Lessons From the High Road



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New Edition of Employment Law Nonprofits Defensible Policies

The article below is excerpted from the Introduction to *Taking the High Road: A Guide to Effective and Legal Employment Practices for Nonprofits — 2nd Edition*, just released by the Nonprofit Risk Management Center. Purchasers of the book enjoy access to a free online edition. For more information, click here.

“Employees are our most valuable asset,” is an organizational cliché. It’s also a true statement. An equally true statement is that employees can be a nonprofit’s liability, both by their specific actions and by not sharing the vision of the organization’s leadership. Managing an organization well requires being mindful of both sides of this conundrum: assets and liabilities. The nonprofit sector can claim no exception to this advice. In fact, when the higher moral purpose that typically distinguishes the nonprofit sector is taken into account, it’s even more important for managers of nonprofit organizations to be attentive to taking the high road.

There are both practical and ethical imperatives for this advice. Minimizing risk comprehends both dimensions. Often overlooked, however, is the desirability of having a workforce that believes in the moral correctness and benevolence of the organization and its leadership. Arguably, the employees in such a workforce will be more motivated and productive. Probably more important is the organizational commitment that ensues from such an environment. Every organization will eventually face difficult times. And every manager will eventually have to make difficult and sometimes controversial decisions.

What better way to ensure that the organization maintains as much equilibrium as possible during these difficulties than to have a workforce that truly believes in the values and moral correctness of the organization? Treating employees well affirms the values and provides an important subliminal message about how employees should treat others (clients, co-workers, and the organization itself). Taking the high road better ensures the long-term health of the organization to cope with the ills that it will almost certainly encounter at some point.

Defining “The High Road”

Dignity. Respect. Compassion. Fairness. Accountability. Consideration. These familiar words describe important values in *any* workplace. And they represent *essential* values in a nonprofit work environment. These values represent a basic formula for reducing the risk of employment-related mishaps, disputes, claims and lawsuits.

These and other undesirable events disrupt the flow of mission-related work and threaten a nonprofit's ability to focus all or most of its resources on meeting client or community needs.

Throughout *Taking the High Road*, we refer to a wide range of recommended practices in the employment arena. In each case the advice goes beyond what a nonprofit employer is legally required to do. Our goal is to help nonprofit leaders adopt policies and practices that put their organizations on a high road with regard to their relationship with paid employees.

Consulting Help

The Nonprofit Risk Management Center has assisted many organizations by reviewing their policies and procedures and recommending ways to strengthen them. The Center also has staff that writes and edits policies and procedures based on the Center's assessment. Whether you want to take advantage of our assistance in part or as a whole, you will find that the Center's fees and knowledge are nonprofit-based. Call Melanie Herman at (202) 785-3891 or e-mail her with a brief outline of your needs and request a time to discuss the scope of work, schedule and cost.

Unfortunately, in an attempt to run their organizations "like a business," some nonprofit leaders have overlooked the importance of legally prudent employment practices or have adopted confining employment practices inconsistent with the organization's charitable mission. This book serves as a global positioning system (GPS) to help get your organization's policies and practices back on track. Back on a decidedly nonprofit — yet, a legally compliant and feasible — track. Your nonprofit's employment practices should reflect the values and caring your organization demonstrates to its clients, while offering sound, reliable policies on which your employees can rely.

As a guide to legal and effective employment practices, *Taking the High Road* provides a roadmap for avoiding claims alleging illegal or wrongful conduct, and avoiding liability in the face of a claim. Taken as a whole, we believe that the book provides practical and feasible advice for strengthening your employment practices. We hope that adherence to the guidance in the book will enable your nonprofit to operate with confidence regarding its employment practices. Operating within the bounds of federal, state and local labor laws is only a starting point.

Ten Rules of Effective Employment Practices

Several themes repeat throughout Taking the High Road. We summarize them here with explanations. These *rules* provide an essential foundation for an organization committed to compassionate and legal employment practices.

