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# “Nonprofits as Employers: Some Key Legal Issues”

Presented by Rachel K. Lozosky, Esquire

Washington County Community Foundation  
Nonprofit Leadership & Engagement  
Education Series

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Via Zoom



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## *Disclaimer*

**Disclaimer:** These materials are intended to serve as an overview of a number, but not all, of the employment-related laws which non-profit organizations may be obligated to follow, and are not a comprehensive discussion of every aspect of the laws addressed herein. These materials are intended as general information only, and not as specific legal advice relative to any specific situation. Employers are advised to consult with legal counsel in reference to any specific employment situation with which they may be faced.



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# Nonprofits As Employers: You Are Unique...and You Are Just Like Everyone Else

*What does this mean?*



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## Nonprofits As Employers: You Are Unique

- You must work within the parameters, and under the pressures, of specific and often limited funding streams.
- You *may* attract employees who are more driven by the organization's mission than by personal gain.
- You *may* be tempted to apply the same benevolent approach that you apply to those whom your nonprofit serves, to your employees, even when doing so is not in the best interests of the organization.
- You are mission-oriented, not profit-oriented...yet still must run the organization as a business.



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## Nonprofits as Employers: You Are Just Like Everyone Else

- You face challenges in attracting, retaining, managing, and parting ways with personnel.
- Regardless of how mission-oriented your employees may be, people are people → human nature presents challenges in all aspects of personnel matters.
- You must handle these issues under much of the same general legal framework that applies to for-profit corporations.



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*The Convergence: You Are Unique...AND You Are Just Like Everyone Else...AND THAT IS WHAT MAKES IT SO DIFFICULT!*

- As an employer, you must:
  - comply with many of the same employment laws applicable to for-profit corporations which have more time, money and personnel to devote to compliance
  - face the same liability as for-profit corporations in the event of non-compliance
  - attract and retain high-quality personnel with less of a budget than many for-profit corporations have, and keep the focus on the mission



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*The Convergence: You Are Unique...AND You Are Just Like Everyone Else...AND THAT IS WHAT MAKES IT SO DIFFICULT!*

*The result is often a difficult balancing act between sound legal compliance strategies directed toward:*

- *avoiding legal liability; and*
- *avoiding a draconian approach that drives away applicants or employees from jobs that are already demanding and not necessarily competitive with for-profit salaries and benefits.*





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*The Balance: First, Follow Recommended  
Liability Avoidance Measures.*

Following standard, objective procedures in all aspects of personnel matters ensures legal compliance and fairness.



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*The Balance: First, Follow Recommended  
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First, the “why.”

(Foundation to understand  
why, new developments, best  
practices—application)



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*The Balance: First, Follow Recommended  
Liability Avoidance Measures.*

Nonprofits are governed by generally the same anti-discrimination laws as for-profit corporations, and have the same potential exposure to liability for non-compliance.



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Pennsylvania Human Relations Act - 43 P.S. Sections 951-963** - Applies to employers engaged in industries affecting interstate commerce that employ **four or more persons within the Commonwealth of PA.**
- **“Employer”** as covered by the HRA does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations.

The term “employer” with respect to discriminatory practices based on race, color, age, sex, national origin or non-job related handicap or disability, includes religious, fraternal, charitable and sectarian corporations and associations employing four or more persons within the Commonwealth.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Pennsylvania Human Relations Act - 43 P.S. Sections 951-963** - Applies to employers that employ **four or more persons within the Commonwealth of PA.**
  - Prohibits discrimination in hiring or with respect to any of the terms or conditions of employment (also applies to independent contractors) because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap of any individual.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Pennsylvania Human Relations Act - 43 P.S. Sections 951-963**
  - Also makes it unlawful for any person to impose penalties or take disciplinary action against, or to deny or limit public funds, licenses, certifications, degrees, or other approvals or documents of qualification to any physician, nurse or staff member or employe of any hospital or health care facility, due to the willingness or refusal of such physician, nurse or staff member or employe to perform or participate in abortion or sterilization by reason of objection thereto on moral, religious or professional grounds, or because of any statement or other manifestation of attitude by such physician, nurse or staff member or employe with respect to abortion or sterilization.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **HRA Damages:**
- Injunction against employer from engaging in such unlawful discriminatory practice
- Order reinstatement or hiring of employees
- Granting of back pay
- Any other legal or equitable relief as the court deems appropriate
- Attorneys' fees and costs.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Title VII of the Civil Rights Act - encompasses the following protected classes , which also are covered under the Pennsylvania Human Relations Act: race, color, religion, sex, national origin.**

Applies to employers affecting interstate commerce that employ **15 or more employees** for each working day in each of 20 or more calendar weeks in the current or preceding year. (Does not include bona fide private membership clubs exempt under 501(c); however, HRA picks up most of the anti-discrimination requirements of Title VII.)





