



Strengthening Nonprofits to Build Communities

A Guide for Nonprofit Organizations: Employment Issues



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This general overview of employment issues for nonprofits is published by The Community Law Project, a project of the Chicago Lawyers' Committee for Civil Rights, formed in 1985 and dedicated to assisting non-profit groups and small business entrepreneurs with neighborhood revitalization efforts. This guide was originally published as part of a broader compliance booklet in 1989. A second edition of that broad compliance booklet, written by Ethel Kaplan, Esq., a tax specialist and volunteer, was published in 1993. The Community Law Project extends its appreciation to Latham & Watkins LLP and Quarles & Brady LLP for assistance with both this **A Guide for Nonprofit Organizations: Employment Issues** (Employment Issues Guide) as well as with the third edition of **A Guide for Nonprofit Organizations: General Charitable Organization Compliance** (General Compliance Guide).

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Both this Employment Issues Guide and the separate General Compliance Guide are intended to provide accurate information regarding the subject matters covered. They are not, however, a substitute for legal, accounting, or other professional services. The mere use of these guides will not create any professional relationship, attorney-client or otherwise. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

To comply with Internal Revenue Service (IRS) regulations, the Community Law Project advises readers that any discussion of Federal tax issues in this guide was not intended to be used, and cannot be used by readers, (1) to avoid any penalties imposed under the Internal Revenue Code or (2) to promote, market or recommend to another party any transaction or matter addressed in this guide.

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I. INTRODUCTION

Many NFPs start small, but as they grow they find that they need to hire employees to better carry out their objectives. Many issues related to employees vary from state to state, and the complexity of the law in this area does not allow for a comprehensive discussion of all relevant employment laws. Therefore, this document briefly addresses a broad range of employment issues with the goal of providing you with a general understanding of the most basic laws applicable to not-for-profit, tax-exempt employers. Therefore, if your organization has a specific employment law question, we encourage you to seek appropriate legal counsel.

II. EMPLOYEE CLASSIFICATION

Before taking steps to comply with employment laws, an NFP must first determine whether a worker should be classified as an employee. In general, workers tend to fall into three categories: volunteers, employees and independent contractors. People who are not paid for their services generally should be classified as “volunteers.” Employment laws usually do not apply to volunteers. On the other hand, workers who are paid for their services are classified as either employees or “independent contractors.” For these purposes, it is important to remember that “payment” can include non-monetary employment benefits like health insurance, in addition to monetary payments.

Whether an individual performing work for an NFP is an employee or an independent contractor depends on several factors, including the amount of direct control the NFP retains over the specific means or method by which the individual completes his or her work (this is the most important factor), how the individual is compensated, the amount of professional skill required to perform the individual’s work, which party provides the tools, equipment, or materials to accomplish the work, which party sets the individual’s work schedule, and others. If a worker is considered to be an employee, the NFP will need to consider and comply with all relevant employment laws, including everything from federal and state minimum wage and hour rules to anti-discrimination laws. However, if a worker is considered to be an independent contractor, some employment laws and regulations will not apply. A helpful guide in making the determination between employee and independent

Example:

Suppose an NFP serving the homeless community pays a nurse to come to its facility once a week to evaluate the condition of patients in need of health care. The NFP does not tell the nurse how he should treat or evaluate the patients at the clinic; does not have the power to control the rate the nurse charges for his services; does not provide him with his stethoscope, blood pressure monitor, uniform, or other equipment; and does not directly control the nurse’s schedule. In this case, the nurse would not be considered an employee even though he was paid for his services to the NFP, but instead would be an independent contractor.

contractor, and other useful information regarding employee classification, can be found on the IRS's website:

www.irs.gov/businesses/small/article/0,,id=99921,00.html.

