New California Employment Laws That May Impact Nonprofits

PLUS: Upcoming Seminars, Board Member Liability & Whistleblower Policy

Employment Law Update 2016

California has recently adopted a number of new laws that may substantially impact nonprofit employers. Below is an overview of some of the most important new laws:

**Discrimination and Retaliation Protections**

*Senate Bill 358* revises and strengthens existing protections for "equal pay."

Existing law prohibits employers from paying an employee a wage rate less than the rate paid to the opposite sex "within the same establishment" for "equal work." SB 358 eliminates the "within the same establishment" requirement and replaces "equal work" to "substantially similar work," based on each employee's composite level of skill, effort, and responsibility, which are performed under similar working conditions. (Cal. Labor Code § 1197.5(a)). SB 358 also places a greater burden on an employer to defend a wage discrimination claim by affirmatively showing that the wage differential is not based on or derived from a sex-based differential, is related to the job at issue, and is consistent with a business necessity. (Cal. Labor Code § 1197.5(a)(1)(D)). The law strengthens anti-retaliation provisions of state law and includes a private right of action for employees. (Cal. Labor Code § 1197.5(g); (j)). Additionally, the law increases the duration of employer's record-keeping requirements from two years to three years. (Cal. Labor Code § 1197.5(d)).

*Assembly Bill 1509* expands protections offered under state law for employee whistleblowing and work condition-related complaints by prohibiting an employer from taking any retaliatory action against employees who are also family...
members of the complainant-employee.

**Time-Off Protections**

Assembly Bill 304 clarifies that employees covered under the mandatory sick leave law must work for the same employer for 30 days or more within a year in order to qualify for sick leave. AB 304 also provides flexibility to an employer in measuring sick day accrual as long as employees are given a minimum of 24 hours (three days) of paid sick leave by the 120th day of employment. Once the 120th day minimum is achieved, employers can limit accrued paid sick leave to the 24 hours (three days) for each 12 month period of employment. If an employee is terminated without a sick leave payout, and then re-hired within one year, the employee's unused paid sick leave must be reinstated. Employers must also provide notice of paid sick leave or paid time off available. The mandatory sick leave law, amended by AB 304, was discussed in our December 2014 newsletter.

Senate Bill 579 increases the reasons for which employees can take job-protected paid time off to care for themselves or family members. Employees may now also take one-half of their paid time off for purposes of diagnosis, care, treatment, or prevention of health conditions for themselves or family members. SB 579 also expands the meaning of “family members” to include stepparents, foster parents, or any individuals standing in loco parentis to a child. Employers may not discriminate or discharge employees for taking paid time off for these reasons and should update their policies to ensure consistency with this law.

**Other Protections**

Senate Bill 623 amends workers compensation regulations to allow employees, regardless of their citizenship or immigration status, to apply to receive funds from the Uninsured Employers Fund of the Subsequent Injuries Benefits Trust Fund in the event that their employers fail to compensate them for injuries sustained during the course of employment. Prior to SB 623, undocumented employees were prohibited from applying to receive benefits from these funds.

Assembly Bill 1245 will require employers with 10 or more employees to electronically file the mandatory report of their contributions, quarterly returns, reports of wages paid, and to electronically remit contributions for unemployment insurance premiums. These employers will no longer be allowed to submit hard copies of these reports and a $50 penalty will be imposed on employers that fail to electronically file the reports or electronically submit insurance contributions.

To learn more about these new laws, and a general overview of employment law issues relevant to nonprofits, please attend our February 3, 2016 training held in conjunction with Boston Private from 8:30 to 10:30 am at Public Counsel’s office located at 610 S. Ardmore Avenue, Los Angeles, CA 90005.
Seminar attendees will be eligible to participate in a FREE “Ask a Lawyer” Employment Law Clinic (date TBA at the seminar), where they will be able to speak with an attorney to discuss specific questions related to employment law. **Advance registration is required.** For more information and to register for the seminar, please visit our website.

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**Board Liability: Can It Happen To You?**
(Yes, it can!)
**Part 1**

In general, board members of nonprofit organizations are shielded from personal liability for the debts or acts of the nonprofit. For example, if someone were to successfully sue a nonprofit after slipping and falling at an event hosted by the nonprofit, the nonprofit itself, rather than individual board members, would be liable for damages. Even to the extent the nonprofit's general liability insurance didn't cover this liability - and the nonprofit didn't have funds to pay damages - board members would generally not be held personally responsible. There are, of course, exceptions to this rule. A board member will not be able to avoid liability if, for example, she engaged in intentional fraud. Moreover, there are other circumstances where federal and California law imposes liability on board members, even in the absence of intentional wrongdoing. In this newsletter, we discuss two circumstances under which personal liability can attach:

**Failure to Pay Payroll Taxes**

Like for-profit employers, nonprofits are required to pay over to the government income and FICA taxes (i.e., Social Security and Medicare) that have been withheld from their employees. The law specifically forbids an employer from using these withheld funds to cover operational expenses - if a nonprofit is struggling financially, it may not use the withheld taxes to keep it afloat with the hope that it can make up the difference the following month. If a nonprofit fails to account for or to pay over the payroll taxes, officers, employees, and board members who are responsible for collecting, accounting for, or paying over payroll taxes may be held personally responsible and will be required to pay the amount owed to the IRS. It is even possible for a board member to face jail time!

