



VENABLE[®]LLP

Investigating Employee Misconduct in the Nonprofit Workplace

Tuesday, June 21, 2016, 12:30 – 2:00 pm ET
Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq.,

Partner and Chair of the Nonprofit Organizations
Practice, Venable LLP

Speakers

Douglas B. Mishkin, Esq.,

Partner, Labor and Employment Practice,
Venable LLP

Alyssa T. Senzel, Esq.,

Deputy General Counsel and Compliance Officer,
Blackboard Inc.



Presentation



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The Point of Our Program

- The four doctors
- Why train?

Standards of Proof

- Beyond a reasonable doubt
- Clear and convincing evidence
- Preponderance of the evidence
- Good faith investigation/reasonable conclusion

5

Identifying the Issue



Time Card




Attendance



Retaliation


6



Gathering the Evidence

- Who?
- What?
- When?
- Where?
- Why?

7



Is An Investigation Necessary?

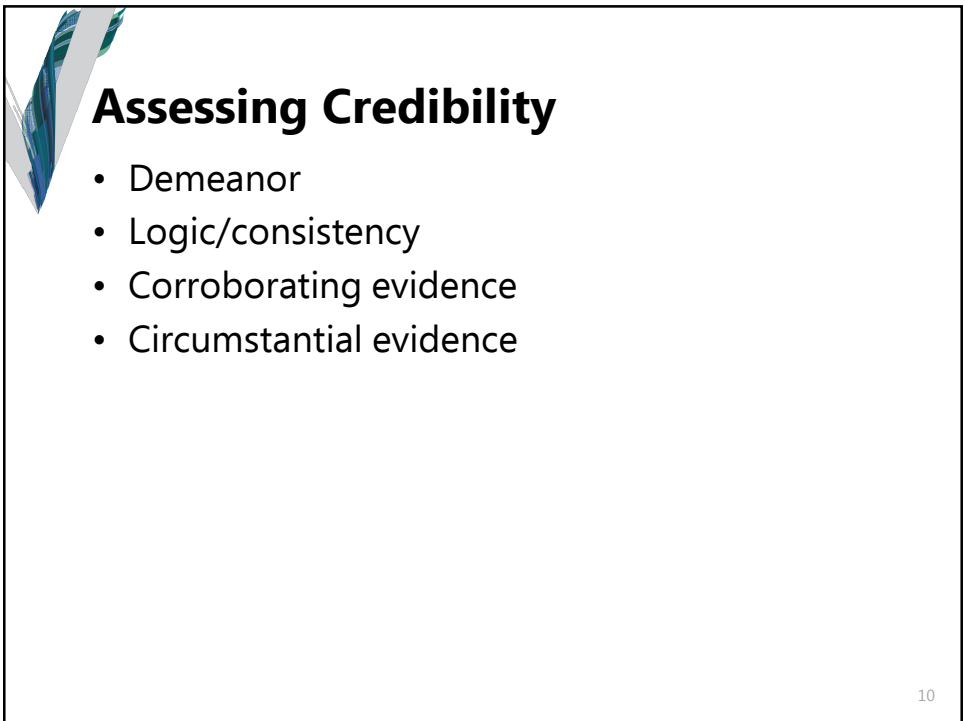
- The Nature of the Issue
- The Need for More Facts
- The Need for Special Expertise

8



Asking Questions

9



Assessing Credibility

- Demeanor
- Logic/consistency
- Corroborating evidence
- Circumstantial evidence

10



Where Can You Look and What Can You Take?

- Electronically Stored Information
- Privacy

11



Taking Notes




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Attorney-Client Privilege

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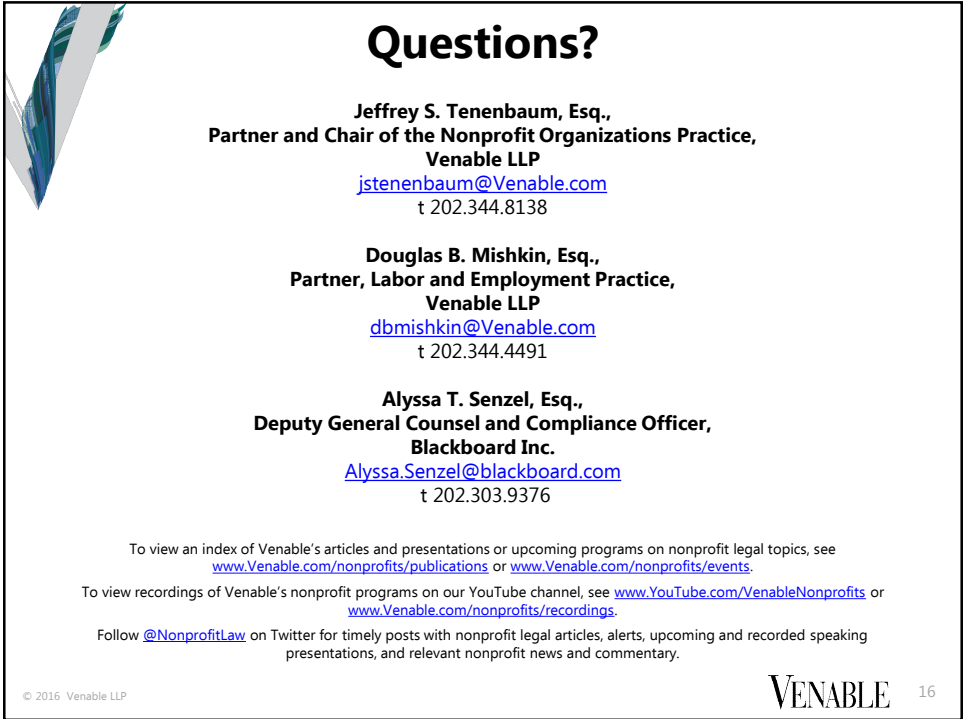


