

## EMPLOYMENT LIABILITY

Your church should have adequate legal safeguards for your pastor, staff, support staff and volunteers.

Unfortunately, there is only limited number of employment situations in which an organization, operating as a religious institution, is protected by the First Amendment. Those situations include: terminating clergy, expressing concerns within a board meeting, or requiring certain employees to be of a specific faith. However, even in these cases, state employment laws may contain provisions that allow legal action to be brought.

Discrimination lawsuits have increased over 2,000 percent in the past twenty years, and religious institutions are not exempt. During the hiring process, most employers do not anticipate problems with the employee. Rather, issues tend to surface after the employment relationship begins. For example, what starts as a personality conflict or constructive criticism escalates quickly into a situation involving a disgruntled employee. This is especially true when the employee is dependent on the income or when confrontations have become emotionally charged.

### What Can We Do?

Bylaws should be in agreement with what is being done.

A comprehensive, **written** "job description," including physical and mental requirements, benefits and general guidelines should be furnished to each prospective employee and volunteer. The church should keep an initialed copy of it.

When the church uses a personnel handbook, it must be **kept up to date** and **in compliance** with current state and federal laws. Your attorney should review the handbook annually.

Consult with local counsel prior to making employment decisions to determine whether you are complying with federal and state laws.

Conduct annual performance reviews, document all disciplinary actions, maintain accurate records, and avoid emotional confrontations.

Be aware of the federal and state laws that affect your organization, regardless of the number of employees.

Provide factual information on a strict, need-to-know basis. Do not offer opinions. In addition, never reveal information to individuals who are not members of your staff or congregation.

Implement a sexual harassment policy that provides for zero tolerance of sexual harassment and educate your staff as to what constitutes sexual harassment.

Always consult an attorney prior to firing an employee.

### Developing an Employee Handbook

Begin by reviewing notes you have made, articles you have read, and information you've collected relating to employment issues.

Compile a list of your basic employment practices such as attendance, vacation policy, benefits, and work rules.

Review problems that may have arisen in each of these areas, then consider how a published policy could help avoid these pitfalls in the future.

Consider including an arbitration or Christian Conciliation provision that identifies how disputes that may arise will be handled.

Ask an attorney to review the final product for compliance with employment laws. Legal counsel will also be able to ensure that you did not omit legally necessary or desirable policies or that you did not inadvertently create an employment contract.

Do not include identifying information such as employee's race, color, sex, national origin, age, disability or marital status.

Record all changes in employee status such as promotions, leaves of absence and rates of pay.

Institute security procedures to protect employee privacy.

Release confidential information regarding employees only to those individuals who have a legitimate "need to know."

Maintain accurate attendance records documenting absences and tardiness.

Provide employees with copies of documents that affect their status.

Include disclaimers stating that the handbook does not constitute a contract, that employment is at-will, and that the handbook may be changed at any time at the church's sole discretion.

Obtain signed acknowledgments from all employees that they have read and received a copy of the handbook.

## **How to Protect Against Employment Claims**

Seek legal counsel.

Maintain detailed personnel records. It is suggested that two (2) personnel files be maintained on all employees as follows:

**File A — Supervised access to employee** — containing application, job description, Form I-9, Form W-4 and all written reports such as job evaluations, etc.

**File B — Confidential file with no employee access** — containing all reference reports, etc.

Maintain confidentiality.

Apply policies consistently.

Ensure policies and procedures are updated annually.

Purchase Employment Practices Liability Coverage.

## **What to Do if an Employment Claim Arises**

Call your attorney. If you do not have an attorney call the Kansas-Nebraska Convention of Southern Baptists.

Call your insurance agent

Review your records.

Document the situation. The **Application for Position, the Applicant's Statement and Release and the Reference Contact forms** (Illustrations D, E and F) should be current and in compliance with state and federal laws.