1. Always put key employment policies in writing.

Written policies are your first line of defense when a current or former employee questions the legality or appropriateness of a policy or its application. Written policies also serve as an invaluable reference point when questions about your practices are raised: "When do I start accruing vacation leave? Is it permissible to make personal long-distance phone calls and use the organization's postage machine?"

Most legal advisors to nonprofits urge the adoption of written employment policies. On occasion, an attorney will state that written policies are a dangerous trap, and it's better not to commit policies to writing. While there are downsides (namely the risk that your written policy will be used against you), the benefits outweigh the risks by a mile. The upsides include:

- *Written policies provide a starting point for consistency.* They represent an effective way to communicate a common message to all employees. Each person receives the same information about the nonprofit's position on various topics. Written policies help you avoid the risk that individual supervisors will apply a personal interpretation to your policies, resulting in the inequitable treatment of employees. Written policies are comforting to employees and provide a sense of the nonprofit's commitment to fairness.
- *Written policies provide admissible evidence* of the organization's policies. Should your nonprofit ever need to defend its employment practices in court or at an administrative hearing, you'll want to refer to

your written policies as evidence of your legal conduct. Don't risk the chance of liability for unlawful employment practices simply because you were unable to prove that a lawful policy existed and was followed.
- *Written policies establish the business-related reason for an employment action*, reducing the possibility that the employer's conduct will be challenged as subjective and discriminatory.

Caution: Establishing, but not following, your written policies is a recipe for disaster. Equally troublesome is permitting supervisors to put their own spin on policies when they deal with employees.

2. Communicate and disseminate without delay.

Written employment policies that are a nonprofit's best-kept secret are of little use. New employees should be schooled in the nonprofit's policies as soon as practicably possible. Some employers send the employee handbook along with the offer letter; others distribute the handbook at the employee orientation session held on the first day of employment. From a bound manual to a file on the nonprofit's intranet, the method of dissemination should fit the culture of your organization. Getting this vital information into the hands of employees is of great importance. Repeatedly telling the story, year in and year out, will help ensure that the policies are truly learned and followed. These methods provide valuable opportunities for ongoing dialogue about "what we believe."

3. Size matters; form may not.

A multivolume treatise on employment rules is of minimal use and may create unintentional risks for the nonprofit. A manual that attempts to answer every conceivable question that could arise during an employee's tenure is likely to be ignored. A handbook that's written in legalese will confuse most, if not all employees, leaving them wondering about the organization's policies and effectively unable to comply. The handbook or policy manual must be a reasonable length to ensure its effectiveness and strict adherence. It must be written in plain language that will be understood by all. Two questions that you should ask about every section in the handbook are:

- Does every employee need to know this information?
- Will every employee be able to understand this policy?

Employment gurus don't always agree whether or not an organization's employment-related policies should be consolidated in a single handbook or policy manual. Some argue that a policy manual or compilation should be limited to critical policy information, and that other information about the workplace, such as etiquette, benefits information, vacation accrual, and issues subject to change and frequent updating should be maintained in a separate document or simply circulated periodically to staff in written memos. The authors don't find this distinction particularly compelling. More important in our view is that an employee handbook or personnel policy manual:

- be circulated to all staff,
- include important policy issues,
- contain only commitments the nonprofit is willing and able to keep, and
- be reviewed annually by counsel to ensure that outdated information is removed and current policies, procedures, and new statutory requirements are incorporated.

Of almost equal importance to putting employment policies in writing is the need to obtain a written confirmation from each employee that he/she has read, understands, and agrees to abide by the rules of the workplace as presented in the policy manual or handbook. When new policies are developed, the handbook should be revised and redistributed, or a separate document describing a new policy should be circulated. In either case, each employee should sign an *Acknowledgment Statement* that she/he received the revised (or new) policy, and the signed Acknowledgment Statement should be kept in the employee's personnel file.