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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Title VII also incorporates the Pregnancy Discrimination Act**, which means that discrimination on the basis of sex includes, but is not limited to discrimination because of or on the basis of pregnancy, childbirth, or related medical conditions.
- **For all employment related purposes, women who are affected by any of the above conditions must be treated in the same manner as other persons who are similar in their ability or inability to work.**



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*The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Pennsylvania Human Relations Act also prohibits discrimination because of pregnancy, and requires reasonable accommodations related thereto.**



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Title VII Damages:**

- injunction
- reinstatement (with or without back pay, up to a max of two years)
- front pay where appropriate
- attorneys' fees and costs
- punitive relief for intentional discrimination
- compensatory damages
- other equitable relief



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **At the federal level, age discrimination is covered by the Age Discrimination in Employment Act (ADEA) 29 C.F.R. Sections 1625.1 - 1625.32**
- Applies to employers engaged in interstate commerce with **twenty or more employees** for each working day in each of twenty or more calendar weeks in the current or preceding calendar year:
- Both the federal and state law (HRA) pertain to individuals age 40 or over. This includes discrimination among those who are over 40, if discrimination is in favor of the older of the individuals who are all over 40.



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- **ADEA damages:**
- Back pay/front pay. (back pay is more than just lost wages...includes lost benefits, bonuses, etc.)
- Liquidated damages equal to the amount of back pay in the case of wilful violations. (Also available under Equal Pay Act; not available under Title VII)
- Possible legal or equitable relief, including, but not limited to, judgment compelling the employer to hire the individual, reinstatement or promotion, or other relief.
- Attorneys' fees and costs
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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **In general: How to avoid *successful* claims alleging discrimination:**
- **Create *and* uniformly apply objective policies and procedures dealing with all aspects of personnel administration (hires, promotions, discipline, management, termination, resignations).**
- ***Thoroughly document* the reasons for the action taken, and the way in which the action complies with policy and procedures.**



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Let's take a look at the *general* legal framework under which a claimant can successfully sue your organization under any of the above employment discrimination laws.**
- **This helps to illustrate the importance of objective and uniformly applied policies and procedures.**



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

.. Complainant (applicant, employee, former employee) must establish a *prima facie* case by showing that he or she:

- is a member of a protected class (no such thing as “reverse discrimination”)
- was qualified to gain/retain a position or other term or condition of employment, that he or she was denied
- a differently situated individual with respect to the protected characteristic was treated more favorably





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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

If claimant establishes the above, that is enough to "get the foot in the door." Employer then has the burden of showing a legitimate, non-discriminatory reason for the action.

If employer establishes a legitimate, non-discriminatory reason, employee can *still* prevail if he or she establishes that employer's offered reason was *merely a pretext*. (This is where following procedures and documentation is so important.)



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

The importance of having and following objective policies and procedures should be clear.

*Lawsuits love a vacuum!* When legitimate, non-discriminatory reasons are lacking, or when personnel actions are taken in a manner inconsistent with policy (or no objective policy exists), *you are paving the way for the claimant to fill the void with alleged discriminatory reasons.*



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

.. Some best practices for liability avoidance:

### **Hiring:**

1. Set objective, qualitative criteria for scoring candidates in the application and interview processes, and hire based on same.



