

Table of Contents

Introduction	11
Defining “The High Road”	11
Ten Rules of Effective Employment Practices	12
Chapter 1: What Is Employment-at-Will?	17
Risk Management to Preserve Employment-at-Will	17
Exceptions and Limitations to Employment-at-Will	18
Caution! Erosion of Employment-at-Will Through Creation of an Implied Contract	19
Employer Handbooks and Manuals	19
Handbook Errors to Avoid	19
Verbal Promises	20
Employee Handbooks: Risk Management 101	20
The Public Policy Exception to Employment-at-Will	21
Protections for Whistleblowers	21
Federal Law Whistleblower Protections	25
Other Theories Creating an Exception to at-Will Employment	26
Covenant of Good Faith and Fair Dealing	26
Detrimental Reliance	26
Tort theories	27
Why Put a Nonprofit’s Employment Policies in Writing?	27
Chapter 2: Staffing the Nonprofit Workplace	29
Avoiding Discrimination in Hiring	29
Federal Law Prohibitions Against Discrimination	29
Title VII of the Civil Rights Act of 1964	29
Age Discrimination in Employment Act	29
Americans with Disabilities Act of 1990	30
Pregnancy Discrimination Act of 1978	30
Equal Pay Act	30
Employee Retirement Income Security Act (ERISA)	30
Immigration Reform and Control Act of 1986 (IRCA)	30
Uniformed Services Employment and Reemployment Rights Act (USERRA)	30
Special Laws for Government Contractors	30
Executive Order 11246	30
The Rehabilitation Act of 1973	31
Vietnam Era Readjustment Assistance Act of 1974	31
State Anti-Discrimination Laws	31
A Word About Independent Contractors and Consultants	36
Best Practices in Hiring and Employment Practices	37
Promoting a Culture of Inclusiveness	37
Race and Color Harassment	38
Be Sensitive to Religious Accommodations	38
Violation of the Americans with Disabilities Act	39
Recent Developments in Discrimination Claims: Gender Identity	39
Breach of Contract Claims	40
Truth in Hiring	40
The Hiring Decision: Risk Management Strategies	44
Questions Not to Ask During the Hiring Process	45
Questions to an Applicant with a Disability	46
Questions Relating to Nationality and Eligibility to Work in the United States	47
Verification of Authorization to Work in the United States	47
Hiring Practices That Affirm a Commitment to Equal Treatment and Fairness: EEO and Affirmative Action Distinguished	48

Government Contractors: Special Rules for Nondiscriminatory Practices	48
Vietnam Era Veterans Readjustment Act	49
Federal Contractors with \$50,000 in Federal Funding and over 50 Employees	49
Negligent Hiring	49
Reference Checking Options	50
Risk Management Tip: Obtain Written Authorizations for Reference Checks	50
Negligent Reference Giving	50
State Reference Immunity Laws Protect Employers	51
Reference Authorization Forms	51
Four-Step Process for Checking Applicant Information	51
Screening for Past Criminal Conduct	53
Is it Legitimate to Reject an Applicant Due to Prior Criminal Activity? Consideration of Convictions and Arrests in the Hiring Process	53
Negligent Retention	55
Consumer Reports: Using an Outside Source to Conduct Background Checks	56
Key Provisions of the FCRA Amendments	56
Written Notice and Authorization	56
Adverse Action Procedures	56
Checklist for Using Outside Vendors for Consumer Credit Reports	57
How to Use Information Received from Background Checks	57
When Is Checking Criminal Histories Essential?	57
Chapter 3: Employee Handbooks	63
Chapter 4: Providing Appropriate Compensation and Benefits	69
The Balancing Act: Reasonable Compensation	69
Caution! Compensation Practices Can Result in Penalties and Excise Taxes	69
Excessive Compensation and Private Benefit	69
The Importance of Documentation	70
Obtaining Comparable Compensation Data	70
Compensation and Pay Practices	71
Paydays and Paychecks	71
Deductions from Paychecks	71
Wage Garnishment	71
Practical Concerns With Paychecks and Compensation Practices	72
Salary Administration Plan	72
Salary Adjustments	73
Final Pay	73
Regulation of Hours of Work, Minimum Wage and Overtime Payments	79
Minimum Wage and Wages for Overtime	79
Premium Pay Required for Overtime Worked	79
Determining Which Employees Are Exempt From Overtime	79
Summary of FLSA Definitions of Exempt Categories	79
Independent Contractors: Proceed With Caution	80
Risks for Violation of the FLSA or State Wage and Hour Laws	82
Checklist for Recognizing When Overtime Is Required	82
Overtime and Compensatory Time	83
Overtime Nuances Governed by State Wage Regulations	84
Regulation of Meal and Rest Breaks	85
Chapter 5: Fringe Benefits for Nonprofit Employees	89
Who's Entitled to Benefits?	89
Domestic Partner Benefits	90
Employees Need to Know About Their Benefits	90
Reinventing Employee Benefits	90
The Cost of Employee Benefits	90
Recruitment Bonuses	91
Annual Bonuses	91
Other Benefits	91
Flexible Work Schedule	91

