

## Risk Management 6

### Risk Management (cont'd)

#### What affect will the Volunteer Protection Act of 1997 have on the potential liability of our nonprofit and our volunteers?

On June 18, 1997, President Clinton signed new legislation providing limited immunity for volunteers serving certain nonprofit organizations. In addition to creating new rules concerning the liability of volunteers, the Volunteer Protection Act of 1997 (VPA) generated widespread confusion on the part of nonprofit organizations about its true effect. At the outset, it is important to clarify that the VPA does not limit the potential liability of nonprofit organizations. Ironically, the opposite may be true. According to Congressman John Porter (R-IL), the intent of the VPA, which Porter first introduced in 1986, was to "shield volunteers from being sued except in cases of willful or wanton misconduct." In the Republican Weekly Radio Address delivered on April 19, 1997, Porter explained that "The idea here is that if litigation must arise from volunteer activity, the nonprofit organization itself should be named, not individual volunteers."

#### Historical Backdrop for the VPA

Before the last decade, lawsuits against volunteers -- although permitted by law -- were extremely rare. Beginning in the mid-1980s, suits against volunteers grew in number and attracted the attention of national media. At about the same time, the insurance picture for volunteers and nonprofit organizations darkened. Premiums rose dramatically, coverage exclusions increased, and several types of coverage became unavailable.

Due to substantially higher insurance premiums, some nonprofit organizations cut back on services. Other agencies eliminated insurance coverage -- increasing the chance that an injured party would sue the organizations' volunteers in search of a "deep pocket." As publicity about the lawsuits and insurance crunch spread, it raised volunteers' apprehension and reduced their willingness to serve. Several surveys conducted during this period reported that many organizations suffered board resignations and volunteer recruitment difficulties.

Several federal legislators began proposing ways to remove the liability chill from volunteering. On the national level, Congressman Porter dramatized the problem by assigning bill number 911 to his proposed Volunteer Protection Act. Congressman Porter designed the federal bill to spur state adoption of volunteer protection laws. In 1990, President Bush released a model act and called for state-by-state adoption. In response to these forces, state legislatures began taking action.

Although every state now has a law pertaining specifically to the legal liability of volunteers, the statutes lack uniformity and consistency. In adopting these laws, state legislatures tried to balance the choice of protecting a volunteer from personal liability with assuring compensation to the innocent victim of the volunteer's negligence. Only about half the states protect any volunteers other than

directors and officers. Moreover, every volunteer protection statute has exceptions. The most common exclusions are for certain types of conduct, the use of motor vehicles, and federal actions. Most of the laws permit claims based on a volunteer's willful or wanton misconduct. Several laws also exclude gross negligence or another category of error above negligence. A few laws even permit suits based on negligence, which nullifies the protection they purport to offer. In addition to the conduct exceptions, current state laws permit actions based on federal law. The Supremacy Clause of the United States Constitution prevents states from cutting off federal claims. Thus, the Internal Revenue Service can sue a volunteer director for failure to comply with tax withholding rules, and wronged employees can sue for civil rights or employment violations.

### **State Law Preemption**

The final version of the VPA -- Public Law 105-19 -- preempts state laws "to the extent that such laws are inconsistent with the Act." However, it does not preempt a state law that provides additional protection from liability for volunteers. The state law preemption also does not apply with respect to any of the following provisions that states incorporated in their existing laws:

1. The requirement that a nonprofit adheres to risk management procedures;
2. Laws that make a nonprofit liable for the acts or omissions of its volunteers to the same extent that an employer is liable for the acts or omissions of its employees;
3. Provisions that render the immunity inapplicable if an officer of a state or local government brought the civil action; and
4. Provisions that limit the applicability of immunity to nonprofits that provide a "financially secure source of recovery," such as insurance.

In addition, the Act's protections do not apply to civil actions in which all parties are citizens of the state where the state has enacted a statute declaring that the VPA does not apply.

### **When "immunity" Applies**

Simply stated, Public Law 105-19 provides immunity for volunteers serving nonprofit organizations or governmental entities for harm caused by their acts or omissions if:

The volunteer was acting within the scope of his or her responsibilities.