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

2. Prepare job descriptions for all positions, identifying the following:
  - essential functions of the position
  - qualifications for the position (education, skills, training, physical requirements)
  - avoid terms like “relevant experience” and “relevant qualifications” – state what they actually are instead



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

3. Do not ask questions or pursue discussion about ANY matters not relevant to the position, ESPECIALLY religion, politics, ethnicity, marital or family status, etc. Be careful of interest-based “extra-curricular activities” that could implicate the same. (The “It’s None of Your Business!” list)(Also avoid “tell me about yourself.”)
4. Prepare and use a standard list of questions (preferably as vetted through legal counsel) for all applicants.
5. Specify in policy/procedures the roles of supervising employees (ex., Executive Director) and Board of Directors in hiring.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

.. **A word about bona fide occupational qualifications:** A qualification is defensible if, although based on a protected characteristic such as age, sex, etc., it is a necessary qualification for the job. ***Employers are greatly cautioned in setting or relying upon a BFOQ - consult with counsel.***



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Hiring and Employment:**

1. Ensure that policies and practices do not have unlawful discrimination built in. *In other words, beware of “disparate impact” discrimination.*

*Neutral policies or procedures that, as applied, have an adverse (disparate) impact on a member of a protected class, and are not justified by business necessity.*



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

Examples of policies/practices that *potentially* have an unlawfully disparate impact: dress code policies without exceptions for religious expression, work rules without exceptions for disability-based reasonable accommodations, policies that assign points in evaluations for attending work events after hours, which would exclude participation by parents of young children, hiring practices that advertise for positions only in geographic areas that highly populated by one racial group.





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“The [employer] must establish that an overriding legitimate business purpose exists which is **necessary** to the safe and efficient operation of the business. Robinson v. Lorillard, 444 F. 2d 791, 3 EPD ¶ 8267 (4th Cir. 1971).”

”If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.”

<https://www.eeoc.gov/laws/guidance/cm-604-theories-discrimination>



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**After-hours marketing example:** Is it necessary to the position? For some positions, probably yes. Be careful in applying *any* policy across the board without looking at the specific requirements of the position, AND considering whether those requirements are truly necessary to the position. (A reminder of the importance of well thought-out *job descriptions*.)



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

**Religious and Disability Exceptions to Work Rules, Policies, etc.:** Any policy that implicates these issues (which may be all policies, so a good idea is to have a blanket “reasonable accommodations policy”) needs to state that *exceptions for reasonable accommodations will be made when required by law.*

***This is not a matter of changing your policy to avoid disparate impact liability, but rather, including appropriate procedures in policy and in practice to:***

- ***inform employees of their rights to reasonable accommodations***
- ***inform employees of how to request reasonable accommodations***
- ***state the general legal framework re: granting and denying reasonable accommodations***



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Americans With Disabilities Act - 29 C.F.R. 1630, et. seq.** Applicable to employers engaged in industries affecting interstate commerce with **15 or more employees** for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 29 C.F.R. Section 1630.2
- (A bona fide private membership club is exempted from ADA, but not from HRA, which has essentially the same requirements.)
- The Pennsylvania Human Relations Act, which applies to employers with **four or more employees**, essentially incorporates the ADA wholesale (with a few exceptions/nuances.)



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **General:**
- Employers are prohibited from discriminating against a **qualified** individual in any term or condition of employment on the basis of disability.
- **Disability** is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual; a record of having such an impairment; or being regarded as having such an impairment.



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **General:**
- If an applicant or employee can perform the essential functions of the position, **with or without a reasonable accommodation**, he/she is **qualified**.
- *Therefore, reasonable accommodations must be made if necessary to allow the individual to perform the essential functions of the position. (Some reasonable accommodations may need to be made in the hiring process itself.)*



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **The *employer* defines the essential functions of the position.**
- **Potential legal liability if you include something as “essential” that truly isn’t *essential to the job* (“*business necessity rule.*”)(Beware “*preferred qualifications.*”)**
- **Yet another reminder to prepare a *well-thought out job description.* (Ask during hiring: *Can you perform the essential functions of the position with or without a reasonable accommodation? If accommodation is requested → interactive process is triggered.*)**



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **More key points about reasonable accommodations for disabilities:**
- **1. Employer does not necessarily have to provide the employee's *preferred* accommodation, just one that is *reasonable*. (If an employee rejects a reasonable accommodation, he/she is not qualified for the position.)**
- **2. Employer must engage in the *interactive process* with the employee to determine what may be a reasonable accommodation.**





## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **More key points about reasonable accommodations for disabilities:**
- **3. An accommodation is *not reasonable*, and therefore an employer is not required to make the accommodation, if it would cause an *undue hardship* to the employer.**
  - **How is an "undue hardship" determined?** Size and financial resources of the employer and cost involved in the accommodation (but typically, cost alone will not be a sufficient factor), the operations, structure, and workforce of the employer, and concerns about the safety of the disabled individual and/or other employees.



