

## Risk Management 7

### Risk Management (cont'd)

#### What can we do to reduce potential liability for wrongful termination?

##### **The fear of employment liability**

While lawsuits against nonprofits are less prevalent than in the for-profit sector, the fear of being sued pervades nonprofit and volunteer organizations -- and for good reason: the impact of a lawsuit on a nonprofit can be devastating. The potential consequences of an employment-related claim include: change in the organization's direction and focus; internal turmoil and resultant declining morale; damage to the agency's reputation in the community; and financial losses.

Despite the lack of comprehensive statistical data about claims filed against nonprofits, we know that employment-related matters represent the largest share of claims filed against nonprofits under directors' and officers' liability coverage. 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) reports that lawsuits alleging wrongful termination represent 60 percent of all suits filed against nonprofit boards.

Whether or not it is likely your agency will face an employment-related claim, the fear of being sued may have a negative effect on your agency's ability to achieve its mission. While it is nearly impossible to eliminate the possibility of such a claim, there are a number of steps you can take to minimize the likelihood of a claim. Minimizing your risk begins with the thoughtful consideration of your choices.

##### **Managing a troublesome employee**

When trying to cope with a poor performing employee, termination is among the choices you have, but it is not the only choice. A number of factors will influence your decision on whether to terminate an employee or pursue an alternate course of action. Factors to consider include the employee's past and overall contributions to the organization, the training investment made in the employee, and the organization's ability to cope in the absence of the employee.

Evaluate these considerations within a framework that supports your overall commitment to your employees. This should include the commitment to treat employees with respect and fairness, and to honor employees' privacy rights. Available alternatives to termination include:

Probation. Placing an employee on probation for a limited period can be an effective way of communicating that his or her tenure with the nonprofit is contingent upon satisfactory performance. Outline the organization's policy on probation in the employee handbook. Address the following issues:

- The circumstances under which the organization may place an employee on probation (for example, following an unsatisfactory performance evaluation or the supervisor's notation of serious performance

deficiencies).

- The length of time of the probation period (a range, such as 30-90 days).
- Information included in the notice of probation received by the employee. The documentation should detail specific performance deficiencies, describe the conditions that the person must meet during the probationary period, and include a statement about the consequences of failing to meet the conditions of probation.
- The process for reviewing the employee's performance during the probationary period. Establish if the supervisor will review and discuss the employee's performance weekly, bi-weekly or monthly.

**Suspension.** Suspensions with or without pay may be an appropriate form of discipline when someone makes a serious charge against an employee. In most circumstances, you will need time to investigate the allegations thoroughly. Organizations usually reserve suspensions without pay for serious misconduct when the nonprofit needs time to confirm and finalize the termination.

Suspensions are never appropriate as a cost-savings measure. If a financial shortfall mandates a reduction-in-force, lay off the affected employees with the understanding that they will be re-hired when the organization resolves the funding shortfall. Also, inform the employees that the layoffs are not a consequence of poor performance.

**Demotions.** An employer must recognize that a decision to "demote" an employee who is not performing adequately raises a number of sensitive issues. One consideration is the possibility that a disability may be the cause of poor performance. It is generally inappropriate to pay a demoted employee the same salary he received if the new position has fewer demands and requires less experience or training.

Lateral transfer. A lateral transfer is a way to retain an employee whose poor performance is limited to a current position or when personality conflicts interfere with productivity. Transfers are appropriate as temporary measures when an employer is investigating allegations of sexual or other harassment.

**Resignations.** Most employees leave nonprofit employers for personal reasons, such as a more lucrative opportunity elsewhere. Most organizations require any employee announcing his or her intent to leave the organization to submit a formal letter of resignation or complete a resignation form provided by the employer. In the latter instance, the form should give the employer authority to release reference information to future employers. Requirements that a minimum period of notice (by the employee) be provided may not be unenforceable. Although not necessarily enforceable, most employees will adhere to such as policy when informed about its existence well in advance of the resignation. If your nonprofit has such a policy, include it in the employee handbook.

Whether you should give a troublesome employee the opportunity to resign before facing a termination depends on the organization and the circumstances. In most states, employees who voluntarily resign are ineligible for unemployment compensation, unless they can prove that their resignations were "forced." Allowing an employee to voluntarily resign may help him or her "save face" and serve as a deterrent to a claim of wrongful termination. However, this practice may be inconsistent with your agency's commitment to honesty and consistency in its personnel practices.

