

Managing Difficult Employees for Nonprofits

From Hiring Through Separation

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Topics Covered by This Webinar

We plan to cover practical strategies for managing employees across the employment life cycle, including:

- ❖ Developing effective hiring and onboarding strategies to set up the employment relationship for success
- ❖ Managing performance and conduct issues through clear expectations, documentation, and appropriate discipline
- ❖ Addressing recurring workplace challenges, including attendance, conflicts of interest, and disruptive conduct
- ❖ Responding to employee complaints and workplace concerns that arise during employment
- ❖ Planning and preparing for employee separations to minimize potential risk

Starting the Employment Relationship

Setting Expectations Before Problems Arise

Job Postings: Build the Right Foundation

- Clearly define the role by describing the position's core responsibilities, qualifications, work location, schedule, and other material expectations
 - Check that the posting reflects the actual position and is consistent with the job description
- Ensure compliance with applicable hiring laws
 - A growing number of states and localities require disclosure of compensation information in job postings or during the hiring process
- Identify internally where there is, and is not, flexibility before the interview process begins
 - Ensure the hiring team is prepared for likely candidate requests and aligned on how to respond
 - *Are there terms the organization is willing to negotiate, such as start date, title, work location, and compensation?*

Interviews: Use the Process to Set Expectations

- Test what you see on paper
 - Focus on relevant experience and skills
 - A strong résumé does not necessarily mean the candidate will succeed in the position, and an imperfect résumé may not tell the whole story
- Be candid about the realities of the role
 - Discuss schedule, work location, reporting relationships, or other expectations that may become points of friction later
 - Avoid overselling flexibility or opportunities that the organization may not ultimately be able to provide
- Identify potential mismatches early
 - Ask questions about how the candidate has handled challenging situations in the past

Interviews: Be Careful What You Ask and Promise

- Keep questions tied to legitimate job requirements
 - Avoid asking about matters or making comments that do or could implicate protected categories under applicable law
 - Consider implementing standardized questions for each position to mitigate the risk of potential failure-to-hire claims
- Do not make promises that may be difficult to unwind later
 - Do not insinuate a particular outcome
- Recognize issues that may require further action
 - Be alert to potential requests for accommodation
- Ensure appropriate coordination among personnel

Offer Letters and Agreements: Choose the Right Approach

- Consider what form of agreement is appropriate for the particular position/employee
 - A straightforward offer letter may be sufficient for many employees
 - A more detailed employment agreement may be warranted for executives or other employees with negotiated or more complex terms
- Determine whether variations from the organization's standard templates are warranted
- Ensure legal compliance with respect to the form of agreement (e.g., at-will employment) and notice requirements
- Determine whether confidentiality or restrictive covenant protections are appropriate
 - Enforceability varies significantly by state and locality
- Determine whether a background check is appropriate
 - Ensure legal compliance with respect to federal and applicable state laws

Probationary Periods: Use Early Employment Purposefully

- Decide whether a probationary or introductory period is useful for the organization
 - May be useful when the organization wants a defined period to assess performance or overall fit
- Set a defined duration and use the period actively
 - Establish when the period begins and ends
 - Address concerns as they arise rather than waiting until the final week
 - Document significant performance or conduct concerns
- Preserve appropriate flexibility
 - Make clear that completion of the period does not guarantee continued employment
 - Reserve the ability to end employment before or after the period expires
- Make clear that the probationary period does not alter the underlying employment relationship
 - For at-will employees, expressly state that the period does not change their at-will status

Managing the Employment Relationship

Engaging in Effective Performance Management

Performance Management: **What Is It?**

- Performance management is a process intended to provide a **fair and accurate** evaluation of employees against reasonable standards required for success in their positions
 - Should create a reliable record of both successes and deficiencies
 - Intended to support decision making throughout the employment relationship

Performance Management:

Address Concerns Regularly and Objectively

- Create a system that provides formal and informal feedback frequently
 - Train managers to use objective metrics, to avoid allowing personal feelings and emotions to impact judgment and/or tone of communication, and to consistently provide accurate feedback (including negative feedback)
- Identify deficiencies promptly and with sufficient detail
 - Notify employees before a deficiency becomes a larger problem
 - Ensure sufficient detail is provided so that the employee is on notice
- Provide meaningful opportunity for improvement
 - Provide examples as to how to improve
 - Recognize improvement (as appropriate)

Performance Evaluations: Create a Defensible Record

- Use formal evaluations to document performance accurately and consistently
 - Train managers to understand the criteria used
 - Check for managers giving inflated ratings or overlooking known performance concerns
 - Review for consistency across similarly situated employees and comparable roles
- Build in a process for employee acknowledgment and response
 - Require employees to sign or otherwise acknowledge receipt of the evaluation
 - Make clear that acknowledgment confirms receipt, not necessarily agreement
 - Preserve any written response or rebuttal with the evaluation
- Have procedures in place for handling disagreement or pushback
 - Manage appeals or requests for reconsideration
 - Avoid allowing disagreement with the evaluation to derail the performance-management process