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

**4. EEOC best practice:** Employers should have a policy advising employees that requests for reasonable accommodations will be considered on an individualized basis.

5. Employee must ask for a reasonable accommodation. However, the EEOC also says that employers should start the conversation if the employer: (1) knows that the employee has a disability, (2) knows or has reason to know that the employee is experiencing workplace problems resulting from or relating to failing to comply with the requirements of a policy due to the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. **If the employee states that she/he does not need an exemption or reasonable accommodation, the employer has fulfilled its obligation.**



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **6. Drugs and Alcohol**
- Employers may prohibit illegal use of drugs and all use of alcohol in workplace.
- Employers may discipline employees for actions resulting from alcohol or drug use which, standing alone if alcohol or drug use was not a factor, would also result in discipline.
- **Employers may hold an employee who currently engages in illegal use of drugs or who is an alcoholic/abuses alcohol to same standards for employment and job performance/behavior as apply to other employees, even if performance/behavior is related to drug use or alcoholism.**



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **6. Drugs and Alcohol**
- Employer **may** have obligation to allow an employee time off from work to attend rehab for drugs or alcohol....reasonable accommodation?
- 7. HRA also prohibits discrimination based on **past disability**. (Remember, assume everything above also applies to small employers under the HRA.)
- ***Not addressing medical marijuana today...that is another seminar!!!***



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Religious Accommodations**
- Potential areas of religious accommodation:
  - work schedules (holidays, Sabbath observances)
  - dress
  - hair and grooming



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Definition of Religion:**
- "EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. **Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance.**" (EEOC guidance)
- "However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information." (EEOC guidance) See also 29 CFR 1605.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Religious Accommodations**
- "Under Title VII, an employer **should thoroughly consider** all possible reasonable accommodations, including telework and reassignment. **In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.**" (EEOC guidance)
- Employer must engage in the interactive process and shall provide a reasonable accommodation **unless the employer can demonstrate that an undue hardship would result.**



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- ***New standard for undue hardship: 2023 Supreme Court case***
- Prior standard: Employer did not have to provide a religious accommodation if there was **more than a *de minimis* cost to the employer to do so. (Any appreciable cost at all.)**
- EEOC on *Groff v. DeJoy*, 143 S. Ct. 2279 (2023): “The *Groff* opinion clarified that “showing ‘more than a *de minimis* cost’ ...does not suffice to establish undue hardship under Title VII.” Instead, the Supreme Court held that “undue hardship is shown when a burden is substantial in the overall context of an employer’s business,” “tak[ing] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer.” For more information about the EEOC’s resources on religious discrimination, please see <https://www.eeoc.gov/religious-discrimination>.”
- This is a potentially tricky analysis, under new case law. Consult with counsel.





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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### ***New Federal Statute Addressing Accommodations:***

#### ***Pregnant Workers Fairness Act (PWFAS), effective June 27, 2023***

- Applies to employers with at least 15 employees.
- Employer must make **reasonable accommodations** (as defined by the ADA) for a qualified employee's known limitations (those which the employee has communicated to the employer) related to pregnancy, childbirth, or a related medical condition, **unless** it would pose an undue hardship (as defined by the ADA) to the employer's business.
- **The known limitation does not have to be a disability.**



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**Remember, Pennsylvania Human Relations Act also prohibits discrimination because of pregnancy, and requires reasonable accommodations related thereto.**

**The difference under PWFA is that “conditions related to pregnancy” which are not disabilities also must be accommodated.**



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### ***New Federal Statute Addressing Accommodations:***

#### ***Pregnant Workers Fairness Act (PWFAS), effective June 27, 2023***

- Interactive process must occur, unless the accommodation can be provided without it.
- Employer may not place employee on leave if she does not want leave, and another accommodation can be provided.
- Generally the same damages apply as under other anti-discrimination laws.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### ***New Federal Statute Addressing Accommodations:***

***PUMP Act, effective December 2022 (portion of Act that provides a private remedy took effect on April 28, 2023)***

- Applies to employers of all sizes ***which are covered by the federal Fair Labor Standards Act.***

***\*Your non-profit entity may not be covered.***



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA)**
- **August 2015**
- This fact sheet provides general information about how the FLSA applies to non-profit organizations. The FLSA is the Federal law which sets minimum wage, overtime, recordkeeping, and child labor standards. There are two ways in which an employee can be covered by the law and therefore entitled to its protections: "enterprise coverage" and "individual coverage."