Cafeteria Plans	92
Housing and Meals	92
Sabbaticals	92
Cell Phone, Auto Leasing and Travel Allowances	92
Commuting and Parking Subsidy	92
Club Memberships	92
Educational Assistance	92
Employee Assistance Programs (EAPs)	93
Loans	93
Health Insurance	93
Life Insurance/Disability Insurance	93
Pension Plans	93
Tax Deferred Retirement Plans—403(b) Annuity Plans and 401(k) Plans	93
403(b) Plans	93
401(k) Plans	94
Severance Pay	94
Time-Off Benefits—Vacation, Sick Days and Personal Leave	94
Time Banks	95
Holiday Leave	95
Holiday Policy Tips	95
Vacation Leave	95
Vacation Policy Tips	96
Vacation—Earned or Not?	96
Holidays Within Vacation Periods	96
Vacation and Newly Hired Staff	96
Vacation Leave and Leaves of Absence Tips	96
Sick Leave	96
Sick Leave Policy Tips	97
Fitness to Return to Work After Sick Leave	97
The Challenge of the Chronically Absent Employee	97
Job Abandonment	98
Using Sick Leave to Care for a Family Member	98
Use of Accrued Sick Leave During Other Leaves	98
Personal Days	98
Chapter 6: Leaves of Absence	99
What Laws Govern Leaves of Absence?	99
Providing Leave as an Accommodation for an Employee With a Disability	99
Other Reasons for a Leave of Absence	100
State Temporary Disability and Workers' Compensation Laws	100
How to Comply With Various Leave Laws	101
A Framework for Decision-Making	102
Frequently Asked Questions About Leaves of Absence Policies	104
Prudent Record Keeping	106
Coordination of Family Leave With Sick Leave and Other Leave Policies	106
What Happens at the End of Family Leave?	106
Communicating With the Employee Who Is on Family Leave	107
Payment and Recovery of Health Benefit Premiums	107
Basic Risk Management Strategies to Reduce Liability for Violation of Leaves of Absence Laws	108
Jury Leave—Witness Leave	116
Jury Leave Policy Tips	116
Voting Leave	122
Bereavement Leave	125
Bereavement Leave Policy Tips	125
Military Leave	125
State Military Leave Laws	126
Military Leave Policy Tips	126
Chapter 7: Discipline and Termination	131
The Fundamental Fairness Formula	131