Promotions and Raises: Apply Consistent Standards

- Align promotion and compensation decisions with documented performance and established criteria
 - Post for open positions, at minimum, internally
 - Use consistent decision-making standards
 - Consider standardizing compensation criteria across the organization
- Anticipate employee reactions and potential challenges
 - Develop a plan for messaging the decision to employees who applied and were not selected for an open position
 - Review whether recent complaints, accommodation requests, or other protected activity could create additional risk around the timing or messaging of the decision
- Maintain appropriate internal controls over employment decisions
 - Identify who has authority to approve promotions, raises, bonuses, and other changes in employment terms
 - Coordinate messaging so employees do not receive inconsistent or premature information

Discipline: **Selecting and Administering Appropriate Action**

The following are key to effectively selecting and administering disciplinary action, which may vary, depending on the circumstances:

- **Contemporaneous documentation**
 - Accurate records are a strong defense against potential claims
 - Best documentation reflects employee was on notice of deficiencies and offered an opportunity to improve
- **Consistency in practices**
 - Treat similarly situated employees alike
- **Adherence to written policies**
 - May dictate the disciplinary action selected

Performance Improvement Plans: Set a Clear Path Forward

- Clearly identify the performance deficiencies
 - Use objective, specific examples
 - Tie expectations to the requirements of the role
- Define what improvement must look like
 - Specify the expected time frame for improvement, such as 60 or 90 days
 - Make clear that improvement must be immediate and sustained
 - Ensure goals are reasonable
- Provide a meaningful opportunity to improve
 - Identify available support, resources, or coaching
 - Schedule regular check-ins to assess progress
- Be clear about potential consequences
 - Explain that failure to meet and sustain expectations may result in further discipline

Common Employee Issues

Addressing Recurring Workplace Challenges

Attendance Issues

- Establish clear expectations regarding attendance, punctuality, call-out procedures, and scheduling
- Identify recurring patterns rather than treating every incident in isolation
 - Examples: repeated late arrivals, frequent unscheduled absences, or patterns around weekends, holidays, or in-person workdays
- Document counseling, prior warnings, and the employee's explanation
- Apply attendance expectations consistently across similarly situated employees
- Before imposing discipline, determine whether the absences may implicate protected rights
- Avoid allowing repeated exceptions to effectively rewrite the organization's attendance expectations

Conflicts of Interest

- Maintain clear expectations regarding potential and actual conflicts
 - Develop a policy that addresses outside employment or consulting, financial interests, and workplace relationships
 - Performing outside work during work hours or using the organization's property should be prohibited
- Require disclosure where appropriate and identify who reviews potential conflicts
- Address actual and perceived conflicts consistently
- Document any approval or other resolution
- Check both the applicable policy and law before treating outside activity as misconduct
 - Failure to disclose can subject an employee to disciplinary action, even if the activity is permitted

Other Disruptive Behaviors

- Do not overlook workplace conduct issues because the employee is technically strong, long-tenured, or otherwise valuable
 - Apply conduct standards consistently, including to high performers and senior employees
- Address behaviors that interfere with the workplace
 - Examples: Confrontational communications, refusal to follow reasonable direction, or other conduct that undermines team functioning
- Engage in appropriate performance management

Responding to Requests and Complaints

Handling Employee Requests and Complaints Appropriately

Written Policies: Ensure They Reflect Actual Practices

- Maintain policies that accurately reflect how the organization actually operates
 - Policies that are routinely ignored or administered differently in practice can create problems when the organization later attempts to enforce them
- Consult the applicable policy before responding to an employee issue
 - It is appropriate to tell an employee that the issue needs to be reviewed before providing a final answer
 - Check whether there are exceptions, approval procedures, or escalation requirements
- Apply policies consistently
 - Consider how the organization has handled similar situations in the past
 - Identify whether there is a legitimate reason for treating the current situation differently
- Recognize when the policy is not the end of the analysis

Employee Requests: Listen for What Is Really Being Asked

- An employee may raise legally protected rights without legal terminology
 - Examples: requests for FMLA leave, requests for accommodations, etc.
- Train managers to avoid responding to a request immediately
 - Do not automatically approve or deny a request before understanding the underlying reason
 - Gather enough information to determine what process may apply
- Document the request and the response
 - Record what the employee requested
 - Record what additional information was requested
 - Record the final decision and any conditions or duration

Leave Procedures: Ensure Policy and Legal Compliance

- Employees should generally be expected to follow established leave procedures
 - Require timely notice where permitted
 - Require appropriate forms or documentation where applicable
 - Ensure time away is accurately recorded
- However, do not assume failure to follow procedure eliminates the issue
 - The organization may have notice of a potentially protected absence even if the employee used the wrong process
- Before imposing discipline for attendance or failure to follow procedure, confirm whether the underlying absence may be protected
 - Handle any discipline separately