If appropriate or required, the volunteer was properly licensed, certified or authorized to act.

The harm was not caused by willful, criminal or reckless misconduct or gross negligence.

The harm was not caused by the volunteer operating a motor vehicle, vessel, or aircraft.

Nevertheless, despite the VPA, many volunteers remain fully liable for any harm they cause, and all volunteers remain liable for some actions. The Act applies to any not-for profit organization that is organized and conducted for public benefit (charitable, civic, educational, religious, welfare or health purposes) including 501(c)(3) organizations and governmental entities. Other exceptions to the liability limitation include misconduct that is a crime of violence, hate crime, sexual offense, violation of federal or state civil rights law, and acts committed under the influence of alcohol or drugs.

## **The Benefits of Federal Volunteer Protection**

Legislative sponsors and nonprofit proponents of federal volunteer protection have argued that the fear of liability has had a negative effect on volunteerism in America. Today's volunteers are often fearful of liability for their mistakes or errors. Advocates of the new law have argued that the new law will enhance volunteerism by:

Encouraging a comprehensive and consistent approach to volunteer immunity so that the courts will treat volunteers serving in different states similarly. The new law will fill the gaps created by the divergent and wide-ranging differences in current state volunteer immunity laws.

Reducing prospective volunteers' fear of liability. Advocates argue that reducing the fear of liability is necessary in order for nonprofit organizations to meet the increasing demand for volunteer services.

The overall reduction in government spending on programs that serve the poor and disadvantaged has, in part, increased the demand for volunteers. By reducing the threat of frivolous lawsuits against good-hearted, well-intentioned volunteers, the new law may increase volunteerism and much needed community involvement.

## **VPA Realities and Potential Negative Effects**

Some of the critical realities of the new Volunteer Protection Act include:

The Act does not prohibit lawsuits against volunteers. Its effect is to "immunize" certain volunteers from liability under certain circumstances. In reality, however, judgments against volunteers are very rare. The greater exposure facing a volunteer is the risk of having to defend oneself in a lawsuit. A volunteer may have to finance a defense -- even after the VPA takes effect, unless the nonprofit organization agrees to indemnify its volunteers.

Act "immunizes" certain volunteers under certain circumstances for claims alleging negligence -- the failure to act as a reasonable person would under the circumstances. The finder of fact -- a judge or jury -- in a civil action determines whether a volunteer's actions constitute negligence or gross negligence.

Some of the potential negative consequences of the Volunteer Protection Act include:

Volunteers and nonprofit organizations often serve highly vulnerable populations that are unable to select their volunteer caregivers. Without the fear of being held liable except for wanton or criminal acts, volunteers may act inappropriately. Volunteers may be more likely to take unacceptable risks or accept assignments or responsibilities for which they have not been trained. In addition, volunteers may not take their responsibility of extraordinary care for vulnerable populations seriously and over time feel less accountable for their actions.

The growing emphasis on risk management may diminish. Risk management provides a means of protecting clients from harm, safely administering volunteer programs, and preventing injuries. In many respects, the fear of liability has been an effective motivation for staff and volunteers to seek training and support in designing risk management programs.

The current tort system provides incentives for volunteers (and others) to exercise due and reasonable care. Most Americans expect the people to whom they have entrusted the care of their children, elderly

parents, and others to follow the reasonable person standard.

An unfortunate consequence of the state volunteer immunity laws has been the creation of a false impression that volunteers are immune from lawsuits. The new Volunteer Protection Act will further fuel existing misconceptions about immunity and cause some to ignore the continuing possibility of suits against nonprofits and their volunteers. In addition, only a small percentage of the nation's 1.4 million nonprofits purchase liability insurance. Those organizations believing they are immune will not be prepared adequately to deal with the consequences (including the financial burden) of lawsuits when they occur. While suits against nonprofits and nonprofit volunteers remain relatively rare, when filed, the impact on small to medium agencies can be devastating. Most organizations are ill-equipped to manage and finance a defense.

