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All That's Sacred:
The Erosion of Employment at Will, the Regular Workday and Other HR Icons

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Today’s Webinar: Overview

- **Employment at Will:** reliable fundamental or thin ice? What you need to know and do
- **Unpaid Internships:** is there no such thing as free labor?
- **The Regular Work Day:** work-life balance, wage and hour issues, oh my!
- **Criminal History Background Checks**
- **Harassment:** broadening or narrowing protections? How should a nonprofit employer manage the risks?

**Risks ON THE RISE**

Claims against nonprofits alleging wrongful employment practices are going up!

"...Employment claims have led the parade of liability claims against both for-profit and nonprofit organizations."

Eric Schall, VP & Claims Counsel for Chubb Executive Risk
Employment at Will

- The comfortable “default” in all but one state

- Two reasons for the erosion of this foundation of the employment relationship
  - Growth in number and scope of protected classes
  - Off-duty conduct protections

Exceptions

► Common law exceptions
  - Public policy
  - Implied contract
  - Implied covenant of good faith and fair dealing

► Statutory exceptions
  - ILLEGAL discrimination
  - Retaliation - such as: filing WC claims or harassments complaints
Montana

The Montana Wrongful Discharge From Employment Act of 1987 (WDEA) establishes a cause of action for employees who believe that they were terminated without good cause. Montana is the only state to have passed such a law!

Illegal Discrimination

FEDERAL - Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex or national origin.

FEDERAL - age (ADEA), genetic information (GINA)

STATE LAWS - add additional protected classes + lower the threshold (e.g., from 15 to 1)
A few examples of additional protected classes under state laws

1. Victims of Domestic Violence
2. Smokers and Other Tobacco Users (off-duty conduct)
3. Bone Marrow Donors
4. Gay or Transgender Individuals
5. Married or Single Individuals (either way, marital status protected)
6. Civil Litigants and Testifying Witnesses in Civil or Criminal Proceedings
7. Individuals Serving or Testifying Before the State Legislature
8. Individuals with an Expunged Juvenile Record

Employment at Will under attach? Off Duty Conduct

- Some states protect employees from adverse employment actions resulting from legal off-duty activities.
  - In Colorado, CRS § 24-34-402.5 was originally known as the Smoker's Rights Act, but actually protects any legal off-duty activities conducted away from the employer’s premises. North Dakota adopted a similarly broad statute.
  - Legislation enacted by Indiana, New Jersey, Oregon, and South Dakota specifically prohibits employer discrimination against smokers.

www.workforce.com
Off Duty Conduct: Limitations

- Employers may constrain the lawful, off-duty activities of their employees when:
  1. the restriction relates to *bona fide* occupational activity;
  2. is reasonably and rationally related to the employment activities and responsibilities; or
  3. is necessary to avoid an actual conflict of interest or the appearance of one.

Risk Tips: *Employment at Will*

- Know thy classes: protected classes, that is
- Don’t be cavalier: just because you can
- Don’t underestimate the exceptions to employment at will: *especially the statutory exceptions*
- Discipline and terminate with care: always follow the *Golden Rule* and ask a disinterested third-party to review the file
Unpaid Internships

- A New York Federal District Court judge ruled that Fox Searchlight Pictures broke the law by not paying two interns for work on the film *Black Swan*.
- Are unpaid internships too risky?
- According to the National Association of College and Employers, 47% of the 1 million internships in this country are unpaid.

Key considerations:

- The ruling specifically pertained to “for-profit” employers.
- Under the FLSA, employees may not volunteer services to *for-profit* private sector employers.
- Workers may not waive their rights under, either federal or state, minimum wage and overtime laws.
Risk Tips: Unpaid Internships

For-profits must PAY their interns unless the internship:

- is similar to training which would be given in an educational environment;
- is primarily for the benefit of the intern;
- does not displace regular employees;
- does not yield immediate advantage to the employer;
- does not entitle intern to a job at the conclusion of the internship; and
- makes it clear that the intern is not entitled to wages.

Volunteer… or Employee?

When the FLSA was revised in 1985, Congress sought to prevent abuse of minimum wage or OT requirements through undue pressure upon individuals to “volunteer” their services.

Yet the Wage & Hour Division recognizes that a volunteer in a religious, charitable, civic, humanitarian or similar nonprofit is not subject to the FLSA.

Volunteers may work for nonprofits without expectation of compensation, and nonprofits are free to recruit and retain true volunteers without undue worry about the risk of wage and hour claims.
True Volunteer or W&H Violation

waiting to strike? (hint: “YES” is the correct answer)

- Is the entity that will benefit/receive services from the volunteer a nonprofit organization?
- Is the activity less than a full-time occupation?
- Are the services offered freely and without pressure or coercion?
- Are the services of the kind typically associated with volunteer work?
- Have regular employees been displaced to accommodate the volunteer?
- Does the worker receive (or expect) any benefit from the entity to which it is providing services?