Don't be afraid to reach a conclusion because you're afraid of being wrong.

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Documentation



Questions?

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Speaker Biographies



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EDUCATION

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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last four years (2012-15). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-16 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-16 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
 Air Conditioning Contractors of America
 Airlines for America
 American Academy of Physician Assistants
 American Alliance of Museums
 American Association for the Advancement of Science
 American Bar Association
 American Cancer Society
 American College of Cardiology
 American College of Radiology
 American Council of Education
 American Friends of Yahad in Unum

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

New York Society of Association Executives

American Institute of Architects
American Red Cross
American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
America's Health Insurance Plans
Association for Healthcare Philanthropy
Association for Talent Development
Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Association of Private Sector Colleges and Universities
Auto Care Association
Biotechnology Industry Organization
Brookings Institution
Carbon War Room
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The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Democratic Attorneys General Association
Design-Build Institute of America
Erin Brockovich Foundation
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Good360
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
InsideNGO
Institute of International Education
International Association of Fire Chiefs
International Rescue Committee
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
The Leukemia & Lymphoma Society
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
Money Management International
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of County and City Health Officials
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Coffee Association
National Council of Architectural Registration Boards
National Council of La Raza
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation

National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
New Venture Fund
NTCA - The Rural Broadband Association
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The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United States Tennis Association
Volunteers of America
Water Environment Federation
Water For People
WestEd
Whitman-Walker Health

HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-15

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-16

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-16

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee.

He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.



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Virginia

COURT ADMISSIONS

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U.S. Court of Appeals for the D.C.
Circuit
U.S. Court of Appeals for the
Fourth Circuit
U.S. District Court for the District
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Doug Mishkin is a partner in Venable's Labor and Employment Group with over 30 years of experience litigating on behalf of businesses and nonprofits. He focuses on litigating about and counseling on theft of trade secrets and breach of noncompetes, with significant experience as well in discrimination, harassment, wage and hour, and employment contract disputes. Mr. Mishkin is a trained mediator, and both represents clients and has served as a mediator.

An experienced trial attorney, Mr. Mishkin has represented clients in state and federal courts across the country. He frequently handles matters in proceedings initiated by the Equal Employment Opportunity Commission and human rights agencies.

Prior to joining Venable, Mr. Mishkin co-chaired the employment law practice at an international law firm for over 15 years. In 1992, he served on President Bill Clinton's transition team for the Equal Employment Opportunity Commission. He has been interviewed on National Public Radio's "All Things Considered" and the CBS "Early Show."

HONORS

Super Lawyers "Super Lawyer," Washington, DC, Employment Litigation (2013, 2014, 2016)

Super Lawyers Business Edition "Super Lawyer," Washington, DC, Employment Litigation (2013)

"Top Rated Lawyer," DC & Baltimore's Top Rated Lawyers, *National Law Journal* (2013)

Martindale-Hubbard AV® Preeminent™ Rating

"Top Lawyer" in the field of Employment Law - Defense, *Washingtonian Magazine* (2015)

"Best Lawyers," *Washingtonian Magazine* (December 2011)

"Top Employment Lawyer," *Washingtonian Magazine* (2009)

Washington, DC Super Lawyers, *Super Lawyers* magazine (2007, 2011, 2015)

Winner, The Burton Award for Legal Achievement (2005)

ACTIVITIES

From 2001 to 2004, Mr. Mishkin served as a faculty member for Georgetown University Law Center's GULC/NITA Intensive Session in Trial Advocacy Skills and in 2002 for the school's GULC/NITA Depositions Seminar. He has also participated in various Georgetown University Law Center CLE programs on employment litigation.

