

# soundwaves

NAVIGATING THE FUTURE  
Information and Risk Management Ideas for Not-for-Profit Organizations

## Emerging Employment Issues

### Keeping abreast of the law can reduce the chance of trouble

Accountability and good governance have always been important in the nonprofit sector, but now no organization can keep its donors happy without implementing safeguards to ensure it's respecting its mission and using funds wisely. Along with that has come greater transparency—making it possible for funders and other stakeholders to see quickly what you're doing and how you're doing it.

There's one exception of course—employment decisions. Unless you're talking about giving a huge severance package to a wayward executive, chances are the decisions you make about hiring and firing are and will remain confidential. If they're being discussed, it's probably in a courtroom—and that's bad news all around.

This issue of *Soundwaves* looks at three emerging issues in employment law and how each could impact your association and the way you do business. The issues involve:

- Anti-retaliation rules under civil rights law
- Job rights under the *Family and Medical Leave Act*
- Soldiers and their civilian jobs

Each is important and, if handled improperly, could put you in the public eye for all the wrong reasons.

#### Supreme Court Takes On Retaliation

In a June 22 ruling, the U.S. Supreme Court greatly expanded the scope of anti-retaliation measures under *Title VII of the Civil Rights Act of 1964*. The unanimous ruling by the Court held that employers cannot retaliate against an employee for filing a discrimination claim, even if that claim is later found to be baseless.

"This case greatly expands the protections afforded to employees who claim to suffer retaliation for filing Title VII discrimination and harassment charges," says Merritt Green, the founding partner of General Counsel, P.C., in McLean, Virginia.

The case, *Burlington v. White*, involved a forklift operator who was demoted after complaining to company officials that her supervisor had repeatedly made sexist and demeaning comments. The supervisor was

suspended for 10 days and ordered to participate in sexual harassment training—and then White was transferred to a less desirable position. White filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging gender discrimination and retaliation. She subsequently filed a second EEOC complaint after being suspended for alleged insubordination. White eventually filed suit in federal court.

In its ruling, the Supreme Court found that "the scope of anti-retaliation extends beyond workplace-related or employment-related retaliatory acts and harm." The Court reasoned that limiting the scope of the act to workplace and employment activities would diminish the law's effectiveness. The Supreme Court also held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse" and thus perhaps "discouraged a worker from making or supporting a charge of

knows that his or her relationship with your organization will not be affected in any way.

#### When Jobs Are Guaranteed—And When They're Not

Switching gears from civil rights to more basic employment law, it's important for nonprofits to understand when an employee's job is protected and when it's not. A recent court case tested the limits of the Family and Medical Leave Act (FMLA). Meanwhile, associations and other employers around the country are facing the question of what to do with military service members who expect to head back to work after a tour of duty.

First, the limits of the *Family and Medical Leave Act*. The FMLA covers employers with 50 or more employees. Under the law, qualified employees may take up to 12 weeks of unpaid leave during a 12-month period for family and health-related matters. A qualified employee is

"It's important to review your policies and procedures to make sure that those dealing with sexual harassment, discrimination, and retaliation are effective"

discrimination." In further noting that "context matters," the Court used as an example the fact that not inviting an employee to lunch would be trivial, but excluding an employee from a weekly training lunch that affects his or her professional development would dissuade a reasonable employee from filing a discrimination claim.

Green notes that organizations can take steps to protect themselves from retaliation lawsuits. "It's important to review your policies and procedures to make sure that those dealing with sexual harassment, discrimination and retaliation are effective," he says. "It's also important to educate and train all your employees about the law and what are appropriate and inappropriate actions." Green also notes that if someone does file an EEOC complaint, it is vital that the complaint be treated confidentially and that the employee

defined as someone who has worked for the organization a total of 1,250 hours during the preceding 12 months.

But does an employee have an absolute right to get his or her job back after taking time off under the FMLA?

No, said the Fourth Circuit Court of Appeals in a recent ruling that tested the limits of job rights under the FMLA. In *Yashenko v. Harrah's NC Casino Company, LLC*, the court found that an employer may deny reinstatement if it can show that the employee would have been discharged regardless of whether he or she had taken leave. The case involves a company reorganization, during which time Harrah's encouraged the employee to apply for a new position. The employee declined the offer because of his medical problems. When he returned from leave, he was discharged.

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## Emerging Employment Issues (continued from front)

"This opinion provides some protection for employers who may have to legitimately discharge an employee regardless of whether they took leave under the Family and Medical Leave Act," explains Green. "However, an organization should proceed with caution—and talk to its attorney—before taking such an action."

While it might be legitimate to discharge an employee under the FMLA, there are no excuses for not rehiring someone returning from military service. With soldiers being deployed from Iraq to Afghanistan, more and more organizations are being faced with the prospect of employees both leaving for and returning from military service.

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA),\* an employer must reinstate returning service members within two weeks after they apply for reemployment. In addition:

- Returning service members must receive the seniority, status and pay they would have attained if they had not been called

away for military service. The fact that an employee may have suffered a disability does not alter this requirement.

- Employers must make reasonable efforts to accommodate a disability if it limits a returning service member's ability to perform his or her job.
- Employers are responsible for paying regular health benefits for the first 30 days of an employee's absence.
- For retirement plan purposes, an employee returning from military service must be considered as not having had any break in job tenure.
- Employers must post a USERRA Rights poster in the workplace.

Green notes "employees also have obligations under the *Uniformed Services Employment and Reemployment Rights Act* (USERRA). Service members must follow specific timetables and procedures when they report back to work." He adds that the timetable for each individual employee depends on how long he or she was deployed.

While keeping up with continuously evolving employment laws can be tough, the bottom line is that knowing the law and sticking to it is good business. Not only will it keep you out of trouble, but your employees *and* your donors will thank you for having good business practices in place. ♦

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*\* More information about USERRA is available on the Department of Labor's Web site at [www.dol.gov/vets/programs/userra](http://www.dol.gov/vets/programs/userra).*

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