4. Involve the board.

An additional tenet of safe and effective employment practices is appropriate board involvement. Some

nonprofit boards report very little involvement, preferring instead to delegate to a Personnel Committee responsibility for reviewing and adopting employment policies. Adopted policies are then implemented by paid staff. This framework may be most appropriate and effective in a relatively mature nonprofit, with a governing/policy-making board that regularly delegates key areas of policy development to committees and implementation to staff. To make this approach work, it may be necessary for the committee to include subject matter experts, such as employment counsel or human resources professionals as committee members.

Another approach is to encourage more active involvement and awareness by the full board due to the significant risks posed by the employment of paid staff. With employment-related claims representing an estimated 85 percent or more of all claims filed under directors' and officers' liability policies, employment missteps place both an organization and its individual directors at risk. State and federal volunteer protection/immunity laws provide no safe harbor, because they specifically exclude intentional wrongs and claims alleging violations of civil rights law — exactly the type of claims alleged by employees or former employees against their employers. Therefore, keeping the entire board apprised of the nonprofit's employment policies may be appropriate.

Under this latter approach the board may review and ratify employment policies developed by the CEO/executive director in consultation with an employment attorney and human resources director. The board may further inquire about the organization's policies and procedures during its regular meetings, and suggest the development of a training program and complaint procedure to ensure the timely correction of prohibited activities, such as harassment. This framework grants permission to the board to ask the CEO about specific employment policies and practices or even to review potentially volatile employee matters. In a start-up or a nonprofit where the board attends to program and service delivery, as well as policy-setting and governance, members of the board may be tapped to research employment practices of similar nonprofits and draft policies for board consideration.

With the exception of their role as direct supervisor of the executive director (or other chief staff member) it's never appropriate for a nonprofit board, or certain members of the board, to step out of an advisory role and into the driver's seat.

5. Strive for fairness.

The fair application of employment policies is vital to reducing employment-related risks. While true for employers in the business and government sectors, it's especially true in the nonprofit sector, where many employees have high expectations about their employer's compassion, sensitivity and fairness. The expectation that they will be treated fairly may be one of the tradeoffs an applicant accepts when foregoing more lucrative opportunities in the private sector. It's neither costly nor unnecessarily time-consuming to strive for and achieve fairness.

Employers who dishonor the commitment to fairness discredit the nonprofit sector and foster cynicism. Defining fairness isn't an easy task. It means affording employees respect, courtesy, equal treatment and opportunities, a forum to seek redress of grievances, and, except when a serious violation of workplace rules or ethics has occurred, notice of poor performance and an opportunity to improve prior to discharge. Striving for fairness is the essence of a sound risk management program, as employers with the policies previously referenced are less likely to be dragged into court or held liable for unlawful or negligent employment practices.

6. Be wary of contract-like promises.

Whether or not employee handbooks seriously impair the revered at-will employment relationship governing most workplaces by creating a contractual obligation between employee and employer is at the heart of the debate over whether or not policies should be in a handbook format. This topic is explored in detailed in the section on *employment at will*.

The viewpoint of *Taking the High Road* is that written employment policies are essential. However, simply reiterating and using large print to remind employees about their at-will status in no way diminishes the obligations an employer may create through oral and written promises to employees.

Contractual or contract-like obligations may be created when an employer makes a promise to its employees. Every nonprofit employer should recognize this and exercise caution in adopting policies or making promises the organization may not be able to live with. Minor alterations in many employment policies can remove or minimize the contract trap. For example, an appropriate progressive discipline policy should give management the *discretion* to place a poor performer on a time-based probation, but not *require* that management do so.

7. Strive for consistency.

Enough emphasis can't be placed on the importance of achieving consistency in employment practices. This is closely related to (and is the technical implementation of) the value of fairness. Just as sound risk management requires that every activity be viewed through a *lens of safety*, safe employment practices require that the application of a policy in a particular instance be subject to a *consistent-treatment* test. This test can be achieved by asking, "How have other employees in this situation been treated? If the employee in question were a man instead of a woman, would I be reducing this position to part-time status?" or "If this employee were a finance director instead of a mailroom clerk, would I be firing him for sleeping on the job?"