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Enterprise Coverage**
- The FLSA generally applies to (“covers”) employees employed by businesses with annual gross volume of sales made or business done of at least \$500,000. **Non-profit charitable organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in sales made or business done, such as operating a gift shop or providing veterinary services for a fee.**
- In determining whether or not a non-profit organization is a covered enterprise, the Wage and Hour Division will consider only activities performed for a business purpose. Charitable, religious, educational, or similar activities of organizations operated on a non-profit basis where such activities are not in substantial competition with other businesses do not result in the organizations being considered covered enterprises. For a non-profit organization, enterprise coverage applies only to the activities performed for a business purpose; it does not extend to the organization’s charitable activities.
- Income from contributions, membership fees, dues (except any part which represents the value of a benefit, other than of token value, received by the payer), and donations (cash or non-cash), used in the furtherance of charitable activities, are not considered in determining whether an organization has met the dollar threshold required for FLSA enterprise coverage. See [Fact Sheet 14: Coverage Under the Fair Labor Standards Act \(FLSA\)](#) for additional information about enterprise coverage.



## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

- **Individual Coverage: Note: An employee's individual coverage does not mean that the nonprofit is covered by the federal Fair Labor Standards Act. However, for purposes of the requirement to pay overtime, this is a distinction without a difference, as we will see later. (Most likely covered under FLSA, and will be covered under PA MMWA.)**
- Employees of employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production.
- Examples of activities that may result in individual employee coverage include making/receiving interstate telephone calls, shipping materials to another state, and transporting persons or property to another state. The Wage and Hour Division, however, will not assert that an employee who on isolated occasions spends an insubstantial amount of time performing individually covered work is individually covered by the FLSA. See [Fact Sheet 14: Coverage Under the Fair Labor Standards Act \(FLSA\)](#) for additional information about individual coverage.



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### ***New Federal Statute Addressing Accommodations:***

***PUMP Act, effective December 2022 (portion of Act that provides a private remedy took effect on April 28, 2023)***

If your non-profit organization is covered:

- Must provide reasonable breaks on an as-needed basis for pumping breast milk for up to one year after the birth of the employee's child.
- Must provide a private place other than a bathroom for pumping.





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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### ***New Federal Statute Addressing Accommodations:***

***PUMP Act, effective December 2022 (portion of Act that provides a private remedy took effect on April 28, 2023)***

- If your nonprofit organization is covered:
- If you have fewer than 50 employees, you may be excused from complying in circumstances in which doing so would cause an undue hardship.



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### ***New Federal Statute Addressing Accommodations:***

***PUMP Act, effective December 2022 (portion of Act that provides a private remedy took effect on April 28, 2023)***

- If your nonprofit organization is covered:
- Employee must either be fully relieved of duties for break to be unpaid, or, must be paid.



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### ***New Federal Statute Addressing Accommodations:***

***PUMP Act, effective December 2022 (portion of Act that provides a private remedy took effect on April 28, 2023)***

- If your nonprofit organization is covered:
- Employee has a private right of action against the organization for violations. Potential remedies: lost wages (including liquidated damages), other economic harms, emotional distress, punitive damages, and attorney's fees and costs.



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***PWFA and PUMP Act are in addition to the Pregnancy Discrimination Act and the pregnancy protections of the Pa Human Rights Act.***



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

***Liability can overlap among the four statutes. (ex., tardiness or starting work on time rule....disparate impact, failure to accommodate, possible failure to provide reasonable pump break.)***

***Generally, accommodations and non-discrimination, as related to pregnancy, are your main concerns, unless also covered by PUMP.***



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Recommended Practices: Employment:**

- 1. Develop and follow, *uniformly*, policies for evaluation, discipline, promotion, and termination.**
- 2. This is not the place for balancing the “softer side of nonprofit work” against liability avoidance (we will cover that balance later.) Be honest and clear in documenting problems as they arise. *Remember....***
  - *Liability loves a vacuum!***
  - *“Unclear is unkind”***



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### **Employment:**

- 3. Job descriptions will also be useful when an individual is seeking to take leave under workers' compensation, as a reasonable accommodation, under your leave policies, etc., as well as when seeking a release to return. (Send job description to doctor-ask if individual can perform the essential functions of the position, with or without a reasonable accommodation.)**
- 4. Follow employment contracts, if any.**