III. EMPLOYEE DOCUMENTATION AND ADMINISTRATION

NFPs with employees generally must comply with several federal and state laws covering a wide range of subjects, such as discrimination, minimum wage requirements and overtime wages, employee safety and taxes. Several of these laws require an NFP to file documentation at the time of hiring an employee, as well as at regular intervals during employment. Some of these employment laws may apply only to employers with more than a certain number of employees, so very small NFPs should check with an employment attorney to determine whether any employment laws may not apply. However, most NFPs should assume that the employment laws do apply to them until they confirm otherwise. Additional details about laws affecting Illinois employers as well as documentation and filing requirements can be found at the Illinois Department of Labor (IDOL) website: www.state.il.us/agency/idol/ and the Illinois Department of Employment Security (IDES) website: www.ides.state.il.us/forms/. All employers, including NFPs, must also withhold taxes on behalf of the government from the paychecks of their employees and pay these funds to the government. Additional information about withholding obligations can be found in Section VI below.

Due to the numerous rules and the complexity of tracking all the required filings, smaller NFPs often choose to outsource their payroll administration to third-party service providers. Some banks also offer special "payroll" accounts for employers to use for payroll processing which offer special features designed to help comply with rules related to the payment of employee compensation. This section discusses only some of the filing requirements and introduces some of the employment laws that are relevant to NFPs managing employees. More detailed information can be found in books and other publications devoted specifically to employment issues or by consulting a lawyer who practices employment law.

IV. FILINGS REQUIRED AT THE TIME OF HIRING

When an NFP hires an employee, it must file several documents with the federal and state governments. These documents should be filed as soon as the employee is hired. The following table summarizes some of the filings required by the federal government and the state of Illinois.

| Agency | Form | Timing | Description |
|--|--------------------|---|--|
| IRS | W-4 | Time of hiring | Provides the NFP and the IRS with the information necessary to determine the appropriate level of withholding for the employee's income taxes. |
| U.S. Citizenship and Immigration Services | I-9 | Time of hiring | Provides the NFP and U.S. Immigration and Customs Enforcement with the information and documentation necessary to verify the employee's legal eligibility to work in the United States. The NFP must retain this information in its files. |
| Illinois Department of Employment Security | IDES New Hire Form | Time of hiring—must be completed within 20 days of commencement of employment | Informs IDES that a new employee was hired. |
| Illinois Department of Employment Security | UI-1 | Newly created employing units must register within 30 days of start-up | Form UI-1 registers the employer with the Illinois Department of Employment Security to enable the employer to report and make unemployment insurance contributions. This may have been filed when the NFP was formed. |

V. RECORDKEEPING UNDER MINIMUM WAGE STATUTES



NFPs with employees are governed by a federal law known as the Fair Labor Standards Act of 1938 (FLSA). The FLSA requires employers to pay minimum wage and to pay time-and-a-half for overtime wages of hourly employees. Although certain criteria must be met before the FLSA applies, for most NFPs—including small NFPs—the FLSA applies to all hourly employees, who are also known as “nonexempt” employees. Executive, administrative, professional, and outside sales employees who are paid on a salaried basis may be exempt from the FLSA's minimum wage and overtime requirements under certain circumstances, and you should consult an attorney specializing in employment law to determine whether such exemptions apply to NFP workers. The FLSA also requires employers to keep records of hours worked, wages paid and other information for non-exempt employees for three years. The recordkeeping requirements of the FLSA call for information that is

similar to the type of information used for payroll accounting, so most organizations already track this information. The FLSA requires that employers retain age verification records for as long as an employee works for the employer and retain payroll records for three years.

Illinois also has a law regarding recordkeeping for employees and minimum wage. Like the FLSA, the Illinois Minimum Wage Law (IMWL) requires employers to keep three years of written records of wages paid to employees, including information about the employee and his or her job description. The IMWL also requires that employers pay certain minimum wage rates to employees in Illinois, which are set independently of the FLSA rates and may be higher than the rates required under the FLSA. To comply with both laws, an employer must pay wages that are high enough to meet the minimums set by both statutes.

Example:

If the minimum wage under the FLSA is \$9.00 per hour and the minimum wage under the IMWL is \$9.25 per hour, an employer who is subject to the IMWL must pay its employees at least \$9.25.