What Is the Fundamental Fairness Formula?	131
A Nonprofit’s Fundamental Obligation: Evaluating Performance and Addressing Substandard Performance	135
Effective Performance Counseling	135
Mission-based Evaluations	136
Trends in Performance Evaluations	137
Discipline and Documentation	138
Disciplinary Options	138
Probation	138
Progressive Discipline	139
Practical Tips for Effective Performance Counseling	140
Documentation Pitfalls	141
Termination of Nonprofit Employees	141
A Nonprofit’s Right to Discharge an Employee	142
Proceed With Caution! Wrongful Termination Theories	143
The Potential Plaintiff	144
Avoiding Retaliation Claims	144
Communicating the Termination Decision	144
Final Pay	144
“Why Was I Discharged?”	145
Plan for the Termination Meeting	145
Details, Details	145
Voluntary Separation of Employment	146
Constructive Discharge	146
Negotiated Resignations	146
Notice of Separation	146
Continuation of Health Insurance Benefits: COBRA and Parallel State Laws	147
Exit Interviews	152
Separation of Older Workers	153
Separation Pay or Severance Pay	154
Downsizing	154
Post-Termination Protocol	156
Reference Policies	157
Grievance Procedures and Internal Dispute Resolution	157
Alternative Dispute Resolution	158
Formal Written Grievance Procedure	158
Advantages of an Ombudsperson	158
Open-Door Policy	159
Peer Review Boards	159
Employee Complaint? Caution!	159
Fundamental Fairness Formula—Self Test	159
Termination Checklist	161
Chapter 8: Illegal Harassment—Policies for Prevention and Prudent Responses.	163
What Is Illegal Harassment?	163
Reducing Liability Risks	164
How Can I Protect My Nonprofit From Liability?	166
Policies Prohibiting Harassment	166
Sexual Harassment	168
Clients as Victims	169
The Importance of Staff Training	169
Complaint Procedures	170
Basic Risk Management Steps to Reduce Liability for Harassment	170
Chapter 9: The Obligation to Make the Workplace Accessible	173
Who Is Protected Under the ADA?	174
Mental Illness and Intellectual Disabilities	175
Drinking, Drugs and the ADA	175
The Duty to Negotiate a Reasonable Accommodation	176
How the ADA Affects Pre-Employment Screening	176
Your Right to Ask Current Employees About Disabilities and to Submit to a Medical Examination	177

ADA Policies and Posting Requirements	177
Summary of ADA Compliance	179
Chapter 10: Workplace Privacy	181
Changing World, Changing Risks	181
The Right to Privacy at Work	181
Risks Relating to E-mail and Internet Use	183
Developing a Technology Policy	184
Confidentiality	186
Disciplining Employees for Off-Duty Conduct	187
Personnel Files	189
Drug Testing and Suspected Drug Abuse	191
Drug Testing	191
Drug Testing: Practical Challenges	196
Best Practices and Risk Management Strategies to Address Privacy in the Workplace	196
Chapter 11: Safety and Violence at the Workplace	199
Workplace Safety	199
Violence at the Workplace	201
Bibliography	203
Web Sites	203
Additional Resources Available From the Nonprofit Risk Management Center	204
Books and e-Books	204
On Line Tools	206

State Laws

States with Individual Whistleblower Laws and Those that Recognize a Public Policy Exception to Employment-at-Will Based on Whistleblower Activity	21
Summary of State Anti-Discrimination Laws	31
State Guidelines on Pre-Employment Inquiries	43
State Law Requirements for Background Checks	58
State Laws Requiring Publication of Certain Policies	64
State Law Considerations Concerning Employment-at-Will and Employee Handbooks	65
State Laws Governing Final Pay Practices	74
Special State Law Overtime Rules	83
State Laws Governing Minimum Meal Periods and Paid Rest Breaks	85
Synopsis of State Family Leave Laws and Special Leave Laws	109
Jury and Witness Leave Laws/Crime Victim Leave	116
Time Off to Vote Laws	123
State Military Leave Laws	126
State Laws Governing Continuation Coverage	148
Eavesdropping on Employees: Proceed With Caution	182
Summary of State Laws Concerning Outside Conduct	187
Summary of State Laws Governing Access to Personnel Files	189
Summary of State Laws on Drug Testing	192
Summary of State Safety and Health Laws	199

Samples


Employee Protection (Whistleblower) Policy	25
Whistleblower Policy for New Jersey Nonprofits—The New Jersey Conscientious Employee Protection Act Policy Statement	26
Certification	40
Authorization for Employment Reference and Release of Information	51
Checklist for Reference Checking	52
Hiring Checklist	61
Bonus Policy	73
Exit Interview Form	152
Prohibition of Harassment Policy	167
Managing the Risk of Illegal Harassment—A Checklist	172

Technology Policy	185
Internet/Computer Use Policy	186
Outside Work Policy	197
Sample Policy Prohibiting Workplace Threats and Violence	201
Emergency Succession Plan	207
Succession Plan in Event of a Temporary, Unplanned Absence: Short-Term	208
Succession Plan in Event of a Temporary, Unplanned Absence: Long-Term	209
Succession Plan in Event of a Permanent Change in Executive Director	209
Checklist for Acceptance of All Types of Emergency Succession Plans	209
Information and Contact Inventory	210
Required Federal Law Notices	214