True Volunteer RISK TIPS

Never Ignore “Off the Clock” Service

- It is the employer’s duty (not the employee’s!) to keep track of the hours worked by nonexempt employees and to ensure that compensation practices are FLSA compliant.
- Exempt employees are expected to work the hours required to perform their jobs. Most exempt employee schedules include occasional long days and extended work weeks. The additional time spent beyond a customary eight-hour day or 40-hour work week is generally part of the job, and not “volunteer” service to the agency.
  - If an exempt worker seeks a formal volunteer role in the nonprofit he or she should be required to follow the proper channels and should be subject to the rules and supervision associated with that volunteer role.
“True Volunteer” RISK TIPS, cont.

▶ **Never Coerce Employees to Volunteer**
  - An employee who feels coerced to “volunteer” after regular work hours is a wage and hour claim waiting to happen. No one should be coerced to volunteer their time for your nonprofit. Make all supervisors aware of the distinction between employee and volunteer status, and that strong-arming employees to work without pay is a violation of policy that may subject the supervisor to discipline.

▶ **Remember the Volunteer Service Rule of Three**
  - “True” volunteers are those who: (1) work toward public service, religious, or humanitarian objectives; (2) do not expect or receive compensation for services; and (3) do not displace any genuine employees.

More Risk! Paying Volunteers

▶ A nonprofit employer must treat payments to volunteers the same as payments to employees, which means that income tax and FICA contributions must be withheld. (See 26 U.S.C. § 3402). Living allowances, stipends and in-kind benefits should generally be treated like wages.

▶ **Inexpensive items** (e.g., a $25 gift card, free lunch or admission to an event where the volunteer is representing the organization) may be excluded from income as de minimis fringe benefits (See Internal Revenue Code section 132(a)(4)).
Risk Tips

▶ Proceed with Care When Paying Volunteers

- Remember that the definition of volunteer is grounded in the idea of service without contemplation of pay. Keep in mind that paying your volunteers “a little something” could have negative consequences for your nonprofit (e.g., exposure to wage and hour claims, extension of protection under civil rights laws, etc.) and negative consequences to your volunteers (e.g., loss of protection under the Volunteer Protection Act).

Risk Tips

▶ Never Offer Benefits Tied to Hours of Work

- Paying volunteers in accordance with their hours of work may be regarded as a “substitute for compensation” and inadvertently convert volunteers to employees. A key factor in determining whether payments to a volunteer are a substitute for compensation is “whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities.” (See Wage and Hour Opinion Letter FLSA 2005-51).
Risk Tips

Never Base Classification Solely on the Nonprofit’s Ability to Pay

- The classification of a position as a volunteer role versus a paid employee role in a nonprofit should be based on a number of factors, and never solely on whether funds are available to pay the worker. Generally, volunteer roles are those that:
  - do not require the worker to follow a consistent, full-time schedule;
  - are required on an “as needed” basis throughout the year, versus a fixed number of hours on a regular basis;
  - vary depending on the programs and services of the nonprofit (e.g., special events, seasonal work, etc.); and
  - are dissimilar in scope, requirements and expectations from paid positions in the organization.

The Regular Workday

Challenges:

- Workloads and compliance with overtime rules of the FLSA
- Timekeeping for grant reporting/project tracking purposes
- Work life balance
- Projects and people across time zones
- Telecommuters
Classify with Care

- Employee versus Volunteer
- Exempt versus Non-Exempt
- Employee versus Independent Contractor

- OT provisions of the FLSA - exemptions: www.dol.gov/elaws/esa/flsa/screen75.asp

OT is a priority at the DOL!

- “The Labor Department - which has set new records for aggressive Wage and Hour enforcement - now has strong new standards in place to better protect workers' pay. As an employer, if you have additional questions to ensure that your workers are properly classified, please call 1-866-4USWAGE. As a worker, if you feel you are improperly being denied overtime, please go to www.dol.gov/fairpay where you can learn more about your FLSA rights and be directed on how to file a complaint with the Department of Labor, or if you have questions call 1-866-4USWAGE.”

Source: www.dol.gov/elaws/overtime.htm
**FLSA Overtime Security Advisor**

Main Menu

When Congress enacted the FLSA, it created an exemption from the minimum wage and overtime pay requirements for "any employee employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman." Congress did not define these terms but instead granted authority to the Secretary of Labor to do so. Because your definitions of these terms may not match DOL's definitions, you may want to first review the Fact Sheet for a particular exemption to learn more about it or you may want to review the occupational index for help in determining which section to use. Please remember that to qualify for an exemption, an employee must meet specific duties tests and, in most cases, minimum compensation requirements.