VI. ONGOING EMPLOYEE FILING AND WITHHOLDING REQUIREMENTS

The exemption from an NFP's obligation to pay taxes on its income does not affect the requirement that its employees pay taxes on their income. Because the IRS administers the collection of employee income and employment taxes by requiring employers to withhold taxes at the time that wages are paid, part of the responsibility for the payment of an employee's income taxes falls on the employer. Based on information provided by an employee on Form W-4, the IRS will require that a certain portion of the employee's income be withheld by the employer and paid to the IRS. The Illinois Department of Revenue requires a similar payment for each employee's Illinois state income taxes.

The IRS requires that all employers report their employee withholdings by filing Form 941 every quarter, and the Illinois Department of Revenue requires that all Illinois employers file Form 941-IL every quarter. Both of these forms must report the total amounts of income taxes withheld. The IRS form must also include the total number of employees, as well as a breakdown of the employer and employee portions of the taxes due under the Federal Insurance Contribution Act (FICA) (which include taxes for Medicare and social security) and any taxes due under any state unemployment tax authorities. During each payroll cycle, the NFP must withhold these taxes from the wages paid to its employees. The NFP must pay the money owed to the IRS and the Illinois Department of Revenue at certain times throughout the year. Depending on the amount of the taxes owed, the NFP must transfer the withheld taxes to the IRS and the Illinois Department of Revenue every day (for very large employers), every two weeks, every month or every quarter. The quarterly payment period only applies to very small

employers (those withholding \$2,500 or less quarterly), so it is common for an NFP to be required to make payments more frequently than it is required to file Form 941. An NFP should always confirm its proper payment schedule, and it should not assume that payments are due only when its Form 941 filing is due. Also, because the payments must be made more frequently as an NFP's payroll increases, any NFP that is quickly adding employees or increasing the compensation it pays to existing employees should regularly review its payment requirements. IRS Publication 15, Circular E listed in the Resource Guide at the end of this Employment Issues Guide and the instructions to Form 941 available on the IRS website provide additional information about procedures for withholding and paying employee taxes.

If the NFP fails to pay its own FICA taxes or the taxes withheld on behalf of the NFP's employees to the IRS, the IRS may hold the NFP's board of directors personally liable for these taxes. This personal liability is not covered under most insurance policies. Therefore, it is extremely important that an NFP complies with state and federal filing and withholding requirements.

At the end of the year, the NFP must complete a Form W-2 for each employee and send copies of the information to the IRS (with a Form W-3) and to each employee. The employer generally is required to file Forms W-2 and W-3 with the IRS on or before February 28 (or March 31 if filed electronically) of the succeeding calendar year. The employer is required to furnish to each employee a copy of their W-2 on or before January 31 of the succeeding calendar year. Employees are then responsible for completing their tax returns based on the information in the W-2.

Rules concerning independent contractors are simpler than the requirements for "employees," but an NFP may also have filing requirements for independent contractors. If an NFP paid \$600 or more during the year to any single independent contractor, then the NFP is required to file a Form 1099 with the IRS for each independent contractor to which it paid \$600 or more. Deadlines for sending Forms 1099 are the same as those for the Forms W-2 described above. The Forms 1099 must be filed with the IRS on or before February 28 (or March 31 if filed electronically) of the succeeding calendar year. The NFP is also required to send a copy of the Form 1099 directly to each of those independent contractors on or before January 31 of the succeeding calendar year.

VII. OTHER EMPLOYEE-RELATED ISSUES

In addition to complying with the regulatory filings listed above, an NFP that has employees should create policies and systems to properly manage and provide support for its employees. Adopting written employee policies and procedures approved by the board of directors and adhering to those policies and procedures is one of the best ways to protect an NFP and its directors from allegations of unfair employment practices if an employee sues the NFP. Employee policies and procedures should be as comprehensive as possible. Although employers are generally allowed to hire and fire employees for any reason or no reason at all (called “at will” employment), anti-discrimination laws prohibit employers from making employment decisions based on certain factors, such as an employee’s age, race, gender or disability status.¹ An NFP should establish written policies for hiring, firing, promoting and compensating its employees, not only because it makes good business sense, but also because such policies provide invaluable guidance to the NFP when difficult employment decisions must be made.