Sidebars

Defining Employment-at-Will	17
What employment-at-will means	18
What employment-at-will doesn't mean	18
Notice Should be Optional	18
States Recognizing Implied Contract Based on Handbook Statements Include	19
States Recognizing Implied Contract Based on Verbal Promises	20
A Template Is a Framework, Not a Finished Product	20
State Anti-Discrimination Laws Often Provide Broader Protection	31
Small Nonprofits Beware	38
Age Discrimination: How Old Is Old?	39
Retaliation Claims Follow Discrimination Claims	40
West Virginia Pre-Employment Inquiry Guide	41
A Word of Caution for New York Employers	41
A Case in Point	41
Trend Spotter: Leased Employees/Professional Employer Organizations (PEO's)	46
Developing Written Job Descriptions Step by Step	47
Trend Spotter: Internet Hiring	48
E-Mail Interviews: Is Saving Time Worth It?	49
A Case in Point	52
A Case in Point	54
Negative Reference Bolsters Retaliation Claim	55
Risk Management Tips	55
The Survey Says: Trends in Background Checking	56
A Case in Point	59
Should Your Nonprofit Have a Contract With the CEO?	60
Employee Manual Tips	63
Remember the Disclaimer!	64
Receipt of Employee Handbook	64
Caution! Special rules may apply when a nonprofit is shutting its doors, and terminating many employees	78
Small Nonprofits Be Aware!	80
Employee/Independent Contractor 20 Factor Test	81
A Word About Compensatory Time Off	83
Danger Zone! Don't Treat an Exempt Employee as a Nonexempt Employee	83
Loss of Exemption Through Improper Docking	85
How might a violation of FLSA or State Wage and Hour Regulations Come to Light?	86
Caution: The Power of Language	90
Caution: Reimbursement May Be Required	92
Vacation Carry-Over	94
Caution: Severance Pay May Be Risky	94
Watch Out!	97
State FMLA Laws May Apply	99
Leaves of Absence: Developing a Policy for Your Nonprofit	100
The Federal Family and Medical Leave (FMLA)	101
Notification Requirements Under the FMLA	101
Medical Certification of a Serious Health Condition	103
Notice Required by Employers Covered by the FMLA	104

Special Exception for Teachers	106
FMLA Compliance Reminder!	107
FMLA Best Practices and Risk Management Strategies	108
Postings Required!	109
Trend Spotter: Leave for Victims of Domestic Violence	116
Case in Point	118
Fundamental Fairness Formula—Objective Review Checklist Before Taking Action	133
Performance Appraisal Do’s and Don’ts	136
Choosing Appropriate Discipline	139
Tell the Truth	142
Service Letter Laws	142
Just Do It	143
Safety First and Always	144
When to Terminate: Does the Day of the Week or Time of Day Matter?	144
A Case in Point	145
Lessons From Real Life: How Not to Fire an Employee	145
Housekeeping on the Way Out	145
“We Were Trying to Be Kind, but She Didn’t Get the Signal”	146
Summary of the Final Rules on COBRA Compliance	147
Risk Management Checklist for Terminations	153
Basic Risk Management Principles to Reduce Liability for Wrongful Termination in Downsizing Situations	156
Red Flag! No Retaliation!	161
The Whistleblower	161
Ten-Step Formal Investigation of Employee Wrongdoing	162
California Court Rules That Vulgar Language Alone May Not Create a Hostile Environment	163
Third-Party Harassment	164
Anti-Harassment Posting Required in Many States	165
Harassment and Volunteers	167
Anti-Discrimination/Harassment Postings Required	168
What to Do if an Allegation of Illegal Harassment Is Made	170
Federal Contractors Must Comply With the Rehabilitation Act	174
Volunteers and the ADA	174
Accommodation: A Three-Step Process	175
Harassment-Based Disability Discrimination	175
Making the Application Process Accessible	176
Job Description: Important Tool in Avoiding Disability Discrimination	177
Evacuating Employees With Disabilities	178
Risk Management Steps for a Safe and Inclusive Evacuation Plan	178
Procedures for Ensuring That There Is an Interactive Process to Explore an Accommodation	179
Big Brother Is Watching	182
Tech Terms You Need to Know	184
Instant Messages and E-Mails Sought in Litigation	184
The First Amendment and the Real World	187
Blogging: New Danger Zone for Employers	188
Random drug testing is mandatory for employees with commercial drivers’ licenses	191
Is the Nonprofit Covered by the Drug Free Workplace Act?	191
Weapons at Work	202

The use of the  signifies the availability of a hyperlink to the source reference (e.g. statute, factsheet) in the online edition of *Taking the High Road*. Consult the online edition in order to gain ready access the source material.