### **Minimizing Volunteer Liability in the Post-VPA Era**

Several risk management strategies are advisable in the post-VPA era.

Provide clear direction to volunteers, supervise volunteer staff closely, and terminate any volunteer whose continued service creates an unacceptable level of risk. Providing clear direction includes defining the scope of each volunteer's authority. Remember that common law will hold your nonprofit liable for the negligence of its volunteers -- even if that volunteer enjoys immunity under the VPA or similar state law.

Do not cancel or non-renew liability policies covering volunteers simply because of the protections afforded by the VPA. Remember that while few judgments are entered against volunteers, defense costs in a tort case can be enormous. In addition to providing funds for settlements or judgments, most policies will finance the defense of a lawsuit. This is crucial for any nonprofit that is unable to reserve or gain ready access to \$50,000 - \$100,000 for litigation defense costs.

### **What are the most common financial management risks facing nonprofits?**

The management and protection of financial resources must be a concern for all nonprofit organizations -- from the smallest all-volunteer group to a large, national association. Without adequate financial resources, an organization is unable to achieve its mission and may not survive. Financial resources or assets fall into three categories -- money, goods, and services. Money consists of cash, checking and savings accounts, securities and other investments. Goods involve merchandise or stock, supplies, and equipment. Services are the programs and activities the organization offers to its clients. Accountants classify goods and services as resources because they have a value or may be used to create value or revenues.

The risks in financial management are any actions that contribute to the reduction in value or loss of any of the organization's financial assets. The decrease can be from the actions of an internal source such as an employee or volunteer, or someone outside of the organization can perpetrate the loss -- a burglar, "con man," or client defrauding the organization. Every organization should be aware of the possibility of a financial loss and take the appropriate protective actions.

A financial loss can have a tremendous impact on a nonprofit. The loss of money can create a cash flow crunch and force the organization to reduce its

spending. The actions may include eliminating staff or reducing the hours worked plus adjusting the services offered to clients. Besides reduced services, the nonprofit may experience negative publicity about the incident. The bad press can lead to a decrease in donations and the willingness of volunteers to work with the organization. Lastly, a financial loss can affect the reputations of the people involved. Often, the board dismisses an executive director if a large theft occurs on his or her "watch." Members of the board are questioned by family, friends, associates and others about the details of the incident and how could it happen to that organization. All of these factors make it imperative for every nonprofit organization to have the proper financial controls in place.

#### Categories of Risk

##### Fraud

Fraud, the intentional pervasion of the truth in order to induce another to part with something of value or to surrender a legal right, is the umbrella term for most financial losses. Fraud is the most common crime perpetrated against nonprofits. Theft is a generic term for the fraudulent taking of property. In insurance terms, theft means any act of stealing. Types of theft include:

- Burglary -- breaking and entering into a building for the purpose of committing a crime.
- Swindling -- convincing someone to give or entrust property to you using deceit or false pretenses
- Forgery -- the unauthorized making or altering of a writing so that it looks to be lawfully authorized
- Embezzlement -- taking property lawfully entrusted to you and converting it to your own use.

Someone inside or outside the organization can commit a fraud or theft of organizational assets or resources. An employee can embezzle funds, steal office supplies or merchandise, pad their expense accounts or create a fictitious company and bill the organization for services never rendered. An outsider can sell bogus merchandise, overcharge the organization for materials or services, or entice the organization to make bad investments. Imagination is the only limit to the ways to defraud an organization. Unfortunately, for every control or security system the organization implements, there is always someone smart enough to breach it. Catching wrongdoing before it translates to sizable losses is key. Therefore, in addition to establishing internal controls, nonprofits must be ever vigilant in monitoring its programs.

##### Investments

The size and types of investments will vary with each organization. For the smaller organizations, investments might be cash on hand while large hospitals, colleges and universities may have sizable endowment funds. Regardless of the size of the investment funds, every nonprofit needs to control and monitor its investments. Many organizations lost money in the savings and loan crisis when banks and lending institutions closed. Another danger is that the organization

may make poor investment decisions such as the purchase of junk bonds by Orange County, California that resulted in its bankruptcy. The New Era scandal is another example of a bad investment decision.