**Salary freezes.** Freezing an employee's earning power for a short time should signal to the employee that the organization views his or her performance as marginal and that it expects improvement. Salary freezes are useful because they hit the employee where it hurts -- in many cases employees who are not performing up to par are oblivious to the employer's serious disappointment. Accompany the freeze with on-going performance counseling so that the employee is aware of the expectations placed on him or her for improvement. Human resources professionals recommend that the organization use a salary freeze whenever it suspends or places an employee on probation. An employer faces increased liability when it increases an employee's wages while the employer is complaining about unsatisfactory performance.

### **Terminations for gross misconduct**

Immediate termination is generally inappropriate when there is any doubt that the misconduct has occurred. In such a case, the alleged misconduct warrants an investigation. The employer should suspend the employee pending the outcome of the investigation.

In some cases, you may want to make an exception for an otherwise effective employee even when there is no doubt that the misconduct occurred. For example, you may want to excuse a 10-year veteran employee caught stealing from the petty cash fund or submitting inflated expense reimbursement requests. However, it is unwise generally to make an exception based on the tenure or contributions of an employee. Inconsistent employment actions may lead an employee to question whether the employer based his treatment on a legitimate or illegitimate consideration. In addition to consistent action, quick action is also desirable when gross misconduct has occurred. Your immediate response reinforces the message that your agency will not tolerate serious infractions of organizational policy. Do not shy away from pressing criminal charges when employees steal, bribe, or otherwise break the law at your expense. Your failure to press charges may be difficult to explain in a subsequent lawsuit brought by the employee alleging "wrongful discharge."

### **Golden rules of employee terminations**

Even though terminating an employee is an unpleasant and difficult task, you may need to take the action in order to restore productivity and morale and ensure the continued, effective functioning of your organization. Follow the "golden rules" summarized below when you are facing a termination.

Respect the employee's privacy rights -- conduct the termination in a quiet area and minimize the potential embarrassment to the employee by making certain that others do not witness the termination conference. Only provide information about the termination to the staff members that have a "need to know."

Be honest about the reasons for the termination and communicate the discharge decision in a calm, business-like manner.

Empower the employee to "determine" whether or not she should leave the organization voluntarily or improve her performance by providing notice of her deficiencies and an opportunity to improve her performance. Having a policy that allows the executive director to invoke a probationary period is one such strategy.

Require oversight of all terminations by a senior manager. Independent review of terminations can prevent missteps in this risky area of employment practices.

Strive for consistency in all employment-related actions, including terminations. Before terminating or imposing discipline, confirm that the organization has treated similarly situated employees consistently.

Document thoroughly the reasons for the termination and the use of any disciplinary processes leading up to the termination.

Except for terminations for "gross misconduct" always err on the side of giving an employee a chance to correct a performance-related problem.

While the information contained in this document may be helpful to identify ways to minimize the risks involved with employee terminations, do not regard this document as a substitute for the advice of legal counsel. If you are considering changing your policies with respect to employee terminations, consult an experienced employment attorney for advice on your particular circumstances.

#### **What are the essential steps in screening paid and volunteer staff?**

Screening is a process used by organizations to ensure that they select only the best possible applicants for volunteer or paid positions. It is an essential part of an overall risk management program that nonprofit organizations can use to protect vulnerable service recipients, other staff members, and the organization itself from exposure to persons who pose unacceptable, identifiable threats.

The requirements of each specific position determines the appropriate screening process. The first step in the screening process, therefore, is developing a position description. In addition to the position description, a basic screening process includes the use of written applications, face-to-face interviews, and reference checks. Some positions may require a more extensive screening process -- including various kinds of record checks, observation, and specialized interviews.

**Position descriptions.** The duties, responsibilities, required experience, and limitations of the position guide the screening process. Position descriptions lay the groundwork for establishing "bona fide occupational qualifications" or BOQs. BOQs become important if an applicant legally challenges an organization concerning the information requested for screening purposes or about training and education requirements. Using BOQs will help ensure that an organization is not acting arbitrarily or in violation of anti-discrimination laws in screening applicants. If the position description calls for the handling of money, for example, the organization has a legitimate interest in the applicant's experience handling money, and any history of past improprieties concerning the handling of funds. If the position described is a truck driver, the applicant's financial history may not be relevant, but driving records would be.

