

LAW MEMO

Employment Law in a Nutshell

Like any other business, nonprofit organizations with employees must comply with legal guidelines and regulations governing hiring, withholding taxes, workplace health and safety, discrimination, wage and hour laws, accommodating workers with disabilities and other personnel matters.

What follows is a brief summary of key employment laws. While some regulations do not apply to organizations with only a few employees, it is in your best interest to look beyond legal liability because workplaces that do not respect their employees' rights are workplaces with demoralized workforces and poor reputations.

NEW HIRE REPORTING

Tax Forms. Nonprofit arts organizations are required to withhold a portion of their employees' wages for tax and Social Security (FICA) purposes. Employers must file quarterly 941 reports, which are used to summarize total and taxable wages paid during the quarter and to compute the amount of contributions due on the taxable wage total.

Before beginning employment, new employees should complete W-4 (federal) and state tax forms, which help determine the appropriate withholding level.

The W-4 form need not be sent to the IRS unless a) the employee claims more than 10 allowances or b) earns more than \$200 per week and claims exemption from withholding.

In 1997, the federal government instituted a system of mandatory reporting of new hires (in order to establish a national database to track parents who are not paying child support). New hires must be reported to the Illinois Department of Employment Security or the Missouri Department of Revenue within 20 days of hire. Most employers simply file a copy of the federal W-4 form with the state.

I-9 Forms. The Federal Immigration Reform and Control Act of 1986 makes it unlawful to employ individuals who are not

authorized to work in the United States.

Employees should complete INS Form I-9. Copies of the forms must be retained for three years after employment terminates. It also is advisable to retain copies of the documentation for each employee establishing I-9 compliance, i.e., passport or driver's license and social security card. Forms and instructions are available from the Department of Justice by calling (800) 870-3676 or can be downloaded from the Department's web site (www.ins.usdoj.gov).

FAIR LABOR STANDARDS ACT

Passed in 1938, the FLSA established the minimum wage, restricted child labor, defined the 40-hour workweek and set requirements for overtime pay. The law, which has been amended many times, now requires equal pay for equal work done by men and women.

Although the FLSA technically applies to employers with annual sales of more than \$500,000 or those who are engaged in interstate commerce, it actually covers most businesses. That is because the definition of interstate commerce is very broad; regularly sending mail out of state, maintaining a web site or making long distance phone calls may be interpreted as conducting interstate commerce.

Minimum Wage & Overtime. Under the FLSA, employers must pay a minimum wage of \$5.15 per hour. Overtime must be calculated after 40 hours per week (not an eight-hour day) at a rate of time-and-one-half. The FLSA does not require overtime pay for work on weekends or holidays.

Under the 1985 amendments to the law, state and local government may give their employees comp time, but private employers (including nonprofits) are not permitted to use comp time in lieu of cash overtime payments.

Contrary to popular belief, being salaried (rather than hourly) does not determine whether an employee is entitled to overtime. The determining factor is the employee's job duties. Three types of

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national VLA network.

This issue was written by Sue Greenberg, VLAA's executive director. Special thanks to VLAA board member Susan Hagen and Stephanie Zorn, Esq.

This publication is distributed with the understanding that VLAA is not engaged in rendering legal or accounting counsel. We urge you to seek professional services to address your specific needs.

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workers are exempt: executive, administrative and professional employees who are paid more than \$250 per week.

To qualify as an exempt executive, an employee must manage an enterprise or a customarily recognized department and supervise (including the right to hire and fire) at least two workers.

Exempt administrative employees primarily perform office work directly related to management policies or general operations. Their duties include work requiring the exercise of discretion and independent judgment.

Professionals include those with advanced training such as lawyers, engineers and teachers. This category also includes employees whose work is original and creative in character, such as designers.

The distinction between exempt and non-exempt workers can be confusing. When in doubt, consult an attorney.

Child Labor. Generally, child labor provisions restrict the employment of youths below the age of 18 to no more than 20 hours per week when school is in session, and further limit their ability to work around dangerous equipment and machinery. Work certificates may be required to employ youths during the school year.

In Illinois, all minors under the age of 16 who are working as models, actors, and in performance work must apply for and receive an employment certificate prior to performing the work. For more information, contact the Illinois Department of Labor, 312/793-2804.

Missouri requires children who are under age 16 who work in the entertainment industry to obtain free work permits, which are valid for one year. The Division of Labor Standards has defined "employ" broadly, interpreting complimentary tickets or T-shirts as "other remuneration." For more information, call 573/751-3403.