Another potential financial risk for an organization is investing in "politically incorrect" companies. If the nonprofit purchased stocks or bonds in a company that subsequently comes under public and media scrutiny, it may experience adverse publicity or a significant decrease in the value of the investment. Every board should establish an investment policy that will guide the nonprofit in its investment and financial decisions. Even an organization operating on a cash current basis should have a policy.

#### Misuse of Funds

All nonprofits exist for a specific purpose with a defined mission. The board is responsible for ensuring that the organization stays focused on its mission. An excellent way to monitor an organization's progress is through its use of funds. Many nonprofits receive gifts or funding with restrictions or limitations on its use. The improper use of these funds can cause the funder to withdraw the money, require repayment of the expended funds, and refuse to provide future funding.

A similar risk is the use of funds for purposes other than serving the organization's mission. Funds inappropriately expended can lead to the loss of the organization's tax exempt status or other legal actions. As pressures continue to mount for nonprofits to meet social needs, it is often easy to lose sight of the organization's mission.

#### Tax Liabilities

Although most nonprofits are "tax-exempt," the government still requires them to pay many taxes. An organization must pay the appropriate employment taxes such as Social Security, FICA, and state and federal income taxes. Failure to pay these taxes will lead to large fines.

A nonprofit may also be responsible for charging and remitting sales tax on items sold. Also, unrelated business income is becoming a significant concern as nonprofits seek creative ways to raise funds. Every nonprofit is responsible for knowing and paying its tax liabilities.

#### Tax-Exempt Status

The IRS's approval of tax-exempt status is not a right but a privilege that it can easily revoke. One possible challenge to the status is that the organization is not meeting the charitable purpose guideline. If the nonprofit uses its funds for reasons not related to its charitable purpose, it can lose its tax-exempt status. Private inurement is another cause for losing the exemption. In one case, the IRS revoked the tax-exempt status for a child care center. The board, whose members were parents of the children in the center, set a fee structure substantially below market rates. The board made up the short-fall with tax-deductible "contributions." The IRS ruled that it was unlawful private inurement, revoked its exemption and is investigating prior years.

Nonprofits have restrictions on the types of "political" activities they can undertake. The IRS guidelines bar any direct or indirect political activity. Lobbying is another area with restrictions. An organization may, however:

- Communicate with its legislators as a constituent
- Petition the government
- Respond to governmental inquiries and testify before legislative and administrative bodies
- Offer nonpartisan analysis of an issue to educate the public.
- A nonprofit cannot devote a "substantial part" of its activities to lobbying.

#### Fundraising

The financial risks for fundraising are two-fold and extend beyond the theft of the money raised. First, an organization must protect itself from unscrupulous fundraising. Many organizations have discovered fictitious groups raising funds on their behalf. However, the organization never receives any of the money. An organization may also suffer losses stemming from injuries at a fundraising event staged by the fictitious group. Every nonprofit must guard against improper use of its name and logo, especially in regard to fundraising. The organization should respond quickly whenever it discovers someone using its name and logo without authorization.

The second issue concerns the selection and use of sponsors and cause-related marketing partners. An organization may spend hours and many dollars to negotiate a sponsorship arrangement only to later discover a flaw with the new partner. Although it did not involve a nonprofit, the Kathie Lee Gifford controversy regarding the use of child labor had a negative impact on sales. Imagine if your organization had been a partner in that deal. The potential damage to an organization's reputation and goodwill could have a lasting impact. A nonprofit needs to evaluate carefully its sponsors and partners to avoid a press relations incident and other losses.

#### Physical Assets

When discussing financial risks, most of the attention focuses on the loss of money or funds. However, all nonprofits have physical assets at risk. Every organization owns office furniture and other fixtures and equipment used to meet its mission that are subject to loss. A fire or flood can damage or destroy the office contents. Also, an employee, volunteer, computer hacker or other person wanting to harm the organization can steal or damage its assets. In addition, some nonprofits may have warehouses of supplies whether it is a food bank, soup kitchen, sports organization or mentoring program. The loss of the supplies could have a devastating effect on the organization's mission.