Introduction

“Employees are our most valuable asset,” is an organizational cliché. It’s also a true statement. An equally true statement is that employees can be a nonprofit’s liability, both by their specific actions and by not sharing the vision of the organization’s leadership. Managing an organization well requires being mindful of both sides of this conundrum: assets and liabilities. The nonprofit sector can claim no exception to this advice. In fact, when the *higher moral purpose* that typically distinguishes the nonprofit sector is taken into account, it’s even more important for managers of nonprofit organizations to be attentive to taking the high road.

There are both practical and ethical imperatives for this advice. Minimizing risk comprehends both dimensions. Often overlooked, however, is the desirability of having a workforce that believes in the moral correctness and benevolence of the organization and its leadership. Arguably, the employees in such a workforce will be more motivated and productive. Probably more important is the organizational commitment that ensues from such an environment. Every organization will eventually face difficult times. And every manager will eventually have to make difficult and sometimes controversial decisions. What better way to ensure that the organization maintains as much equilibrium as possible during these difficulties than to have a workforce that truly believes in the values and moral correctness of the organization. Treating employees well affirms the values and provides an important subliminal message about how employees should treat others (clients, co-workers, and the organization itself). Taking the high road better ensures the long-term health of the organization to cope with the ills that it will almost certainly encounter at some point.

Defining “The High Road”

Dignity. Respect. Compassion. Fairness. Accountability. Consideration. These familiar words describe important values in *any* workplace. And they represent *essential* values in a nonprofit work environment. These values represent a basic formula for reducing the risk of employment-related mishaps, disputes, claims and lawsuits. These and other undesirable events disrupt the flow of mission-related work and threaten a nonprofit’s ability to focus all or most of its resources on meeting client or community needs.

Throughout this book we refer to a wide range of recommended practices in the employment arena. In each case the advice goes beyond what a nonprofit employer is legally required to do. Our goal is to help nonprofit leaders adopt policies and practices that put their organizations on a high road with regard to their relationship with paid employees.

Unfortunately, in an attempt to run their organizations “like a business” some nonprofit leaders have either ignored the importance of legally prudent employment practices or have adopted employment practices inconsistent with the organization’s charitable mission. This book serves as a global positioning system (GPS) to help get your organization’s policies and practices back on track. Back on a decidedly *nonprofit*—yet, a legally compliant and feasible—track. Your nonprofit’s employment practices should reflect the values and caring your organization demonstrates to its clients, while offering sound, reliable policies on which your employees can rely.

The advice in this book is drawn from a variety of sources, beginning with the authors’ experience advising nonprofits of varying sizes and missions about many aspects of human resources management. Each of the authors has spent more than a decade helping individual nonprofits fine-tune their employment policies. The authors have delivered hundreds of workshops and presentations on employment topics to audiences of nonprofit leaders. Additional sources for the information in this book include published resources on employment topics, periodic newsletters published by law firms specializing in the employment arena, and insurance providers that underwrite employment practices liability coverage. As a guide to legal and effective employment practices, this book will provide a roadmap for avoiding claims alleging illegal or wrongful conduct, and avoiding liability in the face of a claim. Taken as a whole, we believe that this book provides practical and feasible advice for strengthening your employment practices and that adherence to the guidance in this text will enable your nonprofit to operate with confidence regarding its employment practices. Operating within the bounds of federal, state and local labor laws is only a starting point.

Ten Rules of Effective Employment Practices

Several themes repeat throughout the book. We summarize them here with explanations. These *rules* provide an essential foundation for an organization committed to compassionate and legal employment practices.