Be Aware of the Employee Who Misuses Remote Work

- Be alert to employees who begin using remote work as the default solution to attendance, reliability, or personal issues
 - Repeated requests to work from home instead of using leave
 - Frequent same-day remote-work requests
 - Remote work being used to address childcare or other dependent-care needs
 - Declining productivity or availability on remote days
- Determine whether another issue is actually driving the request
 - Medical condition or potential accommodation need
 - Attendance or performance concern that should be addressed directly
- Do not allow an informal workaround to become the permanent arrangement
 - Clarify when remote work is permitted and what is expected
 - Address misuse

Be Aware of the Employee Who Sets Their Own Flex Schedule

- Be alert to employees who repeatedly adjust their own schedules without a clear or approved arrangement
 - Regular late arrivals or early departures
 - Frequent requests to “make up” time later
 - Ongoing schedule changes that were intended to be temporary
- Determine whether the pattern reflects a broader issue
- Do not let repeated exceptions redefine the position
- Address continued deviations from the approved arrangement

Complaints: Identifying Employee Concerns

- A complaint does not require “magic words”
 - An employee may describe conduct without labeling it harassment, discrimination, retaliation, or another legal violation
 - Examples: “I am being treated differently,” “That joke made me uncomfortable,” or “I complained and now my schedule changed”
- Do not dismiss a complaint merely because:
 - It appears minor
 - The employee refuses to participate in the investigation fully or becomes hostile
 - The same employee has raised other complaints in the past that were unfounded
- Proceed with extreme caution before determining a complaint has been made in bad faith
- Avoid promising confidentiality or a particular outcome when processing a complaint

Investigations: Use a Consistent Process

1. Receive and assess the complaint
2. Prepare for the investigation
3. Conduct interviews
4. Review the evidence
5. Reach findings
6. Determine appropriate responsive action
7. Communicate the outcome
8. Preserve the file

Investigations: Watch for Areas of Additional Risk

- Consider whether interim measures are needed during the investigation
 - Examples: changes to reporting lines, schedules, work locations, or contact between the complainant and accused employee
- Assess actual or perceived conflicts involving the investigator or decision maker
- Move promptly while allowing enough time for a fair process
- Maintain confidentiality to the extent practicable without promising absolute confidentiality
- Preserve relevant documents, messages, and interview notes in a secure investigation file

Investigation Outcomes: **Communicate Carefully**

- Communicate separately with the complainant and accused employee
 - Provide enough information to close the loop without over-disclosing confidential personnel information
- Be prepared for disagreement, threats, demands for documents, or requests for reconsideration
 - Does not always require further response
 - Ensure privilege is protected, but comply with any personnel file disclosure laws that may cover such documents

Ending the Employment Relationship

Handling Separations to Minimize Risk

Separation Planning: Decide Before You Communicate

- Confirm the legitimate reason for separation
 - Performance, conduct, restructuring, position elimination, or another business reason
- Review the documentation supporting the separation reason
- Identify legal or practical risk factors
 - Examples: recent leave or accommodation issues, complaints, timing concerns, etc.
- Determine timing and logistics
 - Notification to the employee
 - Whether severance will be offered in exchange for a release
 - Internal messaging



Termination Meetings: Control the Delivery and Messaging

- Ensure appropriate personnel are present for the meeting
 - Include at least one witness where practicable
 - Take contemporaneous notes of the meeting
- Keep the message concise, direct, and professional
 - Communicate that the decision has been made and it is final
- Avoid getting into the details or introducing reasons that are not reflected in the record
- Do not turn the meeting into another performance discussion
 - Avoid re-litigating every prior incident or debating whether the employee agrees with the decision
- Anticipate common reactions
 - Anger, tears, threats of legal action, requests to speak to leadership, etc.

Separation Agreements: Structure the Package Before Presenting It

- Decide whether a separation agreement serves a purpose
 - Consider litigation risk, past practice, transition needs, etc.
- Determine the full package and terms before presenting the agreement to the employee
 - Including other terms that the organization may want beyond a general release (e.g., cooperation, non-disparagement, waiver of the right to future employment, etc.)
 - Expect that employees will negotiate and build in room for negotiation
- Ensure that any legal requirements regarding the timing and content of the agreement are followed
- Treat required separation notices as part of the process

Post-Separation Demands: Respond Strategically

- Engage legal counsel promptly
 - Particularly if the employee is represented, threatens litigation, files an agency charge, or raises claims of unlawful conduct
- Identify exactly what the former employee is demanding
 - Monetary payment
 - Reinstatement or other non-monetary relief
 - Modification of restrictive covenants or other continuing obligations
- Preserve and review the relevant record
- Coordinate a consistent response
 - Ensure any response is consistent with the organization's documented reason for separation and prior communications
 - Consider responding only through legal counsel to preserve argument that negotiations are not discoverable

**Any questions or
comments?**

