



Avoiding Potential Employment Pitfalls in Tough Economic Times

Given the present economic conditions, many nonprofit organizations may try to reduce their expenses in many ways. One of the largest expenses a nonprofit has is wages and benefits. Therefore, the nonprofit may try to reduce its labor costs by using unconventional methods. However, some of those methods may not comply with the requirements under the law. Below are potential issues that nonprofits should be particularly mindful of when trying to reduce its labor costs.

Non-Exempt Employees and the Fair Labor Standards Act

Under the Fair Labor Standards Act ("FLSA"), employers are required to pay their employees at least the minimum wage for all hours worked and time and one-half the regular rate for all time worked over 40 hours in a work week.

However, the minimum wage and overtime rules do not apply to exempt employees. Exempt employees include those considered bona fide executive, administrative, professional, outside sales employees and some computer employees. In order to qualify for this exemption, the employee must earn a salary of at least \$455 per week and meet certain criteria for each type of exempt employee categorization. The job title does not determine an employee's exempt status. Both the employee's specific duties and salary

must meet the requirements stipulated under the FLSA.

Employees Who Want to Give Back

In general, a nonprofit is not able to pay the same types of salaries or provide the same amount of benefits as a for-profit enterprise. People work for a nonprofit because they believe in the mission of the organization, and are committed to seeing it succeed. Therefore, when a nonprofit faces difficult financial times, employees often want to help out.

Sometimes employees want to give back their time and salary in order to assist the organization. However, employers and employees can create a number of potential legal problems when non-exempt employees either volunteer or are asked to donate some of their time or salary to the organization.

Employees cannot be asked to waive their rights under the FLSA. They are entitled to be paid at the agreed upon rate, and they are entitled to overtime pay. Therefore, it is not a good idea for an employee to "volunteer" to work part of the time for no pay - even if the employee is sincere in making the offer.

Moreover, the employee should not be allowed to waive overtime pay. Once the employee works more than forty hours during the week, he or she must be paid at the overtime rate. For example, the non-exempt secretary who works for

a nonprofit legal service provider cannot volunteer to come to work on Sunday to perform her work duties out of sheer love for her organization. She cannot surrender her overtime rights.

Even if the employee appears to voluntarily make this offer, your organization will be at risk that the employee will change his or her mind. The employee may later ask to be paid for the "volunteer" time or the "waived" overtime. The employee may claim that he or she felt pressured into foregoing the wages. Moreover, without intending to do so, there is a real risk that people within your organization did exert such peer pressure.

The organization and the employee can agree to a wage decrease, provided the employee is still being paid the minimum wage. For example, a non-exempt employee making \$10.00 per hour can agree to a 10% wage cut, so that the employee will make \$9.00 per hour going forward.

However, for legal reasons, it is not a good idea for a nonprofit to agree to "pay" an employee \$10.00 per hour, and then only actually pay \$9.00, with the understanding that the employee will be paid the additional \$1 per hour at a future date. One of the most serious potential problems is that the employee may have to pay taxes on \$10 of compensation, even if he or she has not yet not received all of the cash. The organization always has the option of giving employees pay increases or bonuses in the future, when its financial situation improves.

The Truth about Comp Time

In order to avoid the cost of overtime, some employers have adopted a practice

of giving their employees compensatory, or "comp," time instead of overtime. The Office of Personnel Management describes comp time as:

[t]ime off with pay in lieu of overtime pay for ... regularly scheduled or irregular or occasional overtime work.

Although state and local governments may offer comp time, as a general matter it is illegal for private employers to give employees time off instead of overtime pay for working over 40 hours in a week. This is because it precludes employees from collecting overtime pay. Therefore, if your employee is not exempt from the wage and hour laws, the employee must be paid overtime for any hours in excess of 40 worked in a week.

Employees versus Independent Contractors

Employers sometimes try to reduce the cost of staff by hiring independent contractors to perform needed work. The advantage of hiring an independent contractor is that the organization is not making a long term commitment to the worker. Also, because the individual is not an employee, the employer is relieved of certain financial obligations, such as the need to cover the employee under the organization's employee benefit plans, paying worker compensation and unemployment insurance premiums and paying the employer's share of social security taxes.