Mr. Mishkin is the co-editor of *Trade Secrets and Transitions*, a blog providing legal news and analysis on the issues regarding employee mobility and trade secrets. In

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U.S. District Court for the District of Maryland

EDUCATION

J.D., George Washington University Law School, 1980

A.B., Brown University, 1977

JUDICIAL CLERKSHIPS

Honorable Peter H. Wolf, District of Columbia Superior Court, 1980 - 1981

MEMBERSHIPS

Chair, Legalink, a worldwide network of law firms (2009-2011)

Member, Ethics Committee of George Washington University Hospital and Adjunct Professor of Health Care Sciences, George Washington University School of Medicine (1986-present)

Workplace Flexibility 2010 Legal Working Group and Member, National Advisory Commission

Director and Secretary, National Courts and Sciences Institute

2015, he authored a series of posts on metadata and what employers must know about using metadata – both defensively and offensively in litigation.

PUBLICATIONS

- May 17, 2016, Compensable Time? What Employers Need to Know Regarding Their Non-Exempt Employees, *Labor & Employment News Alert*
- May 17, 2016, Compensable Time? What Nonprofits Need to Know Regarding Their Non-Exempt Employees
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- February 2015, The EEOC Proposes to Require Pay Data on EEO-1s, *Labor & Employment News Alert*
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- July 17, 2015, Does a Termination Without Cause Mean Termination Without a Non-competition Agreement?, *Trade Secrets & Transitions Blog*

- July 2, 2015, U.S. Department of Labor Proposes Sweeping Changes to FLSA Overtime Exemption Criteria: The Implications for Nonprofit Employers
- June 18, 2015, Advertising Law News & Analysis - September 24, 2015, Advertising Alert
- June 15, 2015, Hijabs, the U.S. Supreme Court, Diversity Discomforts, and the Workplace: How Nonprofit Employers Should Use Their Heads to Minimize Liability Risk
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- June 8, 2015, GINA and the Case of the "Devious Defecator": Broad Prohibition Impacts Nonprofit Employers
- June 4, 2015, GINA and the Case of the "Devious Defecator", Labor & Employment News Alert
- May 6, 2015, Employment Law Update: DC, Maryland, and Virginia
- May 1, 2015, Update from DC Department of Employment Services on DC Wage Theft Act
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- March 3, 2015, DC Employers Subject to New Notice Requirement and Bigger Penalties under New Wage Theft Prevention Act, Labor & Employment News Alert
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- September 15, 2014, DC's New "Ban-the-Box" Law: Nonprofits May No Longer Question Applicants about Arrests
- September, 2014, DC's New "Ban-the-Box" Law: Employers May Not Question Applicants About Arrests, Labor & Employment News Alert
- July 29, 2014, Government Contractors Now Prohibited From LGBT Discrimination, Client Alerts

SPEAKING ENGAGEMENTS

- June 21, 2016, Investigating Employee Misconduct in the Nonprofit Workplace

- May 19, 2016, "What Employers Must Know About Protecting Critical Company Information" at the Frederick County Society for Human Resources Management (FCSHRM) 2016 Annual Conference
- April 12, 2016, "Social Media Wins and Fails: Pitfalls to Avoid in Your Next Social Media Campaign" at the New York Advertising Law Symposium
- April 6, 2016, "Zika and the Workplace: What Employers Can and Cannot Do" webinar hosted by Bloomberg BNA
- March 15, 2016, "The \$20 Million Trade Secret: What Employers Must Know About Protecting Critical Company Information" for the Clear Law Institute
- January 13, 2016, "Volunteering for Trouble? Classifying, Managing and Disciplining Volunteers," a Lorman Education Services Webinar
- July 15, 2015, Mental Health Issues in the Nonprofit Workplace: Questions Raised by the Germanwings Air Disaster
- May 6, 2015, Employment Law Update: DC, Maryland, and Virginia
- December 11, 2014, LGBT, Religion, and Diversity in the Nonprofit Workplace
- December 9, 2014, Legal Quick Hit: "LGBT, Religion, and Diversity in the Nonprofit Workplace: What Every In-House Counsel Needs to Know" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- December 1, 2014, "Ebola and Beyond: Managing Your Workplace, Insuring against Risk, and Addressing Misconceptions about This and the Next Public Health Crisis," a Venable Luncheon and Webinar
- September 3, 2014, "What President Obama's Executive Order On LGBT Means For Government Contractors" for the Professional Services Council

Alyssa T. Senzel, Esq.

Deputy General Counsel and Compliance Officer, Blackboard



Alyssa Senzel is Deputy General Counsel and Compliance Officer for Blackboard. She advises Blackboard on the full range of employment issues (domestic and international) and also oversees the company's corporate compliance program. She joined Blackboard in June 2005.

Prior to joining Blackboard, Ms. Senzel was Of Counsel with Patton Boggs LLP (now Squire Patton Boggs), where she focused on employment counseling, training, and litigation. She received her JD from the University of Virginia School of Law and her BA from the University of Pennsylvania.



