than \$100,000 (with limited exceptions), and subcontracts for services or construction for more than \$3,000 (with limited exceptions), will contain a clause mandating the use of E-Verify. Information concerning E-Verify may be found at [www.uscis.gov/E-Verify](#).
- If your nonprofit offers workers a 403b Plan, are the written plan documents in compliance with new regulations?
 - The IRS has extended the compliance deadline until December 31, 2009, and will soon be issuing written guidance including sample plan language that complies with the new regulations. Stay tuned to the Center’s *e-News* for updates, or check the IRS web site.
- Does your organization have a policy on blogging by employees? Is it time to consider how social networking may impact your hiring/firing policies?
 - One poll revealed that 55% of employees say they have a personal blog but fewer than 5% of employers have policies on blogging.
 - In a widely publicized case that demonstrates how employers are starting to monitor social networking sights, an employer in California concerned about conduct that would be offensive to co-workers, fired 27 employees for posting messages on My Space that remarked on weight and sexual orientation. In another case, an employer, Continental Airlines, was held responsible for harassment, because an employee posted offensive material on an employer-sponsored internet bulletin board.

There has never been a better time to adopt the mantra “be prepared” as your strategy for managing employment risks. The conventional wisdom is that employment law claims **increase** during a stressed economy. Additionally, the average damage award is likely to be higher in tough economic times because of the length of time it may take for a plaintiff to find a new job. To minimize the risk that your nonprofit’s personnel practices will be challenged as unfair, discriminatory or simply out-of-date, be prepared with up-to-date resources on risk management in the employment arena.

The Center is here to help your nonprofit be prepared. The Center’s staff is available by [email](#) or phone (202) 785-3891 to answer your questions. Our bi-weekly *e-News* regularly features new employment related issues. Sign up at www.https://nonprofitrisk.org/. Our publication, [Taking the High Road: A Guide to Effective and Legal](#)

[Employment Practices for Nonprofits](#), is popular with nonprofit leaders as a virtual desk-reference. The on-line version has updated links to new laws and regulations passed through 2008.