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### **Termination:**

- 1. Be clear, consistent and honest in your reasons. (Consistent among verbal and written explanations.) This ties into eligibility for unemployment and potential claims of discrimination.**
- 2. Follow policies (protection against discrimination claims) and employment contracts, if any. (Employee-at-will versus contractual rights.) (“Any reason or no reason, as long as not an unlawful reason.”)**





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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **3. Key Points and Updates on Severance Agreements**

- a. Always have legal counsel involved to ensure that the organization is receiving an appropriate full release of claims in exchange for providing severance benefits, and to discuss the pros and cons of offering a severance from a strategy perspective.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **b. Significant to employers covered by the ADEA:**

- **ADEA contains additional requirements for waivers and releases in separation agreements, for individuals age 40 and older.**
- **Older Workers Benefits Protection Act (OWBPA) requires specific notices when individuals are offered severance agreements as part of “exit incentive programs” (voluntary) or “other employment termination programs” (involuntary), presented to two or more employees.**
- **Very specific requirements. Consult with an attorney.**



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**b. Additional notification requirements for group lay-offs under the  
WARN Act.**

- Very specific requirements. Consult with an attorney.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **b. Significant New Limits on Non-Competes, Non-Solicitations, Non-Disparagement and Confidentiality Clauses**

- **Non-Disparagement and Confidentiality Clauses**, if overbroad, will be considered violations of Section 7 of the National Labor Relations Act, as they have been found by the National Labor Relations Board to chill employees' and former employees' rights to discuss/bargain terms and conditions of employment.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

*McLaren Macomb* (327 NLRB No. 58), February 21, 2021

Specific provisions found to violation the NLRA:

***Confidentiality Agreement:*** *The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purpose of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.*



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

*McLaren Macomb* (327 NLRB No. 58), February 21, 2021

Specific provisions found to violation the NLRA:

***Non-Disclosure: At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives. [Language in bold is the language that was found to violate the NLRA.]***



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*McLaren Macomb* (327 NLRB No. 58), February 21, 2021

Note: Even **the offering** of a severance agreement with one of these prohibited provisions was found to violate the NLRA.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Unresolved Issues:**

- Will courts adopt this reasoning to invalidate similar confidentiality and non-disparagement agreements?
- Will this NLRB decision be applied retroactively? (If yes, six month statute of limitations.)
- Will this decision be expanded to cover employment agreements?
- Will this decision be expanded to apply to severance (and employment) agreements for supervisory employees (as to impact on non-supervisory employees)?





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### **Unresolved Issues:**

- Will the inclusion of a prohibited confidentiality or non-disparagement clause invalidate the entire agreement? (Not likely, if a severability clause is included.)
- Would a more narrowly tailored confidentiality or non-disparagement clause be upheld? (The decision indicates this, but to my knowledge, no such language has been tested yet in litigation in a controlling jurisdiction.)



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Speaking of the NLRA and non-disparagement....**

- Beware of any policy language that restricts a non-supervisory employee's ability to complain to any superiors, co-workers, or the public in general about terms and conditions of work.
- This language can be found in various policies, such as "Complaints and Concerns," "Image of the Organization," and "Social Media." Even restrictions on disparaging comments to the general public are likely violations of the NLRA. (See also *Stericycle*, which we will discuss soon!)
- The NLRB has published, relatively recently, a social media policy to which it gives the "NLRB Blessing." See NLRB website case, Wal-Mart litigation.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Speaking of the NLRA and non-disparagement....**

- *Always ensure you are not retaliating, or giving the appearance of retaliating, against any employee for exercising any of his/her legal rights (NLRA, non-discrimination, etc.)*
- *Retaliation is also expressly prohibited under the non-discrimination statutes.*



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **BACK TO EMPLOYMENT**

#### **NLRB Decision on Overbroad Employer Policies**

***Stericycle, Inc. and Teamsters Local 628 (372 NLRB 113) August 2, 2023***

- Addresses rules/policies that do not expressly inhibit employees from exercising Section 7 rights, but have that impact.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **NLRB Decision on Overbroad Employer Policies**

**NLRB:** “Under the new standard adopted in *Stericycle*, the General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights. If the General Counsel does so, then the rule is presumptively unlawful.”