Additional Information

ARTICLES

June 2, 2016

TRANSGENDER EMPLOYEES AND RESTROOMS IN THE WORKPLACE: WHAT EVERY NONPROFIT EMPLOYER NEEDS TO KNOW

Many nonprofit employers may need to take a hard look at their workplace restroom policies for transgender employees. Earlier this year, the U.S. Equal Employment Opportunity Commission (EEOC) obtained an \$115,000 settlement payment on behalf of a transgender employee who had been barred from using an employer's women's restroom. In an effort to accommodate the transgender employee in that case, the employer had previously provided the employee with access to a gender-neutral single-occupancy restroom. That was not enough, however. According to the EEOC, transgender employees have a right to use multi-occupancy workplace restrooms that correspond to the gender with which they identify.

The EEOC's position raises several issues for employers. In addition, at least 19 states, the District of Columbia, and Puerto Rico now have laws that prohibit employers from discriminating against employees based upon their status as transgender. Here are a few questions nonprofit employers may be asking themselves, as well as suggestions for how to avoid costly litigation.

When Is an Employee Considered Transgender?

Picture this: an employee notifies an employer's human resources department that the employee is transgender. But has the employee had gender reassignment surgery? Has the employee legally changed his or her name? Has the employee begun hormonal therapy, and, if so, when will the therapy be complete? While these are common questions, they are largely irrelevant and, in some cases, illegal to ask an employee. The definition of transgender for most jurisdictions is simple: An employee is considered transgender when he or she identifies with a gender that is different from the one he or she was assigned at birth.

This means nonprofit employers should not require that an employee undergo medical procedures, legally change his or her name, or submit other "proof" before being considered transgender. Once the employee informs the employer that he or she identifies with a gender different from the one he or she was assigned at birth, the employer should consider the employee transgender.

What Restroom Access Must an Employer Provide to Transgender Employees?

Although the laws vary slightly across different jurisdictions, most transgender anti-discrimination laws require employers to provide transgender employees with the same level of restroom access as other employees. Accordingly, employers should permit a transgender employee to access worksite restrooms based upon the gender with which he or she identifies. Simply providing access to single-occupancy restrooms will not do.

What about Complaints from Other Employees?

Some nonprofit employers may find themselves caught between two or more employees' competing views about transgender employees' rights. It is not uncommon for an employer to receive a complaint from a non-transgender (also sometimes referred to as "cisgender") employee regarding the shared use of a worksite restroom with a transgender employee. However, such complaints do not excuse an employer's failure to provide transgender employees with equal restroom access, now that more and more jurisdictions consider transgender status to be akin to an employee's race, age, disability, or any other protected characteristic.

This rule highlights the importance of regular workplace training regarding anti-harassment, transgender sensitivity, and an employer's restroom policies. Among other things, proper training can prepare supervisors to respond to transgender employees' requests for restroom access. A supervisor's initial response is often a big factor in whether a discrimination claim will follow.

AUTHORS

Jeffrey S. Tenenbaum

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ARCHIVES

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What about Single-Occupancy Restrooms?

Single-occupancy restrooms are a potential solution for many nonprofit employers. Such restrooms help provide a more private space for transgender and cisgender employees alike. As discussed above, however, access to single-occupancy restrooms is not sufficient to comply with most transgender anti-discrimination laws. If an employer does provide access to single-occupancy restrooms, the employer should post a sign that clearly informs employees that the single-occupancy restroom is available to any gender. At a minimum, the employer should not have signs indicating that a single-occupancy restroom is available to only one gender and not the other.

What about Multi-Occupancy Restrooms?

The harder questions often involve access to an employer's multi-occupancy restrooms. If an employer has multi-occupancy restrooms at its workplace, there is usually a potential access issue for transgender employees. There is at least one easy solution – make all workplace restrooms unisex. If an employer's restrooms are completely unisex, the potential discrimination issue typically disappears because anyone may access any restroom. The employer must simply ensure there is a private space available within the restrooms, such as a lockable stall, which most multi-occupancy restrooms already have.

In the alternative, employers must take other steps to ensure that transgender employees may access the single-sex multi-occupancy restrooms for the gender with which they identify. This often requires a discussion between the employer and transgender employee. Employers also should have a policy in place for how their managers will respond to a transgender employee's request for restroom access, as well as specific procedures for addressing other employees' requests or comments regarding transgender employees. Jokes, insults, or thinly veiled criticisms of an employee's transgender status, even if made by non-managerial employees, may support a hostile-work-environment claim against an employer.

What Are the Penalties for Not Providing Equal Restroom Access to Transgender Employees?

