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Non-Profit Legal Landscape

Business and Technology Institute  
Eastern Illinois University

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**Non-Profit Legal Landscape**  
Business and Technology Institute  
Eastern Illinois University  
March 2006 outline

Non-profit organization (may be tax exempt or not):

distinctly American  
historically: charity  
interaction of “members” / “volunteers” and “staff” / “professionals”

Any entity:

business plan  
SWOT  
financial projections (A/L/I/E); pro formas  
periodic review

ownership; control  
taxes  
licenses  
    professional regulation  
    Department of Labor  
    liquor; weights and measures  
    county clerk

name  
child support enforcement  
immigration reform and control  
intellectual property  
environmental  
marketing/development  
doing business with the state  
business advisors  
    accountant and bookkeeper  
    attorney  
    risk - insurance, noninsurance, transfer, retention, avoidance  
    banker  
    employee recruit / retain / reward  
    legislators

financing  
    debt  
    equity  
    incentives  
    successors  
    private  
    public, especially incentives, women and minority owners

resources  
    private - Associations, foundations, universities, think tanks, SCORE  
    public  
        federal (SBA, various departments/agencies)

**Illinois**

Small Business Development Centers;  
Procurement Technical Assistance Centers;  
International Trade Centers  
Small Business Environmental Assistance Programs  
First Stop Business Information Centers  
Guide for Organizing Non-Profits in Illinois:  
business.illinois.gov/startup.cfm and  
[http://www.ilsos.net/publications/pdf\\_publications/c16524.pdf](http://www.ilsos.net/publications/pdf_publications/c16524.pdf)

county, local, regional, international

Nonprofit entity specifically:

Entity  
tax status  
minimum of three directors if corporation (\$50 filing fee, \$5 renewal; \$25 expedited)  
federal income tax  
Illinois income tax  
Illinois sales tax/exemption - charitable, religious, educational or senior citizens  
Illinois Attorney General Registration  
    Illinois Charitable Trust Act  
    Illinois Charitable Solicitation Act

All employers must post posters conspicuously in every workplace:

**State of Illinois**

Child Labor Law (Regulates Work of Those under 16)  
One Day Rest in Seven Act (Odrisa)  
Illinois Wage Payment and Collection Act  
Equal Pay for Equal Work (Men/women)  
Minimum Wage Law and Overtime  
Toxic Substances Disclosure  
Unemployment Insurance Benefits  
Victims' Economic Security and Safety Act  
Workers Compensation

**Federal**

Equal Opportunity - Race, Color, Religion, Sex, National Origin - Title VII of the Civil Rights Act  
Disability - the Americans with Disabilities Act  
Age - the Age Discrimination in Employment Act of 1967, as Amended  
Sex (Wages) - Title VII of the Civil Rights Act and the Equal Pay Act of 1963  
Employee Polygraph Protection Act  
Family and Medical Leave Act  
Job Safety and Health Protection (OSHA)  
Migrant and Seasonal Agricultural Worker Protection Act  
Fair Labor Standards Act  
    Federal Minimum Wage; Overtime

Child Labor Act  
Notice to Workers with Disabilities (re special minimum wages aka Commensurate Wage Rates)  
Uniformed Services Employment and Reemployment Rights Act of 1994

new hire reporting

Employers in Illinois required to report persons hired or rehired within 20 days of first day on the payroll: Employee's name, address and social security number, (the employee's first day of work is also requested, but is not mandatory); and the employer's name, address, and federal employer identification number (FEIN). An employer is also asked to provide an address where income withholding orders should be sent, if different from the FEIN address, but this information is optional.

Employee classification

Volunteer Employee

Reliance on donated services to accomplish mission, purposes

Show intention for implied contract of employment:

1. the intent of the parties
2. evidence of payment
3. bargaining for a quid pro quo

To determine whether a person is truly a volunteer and not an employee, the U.S. Department of Labor considers the following factors:

1. Does organization receives benefit from services performed;
2. Is position regularly scheduled and/or performed or whether it comes and goes;
3. how much time is spent in the volunteer activity
4. whether the services performed are of the kind typically associated with volunteer work; and
5. compensation expectations and/or given

Impact / application - FLSA / overtime

Employee v Independent Contractor

IRS test: control, training, tax, relationship, contract, etc.

US Dept of Labor test: economic reality test

Illinois Worker Compensation test: gratuitous relationship no coverage

Illinois Unemployment Insurance test:

Control/Direction

Outside scope of usual service or of the business of enterprise

Independently established trade, profession, business

Exempt v non-exempt

FLSA exempt: professional, administrative, managerial; sales; highly skilled tech/computer; salaried

Nonexempt: hourly skilled and non-skilled

Liability for unpaid overtime

Non-profits: voluntary services at special times of need

DOL factors in determining if truly a volunteer and not an employee:

- a. whether services are voluntary, no coercion, advancement, penalty
- b. whether activities are predominately for employee's own benefit;
- c. whether employee does not replace another employee or impair the employment opportunities of others
- d. whether the employee serves without contemplation of pay;
- e. whether the activity takes place during the employee's regular working hours or scheduled overtime hours;
- f. whether the volunteer time is insubstantial in relation to the employee's regular hours

Full-time v part-time: eligibility for benefits? 40? 32? 30?

Regular v seasonal: eligibility for benefits?