However, this approach only works if, in fact, the person meets the test for an independent contractor. Contrary to what many people think, the worker and the organization cannot just agree to treat the worker as an independent

contractor. Whether the worker should be treated as an employee and not a contractor is determined by measuring the nonprofit-worker relationship using a series of objective criteria. The mere fact that an individual works on a part-time or temporary basis does not automatically create an independent contractor relationship.

Generally, a worker will be considered an employee if he or she is subject to the direction and control of the hiring nonprofit. Alternatively, an independent contractor is hired to complete a task, and is given a great deal of discretion as to how that task is performed. The more control you exercise over a worker, the more likely the worker will be considered an employee.

Among the most common factors to consider are:

- Do you set the days, hours and location for when and where the work is performed? Do you supervise the day-to-day performance of the work?
- Do you provide the tools and methods for performing the work? Do you provide additional personnel to assist in performing the work or does the worker hire and pay for any assistants necessary to perform the job?
- Do employees perform substantially similar types of work for your organization?
- Does the worker hold himself or herself out to the general public as available to work, or does the person work principally for your organization?

There are significant consequences if an employer wrongly characterizes an

employee as an independent contractor. These include:

- Penalties for failure to withhold income and payroll taxes. The employer is also liable for any unpaid taxes. Officers and directors may be personally liable for unpaid taxes as well.
- Penalties for failing to pay workers' compensation and unemployment insurance premiums as well as back premiums.
- Back wages for failure to pay overtime and minimum wages.
- Claims for unpaid employee benefits.

Your organization could be liable for claims of back wages and benefits, even though the employee appeared to agree to the independent contractor arrangement. At the very least, you are at risk because the employee could claim that he or she felt forced into the arrangement.

Excluding Employees from Health and Retirement Plans

During these tough times, your organization may consider excluding employees from your organization's benefit plans in order to cut costs. You may suggest that employees search for alternative plans for healthcare, such as using a spouse's coverage or making do without coverage altogether.

An employer is not obligated to provide health care coverage for its employees, and there is a great deal of flexibility in setting minimum service requirements before health care coverage is provided. However, if an employer provides health care to its employees, it must do so on a

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nondiscriminatory basis. The employer cannot discriminate in coverage or in the required amount of employee contributions on such bases as an employee's age, gender, marital status, or disability. Employees over the age of 65 can, but may not be required to, reject employer plan coverage in favor of Medicare.

Different rules apply to employer sponsored retirement plans. As a general rule, any employer-provided benefits must be provided on a nondiscriminatory basis. In addition, an employer-sponsored plan must cover a certain minimum percentage of the workforce. If the plan fails to meet these requirements, the employees could be currently taxed on the value of their retirement benefits.

Therefore, you should consult with an attorney or benefits consultant before you make any changes to your benefit plans in order to save costs.

How Claims May Arise

The law provides several ways that your organization may be penalized for failing to meet the employment law requirements. The most common claim is for back wages. If you fail to pay overtime, or offer comp time when you should be paying overtime, the employee or former employee may file a claim for back wages with the Department of Labor. An independent contractor that your organization should have treated as an employee may also file a claim. Finally, the Department of Labor may audit your entire organization, especially if an individual has filed a claim.

The employee or former employee may also file a claim with the D.C. Office of Human Rights or the Equal Employment

Opportunity Commission if your organization discriminated in providing benefits because of the employee's age, marital status, gender or disability. For example, if you pressured a 66 year old employee to elect not to be covered by your health plan, the employee could file an age discrimination claim.

There have been an increasing number of legal claims filed against employers for failure to make overtime payments. For example, Wal-Mart recently agreed to pay over \$600 million in order to settle a class action claim for overtime pay. Therefore, your nonprofit should take the steps necessary to meet its legal requirements and avoid potential litigation in the future.

Additional Resources

For additional information, please visit:

IRS: <http://www.irs.gov/pub/irs-pdf/p1779.pdf>
– Publication 1779

U.S. Dept. of Labor:
<http://workforcesecurity.doleta.gov/unemploy/uiifactsheet.asp>

D.C. Dept. Of Employment Services:
<http://does.dc.gov/does/cwp/view,a.1232,q.537855,doesNav,%7C32062%7C.asp>

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