UNEMPLOYMENT INSURANCE

Federal and state unemployment systems have provided compensation to those who have lost their jobs through no fault of their own and who are able,

available and actively seeking work. Employers pay these taxes without deducting money from the employees' salaries.

Tax-exempt organizations are not required to pay federal unemployment taxes. However, if a nonprofit arts organization in Missouri employs four or more workers for any 20 weeks during the year, it must pay unemployment taxes to the state. If an organization employs fewer than four workers, it may elect to cover its employees. Contact the Missouri Division of Employment Security, 573/751-3215, for more information.

In Illinois, organizations are liable if they employ one or more workers in any 20 weeks in a calendar year or pay at least \$1,500 in total wages during a calendar year. For more information, contact the department of Employment Security, 800/247-4984.

CIVIL RIGHTS

Civil rights laws cover all stages of the employment process, including recruitment, hiring, promotion, pay, discipline and discharge. Small organizations (those with fewer than 15 full- or part-time employees) are not covered by **Title VII of the Civil Rights Act of 1964**, which prohibits discrimination based on race, color, religion, gender or national origin, or by U.S. Equal Employment Opportunities Commission (EEOC) sexual harassment guidelines.

But Illinois law applies to employers of one or more persons, if a charge alleges discrimination on the basis of physical, mental or perceived handicap or sexual harassment and to employers, without regard to the number of employees, if the employer is a public contractor doing business with the state.

Missouri law covers companies with six or more employees. Some municipalities have laws prohibiting discrimination. Local laws often add categories of protection to those covered by state and federal regulations. In St. Louis City, for example, it is illegal for an employer to discriminate based on marital status or sexual orientation.

State arts councils comply with all local, state and federal regulations concerning civil and human rights. In addition to Title VII, grantees are required to attest to compliance with:

- **The Pregnancy Discrimination Act**, which prohibits employers from treating a female employee differently because of pregnancy, childbirth or related medical conditions;

- **The Age Discrimination in Employment Act**, which prohibits discrimination on the basis of age against employees who are age 40 or older;

- **Section 504 of the Rehabilitation Act of 1973** and the **Americans with Disabilities Act of 1990 (ADA)**, which seek to increase opportunities for the disabled. Under the employment provisions of the ADA, discrimination against "qualified" disabled employees or applicants who are able to perform the "essential functions" of a job is prohibited. A qualified individual is one who satisfies the requisite skill, experience, education and job-related requirements of the position.

When a person's disability creates a barrier to employment, the ADA requires employers to consider whether "reasonable accommodation" could remove the barrier. "Reasonable" is defined as change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process and to perform the essential functions of a job.

Management should make it clear to both employees and volunteers that any discriminatory conduct — whether intentional or unintentional — that results in abuse of another individual's rights will not be tolerated.

HEALTH AND SAFETY

OSHA. Designed to reduce workplace hazards and improve safety programs for workers, the Occupational Safety and Health Act (OSHA) applies to all businesses that are involved in interstate commerce. Again, interstate commerce is defined broadly.

As a practical matter, OSHA rarely gets involved in office settings.

But, as in the construction trades, producing and presenting art often involves risky tasks, including: exposure to hazardous material, including poor ventilation; climbing on insecure scaffolding and ladders; failing to wear appropriate protective equipment, such as goggles; lack of access to first aid and emergency medical treatment; and failure to train workers about hazards, safety precautions or emergency procedures.

Employers can receive free assistance in developing safety and health programs. For further information contact the Illinois Department of Commerce and Community Affairs, Industrial Services Division, 312/814-2337 or 800/972-4216 or the Missouri Department of Labor Department of Industrial Relations, 573/751-3403.

Workers' Compensation is a no-fault system that provides replacement income and covers the medical expenses of employees who are injured on the job. In Illinois, companies with one or more employees are covered by the workers' compensation law; in Missouri, companies with five or more employees are governed by the law. Smaller organizations can elect to comply voluntarily.

Any work-related illness or injury (except those that are intentionally self-inflicted or caused by illegal substance abuse) is covered by workers' compensation insurance. The law provides for medical care to cure the injury; payment for lost wages; and payment for permanent disabilities.

"Workers' comp" insurance is generally purchased through private firms or agents. Organizations that are unable to obtain insurance in the open market can purchase it from the Assigned Risk Pool, where rates will be approximately 20 percent higher. For more information, contact the Illinois Industrial Commission, 312/814-6611, or the Missouri Division of Workers' Compensation, 800/775-2667.