A. Whistleblowers

The term “whistleblower” refers to an employee who discloses to management or government authorities suspected illegal behavior within an organization. Although whistleblowers benefit the public by uncovering illegal behavior, the act of exposing potentially illegal behavior may damage the careers of their supervisors. Consequently, the risk of retaliation from supervisors discourages whistleblowing. To encourage whistleblowers to come forward, certain federal and Illinois laws protect them from retaliation. As a result, NFPs should be very careful about the treatment of whistleblowers.



An NFP should create policies and procedures for the treatment of whistleblowers in advance of any actual occurrence of whistleblowing. IRS Form 990 specifically asks if NFPs have a policy regarding whistleblowers. Creating whistleblower policies and procedures reduces errors of judgment that can occur when NFPs are forced to react to unexpected events. If a whistleblowing situation arises, the NFP can follow its policies and procedures, and subsequent challenges to the NFP’s actions, such as lawsuits or regulatory fines, may be defended by demonstrating that the NFP had appropriate

¹ Federal anti-discrimination laws, including Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), apply generally to NFPs, but only to those with a certain minimum number of employees (not independent contractors or volunteers). For example, Title VII applies only to those organizations with fifteen or more employees. Because many NFPs are not subject to these laws for numerosity reasons, in the interest of brevity they will not be discussed here. However, NFPs with higher numbers of employees should consult an employment attorney for more details regarding their obligations to comply with these laws.

policies and procedures in place and followed those policies and procedures as they related to the whistleblowers involved.

An appropriate whistleblower policy should include two main features. First, the policy should provide that whistleblowers shall not be retaliated against by other individuals within the NFP. This means that a person should not be fired, demoted or suffer other negative treatment merely for being a whistleblower. Having a formal review policy for all employees and documenting reasons for changes to an employee's position will help protect NFPs from lawsuits if an employee later accuses the NFP of retaliation. Second, the policy should provide that employees are given an effective mechanism for reporting suspected illegal acts (some policies may also cover reporting unethical acts). In a small NFP, this could include setting up a drop-box for paper notes. Larger organizations often use a hotline system. Whatever system is created, the most important aspect of a whistleblower policy is that the NFP takes allegations seriously and responds to them appropriately.

B. Workers' Compensation

"Workers' compensation" refers to a set of laws designed to protect employees from injuries at work. Workers' compensation laws do not contain specific safety requirements, but instead encourage employers to protect their employees by requiring that employers pay for any injuries to employees incurred in the scope of their employees' employment. Outside the workplace, a person's legal responsibility is usually based on fault. For instance, when two cars crash at an intersection, a driver who ran a red light is usually responsible for paying for the other person's injuries. Workers' compensation ignores fault and always makes the employer pay for workplace injuries to employees. However, the workers' compensation system also prohibits employees from filing private lawsuits against employers and mandates that payment for workplace injuries will be handled through the workers' compensation system. The Illinois' workers compensation statute provides that an employee's injury is compensable if it arises out of and in the course of employment. Again, fault plays no role in whether an employee's injuries will be covered under the workers' compensation act, so an employee whose own negligence causes his injuries will be covered, provided the criteria above are met. Whether an injury meets these criteria can be a difficult legal question, however, and an NFP should consult an employment attorney for guidance on specific issues.

In general, there is no minimum number of employees necessary for employers to come under the purview of the Illinois workers' compensation statute. Although participation in workers' compensation may be voluntary for some employers, several types of employers are required to participate and most others choose to participate because of the protection from separate individual lawsuits that is provided by participation. An NFP with employees should generally assume it needs to comply with the workers' compensation rules unless it has confirmed otherwise. Because some employers would

not be able to pay for major employee injuries, workers' compensation laws also mandate that all employers carry insurance to cover injury claims. Therefore, most employers purchase workers' compensation insurance from an insurance provider. Illinois makes two exceptions to the requirement to purchase private insurance. First, certain companies may be able to "self insure" against workers' compensation if they are granted permission from the Illinois Workers' Compensation Commission. An NFP should consult its attorney if interested in exploring this option. Second, companies that cannot find a private insurance provider may enroll in a special plan designated by the Illinois Workers' Compensation Commission.