1. *Always put key employment policies in writing.*

Written policies are your first line of defense when a current or former employee questions the legality or appropriateness of a policy or its application. Written policies also serve as an invaluable reference point when questions about your practices are raised: “When do I start accruing vacation leave? Is it permissible to make personal long-distance phone calls and use the organization’s postage machine?” Most legal advisors to nonprofits urge the adoption of written employment policies. On occasion an attorney will state that written policies are a dangerous trap, and it’s better not to commit policies to writing. While there are downsides (namely the risk that your written policy will be used against you), the benefits outweigh the risks by a mile. The upsides include:

- ❑ *Written policies provide a starting point for consistency.* They represent an effective way to communicate a common message to all employees. Each person receives the same information about the nonprofit’s position on various topics. Written policies help you avoid the risk that individual supervisors will apply a personal interpretation to your policies, resulting in the inequitable treatment of employees. Written policies are comforting to employees and provide a sense of the nonprofit’s commitment to fairness.
- ❑ *Written policies provide admissible evidence* of the organization’s policies. Should your nonprofit ever need to defend its employment practices in court or at an administrative hearing, you’ll want to refer to your written policies as evidence of your legal conduct. Don’t risk the chance of liability for unlawful employment practices simply because you were unable to prove that a lawful policy existed and was followed.
- ❑ *Written policies establish the business-related reason for an employment action*, reducing the possibility that the employer’s conduct will be challenged as subjective and discriminatory.

Caution: Establishing, but not following your written policies is a recipe for disaster. Equally troublesome is permitting supervisors to put their own spin on policies when they deal with employees.

2. *Communicate and disseminate without delay.*

Written employment policies that are a nonprofit’s best kept secret are of little use. New employees should be schooled in the nonprofit’s policies as soon as practicably possible. Some employers send the employee handbook along with the offer letter; others distribute the handbook at the employee orientation session held on the first day of employment. From a bound manual to a file on the nonprofit’s intranet, the method of dissemination should fit the culture of your organization. Getting this vital information into the hands of employees is of great importance. Repeatedly telling the story, year in and year out, will help ensure that the policies are truly learned and followed. These methods provide valuable opportunities for ongoing dialogue about “what we believe.”

3. *Size matters; form may not.*

A multivolume treatise on employment rules is of minimal use and may create unintentional risks for the nonprofit. A manual that attempts to answer every conceivable question that could arise during an employee’s tenure is likely to be ignored. A handbook that’s written in legalese will confuse most, if not all employees, leaving them wondering about the organization’s policies and effectively unable to comply. The handbook or policy manual must be a reasonable length to ensure its effectiveness and strict adherence. It must be written in plain language that will be understood by all. Two questions that you should ask about every section in the handbook include:

- ❑ Does every employee need to know this information?
- ❑ Will every employee be able to understand this policy?

Employment gurus don’t always agree whether or not an organization’s employment-related policies should be consolidated in a single handbook or policy manual. Some argue that a policy manual or compilation should be limited to critical policy information, and that other information about the workplace, such as etiquette, benefits information, vacation accrual, and issues subject to change and frequent updating should be maintained in a separate document or simply circulated periodically to staff in written memos. The authors don’t find this distinction particularly compelling. More important in our view is that an employee handbook or personnel policy manual 1) be circulated to all staff, 2) include important policy issues, 3) contain only commitments the nonprofit is willing and able to keep, and 4) be reviewed annually by counsel to

ensure that outdated information is removed and current policies, procedures, and new statutory requirements are incorporated.

Of almost equal importance to putting employment policies in writing is the need to obtain a written confirmation from each employee that he/she has read, understands, and agrees to abide by the rules of the workplace as presented in the policy manual or handbook. When new policies are developed, the handbook should be revised and redistributed, or a separate document describing a new policy should be circulated. In either case, each employee should sign an Acknowledgment Statement that she/he received the revised (or new) policy, and the signed Acknowledgment Statement should be kept in the employee's personnel file.

4. *Involve the board.*

An additional tenet of safe and effective employment practices is appropriate board involvement. Some nonprofit boards report very little involvement, preferring instead to delegate to a Personnel Committee responsibility for reviewing and adopting employment policies. Adopted policies are then implemented by paid staff. This framework may be most appropriate and effective in a relatively mature nonprofit, with a governing/policy-making board that regularly delegates key areas of policy development to committees and implementation to staff. To make this approach work, it may be necessary for the committee to include subject matter experts, such as employment counsel or human resources professionals as committee members.