The best protection is systems and procedures that limit the access to these assets. Computers contain not only a wealth of information but also confidential data. Control and limit access to the people with the "need to know." Also, protect the organization's supplies and merchandise. Although every employee "borrows" a pen or pad of paper, what about the merchandise (sweatshirts,

briefcases, coffee mugs, books) that the organization sells to raise money?

Many organizations lose money on merchandise sales due to the lack of inventory and access controls.

#### Risk Management Techniques

One key to controlling financial management risks is the development and use of effective internal controls. Every nonprofit needs policies and procedures to control the access and use of its financial resources. The techniques involve general management controls and accounting controls.

#### General Management Controls

General management controls consist of the board's and senior management's responsibilities for establishing the proper oversight of financial operations. The board should require clear and informative financial reports and statements on a regular basis. The organization, if possible, should use a certified public accountant and have an outside independent audit. If it cannot afford an audit, it should at least have an outside party review its financial reports and accounting records. A word of caution, an audit is not designed to detect fraud. An audit's purpose is to affirm the organization's financial records and position. The board should establish the appropriate financial policies such as investment and loan policies. Senior management and the board also must ensure that the proper financial and accounting procedures are in place. Lastly, the board and senior management should set the organization's priorities and goals, keeping the nonprofit focused on achieving its mission.

#### Accounting Controls

Accounting controls are the procedures used to safeguard the nonprofit's assets. Proper accounting controls also provide reliable and accurate financial records. Both of these goals enable the board and senior management to monitor the organization's financial operations.

The creation of adequate accounting controls should focus on four areas -- authority and approval, proper documentation, physical security, and early detection. Authority and approval procedures require the identification of who has the authority to perform and approve certain transactions, such as approving invoices, expense accounts, signing checks, and dispensing supplies. Proper documentation is a part of the approval and authority process, in that every financial transaction should leave a "paper trail." Physical security addresses limiting access to various physical assets (accounting records, personnel files, merchandise, supplies, and other equipment).

Organizations often ignore the early signs of wrongdoing. If the proper controls are in place, the systems should alert someone to possible fraud. Unfortunately, people tend to ignore the early warning signs and let the deceit continue.

Everyone must follow the established procedures for the controls to work. Any deviation from the system will enable someone to defraud the organization successfully. Good risk management may prevent a financial loss or catch the culprit early in the process, thereby minimizing the loss.

## What practices minimize the risk of employment-related claims?

Employment-related claims are one of the fastest growing sources of claims for organizations in both the public and private sectors. During fiscal year 1996, employees and applicants filed approximately 78,000 complaints with the Equal Employment Opportunity Commission (EEOC). This number does not include claims filed with state and local regulatory agencies, or lawsuits filed in courts across the country. In the nonprofit sector, employment-related matters represent the largest share of claims filed under Directors' and Officers' (D&O) Liability policies. Coregis, a large insurer of nonprofit D&O coverage, reports that employment-related allegations account for more than 75 percent of nonprofit claims. The Nonprofits' Insurance Alliance of California (NIAC), a liability insurance pool, reports that 87 percent of all claims filed under D&O policies allege wrongful employment actions, ranging from wrongful termination (60%) to sexual harassment (17%) and discrimination (10%). Unfortunately, due to the publicity of multi-million dollar awards and the continued pressure on organizations to do more with less, there is little hope that the trend will reverse.

### Defining employment-related claims

An employment practices claim is an action arising from the employer-employee relationship where the employee believes the employer has wronged him or her. The employee's claim may be a tort action alleging personal injury to the employee (note: a tort is a private or civil wrong or injury other than a breach of contract for which the law provides damages), or a statutory claim alleging the violation of an employment law or regulation (such as the Age Discrimination In Employment Act Of 1967). The most common employment-related claims are:

Wrongful Termination or Discharge -- Wrongful discharge claims encompass any unfair or illegal dismissal. Such actions can include "whistle blower" claims (where an employer dismisses an employee for reporting the employer to a regulatory agency), retaliatory discharge (where an employer discharges an employee for exercising a statutory right), breach of contract (whether or not a formal employment contract exists), or breach of implied covenant of good faith and fair dealing (a subset of breach of contract).