For more information on the Illinois Workers' Compensations statute, you can consult www.state.il.us/agency/IIC/handbook020106.pdf.

C. Unemployment Insurance

Unemployment insurance is a type of insurance where employers pay premiums so that employees who lose their jobs will receive benefits. Like the workers' compensation law, Illinois law requires employers to insure for unemployment. Illinois laws also require all Illinois employers to register with Illinois Department of Employment Security (IDES). Usually, an NFP should have done this when it was formed. To pay for Illinois unemployment insurance, Illinois employers generally pay contributions to a state unemployment pool administered by IDES. However, an NFP employer has the option to pay IDES for the unemployment benefits actually owed to its own employees who become unemployed rather than making regular contributions into the pool. If an employer that is an NFP elects this option, it must notify IDES on Form UI-5NP – Reimbursement in Lieu of Paying Contributions. Whether an NFP acting as an employer pays into the pool or elects to reimburse IDES for actual claims paid, it must file quarterly wage reports with IDES within one month of the close of each quarter using Form UI-3/40 – Employer's Contribution and Wage Report. If the employer has not opted out of paying regular contributions, the payment for any contributions owed to IDES is due at the time of filing Form UI-3/40. Employers who choose not to pay into the pool may want to purchase private insurance to help cover the costs of paying for employees to whom benefits may be owed in the future. Such insurance is generally available from several commercial insurance providers.

The documentation and filing requirements of the Illinois Department of Employment Security (IDES) can be found at: www.ides.state.il.us/employer/uitax.asp.

D. Mandatory Workplace Posters

Various federal and Illinois employment laws require employers to post notices and other posters in the workplace describing certain laws and informing workers of their rights. For example, employers are required to post posters informing workers of the minimum wage rates and the laws prohibiting child labor. Some of these laws may

require the posters to be hung in a specific manner or a specific location. Additional information and a full list of all posters required under federal and Illinois laws, as well as links to obtain or print copies of the posters, can be found at the Illinois Department of Labor website: www.state.il.us/agency/idol/Posters/poster.htm.

VIII. CONCLUSION

This overview of employment issues only introduces some of the most common and most important issues related to employees. As demonstrated in this guide, NFPs and their boards of directors are affected by many different employment laws that are complicated and change often. Understanding how workers can be classified, setting policies related to managing employees and complying with filing requirements related to employees can be complicated. **Furthermore, failure by the NFP to comply with certain employment laws, such as the laws requiring employers to withhold taxes from employee wages, can result in personal liability for directors.** For more information you should seek the advice of legal counsel or a professional who is familiar with employment laws and regulations.

IX. SUMMARY TABLE OF EMPLOYER FILINGS AND REGULAR RESPONSIBILITIES

| Document | Filing Time/ Frequency/Agency | Purpose |
|---|--|---|
| UI-3/40—Employer’s Contribution and Wage Report | Filed quarterly with IL Department of Employment Security within a month after the end of each calendar quarter. | Reports wages paid in each quarter and contributions owed to the IL Department of Employment Security. |
| UI-5NP— Reimbursement in Lieu of Paying Contributions | Optional filing with the IL Department of Employment Security. | Informs the IL Department of Employment Security of an election to reimburse actual unemployment claims instead of contributing to unemployment pool. |
| I-9—Employment Eligibility Verification | Filed with U.S. Department of Homeland Security at the time of hiring an employee. | Verifies an employee’s worker status. |
| IL Department of Employment Security New Hire Form | Filed with the IL Department of Employment Security (IDES) within 20 days of commencement of employment. | Informs IDES that a new employee was hired. |