Not complying with the transgender anti-discrimination laws is often an expensive proposition. In the case referenced above, the \$115,000 settlement included money for lost wages, emotional distress, and attorneys' fees. That case involved just a single employee. Larger employers with a higher proportion of transgender employees could face more costly class-action lawsuits. The potential awards for emotional distress damages can be particularly expensive because of the psychological harm transgender employees often suffer when they are denied access to the restroom of their choosing. Some laws also carry significant civil penalties. Employers in New York City, for example, may face a maximum penalty of \$250,000 if they do not provide adequate restroom access to transgender employees.

Employers also may face non-monetary consequences. The settlement agreement for the case noted above included a long list of non-monetary obligations for the employer, including regular transgender employee rights training for its workforce, the implementation of new bathroom-access policies, posting new bathroom signs at worksites, and annual reporting requirements regarding internal complaints of discrimination against or harassment of transgender employees.

* * * * *

As the laws regarding transgender employees continue to evolve, nonprofit employers should proactively take steps to ensure that they are ready to respond to requests and comments regarding restroom access for transgender employees. Employers also should be mindful that different jurisdictions may have different requirements. Accordingly, it always is recommended that nonprofit employers consult with legal counsel about complying with anti-discrimination requirements for transgender employees.

ARTICLES

May 19, 2016

WHAT EVERY NONPROFIT SHOULD KNOW ABOUT THE NEW FEDERAL RULES LIKELY TO CAUSE A SIGNIFICANT INCREASE IN YOUR NON-EXEMPT WORKFORCE AND OVERTIME PAY

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After decades of relative inaction, the federal Fair Labor Standards Act (FLSA) has become an epicenter of change and litigation in recent years. That change continued yesterday when the U.S. Department of Labor (DOL) released its highly anticipated final regulations altering the overtime exemptions under the FLSA. Nonprofit employers need to understand the implications of these changes on their workforces, as the changes may have the effect of converting many "white-collar" exempt employees to overtime-eligible employees when the new rules take effect in December 2016, and may have a significant impact on many nonprofits' fiscal bottom line. There are steps, however, that your nonprofit can take to at least partially mitigate the adverse economic impact of the new rules on your organization.

In general, the FLSA requires that nonprofits pay non-exempt employees an hourly wage at least one-and-a-half times their regularly hourly rate for time worked in excess of 40 hours in a given workweek. However, workers employed in certain capacities, including a "*bona fide* executive, administrative, or professional capacity," may, under certain circumstances, be considered to be exempt from overtime. Under the current rule, an employee is exempt from overtime under the "white-collar" exemptions if (i) the employee is paid on a salary basis not subject to reduction based on the quality or quantity of work ("salary basis test"), (ii) the employee's salary meets a minimum salary level of at least \$455 per week (\$23,660 per year)("salary level test"), and (iii) the employee's primary job duties fall within the federal definition of one of the above-noted exemption categories ("standard duties test"). In other words, an employee must generally (lawyers, doctors, teachers, and computer professionals are excepted) meet the salary basis test, the salary level test, and the standard duties test in order to be exempt from being paid overtime; it is the salary level test that is being changed. There also is an exemption for highly compensated employees earning at least \$100,000 per year (HCE exemption). The new changes to the law will restrict the number of employees eligible for these exemptions in the following ways.

First, the salary level threshold for overtime exemption doubles to \$913 per week (\$47,476 per year), and employees earning a weekly salary of less than \$913 will be eligible for overtime pay. Second, the threshold for the HCE exemption increases from its previous threshold of \$100,000 to \$134,004. Third, the new salary level thresholds will increase every three years based on the salary level at the 40th percentile and 90th percentile, respectively, for full-time salaried workers of the lowest-wage Census region in the country (currently the Southeast). Fourth, subject to certain details, the new rules allow up to 10 percent of the salary level threshold for all non-highly compensated employees to be attributable to non-discretionary bonuses, incentive pay, or commissions, so long as such payments are made on a quarterly or more-frequent basis.

Importantly, the "standard duties test" has not changed under the new rule (as had been initially intimated by the DOL), so employers will be able to rely on prior guidance to determine whether employees who meet the salary requirements also perform primary duties which meet the definition of one of the exemptions. (Prudent nonprofit employers will use this opportunity to re-evaluate whether employees who meet the new salary level test *also* meet the standard duties test; this test has historically been an area of significant non-compliance in the nonprofit community.)

The FLSA sets the floor for the overtime exemption requirements and many states, such as New York and California, have salary thresholds that exceed the amounts set by the federal government. Consequently, nonprofits should educate themselves about the state and local laws governing their employees, as state laws often extend more rights to employees than provided under federal law.

The new rule takes effect on December 1, 2016, so nonprofits have less than 200 days to evaluate and implement any necessary changes to their pay and employee management practices. As the planning

process for next year's budgets is already well underway in many, if not most, nonprofits, potential added overtime costs need to be taken into immediate consideration.