Title VII of the Civil Rights Act of 2064, prohibits discrimination on basis of race, sex, religion, color and national origin. It applies to employers **engaged in industry affecting commerce**, with 15 or more employees. The court has **never addressed the issue** of whether a church affects commerce; however, the courts tend to give commerce a broad meaning in civil rights cases (telephone and mail).

Because of the First Amendment, courts have not interfered in the relationship between a church and its clergy, and churches and religious organizations are **permitted to discriminate on the basis of religion**.

Also, there are other laws dealing with discrimination against disabled persons or veterans. These laws will relate, but are not limited, to the following:

- Recruitment
- Testing and employment requirements
- Checking references
- Promotion policies
- Sexual harassment
- Termination
- Giving references

Churches should use the **utmost integrity** in giving references. Neutral reference policies are increasingly popular for employers who want to avoid defamation lawsuits. On the other hand, they present an obstacle for employers checking references of job applicants. Your church needs some **guidelines** about giving references, and it also needs a **strategy** for checking them. See Illustrations E and F.

## Americans with Disabilities Act

The Americans with Disabilities Act protects qualified individuals with disabilities from employment discrimination. This act expressly prohibits asking a prospective employee about any disability. A person has a disability if he/she has a physical or mental impairment that substantially limits a major life activity. (Major life activity is defined as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, learning, breathing and working.)

An employer simply cannot discriminate merely on the basis of disability. An employer still has the right to employ the **best-qualified person**. However, if a disabled person is not hired and brings a lawsuit, the **defendant must prove** the nondisabled person who was hired was **better qualified** and the decision was **not based on disability**.

Churches are **not yet bound** to abide by the public accommodation portion of the Americans with Disabilities Act.

## Employment and Termination of Certain Groups

Be aware of state and federal statutes concerning employment and termination of certain protected groups — based on race, color, sex, age, national origin, ancestry, disability and marital status. Some disability and discrimination laws do apply to churches with four or more employees — see state statutes.

Each church should review its screening, interviewing and reference checking process including the following:

- **Review** complaint handling procedures
- **Review** disciplinary procedures
- **Review** termination procedures

Churches must provide a safe working environment for its employees and volunteers. Specific **plans must be in effect for major catastrophes** — such as evacuation plans in case of fire, and getting to a shelter in case of a tornado, etc. These same plans must be in effect during church meetings. Church members and staff should be aware of evacuation and shelter plans, and such plans should be posted.

### **Guidelines for Employing Teenagers**

Under guidelines provided by the U.S. Department of Labor, youths 14 and 15 years old may work outside of school hours in non-hazardous jobs from 7:00 a.m. until 7:00 p.m.

- 3 hours on a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours on a non-school week

Deductions should be made for Medicare, Social Security, federal and state income taxes.

There are certain hazardous jobs as determined by the Secretary of Labor that are out of bounds for 14 and 15 year olds such as

- Power driven mowers and cutters
- Construction including repairs
- Any work requiring the use of scaffolding and ladders
- Cooking and baking

Any teenager under 18 should be prohibited from the use of power-driven equipment such as:

- Wood-working machines
- Hoisting equipment
- Circular saws
- Band saws

### **New Hire Requirements**

Amendments to the Personal Responsibility and Work Opportunity Reconciliation Act enacted new regulations for employers regarding new employees. Each state will establish an automated directory that will contain information supplied by employers on each newly hired employee. All employers, including churches, must report particular information on all newly hired and recalled workers. Religious organizations are not exempt from the act. Such report shall contain:

- Federal Identification Number of the Church
- Name
- Address
- Social Security Number

Some states require the employee's date of hire and whether they are newly hired or recalled to work. The "date of hire" is considered to be the first day that services are performed for wages by an individual.

The act requires that New Hires be reported within twenty (20) days of the date of hire. However, states are given the option to establish reporting time frames that may be shorter than twenty (20) days.

States are given the option to impose penalties on employees for noncompliance.