Sexual Harassment -- According to the EEOC, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:

- submissions to such conduct are made either explicitly or implicitly a term of or condition of an individual's employment,
- submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual,
- such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Discrimination -- Under Title VII of the Civil Rights Act of 1964, an employer acts in an illegal and discriminatory fashion when it:

- Fails or refuses to hire or discharges any individual, or otherwise discriminates against any individual with respect to his compensation, terms, conditions, or privileges of employment because of some protected characteristic such as race, color, religion, sex, national origin, age or disability.
- Limits, segregates, or classifies employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of some protected characteristic.

Failure to Employ or Promote -- Causes of action alleging employment-related decisions that are not performance-based. Such actions are closely related to charges of discrimination.

Breach of Employment Contract -- Usually a subset of wrongful discharge but claims may also involve other implied conditions of employment such as promises to provide a bonus or salary increase.

Wrongful Discipline -- Causes of action alleging that an employer disciplined an employee inappropriately, such as placing an employee on probation for an alleged infraction.

Failure to Grant Tenure -- Claims that the employer did not grant tenure for an incorrect or illegal reason.

Negligent Evaluation -- Claims alleging that an employee's evaluation was inaccurate or not completed and affected the terms and conditions of his or her employment.

Another category of employment claims arises from the administration of employee benefits. Any organization offering employee benefits must comply with detailed, complex, and stringent legal requirements. Benefits administration requires the use of utmost care and the avoidance of conflicts of interest including the appearance of a conflict. Claims may stem from actions made by the plan's administrators ("fiduciaries"). Such claims typically claim that the fiduciaries:

1. Made imprudent investments,
2. Incorrectly calculated benefit payments, or
3. Gave inaccurate advice to participants regarding eligibility and benefits.

## **Practices to Minimize Employment-Related Claims**

The claims described above arise from the perception by prospective, current, or former employees that an organization acted illegally or failed to treat them fairly. Perception and reality overlap in the world of employment litigation. As a result, organizations can avoid many potential employment-related claims by striving for clarity and consistency in the administration of employment practices.

Every nonprofit should ground its personnel practices in legal, defensible practices. In addition, the foundation for all employment actions should be a strong commitment to treat employees fairly. The effectiveness of this approach is only as strong as the weakest link in the nonprofit. Therefore, it is crucial that all supervisors and managers be trained and coached in the implementation of the organization's employment practices. It is not enough to distribute a list or manual containing the organization's policies. Training sessions should discuss potential problem scenarios and concerns. Those who administer employment policies must feel free to seek additional assistance or clarification when they do not understand the reasons behind a particular policy or the manner in which they should implement the policies.

Tips for minimizing the likelihood of an employment-related claim include:

Develop concise, written policies on employment matters

Conduct training on sexual harassment

Follow a carefully documented procedure and exercise special care when handling terminations

Carefully document all employment-related actions

Conduct thorough, candid annual performance reviews

Promptly investigate all allegations of harassment or discrimination

Seek the advice of counsel before taking action

The following explains these strategies:

Develop concise, written policies on employment matters

Clear, written policies on employment matters are a nonprofit's first and best defense against employment-related disputes. Carefully written and up-to-date employee policies provide a thorough explanation of the organization's rules as well as advance warning of procedures that will the organization will invoke under special circumstances. Documents that are especially important include:

- Screening and interviewing policies -- these policies define and explain the process the nonprofit will use to screen and interview applicants. Of particular importance in any screening or selection process is consistency in the treatment of applicants. Provide an interview guide to all supervisors, who should also

receive training in the proper way in which to interview candidates, including interview do's and don'ts.

- Job descriptions -- a detailed job description is the appropriate starting point in a thorough screening process. High performing employees know what is expected of them from the moment they are first considered for a position. A job description may allay the fears of an applicant or employee with regard to the skills that the employer requires in order to perform satisfactorily. Job descriptions should include any educational, experiential, and physical requirements for the position.