**Written applications.** Application forms are the most common source of information about applicants for staff positions -- both paid and volunteer. Application forms that incorporate the following elements provide a solid foundation for screening:

- Identification -- basic facts about the applicant such as name, addresses for the past several years, and telephone number.
- Qualifications -- education, training and certificates or licenses (with expiration dates) relevant to the particular position sought by the applicant.
- Experience -- relevant experience, both volunteer and paid, with dates of service, description of duties, and the names of the organization and the applicant's immediate supervisor.
- Background and references -- if relevant to the position, the application should ask for a listing of any convictions for serious criminal or serious motor vehicle violations; at least three references (unrelated individuals, but who know the applicant well) should be requested, as well as the nature of the relationship and the length of time known to the reference.
- Waiver and consent -- the application should include a statement that the applicant certifies the information provided is true and accurate and authorizes the organization to verify it. Further, the application should require that the applicant specifically waive rights to confidentiality and authorize the organization to perform specific procedures such as criminal history record checks, reference checks, employment verification, etc.
- Signature and date.

**Interviews.** The face-to-face interview is the best opportunity for the applicant and organization to size each other up and determine if they share common interests. While an interview is only a part of a comprehensive screening process, it is important as the interview can uncover grounds for rejecting an applicant that were not apparent from the written application. Interviewers need to prepare for and conduct interviews properly. This preparation should include a review of the requirements for the position as well as the contents of the applicant's application or résumé. The nonprofit should develop

and document the significant questions that the interviewer should ask each applicant, so there will be consistency among all interviews for the same position. Train the interviewers as what types of questions they can ask and those that they should never ask of an applicant.

**Reference checks.** Checking references, like interviewing, begins with preparation: become familiar with the position description and information provided by the applicant. The nonprofit can check references by telephone or through a written request. Most human resource professionals suggest that the initial contact with a reference be made by telephone. If the reference is able to provide information over the telephone, you will receive the information more expeditiously. In addition, the telephone is an interactive medium permitting follow-up questions for clarification. The reference checker can also assess the non-verbal quality of the information such as the tone of voice, any hesitancy, emphasis, and demeanor. When checking references, a script is useful to ensure that the organization collects the relevant information in a consistent fashion on all applicants. The person who interviewed the applicant should conduct the reference checks.

**Record checks.** Depending upon the nature of the position, criminal history records, child abuse registries, driving records, and credit bureaus can provide relevant information. Each nonprofit needs to balance the use of these information sources against its cost and relevancy to the specific position in question. In some cases, relevant information may not be readily available to your organization. For example, in New York state, an organization cannot access criminal history records unless there is a specific law or regulation permitting the organization to obtain them. Before integrating background checks into your screening process, you must first establish the criteria for evaluating the information obtained and a process for minimizing the dissemination of such information to inappropriate persons. For example, will the organization exclude a person with prior convictions for reckless driving from a pool of eligible tutors in a literacy program? With respect to any criminal background check or motor vehicle check, always give an applicant the opportunity to correct or challenge the records you unearth.

**Other screening techniques.** Psychological, chemical, and mechanical testing may be appropriate for some positions. A nonprofit must first determine if the benefits derived from using such tests justify the costs of conducting them.

### **Legal Duties and Screening**

The law requires that organizations use reasonable care in selecting staff -- both employees and volunteers. When the court finds that a lax screening process enabled a staff member to cause harm to a service recipient, member of the public, or another staff member, it may hold the organization liable and financially responsible for the harm caused by its "negligence." The amount of care an organization must use is in direct proportion to the risks inherent in the position. The law does not require perfection but applies a "reasonable person standard" -- did the organization exercise the same care that a reasonable person would have under the same circumstances?

For example, the courts may hold an organization liable for failure to conduct a motor vehicle records check if it hires a driver who subsequently operates the vehicle while under the influence of alcohol and kills a pedestrian and the motor vehicle report revealed prior DWI convictions -- something that a

number of courts have ruled that a reasonable person would do.

**Applicants have rights also.** Organizations must treat applicants fairly and respect their privacy.

Both state and federal laws govern the selection process used by organizations. Below are some of the more notable federal laws applying to the rights of applicants.

Title VII of the Civil Right Act of 1964 and the Age Discrimination in Employment Act Of 1967 prohibit considerations in employment based upon race, sex, age (other than over the age of majority), and religion. In general, anti-discrimination laws establish protections for individuals who receive monetary benefit for their service -- in other words, employees. The laws usually do not afford volunteers the same legal protections; however, organizations would be prudent to apply these laws as guidelines when screening volunteers just as they would applicants for paid employment.