X. RESOURCES GUIDE

- “I Am an Employer... How do I... Complete Form I-9, Employment Verification” - U.S. Citizenship and Immigration Services. Available at: www.uscis.gov/files/article/E3_english.pdf
- “Employer’s Tax Guide: Publication 15, Circular E” - Internal Revenue Service. Available at: www.irs.gov/publications/p15/index.html
- “The Fair Labor Standards Act - Compliance Assistance Materials” - United States Department of Labor. Available at: www.dol.gov/compliance/laws/comp-flsa.htm
- “Do I have to comply with the Fair Labor Standards Act?” - United States Department of Labor. Available at: www.dol.gov/elaws/esa/flsa/scope/screen24.asp
- “New Employer Packet” - Illinois Department of Employment Security. Available at: www.ides.state.il.us/pdf/employers/new_employer_packet.pdf
- “Fast Facts for Employers” - Illinois Department of Employment Security. Available at: www.ides.state.il.us/pdf/employers/FastFacts.pdf

The following government organizations and departments may also be able to provide more information about their rules and requirements:

| | |
|--|---|
| ILLINOIS DEPARTMENT OF REVENUE www.revenue.state.il.us | |
| Department of Revenue Income Tax Division 101 W. Jefferson Springfield, IL 62708 800-732-8866 | Department of Revenue Income Tax Division 100 W. Randolph Chicago, IL 60601 800-732-8866 |
| Department of Revenue Sales Tax Division 101 W. Jefferson Springfield, IL 62708 800-732-8866 | Department of Revenue Sales Tax Division 100 W. Randolph Chicago, IL 60601 800-732-8866 |
| U.S. INTERNAL REVENUE SERVICE (Street addresses for form pick-up only) http://www.irs.ustreas.gov/proc/ | |
| Internal Revenue Service 320 W. Washington, Rm. 611 Springfield, IL 62703 | Internal Revenue Service 230 S. Dearborn Chicago, IL 60609 Attn: Forms Services 800-829-3676 |
| ILLINOIS DEPARTMENT OF LABOR http://www.state.il.us/agency/idol/index.htm | |
| 1 W. Old State Capitol Plaza Room 300 Springfield, IL 62701 Phone: 217-782-6206 Fax: 217-782-0596 | 160 N. LaSalle Street Suite C-1300 Chicago, IL 60601 Phone: 312-793-2800 Fax: 312-793-5257 |
| ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY http://www.ides.state.il.us/employer/default.asp | |
| IDES Administrative Offices 850 East Madison Street Springfield, IL 62702-5603 800-247-4987 | IDES Administrative Offices 33 South State Street Chicago, IL 60603 312-793-1900 |
| ILLINOIS WORKERS' COMPENSATION COMMISSION http://www.state.il.us/AGENCY/IIC/insurance.htm | |
| 4500 S. Sixth St. Frontage Road Springfield, IL 62703 217-785-7087 | 100 W. Randolph St. #8-200 Chicago, IL 60601 312-814-6611 |

The following resources are available directly from the Community Law Project and may be downloaded at www.clccrul.org/community-law-project (unless otherwise noted below):

- *Tax Issues for Exempt Organizations, A Primer*, By Paula Cozzi Goedert, Barnes & Thornburg, LLP 30pp. An introduction to the topics of “related” and “unrelated” business income. (Only available by mail. You will be asked to pay postage costs for orders requiring extra postage.)
- *Introduction to Board of Directors Meetings for Emerging Not-for-Profit Illinois Corporations*. 45pp. A guide with information to help directors run their meetings and take care of the corporation’s business in an efficient and productive manner. 2007
- *Sales Tax Exemption for Illinois Not-for-Profit Organizations*. April 2006
- *Maybe It’s Time to Incorporate: Various Issues for Community Groups to Consider Before Consulting an Attorney*. 28pp. February 2007
- *How Do I Create a Non-Profit Corporation? A Step-by-step guide to obtaining recognition of income tax exemption*. Updated 2007
- *Is NPO the Way to Go? Explore the differences between a not-for-profit and a for-profit*. 2005
- *FAQ on Fiscal Sponsorship*. Information about partnering with an existing tax-exempt organization before obtaining tax exemption. 2007
- *Not For Profit Corporations: Understanding Board Composition*. Who the players are in a nonprofit organization. 2007
- *Bylaws Fact Sheet*. The purpose of bylaws. 2007
- *Obtaining 501(c)(3) Status for Economic Development Organizations: A Guide for Attorneys*. November 2008