The perception of disparate treatment leads to countless claims and lawsuits against employers, including nonprofits. The consistent-treatment test may help a nonprofit manager who is caught up in the emotionally charged atmosphere of a termination avoid missteps and resulting litigation.

8. Stay mission-focused and strive for efficiency.

The employment practices reviewed in *Taking the High Road* shouldn't be viewed as distracting management from an organization's core mission. While it's true that any policy takes time to develop and implement, the real-time waster for a community-serving nonprofit is defending a lawsuit. By focusing on the preventive medicine of sound, defensible employment practices, the nonprofit will be reducing the risk of employment litigation and its accompanying expense, heartache, worry and distraction.

9. Honesty is always the best policy.

Always be honest and tell the truth in dealing with prospective and current employees. Never exaggerate a position's duties or responsibilities to attract a desirable candidate, or give someone a false reason for an adverse employment action (such as telling the person that he or she is being laid off due to budgetary constraints when it's actually for incompetence). Commit to providing honest appraisals of performance, and empower supervisors in your organization to conduct appraisals in a timely manner.

Dishonesty or delay heightens the risk of litigation. An employee who isn't told why he or she is being fired is likely to assume the firing was illegal. Don't let employees second-guess the nonprofit's motives. Honesty, however difficult to hear or deliver, is the best policy.

10. Resist the urge to hurry; allow time to get a second opinion.

Just as increasing speed to 20 mph above the speed limit isn't guaranteed to get you to your destination quicker (an accident would add hours to the trip or perhaps derail your plans altogether), sound employment practices require patience and respect for timing. Chapter 7 of *Taking the High Road* explains why providing a poor performer with time to address his deficiencies minimizes the likelihood of a lawsuit, and why it's never a good idea to terminate an employee on the spot. Similarly, it makes no sense to hurry the development of an employee handbook that will invite legal challenge. Allow policy development the time, care, and feeding it deserves. Resolve to administer employment practices with deliberation and to follow the sound risk management practices described throughout *Taking the High Road*.

Also, remember to never go it alone. Creating and administering defensible, compliant and appropriate employment policies requires expert help. No nonprofit of any size should establish employment policies and procedures without the assistance of an employment lawyer licensed in the state where the nonprofit does business. We invite you to consider the policy frameworks and sample forms included in the book, but offer extreme caution about the downsides of proceeding without legal counsel. Your organization's mission and services are too important to jeopardize by a misstep in this risky area of operations.

Conclusion

The materials in *Taking the High Road* should serve as a refresher, a starting point for discussion with employment counsel, or a reminder about issues to discuss with other experts or stakeholders. Nonprofit managers and volunteers are widely regarded as creative resource developers. It takes creativity and commitment to secure donations of equipment, funds, and services to support charitable activities. Similarly, learn as much as possible about effective and legal employment policies, including the specific laws that apply in the state where the organization operates. You'll reduce the cost of a legal review and make the organization an enviable client.

To a large extent, *Taking the High Road* is about regaining your footing as a manager. It's about easing out of the fast lane and reclaiming the higher moral ground for you and your organization. It's about dealing with your employees fairly and honestly. Treating people right doesn't mean lowering your standards. On the contrary, it's making the standards known and giving your employees the opportunity to live up to them.

Every manager has to discipline or even terminate an employee from time to time. By following the guidelines in the book, you can approach these difficult tasks with more confidence and the knowledge that you can back up your words and actions. Your organization will run better, too.

How often has it been said that our reward is the journey and not the destination. Think of your organization's mission as a journey. Shortcuts may save a little time, but at what cost? We all know that sometimes the seemingly shortest path may cost precious time and resources in the long run. The journey will be more rewarding and the results produced by your nonprofit more satisfying when you and your fellow managers focus on taking the high road.