The Americans with Disabilities Act (ADA) requires most employers to make reasonable accommodations in the workplace to provide access to people with disabilities. Physical qualifications must be based upon the requirements of the position. The Act permits employers to ask applicants to describe or demonstrate how they would perform essential functions of a position, for example carrying heavy food platters to and from the kitchen of a homeless shelter. You could not, however, ask about past back injuries. The ADA focuses upon arbitrary barriers to employment; it does not over-ride health and safety considerations. It would not, for example, require an organization to place a person with an infectious disease in a position in which the person could transmit the disease to others. Its scope does not extend to some conditions that many think the law applies to, such as kleptomania, pyromania, and pedophilia -- all of which the act specifically excludes.

The Fair Credit Reporting Act permits credit bureaus to release the information collected in accordance with an individual's written instruction. The act also allows the release of information to any person who could reasonably use the information in connection with employment or any other legitimate business need.

The Employee Polygraph Protection Act of 1988 bans the use of lie detectors in the workplace unless there is an on-going investigation into an economic loss and the employer has a reasonable suspicion that loss involves the employee being tested. Employers cannot use lie detector tests to screen applicants for employment.

### **How should we conduct reference checks to minimize our liability?**

A rigorous screening process for prospective paid and volunteer staff members generally includes reference checks. While the results of reference checks can be invaluable, the process can also be frustrating for the person performing the checks. The frustration arises from two increasingly common practices:

Some employers refuse to provide references for former employees, outside a standard confirmation of the applicant's name and dates of employment.

Other employers provide positive referrals as a means of getting rid of poor performers. This practice may result from the fear that an employer risks liability when giving an unfavorable report about a former employee.

Both of these practices contribute to the unfortunate reality that poor performers and even potentially dangerous employees are often re-circulated among unsuspecting prospective employers. Your agency may have a policy similar to those described above. In addition, you have probably suffered from having too little information about prospective employees.

### **Liability for giving references**

Liability can result from a number of reference-giving practices -- including giving a favorable report on an employee who poses a known danger. An organization relying on such a reference might allege negligent referral or negligent failure to warn if your former employee harmed someone at their organization.

In a widely reported case, Allstate Insurance Company provided a letter of recommendation for Paul Calden, indicating that the company released him following a corporate restructuring process. Allstate actually fired Calden for bringing a gun to work. Fireman's Fund Insurance Company considered Allstate's letter of recommendation in making the decision to hire Calden. Some time later, Calden shot five co-workers, killing three.

In another recent case, a young victim of sexual abuse sued the principals of three schools that had employed the perpetrator and provided glowing references. The hiring personnel at the school at which the plaintiff's injury took place considered the letters of reference provided by the other schools. At the first school providing a reference, the principal was aware that the teacher had been involved in "sexual situations" with more than one student. The principal's letter of recommendation included the statement, "I wouldn't hesitate to recommend him for any position!" At the second school, the school forced the teacher to resign following charges made by parents about sexual overtones and remarks made to students. Despite this, the principal wrote, "I would recommend him for almost any administrative position he wishes to pursue." The third school forced the teacher to resign due to allegations regarding offensive and sexual touching of female students. The letter of recommendation provided by the third principal included the statement, "Due in large part to [his] efforts, our campus is a safe, orderly and clean environment for students and staff...I recommend[him] without reservation."

A state appeals court ruled that the three principals were responsible for the victim's injuries. The court's ruling cited the principals' "negligent misrepresentation" in failing to disclose the incidents of sexual misconduct to the prospective employer. The California Supreme Court affirmed the ruling. The court wrote that "Although policy considerations dictate that ordinarily a recommending employer should not be held accountable for failing to disclose negative information regarding a former employee, nonetheless liability may be imposed if, as alleged here, the recommendation letter amounts to an affirmative misrepresentation presenting a danger to a third person."

To discourage the practice of giving false-positive references, twenty-five states have laws in place that

afford some protection to employers that provide honest assessments when providing references. A growing practice among employers, particularly in those states where there is no legislative protection for reference-giving, is to request that applicants sign a written waiver as part of the job application process that releases their former employer from liability for providing information about their previous employment. Such releases are legally enforceable, and can protect the previous employer from claims of defamation. Therefore, a safe practice, even in states where protective legislation exists, is to only release information about a former employee when the person provides written authorization for the reference. Also, limit statements to those the former employee's personnel file supports factually.