Another approach is to encourage more active involvement and awareness by the full board due to the significant risks posed by the employment of paid staff. With employment-related claims representing an estimated 85 percent or more of all claims filed under directors' and officers' liability policies, employment missteps place both an organization and its individual directors at risk. State and federal volunteer protection/immunity laws provide no safe harbor, because they specifically exclude intentional wrongs and claims alleging violations of civil rights law—exactly the type of claims alleged by employees or former employees against their employer. Therefore, keeping the entire board apprised of the nonprofit's employment policies may be appropriate. Under this latter approach the board may review and ratify employment policies developed by the CEO/executive director in consultation with an employment attorney and human resources director. The board may further inquire about the organization's policies and procedures during its regular meetings, and suggest the development of a training program and complaint procedure to ensure the timely correction of prohibited activities, such as harassment. This framework grants permission to the board to ask the CEO about specific employment policies and practices or even to review potentially volatile employee matters. In a start-up or a nonprofit where the board attends to program and service delivery, as well as policy-setting and governance, members of the board may be tapped to research employment practices of similar nonprofits and draft policies for board consideration.

Except as respects the employment of the executive director (or other chief staff member) it's never appropriate for a nonprofit board, or certain members of the board, to step out of an advisory role and into the driver's seat.

5. *Strive for fairness.*

The fair application of employment policies is vital to reducing employment-related risks. While true for employers in the business and government sectors, it's especially true in the nonprofit sector, where many employees have high expectations about their employer's compassion, sensitivity and fairness. The expectation that they will be treated fairly may be one of the tradeoffs an applicant accepts when foregoing more lucrative opportunities in the private sector. It's neither costly nor unnecessarily time-consuming to strive for and achieve fairness. Employers who dishonor the commitment to fairness discredit the nonprofit sector and foster cynicism. Defining fairness isn't an easy task. It means affording employees respect, courtesy, equal treatment and opportunities, a forum to seek redress of grievances, and, except when a serious violation of workplace rules or ethics has occurred, notice of poor performance and an opportunity to improve prior to discharge. Striving for fairness is the essence of a sound risk management program, as employers with the policies previously referenced are less likely to be dragged into court or held liable for unlawful or negligent employment practices. And, as we pointed out at the beginning of the introduction, this commitment to fairness won't go unnoticed by the employees and will pay dividends at critical points in the organization's future.

6. *Be wary of contract-like promises.*

At the heart of the debate over whether or not policies should be in a handbook format is consideration of whether or not employee handbooks seriously impair the revered at-will employment relationship governing most workplaces by creating a contractual obligation between employee and employer. This topic is explored in detailed in the section on *employment at will*.

The viewpoint of this text is that written employment policies are essential. However, simply reiterating and using large print to remind employees about their at-will status in no way diminishes the obligations an employer may create through oral and written promises to employees. Contractual or contract-like obligations may be created when an employer makes a promise to its employees. Every nonprofit employer should recognize this and exercise caution in adopting policies or making promises the organization may not be able to live with. Minor alterations in many employment policies can remove or minimize the contract trap. For example, an appropriate progressive discipline policy should give management the *discretion* to place a poor performer on a time-based probation, but not *require* that management do so. Remember that even casual representations such as, “I would like to see you retire from this place,” may be interpreted as a promise of lifetime employment and subject the employer to liability for an unfulfilled promise.

7. *Strive for consistency.*

Enough emphasis can't be placed on the importance of achieving consistency in employment practices. This is closely related to (and is the technical implementation of) the value of fairness. Just as sound risk management requires that every activity be viewed through a *lens of safety*, safe employment practices require that the application of a policy in a particular instance be subject to a *consistent-treatment* test. This test can be achieved by asking, “How have other employees in this situation been treated?” “If the employee in question were a man instead of a woman, would I be reducing this position to part-time status?” or “If this employee were a finance director instead of a mailroom clerk, would I be firing him for sleeping on the job?” The perception of disparate treatment leads to countless claims and lawsuits against employers, including nonprofits. The consistent-treatment test may help a nonprofit manager who is caught up in the emotionally-charged atmosphere of a termination avoid missteps and resulting litigation. The best way to ensure consistency is to involve an objective third party—such as another manager or board member or outside legal counsel—who can review the situation before the nonprofit takes adverse action.

8. *Stay mission-focused and strive for efficiency.*

The employment practices reviewed in this book shouldn't be viewed as distracting management from an organization's core mission. While it's true that any policy takes time to develop and implement, the real time waster for a community-serving nonprofit is defending a lawsuit. By focusing on the preventive medicine of sound, defensible employment practices, the nonprofit will be reducing the risk of employment litigation and its accompanying expense, heartache, worry, and distraction.