Fortunately, the IRS has recently launched a new initiative (the “Early Interaction Initiative”) to identify employers who have fallen behind on payroll taxes and help them get caught up on their payment and reporting responsibilities. Under the Early Interaction Initiative, the IRS will communicate with employers about late tax payments before an employment tax return is filed, allowing employers an opportunity to come into compliance before a penalty is assessed. More information on payroll taxes and the Early Interaction Initiative can be found [here](#).

Although the Early Interaction Initiative may prevent some nonprofit organizations from getting into trouble for failing to pay over payroll taxes, board members, particularly those who have assumed responsibilities related to financial oversight, must still actively ensure that the nonprofit has remitted

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"Employment Law Must-Knows 2016"
- Feb. 3, 2016

On Wednesday February 3, 2016 from 8:30 to 10:30 am, join employment law attorneys Jacqueline Cookerly Aguilera and Mae Kieng Hau of Morgan, Lewis & Bockius LLP for a free seminar, "Employment Law Must-Knows 2016," sponsored by Boston Private.

The seminar will cover key guidelines that California employees must know in order to safeguard their organizations.

Covered topics include:

- Hiring practices
- Classification of workers
- Leaves of absence
- Discrimination
- Termination Practices
- Wage and Hour Practices
- Arbitration Agreements
- National Labor Relations Board
- Immigration
payroll taxes to the federal government on time. Board members should carefully read financial documents and ask questions of the administrative and executive staff if there is any doubt as to whether these taxes have been paid.

**Distributing or Expending Assets While Nonprofit's Attorney General Registration is Suspended or Revoked**

Most nonprofit organizations holding assets for charitable purposes in California must register with the California Attorney General's Registry of Charitable Trusts by filing Form CT-1 within 30 days of first receiving any property or assets. For every year after initial registration, such a nonprofit must file a financial and activity update report, Form RRF-1, along with a copy of its federal 990 return and pay the appropriate fee. If a nonprofit's registration with the Attorney General has been suspended or revoked, it may not distribute or expend any assets without written approval by the Attorney General. Under newly effective regulations, a board member of a suspended or revoked organization may be held personally liable if he or she is involved in distributing or expending charitable assets of an organization whose registration has been suspended or revoked.

The Attorney General is permitted to suspend or revoke the registration of a nonprofit organization for a number of reasons, such as misuse of charitable assets, false or misleading statements in connection with a solicitation, or false or misleading statements in a governmental filing (such as the federal 990 return or the California 199 annual return). In addition, a nonprofit's registration with the Attorney General is subject to automatic suspension in a number of circumstances, including:

- Suspension or revocation of tax exempt status by the IRS or Franchise Tax Board;
- Failure to file the RRF-1 together with a copy of the Form 990 for three consecutive years; and
- Suspension or revocation of corporate status by the California Secretary of State

Prior to suspending an organization, the Attorney General must mail a notice to the registrant identifying the reason for suspension and providing information about what is needed to resolve the suspension. If the Attorney General does not receive the information within 30 days, the organization will be suspended.

It is therefore important for a nonprofit organization to maintain good standing with all the agencies that regulate its activity - Attorney General, IRS, Franchise Tax Board, and Secretary of State - and to make sure that the relevant agencies have the nonprofit's most recent address on file. For example, if a nonprofit fails to file its Statement of Information with the California Secretary of State, its corporate status may be suspended with the Secretary of State. Under Attorney General regulations, it may also be subject to automatic suspension by the Attorney General. If the nonprofit has not informed the Attorney General of its most recent address, it may not receive the notice of suspension and it will be unable to take the steps necessary to prevent suspension. Board members may then potentially face personal liability if the organization continues to operate and expend funds when its registration has been suspended. A nonprofit can avoid this outcome by ensuring that it is properly registered and is compliant with all legal requirements.

Seminar attendees will be eligible to participate in a FREE "Ask a Lawyer" Employment Law Clinic (date TBA at the seminar), where they will be able to speak with an attorney to discuss specific questions related to employment law.

**Advance registration is required. For more information and to register for the seminar, please visit our website.**

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**CDP eNewsletter Archive**

Have you recently joined our mailing list and feel like you’ve been missing out on great information? If so, we have good news! Previous issues of the CDP eNewsletter are available on our website.