Nonprofits that contract with federal, state, or local governments for grants, cooperative agreements, and contracts may find themselves in the difficult position of having to absorb new overtime costs that were not accounted for at the time the federal, state or local awards were made. Unlike commercial enterprises that sink additional payroll expenses into advance pricing structures, nonprofits bound by existing government grants and contracts likely will be required to perform the same tasks and provide the same services despite the added and unforeseen costs that the new rules impose.

Like other nonprofit organizations, nonprofit colleges and universities also are vulnerable to the burdens of this rule change. While there are special regulations that exempt teachers, high-level academic administrators, and other inherently academic positions from the new rules, university employees whose duties are not unique to higher education will be subject to the increased threshold for overtime exemption. In a tacit acknowledgment of the significant impact the rule change will have on academic institutions, the DOL issued a guidance memorandum specifically tailored to higher-education institutions, which can be viewed [here](#).

Nonprofits will have to make some difficult decisions to adapt to these new changes, which may include increasing the salaries of certain exempt employees to get them to the new threshold, paying overtime to employees not previously eligible, realigning now-non-exempt employees' workloads and responsibilities and otherwise managing their hours worked to avoid paying overtime, and/or altering the job duties of certain otherwise-non-exempt employees to bolster the likelihood that they will, in fact, be considered exempt.

The DOL has provided guidance specific to nonprofits on the new changes: [overview](#) and [guidance](#).

For tips on the rules governing compensable time for non-exempt employees and managing overtime costs, click [here](#).

Finally, for a comprehensive overview of all of the relevant FLSA rules in this area as they apply to nonprofits, our recorded webinar on the subject from earlier this year can be found [here](#).

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ARTICLES

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COMPENSABLE TIME? WHAT NONPROFITS NEED TO KNOW REGARDING THEIR NON-EXEMPT EMPLOYEES

Nonprofit employers already should be alert to the **U.S. Department of Labor's (DOL) heavily anticipated changes to the so-called white-collar exemptions under the federal Fair Labor Standards Act (FLSA)**. Those changes may effectively convert as many as five million employees from exempt to non-exempt status. The time to prepare is now. One area ripe for review is determining what constitutes "compensable time" for your nonprofit's non-exempt employees.

"Compensable time" is any time the employer *suffers or permits* an employee to perform the principal activity for which the employee was hired for the benefit of the employer. This includes all time worked while at the office, work performed at home, and even work that is performed before or after the regular workday that the employer "suffers or permits" to occur.

Sound simple? It's not. It is a lot more complicated and nuanced than you might think, as discussed below. Here are some of the most common pitfalls and areas of confusion for non-exempt employees in the nonprofit workplace.

1. Off-the-Clock, On-Call, and Unreported Work

Nonprofits must pay each non-exempt employee for all hours worked, including work performed outside the employee's regular workday. For example, a non-exempt employee may report to the office 30 minutes early each day because of a commuter bus schedule. If the employee begins working prior to the start of the regular workday, that time is compensable and should be recorded on the employee's time sheet. The same is true for the non-exempt employee who brings work home or responds to emails from home before or after the regular workday.

Sometimes, even the time an employee is merely "on call" is compensable. An employee who is required to remain on his or her employer's premises, or so close thereto that he or she cannot use the time effectively for his or her own purposes, is considered to be working and must be compensated. For example, a hospital employee who must stay at the hospital in an on-call room but who may sleep, eat, watch television, or read a book may be required to be compensated, whereas a hospital employee who must carry a pager but need not remain at or close to the hospital may not need to be compensated. In sum, whether on-call time is compensable is a case-by-case determination.

Nonprofits should instruct non-exempt employees not to perform work beyond their regular work schedule unless they receive prior approval from their supervisor. Employers take note: you must pay non-exempt employees who work without authorization—but you can discipline them for doing so.

2. Comp Time

Compensatory time, or "comp time," is a system that nonprofits may use in certain limited circumstances to provide time off in lieu of overtime pay to non-exempt employees. Comp time generally is not permitted for private sector non-exempt employees (the rules are different for government employees and exempt employees). However, under federal law, there are two exceptions to the rule prohibiting comp time for private sector non-exempt employees: (1) nonprofits *may* allow non-exempt employees to take comp time within a single week to avoid exceeding 40 hours worked; and (2) nonprofits *may* require an employee to take time-and-one-half off (comp time) in one week to offset overtime hours worked in another week *within the same pay period*.

Importantly, federal law is only half the equation. Nonprofits should check the state law governing comp time in the states in which they have employees because certain states restrict the use of comp time for their state's employees further than federal law. For example, in states like California, overtime is calculated on a daily basis (in excess of 8 hours) rather than weekly basis (in excess of 40 hours).