Introductory v probationary: beware at-will doctrine; employment contracts and employee handbooks

## Compensation

Employment contracts v at-will

Key person or not:

disclosure of compensation, benefits, expense allowances;  
excessive pay, private inurement; ordinary and necessary

## Liability issues

Errors and omissions arise from employed, compensated and volunteers

Vicarious liability; respondeat superior - three elements impose liability

- 1) employment or volunteer relationship
- 2) caused by negligence of employee or volunteer
- 3) employee/volunteer acting within scope of employment/assignment

Diminution of Doctrine of Charitable Immunity in Employment Torts

Divert resources from charitable mission; benefit humanity, not org  
Might mitigate but probably not eliminate

Federal Volunteer Protection Act of 1997: not liable if

- 1) acting in scope
- 2) duly authorized
- 3) no willful, intentional, criminal misconduct, flagrant disregard
- 4) no licensure issues

Limited Liability of Directors and Officers

- 1) serving without compensation
- 2) organized pursuant to Illinois Non-Profit Corporation Act; and
- 3) exempt from federal income taxation

Can still be sued so check D&O duty to defend language

Non dischargeability of federal and state tax liabilities

Employment related insurance

Unemployment Compensation Insurance  
Workers Compensation Insurance  
Directors and Officers Liability Insurance  
Professional Acts and Omissions Insurance  
Fidelity Bonds  
Employment Practices Liability Insurance  
Employee Benefits Liability Insurance

Personnel Practices for Employees and Volunteers

At-Will Employment in Illinois  
Content of Personnel Policy Manuals and Employee Handbooks  
Complex area; important; can't cover in this time

Equal employment opportunity  
Disability issues  
At-will employment policy  
General employment issues such as hiring, orientation and training, working hours, preference for notices, performance appraisal, progressive discipline policies, job transfers and promotion, outside employment, employee classification, layoff, termination, and retirement  
Compensation and pay practices, including compensatory time and overtime  
Benefits, including holidays and vacations, retirement and savings plans, and educational assistance  
Expense reimbursement  
Safety and health issues  
Meals/rest breaks, sick days, personal days, other short-term absences, FMLA, other long-term  
Personal behavior issues such as use of drugs, smoking, sexual harassment, use of information systems (e-mail), conflicts of interest, and the policy on nondiscrimination and a productive work environment  
Access to personnel files and updating personnel information

Language

"Personnel policy manuals", "Employee handbooks"  
clear, accurate, and up-to-date  
Permissive v mandatory terms

Personnel Information Storage

Typically four types of records on applicants, employees, and former employees

- 1) Personal employment records file
- 2) Supervisors' records
- 3) Human resources management records
- 4) Employee medical records

Exclude from files  
How long: statute of limitations  
Employee access  
The Health Insurance Portability and Accountability Act of 1996 (HIPAA)  
excellent summary of HIPAA Privacy Rule at [www.hhs.gov/ocr/privacysummary.pdf](http://www.hhs.gov/ocr/privacysummary.pdf)

#### Selection, Screening and Hiring Issues

Beware exposure for negligent selection, screening and hiring - if knew or should have known of harm to third persons; distinct from respondeat superior

#### Supervision and Supervisor Liability

Some is respondeat superior  
Individual liability under FLSA, Equal Pay Act (up to \$10k or 6 mos or both)

#### Performance Evaluation Issues

no obligation to conduct; if do so, no discrimination or arbitrary/capricious

#### Sexual Harassment Issues

covered extensively elsewhere: quid pro quo and hostile environment

#### Conflict of Interest Issues

Employee duty of loyalty to Employer  
When do Conflicts of interest arise?  
Written policies  
Some outside activities may be protected by law

#### Termination and Severance Issues

At-will; Contracts; Retaliatory discharge

Reference check: restrict information to avoid post-termination defamation charge. Limit to name, dates of employment, job title, employment status, and confirmation of salary. No discrimination.

### EMPLOYMENT-RELATED LAWS

#### Federal Laws

Age Discrimination in Employment Act of 1967  
Americans with Disabilities Act of 1990  
Bankruptcy Code §525  
Civil Rights Acts of 1866, 1964, and 1991  
Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)  
Consumer Credit Protection Act  
Drug-Free Workplace Act of 1988  
Employee Polygraph Protection Act of 1988

Employee Retirement Income Security Act of 1974  
Equal Pay Act of 1963  
Executive Order No. 11246  
Fair Credit Reporting Act  
Fair Labor Standards Act of 1938  
Family and Medical Leave Act of 1993  
Federal Election Campaign Act of 1971  
Federal Unemployment Tax Act  
Higher Education Act of 1965  
Immigration Reform and Control Act of 1986  
Jury System Improvements Act of 1978  
National Labor Relations Act  
Occupational Safety and Health Act of 1970  
Older Workers Benefit Protection Act  
Pregnancy Discrimination Act  
Rehabilitation Act of 1973  
Uniformed Services Employment and Reemployment Rights Act of 1994  
Vietnam Era Veterans' Readjustment Assistance Act of 1974  
Whistle-Blower Claims  
Worker Adjustment and Retraining Notification Act

#### State Laws

Child Labor Law  
Disclosure of Offenses Against Children Act  
Equal Wage Act  
Human Rights Act  
Medical Examination of Employees Act  
Minimum Wage Law  
One Day Rest in Seven Act and Eight Hour Work Day Act  
Personnel Record Review Act  
Right to Privacy in the Workplace Act  
School Visitation Rights Act  
Unemployment Insurance Act  
Uniform Conviction Information Act  
Wage Payment and Collection Act  
Whistle-Blower Claims  
Workers' Compensation Act

Local Laws - any applicable ordinances

#### Churches and Other Religious Organizations – Federal Law Regarding Clergy and Church Employees

The Church as Employer  
The Minister as Employee  
Clergy Housing Allowance  
Exemption from Social Security Coverage  
Self-Employed Social Security Contributions  
Income Tax Withholding  
Judicial Involvement in Clergy-Related Employment Disputes