Please be aware that the Advisor may not be able to address every employment situation. Rather, the Advisor is designed to help employers and employees understand the general application of these regulations. You may want to review Fact Sheet 17A: Exemption for Executive, Administrative, Professional, Computer and Outside Sales Employees Under the FLSA to help determine whether this Advisor applies to your employment situation. Please select one of the sections below:

**Compensation Requirements**
This section helps you in understanding the compensation requirements for a particular employee to be exempt from the minimum wage and overtime pay requirements of the FLSA.
- Review Fact Sheet
- Start Compensation Requirements section

**Executive Employee section**
This section helps you in determining whether a department manager who supervises other employees meets the duties tests for exemption from the minimum wage and overtime pay requirements of the FLSA.
- Review Fact Sheet
- Start Executive Employee section

**Administrative Employee section**
This section helps you in determining whether a particular employee who works in a management or general business function (e.g., Human Resources, Accounting) meets the duties tests for exemption from the minimum wage and overtime pay requirements of the FLSA.
- Review Fact Sheet

**Administrative Employees**

The FLSA contains an exemption from the payment of both minimum wage and overtime pay to any employee employed as a bona fide administrative employee, as that term is defined by the Regulations, Part 541. To qualify for exemption as an administrative employee, three tests must be met:

- The employee must earn a minimum amount,
- The minimum amount must be paid on a salary or fee basis and
- The employee must perform specific job duties.

The first of the duties tests for exemption is the employee's primary duty. Primary duty means the principal, main, major, or most important duty that the employee performs. The determination of an employee's primary duty must be based on all of the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. While time is not the sole test, as a guideline, an employee who spends more than 50 percent of his or her time performing a specific activity can generally be said to have that activity as his or her primary duty. If the employee spends less than 50 percent of his or her time performing his or her major or most important duty, the employee may still meet the primary duty requirement if other factors support that conclusion. Please review the definition of primary duty for further guidance regarding this requirement.

Is the employee's primary duty the performance of office or non-manual work?

Yes
No
Volunteers

The Fair Labor Standards Act (FLSA) defines employment very broadly, i.e., "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage or on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service.

For example, members of civic organizations may help out in a sheltered workshop; men's or women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; parents may assist in a school library or cafeteria as a public duty to maintain effective services for their children or they may volunteer to drive a school bus to carry a football team or school band on a trip. Similarly, an individual may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with disabled children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, deaconesses, providing child care assistance for newly working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs.

Under the FLSA, employees may not volunteer services to for-profit private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employees. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception - public sector employers may not allow their employees to volunteer, without compensation, additional time to do the

Independent Contractors

The Supreme Court has said that there is no definition that solves all problems relating to the employer-employee relationship under the Fair Labor Standards Act (FLSA). The Court has also said that determination of the relationship cannot be based on isolated factors or upon a single characteristic, but depends upon the circumstances of the whole activity. The goal of the analysis is to determine the underlying economic reality of the situation and whether the individual is economically dependent on the supposed employer. In general, an employee, as distinguished from an independent contractor who is engaged in a business of his own, is one who "follows the usual path of an employee" and is dependent on the business that he serves. The factors that the Supreme Court has considered significant, although no single one is regarded as controlling are:

(1) the extent to which the worker's services are an integral part of the employer's business (examples: Does the worker play an integral role in the business by performing the primary type of work that the employer performs for his customers or clients? Does the worker perform a discrete job that is one part of the business' overall process of production? Does the worker supervise any of the company's employees?);

(2) the permanency of the relationship (example: How long has the worker worked for the same company?);

(3) the amount of the worker's investment in facilities and equipment (example: Is the worker reimbursed for any purchases or materials, supplies, etc.? Does the worker use his or her own tools or equipment?);

(4) the nature and degree of control by the principal (example: Who decides on what hours to be worked? Who is responsible for quality control? Does the worker work for any other company(s) Who sets the pay rate?);

(5) the worker's opportunities for profit or loss (example: Did the worker make any investments such as insurance or bonding? Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?); and

(6) the level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise (example: Does the worker perform routine tasks requiring little training? Does the worker advertise independently via yellow pages, business cards, etc.? Does the worker have a separate business site?).
Risk Tips: Worker Classification

- It is never appropriate to classify an employee as “exempt” from overtime pay simply because you can’t afford to pay overtime.
- “Exempt” status should never be assigned to make an employee feel valued.
- It is a good idea to let non-exempt workers know that they should seek and obtain approval before working overtime hours.
- An employee who ignores your rule requiring advance approval for overtime may be disciplined; but, that discipline can never include withholding premium pay for actual overtime hours worked.
- If your head is starting to hurt or there’s a knot in your stomach as you read this, it’s probably time to conduct an internal review of all positions in your nonprofit. Refer to the “Classification Conundrum” article as you review each position description to determine whether it has been properly classified.
- When in doubt, choose “non-exempt.”