Nevertheless, your agency must tread carefully to avoid potential liability for defamation when you provide information about former employees. A claimant alleging defamation -- including written defamation (libel) or spoken defamation (slander) -- must generally prove that:

1. the communication was defamatory (defined as language, spoken or written, that tends to lower an individual in the esteem of any substantial and respectable group);
2. the communication was made in reckless disregard of the truth or with the knowledge of its falsity:  
and
3. injury resulted.

The best way to insulate your agency from potential liability for defamation is to limit statements about a former employee to those that the agency can support in the employee's written files. For example, informing a prospective employer that "Mary was occasionally tardy" would be inappropriate unless Mary's file contained information supporting this allegation.

It is critical to specifically designate through your organization's policies who has the authority to give references. Train any supervisor or others authorized to provide references about the risks of negligent references and safe practices in reference giving.

### **Minimizing potential liability for reference giving**

Organizations concerned about possible missteps in giving or receiving references should adopt and follow a reference checking and giving policy. An appropriate policy will govern the organization's commitment to check references for prospective employees and to provide written references for former staff.

### **A policy on checking references**

The first step in implementing your reference checking policy is providing advance notice to prospective staff of your intent to incorporate reference checks in your screening and hiring process. Your application form should include a statement concerning your reference check policy (and background check policy, if appropriate). Furthermore, you should make the satisfactory completion of reference checks a condition of employment. The application form should also indicate that any false or misleading statements on the application or the withholding of information will be grounds for the

rejection of the applicant or termination if the organization discovered the dishonesty after it hired the employee. Tips for effectively checking references include:

- Use a script asking the same questions of all applicants for a particular position.
- Make your managerial or supervisory position clear to the former employer and give a brief description of the position you are filling.
- Ask only position-related questions, including questions about past job performance. Only ask questions about personal characteristics if they are relevant to the position responsibilities or conditions.
- Refrain from asking leading questions or ones that the applicant can answer by a simple yes or no.
- Obtain waivers. Have every candidate sign a waiver granting the employer permission to contact previous employers and other personal references.
- Always check more than one reference. The courts may consider a nonprofit negligent if it only checked one reference.
- Use the reference checking process to verify employment history, and always listen carefully to the tone of the person providing the reference.

#### **A commitment to provide references**

As a condition of employment, require that all employees agree to cooperate with the agency's referral policy. If applicable, prospective employees should provide consent to the organization to complete a Reference Form (explained below). The form should contain a "hold harmless provision," that expressly permits the release of the form to any prospective employer.

Consolidating the interviewing and reference check process and training those involved. Hiring managers in some nonprofits routinely delegate reference checking to a subordinate. This is generally unwise. Many organizations centralize the interviewing and reference checking processes so that only trained personnel engage in these activities. In most cases, this should be the direct supervisor of the new employee.

#### **USE OF REFERENCE FORMS**

Some nonprofits use a Reference Form instead of providing oral references for past employees as a means of reducing potential liability. A Reference Form includes an objective, verifiable assessment of the employee's performance over a two- to three-year period. The form includes a summary of positions held, dates of employment, and last salary. In addition, the format should include a statement about the employee's reason for leaving the agency and a space for the employee to indicate if he or she disagrees with the facts or opinions expressed in the document.

A senior manager and the employee should sign the statement. Present the Reference Form to the departing employee as a part of your letter accepting the person's resignation or confirming his or her dismissal. From a practical standpoint, the use of a Reference Form eliminates the need to track down former employees and obtain their permission to provide references on a case by case basis.

#### **What to check**

If a position requires professional designations or credentials, it is well worth the time involved to double-check degrees, certifications, and licenses noted by applicants for professional positions. Sadly, a significant percentage of job seekers falsify their professional credentials. The discovery of any false statements about credentials should constitute grounds for rejecting an applicant or terminating an employee. The employment application should include a statement that applicants falsifying information on the job application will be subject to rejection or dismissal.

In addition to verifying academic credentials and other certifications, it is very important to check more than one reference. In a recent case involving the McDonald's Corporation, the company faced liability after an incident involving the molestation of a customer by an employee. As it turned out, the company had only checked one reference on the worker. More courts are considering this practice as being negligent. The preferred practice is to check a minimum of three professional, volunteer or educational references.

While the information contained in this document may be helpful to identify ways to minimize the risks involved in checking or giving references, do not regard this document as a substitute for the advice of legal counsel. If you are considering adopting or changing your policies with respect to reference checks, consult an experienced attorney for advice on your particular circumstances.