Staying mission-focused sometimes leads a nonprofit to negotiate a monetary settlement or termination agreement with an employee to avoid a lawsuit. It isn't uncommon to resist settling a dispute when the nonprofit believes it hasn't done anything wrong. However, a negotiated settlement is frequently the best outcome in an employment case. The cost of defending an employment claim can be substantial. The cost of defense counsel is only the beginning; lost personnel time, damage to the nonprofit's reputation in the community, a decline in staff morale, and a rise in insurance premiums can far exceed the lawyer's fee for services. Since the nonprofit's mission is to serve its constituency, preservation of resources to ensure that the nonprofit will be there in the future to continue its service to the community should be paramount. On the other hand, merely acceding to the demands of a difficult employee can have a different cost: the demoralizing effect on the workforce. When an organization consistently takes the high road, it makes sense to defend the values of the organization. Each case will have to be judged on the merits and in consideration of the *costs* of settling or persisting.

9. *Honesty is always the best policy.*

Always be honest and tell the truth in dealing with prospective and current employees. Never exaggerate a position's duties or responsibilities to attract a desirable candidate, or give someone a false reason for an adverse employment action (such as telling them that they're being laid off due to budgetary constraints when they're being terminated for incompetence). Commit to providing honest appraisals of performance, and empower supervisors in your organization to conduct appraisals in a timely manner. Dishonesty or delay heightens the risk of litigation. An employee who isn't told why he or she is being fired is likely to assume the firing was illegal. Don't let employees second-guess the nonprofit's motives. Honesty, however difficult to hear or deliver, is the best policy.

10. *Resist the urge to hurry; allow time to get a second opinion.*

Just as increasing speed to 20 mph above the speed limit isn't guaranteed to get you to your destination quicker (an accident would add hours to the trip or perhaps derail your plans altogether), sound employment practices require patience and respect for timing. In Chapter 7, read why providing a poor performer with time to address his deficiencies minimizes the likelihood of a lawsuit, and why it's never a good idea to terminate an employee on the spot. Similarly, it makes no sense to hurry the development of an employee handbook that will invite legal challenge. Allow policy development the time, care, and feeding it

deserves. Resolve to administer employment practices with deliberation and to follow the sound risk management practices described throughout this book.

Also remember to never go it alone. Creating and administering defensible, compliant and appropriate employment policies requires expert help. No nonprofit of any size should establish employment policies and procedures without the assistance of an employment lawyer licensed in the state where the nonprofit does business. We invite you to consider the policy frameworks and sample forms included in this book, but offer extreme caution about the dangers of proceeding without legal counsel. Your organization's mission and services are too important to jeopardize by a misstep in this risky area of operations. The materials in this book should serve as a refresher, a starting point for discussion with employment counsel, or a reminder about issues to discuss with other experts or stakeholders. Nonprofit managers and volunteers are widely regarded as creative resource developers. It takes creativity and commitment to secure donations of equipment, funds, and services to support charitable activities. Similarly, learn as much as possible about effective and legal employment policies, including the specific laws that apply in the state where the organization operates, and you'll reduce the cost of a legal review and make the organization an enviable client.

To a large extent, this book is about regaining your footing as a manager. It's about easing out of the fast lane and reclaiming the higher moral ground for you and your organization. It's about dealing with your employees fairly and honestly. Treating people right doesn't mean lowering your standards. On the contrary, it's making the standards known and giving your employees the opportunity to live up to them.

Every manager has to discipline or even terminate an employee from time to time. By following the guidelines in this book, you can approach these difficult tasks with more confidence and the knowledge that you can back up your words and actions.

Doing the *right* thing is often the smartest thing from a legal perspective, too. In this text you'll learn how to apply the Fundamental Fairness Formula, an aid to decision-makers faced with discipline, termination, or day-to-day employee performance dilemmas. This formula not only will protect your nonprofit from liability, but will ensure that management treats staff fairly.

Your organization will run better too. How often has it been said that our reward is the journey and not the destination. Think of your organization's mission as a journey. Taking shortcuts may save a little time, but at what cost? We all know that sometimes the seemingly shortest path may cost precious time and resources in the long run. The journey will be more rewarding and the results produced by your nonprofit more satisfying when you and your fellow managers focus on taking the high road.

—Jennifer Chandler Hauge and Melanie L. Herman