- Employment applications -- the nonprofit's employment application is an invaluable tool that it should use for paid staff and volunteer positions. Applications should include a statement signed by the applicant giving the nonprofit the right to verify any and all information included on the application. In addition, the applicant should give permission for the nonprofit to conduct appropriate background checks. The appropriate personnel should review the applications carefully and verify key information contained therein, including past positions held. Unfortunately, a significant percentage of job applicants lie about their education and experience. In light of this fact, the application should provide notice to the applicant that any material misrepresentation or omission subsequently discovered by the nonprofit may result in discharge of the employee.

- Employee handbooks -- an effective handbook provides insight into the nonprofit's philosophy regarding the workplace, including its commitment to treat employees fairly and consistently. In addition, a handbook is the appropriate place in which to summarize employee benefits. A handbook tells an employee both what he or she can expect from the employer and what the employer expects from the employee. While most counsel agree that an employee handbook does not materially alter the "employment at will" doctrine, the courts require employers to live up to the commitments made in such documents.

### **Follow a carefully documented procedure and exercise special care when handling terminations**

The degree to which a nonprofit follows the policies outlined in the handbook and other documents may affect the employees' perceptions of a nonprofit's practices. Therefore, it is crucially important that the organization review such materials regularly, update as needed, and follow closely. As discussed earlier, terminations are the basis for a significant percentage of employment-related claims. As a result, their handling deserves special attention. A nonprofit should follow the following strategies when handling employee terminations:

- Respect the employee's privacy rights -- conduct the termination conference in a manner and location that will not exacerbate the employee's embarrassment. In addition, details about the reasons for the termination should be shared with only those who "need to know."
- Be honest about the reasons for the termination -- many wrongful termination claims stem from an employee's assumptions about the reasons he was discharged. Never tell an employee that he is being "laid off" when you are in fact terminating the individual for poor performance. Being candid and honest may be the best way to avoid a claim.
- Empower the employee to determine whether or not she will be terminated -- except in cases of gross misconduct, give employees the time and opportunity to adjust their performance, correct deficiencies, and meet your standards. One way to do this is by imposing a 30, 60 or 90 day "probation period" before terminating an employee.
- Require the independent review of all terminations by a senior manager -- require a second review of all terminations, including documents prepared prior to the termination. Your legal counsel or a senior manager well-versed in employment matters should conduct the review.
- Strive for consistency in all employment-related actions, including terminations -- before terminating any staff member, ask whether another similarly situated employee would have received the same treatment.
- Carefully document the reasons for the termination and the use of any processes or discipline leading up to the termination, including a probation period, warnings, and work-related deficiencies.
- With the exception of terminations for "gross misconduct" err on the side of giving an employee a chance to correct a problem.
- Carefully document all employment-related actions

Prepare a written summary of any conferences with an employee on a performance matter and place it in the employee's personnel file. The summary should be signed by the supervisor and employee. Notices of progressive discipline, including probation, should always be in writing and included in the employee's file.

Conduct thorough, candid annual performance reviews Annual performance

reviews are an invaluable tool. However, these reviews must be candid and honest or they increase, rather than minimize the likelihood of an employment-related claim. An employee who receives a "satisfactory" or higher rating whom the nonprofit subsequently fires for poor performance will no doubt assume that impermissible considerations factored into the decision.

### **Promptly investigate all allegations of harassment or discrimination**

Thorough investigations of allegations are critically important in minimizing the likelihood of a claim. Many plaintiffs in employment cases take their grievances to court when they feel that the organization has ignored their concerns or complaints.

Seek the advice of counsel before taking action

The advice of an employment law specialist is invaluable in minimizing the likelihood of a claim. If your current outside counsel (paid or pro bono) does not have experience in this area, it is well worth your time and effort to find someone who can assist you as matters arise.

### **Summary**

A nonprofit can reduce the likelihood of an employment-related claim through effective management practices. The strategies and practices outlined in this document provide a starting point. Overall, employees that know and understand the rules and see that the organization adheres to its own policies are less likely to file claims.