**Legal Services for Nonprofits**

The Community Development Project builds strong foundations for healthy, vibrant and economically stable communities by providing comprehensive legal and capacity building services to organizations serving people with lower-incomes in the Los Angeles area. CDP provides assistance on a wide range of matters to community organizations, including:

**Contract & Lease Negotiation**

Does your nonprofit need to terminate or renegotiate contractual or lease obligations? Do you know
reporting requirements.

A nonprofit may confirm its good standing on the website of the regulating agencies as follows:

- **California Attorney**
  **General**: [http://rct.doj.ca.gov/Verification/Web/Search.aspx?facility=Y%20](http://rct.doj.ca.gov/Verification/Web/Search.aspx?facility=Y%20). The status should be listed as "Current." Nonprofit can also confirm that address is correct.

- **California Secretary of State**: [http://kepler.sos.ca.gov](http://kepler.sos.ca.gov). Status should be listed as "Active." Nonprofit can also confirm that address is correct.


- **California Franchise Tax Board**: [https://www.ftb.ca.gov/businesses/Exempt_organizations/Entity_list.shtml](https://www.ftb.ca.gov/businesses/Exempt_organizations/Entity_list.shtml)

Stay tuned for our next newsletter, in which we will cover another circumstance under which board members may find themselves on the hook - approving excess benefit transactions.

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### Nuts and Bolts of Nonprofit Whistleblower Policies

**Why Do We Need a Whistleblower Policy?**

Nearly every week, the news covers a story of illegal and unethical activity on the part of nonprofit employees or board members - the CEO of a major poverty nonprofit receiving kickbacks from an insurance company, the board president of a cancer organization spending donations on family vacations, a teacher at an independent school sexually abusing students. On some occasions, individuals within the organization were aware of the activity and either failed to or were otherwise unable to stop it. In the most tragic examples, such as when abuse is involved, these failures can lead to devastating outcomes for the nonprofit, its clients, and the public.

In order to curb illegal or unethical activity and to protect itself from lawsuits, every nonprofit organization should have written policies and procedures that allow staff, volunteers, or clients to come forward with information on suspected wrongdoing within the organization without fear of retribution. An effective whistleblower policy gives management the opportunity to learn early on of unethical or unlawful practices directly from employees and allows management to respond swiftly in order to stop and remediate the wrongdoing, potentially protecting the nonprofit and its managers from legal liability. Early knowledge of wrongdoing also gives a nonprofit the opportunity to respond before the media is involved. A whistleblower policy can also increase transparency, empower employees, and create a work environment in which all employees are accountable.

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### Employment Advice

Is your nonprofit exploring reduction of employee benefits, salaries or hours? Do you know the criteria to use when downsizing staff? Are you attempting to reclassify employees as independent contractors? Are you aware of the legal implications of all of these actions?

### Corporate Governance

Is your board aware of its duties during a period of financial difficulty? Do your board members know how to conduct financial and programmatic oversight? Has your organization adopted a conflict of interest policy? Are your directors aware of the situations where they could incur personal liability for the acts of the corporation, and do you have appropriate controls and procedures in place to protect them?

### Debt Reorganization & Cash Flow

Does your nonprofit need to renegotiate debt repayment terms? Do you know what agreement terms you should pay special attention to if applying for or increasing a line of credit? Have any of your key vendors filed for bankruptcy?

### Fundraising & Social Enterprise

Is your nonprofit considering alternative fundraising methods

whether your nonprofit is legally permitted to sublet unused space?
Further, a whistleblower policy helps a nonprofit comply with the laws protecting whistleblowers. Under California law, an employer, including a nonprofit, may not prevent an employee from disclosing information regarding activity that is illegal or does not comply with regulations to a government agency, law enforcement agency, supervisor, or another employee who has the authority to investigate or correct the violation or incompliance. An employer may also not retaliate against an employee for making such a disclosure or refusing to participate in an activity that would result in a violation of the law. And, as of this year, an employer may also not retaliate against an employee because his or her family member has engaged in whistleblowing activity. Under the federal Sarbanes-Oxley Act, an employer may not retaliate against a whistleblower who provides truthful information to a law enforcement officer regarding the commission or possible commission of a federal offense.

A whistleblower policy creates a clear system for reporting violations and can be a useful tool for an organization defending against a whistleblower retaliation suit.

Last, though not required, whistleblower policies are strongly encouraged by the IRS. Since 2009, nonprofit, tax-exempt §501(c)(3) organizations that are required to file the Form 990 have been asked whether the organization became aware during the year of a material diversion of its assets and whether the organization has adopted a written whistleblower policy. The commentary to Form 990 states that the IRS "encourages the board of directors to adopt an effective policy for handling employee complaints and to establish procedures for employees to report in confidence any suspected financial impropriety or misuse of the charity's resources."