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Korn Ferry Survey Says

- 80% of organizations allow some employees to telecommute
- 94% believe that working from home is an important option for parents who work
- Vast majority of respondents believe that telecommuting has a positive effect on employee work/life balance
Risk Tips: The Regular Workday

- Review positions to determine how they relate to the regular workday
  - Which positions require employees to be at the office during “normal” working hours?
  - Which positions are suited to telecommuting?
  - What is the culture at your nonprofit along the trust and verify vs. law and order continuum?

Background Checking

- What’s new?
  - Ban the box legislation
  - There’s risk in that Facebook post... and it’s not limited to embarrassing a candidate
    - EEOC: “an employer’s use of an individual’s criminal history in making employment decisions may, in some cases, violate the prohibition against discrimination.”
Risk Tips: Background Checking with Care

- Establish disqualifiers before you check
  - “related” = past conduct that renders an applicant unfit for service
- Link disqualifiers to specific roles: screen based on the risks of a position
- Request permission to conduct a check; notify applicant that information will be used in evaluating eligibility for employment
- “Don’t ask follow-up questions about an expunged conviction” - Jonathan Segal, Duane Morris LLC
- Be consistent and comply with the FCRA

Fair Credit Reporting Act

- If you decide not to hire an applicant/candidate based on background check results, you must:
  - Provide the applicant in writing with:
    - the contact information of the company supplying the background check,
    - a statement that the company supplying the report did not make the decision to take the unfavorable action and cannot give specific reasons for it, and
    - a notice of the right to dispute the accuracy or completeness of any information the investigative company furnished
Harassment Risk

Under Title VII, an employer can only be held strictly liable for the harassing conduct of employees if the employee is a supervisor.

- Hostile environment and QUID PRO QUO

LOWER COURT: The U.S. District Court for the Southern District of Indiana dismissed the lawsuit in favor of Ball State. RULING: Ball State was not vicariously liable for Davis’ actions because: (1) she was not a supervisor, and (2) the employer promptly remedied the employee’s complaints. The district court decision was affirmed by the U.S. Court of Appeals for the 7th Circuit.

Case: Vance v. Ball State University, No. 11-556, U.S. Supreme Court (June 24, 2013).

Ball State

What evidence of non-supervisory status?

- Davis did not have the power to hire, fire, demote, promote, transfer or discipline employees.
- The U.S. Supreme Court: to be a supervisor for vicarious liability purposes under Title VII, an employee must be authorized by the employer to take tangible employment actions against another worker. Under Title VII, a supervisor must have the authority to make a “significant change” in another worker’s employment status, such as through hiring, firing or failing to promote.
- What about the EEOC?! The U.S. Equal Employment Opportunity Commission has used a broad definition of “supervisor” to include employees who direct other workers’ day-to-day activities.
**Risk Tips: Harassment**

- Your nonprofit must have complaint procedures + process and commitment to investigate and resolve ALL harassment allegations.

- A broad harassment policy is best.

**EXAMPLE**

- [Name of Nonprofit] is committed to providing a work environment in which all employees are treated with dignity and respect. Therefore, [Name of Nonprofit] will not tolerate any type of harassment of its employees, volunteers, vendors/business partners or clients/consumers.

- As used in this policy, the term “harassment” includes sexual and racial harassment as well as harassment based on any other protected classification such as a person’s race, color, sex, sexual orientation, religion, ethnic heritage, mental or physical disability, age and/or appearance. Specifically, sexual harassment may be defined as unwelcome verbal, physical, or sexual conduct including, without limitations, sexual advances, demands for sexual favors, or other verbal or physical conduct of a sexual nature.
Overtime provisions of the FLSA

The Fair Labor Standards Act (FLSA) provides standards for the basic minimum wage and overtime pay, affects most private and public employment. It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one and one-half times the regular rate of pay. For nonagricultural operations, it restricts the hours that children under age 16 can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. For agricultural operations, it prohibits the employment of children under age 16 during school hours and in certain jobs deemed too dangerous. The Act is administered by the Employment Standards Administration’s Wage and Hour Division within the
References and Resources

- [www.workforce.com](http://www.workforce.com) - *Supreme Court Ruling Limits Harassment Claims*, August 21, 2013

- *Will Work for Free? The Future of the Unpaid Internship* [www.npr.org/2013/06/19/193526906/will-work-for-free-the-future-of-the-unpaid-internship](http://www.npr.org/2013/06/19/193526906/will-work-for-free-the-future-of-the-unpaid-internship)

- *Employee or Volunteer: What’s the Difference?* [www.nonprofitrisk.org/library/articles/employee_or_volunteer.shtml](http://www.nonprofitrisk.org/library/articles/employee_or_volunteer.shtml)