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Providing an employee with comp time, even if only to avoid exceeding 40 hours worked in a single week, may not be lawful under state law like California if more than 8 hours were worked in a single day. Moreover, exception (2) above has only been expressly approved by federal courts in certain parts of the country, whereas federal courts in other parts of the country have not considered its legality under the FLSA. Accordingly, nonprofits should proceed with caution when implementing comp time policies for non-exempt employees. Beyond this, successful application of the exceptions requires significant administrative burdens and, in some instances, is illusory. For instance, if an employee works more than 40 hours in the second week of a two-week pay period, compensatory time is not available even under the exceptions.

Employers take note: federal and state departments of labor and the courts take a skeptical view of comp time practices in general. It is crucial that nonprofits considering the use of comp time for non-exempt employees consult with legal counsel to determine what is permissible in the states in which they have employees. For nonprofits that do implement comp time policies for non-exempt employees, it is imperative to keep accurate records that reflect that comp time off is properly calculated and provided to the employee within the appropriate pay period.

3. Seminars, Lectures, Training

Attending lectures, meetings, training programs, and similar activities outside the office is compensable time for non-exempt employees unless *all* of the following criteria are met:

- . Attendance is outside the employee's regular working hours;
- . Attendance is voluntary;
- . The course, lecture, or meeting is not directly related to the employee's job; and
- . The employee does not perform any productive work during such attendance.

Training is considered related to the employee's job if it is designed to help the employee manage his or her job more effectively. If training is for a different job or a new skill, then it is not job-related, even if the course incidentally improves the employee's performance of his or her regular duties. For example, an IT employee who takes classes toward an accounting degree may incidentally improve his or her organizational skills, but that training is not job-related and is not compensable.

Voluntary attendance at independent training, courses, and college after hours is not compensable time, even if the employer pays or reimburses the employee for part of the tuition through an employee benefit plan. Similarly, if an employer offers a lecture or training session for the benefit of employees, voluntary attendance outside of work hours is not compensable time, even if it is job-related or paid for by the employer. For example, an employer may offer all employees an opportunity to attend a lecture on improving management skills. If it is during work hours, the time spent at the session is compensable time. If the speaker event is outside of regular hours and is completely voluntary, it is not compensable time.

4. Receptions, Dinners, and Social Events

Nonprofits that require non-exempt employees to attend social events (whether the events are sponsored by the employer or by another organization) must treat that time as compensable, even if the employee is not performing his or her regular duties. Nonprofits must clearly communicate to non-exempt employees what is, and is not, required attendance, preferably in writing. Prudent employers train supervisors not to pressure non-exempt employees to attend an event that is not mandatory.

5. Meal Time/Breaks

Bona fide meal breaks of 30 minutes or more are not compensable. To be a *bona fide* meal break, the non-exempt employee must be relieved of all duties to perform work during the break. Even merely permitting non-exempt employees to work through lunch (when they are not required to do so) must be treated as compensable. For example, a receptionist who is required to answer the telephone while having his or her lunch is not on a *bona fide* meal break and must be compensated for his or her lunch time. Consequently, non-exempt employees should be required to take daily meal breaks, and such breaks should be required to be taken away from their desks. Rest time of 5 to 20 minutes is common and is compensable work time, as breaks of less than 20 minutes are generally considered to be insufficient to enable the employee to engage in personal pursuits.

6. Interns, Volunteers, and Stipends

The proper treatment of interns and volunteers for employment and tax purposes is a subject unto itself. Whether a nonprofit may utilize unpaid interns, or must pay them as employees, has become a very hot topic in the nonprofit community in recent years. The principal potential liability for the use of unpaid volunteers and unpaid interns is substantially the same—the risk that the individual will be deemed to be an employee for wage payment and tax purposes.

Unpaid interns and unpaid volunteers, if properly classified, are not employees for purposes of many federal laws. This means that a nonprofit that provides for (properly classified) "interns" or "volunteers" generally is not required to pay the individuals wages or provide employee benefits, pay employment taxes to the IRS, or provide other employment-related insurance and tax contributions. However, whether an individual is properly classified as an intern or volunteer is a tricky issue, and requires looking beyond the label and reviewing the underlying relationship between the individual and the nonprofit, looking to both federal and state law and standards.

With respect to volunteers, the DOL's position is that charitable, religious, and other similar nonprofit organizations may properly utilize volunteers where the individual donates his or her services for *public service, religious, or humanitarian objectives*, usually on a part-time basis and without the expectation of pay. Note that under the FLSA, employees of for-profit, private-sector employers may not volunteer services to such employers. In addition, individuals generally may not volunteer in commercial (*e.g.*, unrelated business) activities run by a nonprofit organization.