What Should the Policy Include?

A whistleblower policy should include the following components:

1) **Encourage reporting.** A whistleblower policy should encourage staff and volunteers to come forward with credible information regarding illegal practices or violations of adopted policies of the organization;

2) **Statement Protecting Against Retaliation.** The policy should clearly state that an employee or volunteer who reports a violation or cooperates with the investigation of a violation will not suffer any retaliation, harassment, or other adverse employment or volunteer consequences;

3) **Good Faith Requirement.** A whistleblower policy should include a requirement that anyone reporting a violation should act in good faith and with a reasonable belief that a violation of the law or policies has occurred. The policy may also provide that a report made maliciously or with knowledge that it was false may be grounds for disciplinary action;

4) **Reporting Process.** The policy should clearly describe the procedures that employees or volunteers follow in making a report, including identifying the staff, board members, or outside parties to whom information can be reported. Since an employee may not feel comfortable raising concerns directly with their supervisors, the policy should provide several options for employees to raise concerns, including anonymous reports;
5) **Role of Compliance Officer.** The individual who receives a report of a violation must notify the nonprofit’s compliance officer (or other individual appropriate to your organization). The compliance officer is responsible for investigating the violation and reporting to the Executive Director or Board of Directors, as needed. The compliance officer can be a board member, executive director, or other individual (including a third party);

6) **Confidentiality.** A whistleblower policy should assure confidentiality to the greatest extent possible, consistent with the need to conduct an adequate investigation, comply with applicable laws, and cooperate with law enforcement authorities.

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**Is That All There Is?**

Writing a strong whistleblower policy is only the first step. A nonprofit must make sure that the policy is being followed. Managers and board members should be trained on the reporting process and whistleblower protections. Board members and staff must know the name and contact information for the compliance officer. The nonprofit should also make sure that non-managers are aware of their rights and the individuals to whom they can report concerns. To that end, California law requires that all employers display a posting describing employees’ rights and responsibilities under the whistleblower laws. A sample posting can be found at the Department of Labor Standards and Enforcement [website](#). In the event a supervisor retaliates against an employee for whistleblowing, senior management and/or the board of directors must hold the supervisor accountable.

For a sample whistleblower policy, please see Public Counsel’s website [here](#).

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**Small Organizations - Read This!**

**Or, the risks of obtaining federal tax-exemption through the Form 1023-EZ**

Nonprofits, even small ones, must comply with a myriad of state and federal requirements in order to maintain their standing as tax-exempt corporations. It is easy for small nonprofits to go unnoticed or to slip under the radar by receiving tax-exemption through IRS Form 1023-EZ and then filing annual federal income tax returns using the Form 990-N, neither of which ask for much information. While Form 1023-EZ certainly makes it easier for smaller nonprofits to apply for and receive federal tax-exempt status, it has also resulted in many nonprofits not engaging in a thorough planning process before incorporating and applying for tax-exemption. In fact, many nonprofits who received tax-exemption through the Form 1023-EZ should not have qualified for such exemption in the first place.
According to the National Taxpayer Advocate's annual report to Congress, it was recently reported that the IRS improperly granted tax-exempt status to more than a third of nonprofits that used the Form 1023-EZ. In a study of 408 nonprofits across 20 states, the advocate's office discovered that 37 percent of applicants who used the Form 1023-EZ did not meet the organizational test required of nonprofits, one-third of applicants did not provide an acceptable purpose clause defining the organization's mission, and 23 percent did not document an acceptable distribution of assets if the organization were to dissolve.

Smaller nonprofits may be obtaining tax-exemption through the 1023-EZ process but still have serious deficiencies in their articles of incorporation and other qualifications to be an exempt organization such as their purpose, governance, activities, and methods for fundraising, etc. It is important to be aware of state and federal requirements imposed on nonprofit corporations because critical deficiencies in the organization's governance, purpose, activities, and fundraising could result in the nonprofit being audited by the IRS, which may result in fines or penalties, or loss of tax-exemption all together. The IRS has stated that in the 2016 fiscal year, it will begin auditing 1023 EZ-filers that have operated for a full year after receiving tax-exempt status.

If your organization used the Form 1023-EZ to obtain tax-exemption or you normally file the Form 990-N tax return, your board should educate itself on the state and federal requirements for tax-exempt corporations. Public Counsel is currently offering qualifying nonprofit organizations a free legal assessment on issues related to corporate and tax exemption compliance, fundraising activities, employment law, and intellectual property. A volunteer attorney will identify the issues that may affect the legal health of your organization and answer questions related to your organization's major contracts and leases. If you have questions, or are interested in scheduling an assessment, please feel free to call our intake line at (213) 385-2977, ext. 200, or email cdp@publiccounsel.org.