“However, the employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest **AND** that the employer is unable to advance that interest with a more narrowly tailored rule.”



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **NLRB Decision on Overbroad Employer Policies**

**NLRB:** In determining whether a rule is presumptively unlawful, “the Board will interpret the rule from the perspective of the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in. The reasonable employee interprets rules as a layperson, not as a lawyer.”



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **NLRB Decision on Overbroad Employer Policies**

- Stericycle will be applied to employer policies/rules **retroactively!**
- **A thorough review of existing policies would be prudent. Look for rules that a reasonable employee could view as chilling their rights to address the terms and conditions of their employment. This is a broad standard.**



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### **NLRB Decision on Overbroad Employer Policies**

The rules/policies at issue in *Stericycle* governed personal conduct, conflicts of interest, and confidentiality.

However, the NLRB did not issue a ruling on these specific policies, but remanded further consideration of them to the Administrative Law Judge.

“NLRA disclaimer” is not sufficient.





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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **EMPLOYMENT**

#### **Non-competes and Non-solicitation provisions**

#### **NLRA General Counsel Memorandum GC 23-08 May 30, 2023**

“The proffer, maintenance, and enforcement of a non-compete provision that reasonably tends to chill employees from engaging in Section 7 activity [violates the NLRA] unless the provision is narrowly tailored to special Circumstances justifying the infringement on employee rights.”



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Non-competes and Non-solicitation provisions**

- This includes non-compete and non-solicitation provisions in employment agreements, severance agreements, and stand-alone documents.
- Non-solicitation: Provisions that prohibit employees from soliciting co-workers to work for competitors.



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Non-competes and Non-solicitation provisions**

#### **GC memo says non-competes would not be justified by:**

- desire to avoid competition from a former employee
- desire to protect investment in training the former employee

**and would most likely be considered overbroad especially as applied to low or middle wage workers who lack access to trade secrets or other protected employer interests.**



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Non-competes and Non-solicitation provisions**

**GC memo says the following may be considered sufficiently narrowly tailored to not violate the NLRA:**

- “provisions that clearly restrict only individuals’ managerial or ownership interests in a competing business”
  - “provisions that clearly restrict ...true independent contractor relationships”
- \*but may still be a violation if it is a restriction “in the context of industries where employees are commonly misclassified as independent contractors”



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**Non-competes and Non-solicitation provisions**

**\*This is one more reason to ensure that your employee/independent contractor classifications are correct! (IRS and Department of Labor Tests)**



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Unresolved Issues:**

- Will courts adopt this reasoning to invalidate certain non-compete and non-solicitation agreements?
- Will this NLRB decision be applied retroactively? (If yes, six month statute of limitations.)



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Unresolved Issues:**

- Will the inclusion of a prohibited non-compete or non-solicitation clause invalidate the entire agreement? (Not likely, if a severability clause is included.)
- Would a more narrowly tailored non-compete or non-solicitation clause be upheld? (Yes, but to my knowledge, no specific language has yet been tested in a controlling jurisdiction.)
- Pending FTC rule banning non-competes....enforceability?



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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Consequences for Violation of National Labor Relations Act:**

- Investigation and hearing
- Cease and desist order
- As applicable, reinstatement of employee with or without back pay  
(Employee resigns because presented with non-compete, non-solicitation, confidentiality, non-disparagement?)





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## *The Balance: First, Follow Recommended Liability Avoidance Measures.*

### **Consequences for Violation of National Labor Relations Act:**

- Fines and penalties
- Direction to re-write rules/policies (even those which were not the subject of the complaint!)
- NLRB MAY say they approve the re-write, but also say that this is no guarantee that the new verbiage will be upheld in a future challenge.



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

- Must a nonprofit always be harsh with its employees in order to avoid liability.....**No.**
- As seen throughout this presentation, many of the actions that we are recommending, to comply with the law, are also in the *employee's* interests.
- The recommendations that the nonprofit be clear, accurate and honest in evaluating, managing, and disciplining employees are essential liability avoidance measures that can also be seen as helping employees to improve and therefore fitting into the “mission orientation” of the nonprofit.