Interns, on the other hand, are considered to be "trainees." The DOL has issued guidance stating that in order for interns in for-profit enterprises to be properly classified as non-employees, the intern experience must be for the benefit of the intern and the organization must not derive an immediate advantage from the intern's services, the intern must receive training similar to training that would be provided in an educational environment, the intern must not displace regular workers, the intern must not be entitled to a job at the conclusion of the internship, and there must be an understanding from the beginning that the intern is not entitled to wages. While the DOL suggests in a footnote that "non-profit charitable organizations" will not be subject to the same standards, there is no blanket exclusion for all nonprofit entities, and the best practice among nonprofit organizations has become to follow the DOL guidance for for-profit entities.

Another common area of confusion is when a nonprofit's paid employees wish to perform unpaid volunteer service for the nonprofit. This situation may arise when a non-exempt employee asks to volunteer at a nonprofit-sponsored event after work hours or on the weekend. Individuals who volunteer or donate their services for public service or nonprofits are not considered employees of the nonprofit organizations that receive their service. However, non-exempt employees who perform volunteer work during their normal working hours must be paid, and non-exempt employees who perform volunteer work after normal work hours that is similar to their normal work duties also must be paid. In addition, employers must be vigilant not to expressly or implicitly pressure paid non-exempt employees to volunteer after normal work hours, since "volunteer" work performed under coercion is not *bona fide* volunteer work and must be compensated. Nonprofit employers must clearly communicate volunteer opportunities to non-exempt employees and should educate managers to avoid any appearance of coercion on attendance at volunteer events.

Lastly, many nonprofits seek to give their volunteers stipends to cover costs associated with volunteer service. The DOL allows volunteers to be paid/reimbursed for out-of-pocket expenses, reasonable benefits, and/or a nominal fee for their service without losing their status as volunteers. The DOL has not specifically defined a financial threshold for what constitutes a "nominal" fee, but generally a nominal fee must not be a substitute for compensation or be tied to productivity. Other relevant factors include the distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around the clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. Incidental or insubstantial stipends are acceptable under DOL regulations.

7. Travel

Travel incidental to employment by a nonprofit falls into two categories: (1) travel as a passenger during

non-shift hours where no work is performed; and (2) travel as a passenger during shift hours. As a general rule, a non-exempt employee who travels from home before his or her regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel that is a normal incident of employment and is not compensable.

Often non-exempt employees are asked to travel longer distances to attend conferences or other out-of-town events. Such travel to a different city is *not* considered compensable time if (1) the employee is a passenger on an airplane, train, boat, or automobile; (2) the travel is during non-shift hours; and (3) no work is performed during the travel time. For example, an employee who takes a four-hour plane trip to a week-long conference during non-shift hours but performs no work on the plane need not be compensated for this travel time.

On the other hand, if a non-exempt employee travels to an out-of-town conference during shift hours, that employee must be compensated for all of the commuting time to the conference which exceeds that employee's regular commute, whether or not he or she performed any work during the commute. For example, an employee whose regular commuting time is 30 minutes, and who takes a three-hour train trip to a conference in another city during regular shift hours, must be compensated for the two and a half hours that are not part of his or her regular commute, even if he or she performs no work on the train. Finally, it goes without saying that if a non-exempt employee performs work during travel time which is otherwise non-compensable, he or she must be compensated for that time.

8. Employee Time Records

In the event of litigation, courts place the burden on the nonprofit employer to support its position as to an employee's hours worked through adequate contemporaneous records. In the absence of proper records, an employee may substantiate an FLSA claim merely by offering sufficient evidence to permit a reasonable inference as to his or her hours worked. Personal records kept by the employee without the nonprofit's knowledge may be particularly damaging if the nonprofit has no means of proving the hours worked by its employees. In addition, evidence that a nonprofit has directed employees not to record time actually worked will be used against the nonprofit. Nonprofit employers are required to keep track of the hours worked by non-exempt employees. While time clocks are not required, some comparable means of keeping contemporaneous records of hours worked (such as weekly time sheets approved by employees) are essential to protect the nonprofit. Nonprofits should follow federal and state record-keeping requirements meticulously, as good record-keeping practices often make the difference in litigation.

Conclusion

The challenge for nonprofits of properly paying for "compensable time" will only get greater when the upcoming changes to the FLSA's "white-collar" exemptions reclassify millions of employees nationwide as non-exempt, and thus overtime-eligible. Nonprofits, like all employers, have always borne the burden of properly classifying employees and maintaining complete and accurate records of hours worked and wages paid. That burden is about to increase.

Additional Resources

[Proposed Changes to the FLSA's White-Collar Exemption Criteria: What Nonprofits Need to Know about the Current Rules, Where Things Are Heading, and How to Avoid Employee Classification Traps and Pitfalls](#) (*webinar recording*)

[U.S. Department of Labor Proposes Sweeping Changes to FLSA Overtime Exemption Criteria: The Implications for Nonprofit Employers](#) (*article*)