HEALTH & RETIREMENT

The Health Insurance Portability and Accountability Act applies to

companies that provide group health insurance to two or more current employees. Its nondiscrimination provisions generally prohibit a group health plan or group health insurance issuer from denying an individual eligibility for benefits based on a health factor and from charging an individual a higher premium than a similarly situated individual based on a health factor.

The Consolidated Omnibus Budget Reconciliation Act (COBRA) applies to companies with 20 or more employees at work for more than 50 percent of the work days in the prior year (whether full-time, part-time or otherwise). It allows employees (and/or dependents) who otherwise would lose coverage due to certain circumstances under company medical insurance plans to continue their existing insurance coverage by payment of the company's cost for such insurance (plus a 2 percent administrative fee).

Eligible employees and dependents can extend their health insurance coverage for up to 18 months in most cases (36 months coverage allowed for spouses and minor children in the event of death, disability or divorce).

Illinois and Missouri have mini-Cobra laws that permit almost any employee enrolled in a small group plan sponsored by employers of any size to extend coverage after termination or layoff. In Missouri, employees are allowed to continue coverage for nine months; in Illinois, employees qualify for 18 months of coverage.

The Health Maintenance Organization Act requires employers with 25 or more employees who are already providing health insurance benefits to offer an alternative HMO option to employees, if a qualified HMO is available in the area where at least 25 of the employees live. It also requires employers to allow employees to make their contributions for their share of the cost through payroll deduction.

The Employee Retirement Income Security Act of 1974 (ERISA) is a complex and lengthy statute, which

protects rights under employee benefit plans. ERISA places certain duties and responsibilities on plan sponsors and plan administrators to act in prudent manners to safeguard the assets for plan participants and to treat plan members fairly. ERISA also prohibits employers from discriminating against employees who utilize or might utilize benefits under an employee benefit plan.

FAMILY & MEDICAL LEAVE

FMLA applies to companies with 50 or more employees, at all facilities that have 50 or more employees in a 75-mile radius of location where employees work. It allows up to twelve weeks of unpaid leave when employees or covered family members have serious health conditions and physician certifies that leave is necessary. To be eligible for FMLA leave, an employee must have worked for the employer for a total of twelve months and at least 1,250 hours during that period.

WAGE GARNISHMENT

With several exceptions, the **Consumer Credit Protection Act** places limits on the amount of wages that can be garnished by a creditor or to pay a tax lien to no more than 25 percent of disposable income. Higher garnishments are allowed to provide payment of child/spousal support. Garnishment law can be complex, so consultation with legal counsel is advisable.

E-COMMUNICATIONS PRIVACY

The Electronic Communications Privacy Act (ECPA) of 1986 was adopted to address the privacy issues that were evolving with the growing use of computers and other new innovations in electronic communications. Under the ECPA, an employer cannot monitor employee telephone calls or electronic mail when employees have a reasonable expectation of privacy. However, the ECPA does allow employers to eavesdrop if employees are notified in advance.

Many companies have established comprehensive, written e-policies that provide clear guidance on what is, and is not, considered appropriate electronic business communication.

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RESOURCES

Posters

Department of Labor. Some of the statutes and regulations enforced by agencies within the US Department of Labor require that notices be posted in the workplace. The Department provides electronic copies of the required posters. Please note that posting requirements vary by statute; that is, not all employers are covered by each of the Department's statutes and thus may not be required to post a specific notice. For example, some organizations may not be covered by the Family and Medical Leave Act and would not be subject to the Act's posting requirements. For more information about poster requirements, visit www.dol.gov/osbp/sbrefa/poster/main.htm.

EEOC. Businesses with 15 or more employees must display the poster from the EEOC entitled *Equal Employment Opportunity is the Law*. The poster is available upon request from: EEOC Publication Office, PO Box 12549, Cincinnati, OH 45212 or can be ordered on the web (www.eeoc.gov).

Missouri and Illinois have additional poster requirements. Consult the Illinois Department of Labor (www.state.il.us/agency/idol) or the Missouri Department of Labor and Industrial Relations (www.dolir.state.mo.us).

Recommended Book

The Employer's Legal Handbook by Fred S. Steingold is a comprehensive reference guide that covers everything from employee benefits and wage laws to workplace safety and discrimination to hiring and firing employees.

This book and many others on arts law and business practices are available at the **St. Louis Volunteer Lawyers and Accountants for the Arts library** located within the Regional Arts Commission office, 3540 Washington, in Grand Center.