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

***Are there any “perks” that can be offered to nonprofit employees to offset the stringent employment law approaches and the other challenges of working for a nonprofit?***

**For today’s purposes, I will focus on *flexible work arrangements*.**

1. Flexibility in hours
2. Flexibility in location



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

- What does “flex time” really mean?
- It depends upon an employee’s status as exempt or non-exempt (i.e., exempt from the entitlement to OT, or non-exempt, and thus entitled to OT.)
- This status is not defined by whether a salary is paid (employees whose pay is calculated hourly are often still considered to be paid a salary, *and* misclassification is possible,)



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

Liability results from *misclassification of a non-exempt employee as exempt, resulting in deprivation of legal right to overtime.*

Potential Liability:

Payment of back wages, liquidated damages, attorney's fees and court costs.



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

Potential Liability:

For willful or repeated violations:

- Civil penalty of up to \$1,000 per violation
- Criminal fine of up to \$10,000
- Imprisonment for second violation



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

- This status is determined by the employee's job duties and amount earned, as those matters are factored into the determination for exempt/non-exempt under:
  - Federal Fair Labor Standards Act (if enterprise or individual coverage-safest to assume that at least individual coverage exists)
- Pennsylvania's Minimum Wage Act



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

- Currently, the tests for exempt/non-exempt are essentially the same under federal and state law. Always apply the law (federal or state) that is more protective of the employee.





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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

To be exempt, an employee generally must fall under one of these three

**exemptions\*** (\*There are other position specific exemptions, such as outside sales and computer employees. Discuss all exemption nuances with counsel.)

#### **1. Executive:**

- Primary duty is managing the enterprise or a department.
- Customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and
- Has authority to hire and fire, or his/her recommendations regarding any term or condition of employment must carry particular weight.



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# *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

## **1. Flexibility in Hours**

To be exempt, an employee generally must fall under one of these three

**exemptions\*** (\*There are other position specific exemptions, such as outside sales and computer employees. Discuss all exemption nuances with counsel.)

### 2. Administrative

- Primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer or its customers.
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.



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# *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

## **1. Flexibility in Hours**

To be exempt, an employee generally must fall under one of these three

**Exemptions\*** (\*There are other position specific exemptions, such as outside sales and computer employees. Discuss all exemption nuances with counsel.)

### **3. Professional**

- Primary duty is the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.
- The advanced knowledge must be in a field of science or learning (PA: invention, imagination, originality or talent in a recognized field of artistic or creative endeavor) ; and
- FLSA: The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

To be exempt, an employee generally must fall under one of these three

**Exemptions\*** (\*There are other position specific exemptions, such as outside sales and computer employees. Discuss all exemption nuances with counsel.)

To be exempt, the individual must also be paid on a salary basis at a rate of not less than \$684 per week.



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

*Exempt employees* can be afforded flexibility, as long as the work gets done.

Establish clear ground rules, and hold employees to same.

**DO NOT** calculate precise “compensatory time.” Treating exempt employees as non-exempt → loss of exemption → **requirement** to pay overtime



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

*Non-exempt employees* **must** be paid overtime, at the rate of one and one-half times their hourly rates, for any hours over 40 worked in a workweek.

Per Pa Minimum Wage Act, exempt employees cannot be given compensatory time in lieu of overtime. (Specific in the Regs. *Maybe* could enter a contract or waiver to the contrary; definitely need assistance of counsel. *Legally risky.*)(Better option: “flex” schedule so that they are not working OT.)

Establish clear ground rules, and hold employees to same.



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **1. Flexibility in Hours**

Establish clear ground rules, and hold employees to same:

- Permission needed to work OT
- Limit on OT to be worked
- Careful recordkeeping
- Define a “workweek”



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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **2. Flexibility in Work Location (Still trending toward remote work?)**

- **A remote work policy should be in place if remote work will be an option.**
- Be fair and consistent in how you decide who is permitted to work remotely and under what rules.
- Be clear that remote work is not a right, except where it may be a reasonable accommodation.
- Define what remote working means and rules that apply while working remotely.





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## *The Balance: Must a Nonprofit Always Be Harsh With Its Employees In Order to Avoid Liability?*

### **2. Flexibility in Work Location (Still trending toward remote work?)**

- A remote work policy should be in place if remote work will be an option.
- Address responsibility for equipment costs, damage, etc.
- Address confidentiality and protecting employer equipment.
- Address child/elder/family care and other non-work use of time.
- Address meeting with clients/third parties.



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*CONCLUSION*

Thank you for your time and attention!

*Questions?*



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