

# WHAT NOT-FOR-PROFITS SHOULD KNOW ABOUT EMPLOYMENT LAW

What you don't know, may be held against you ...

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# SURPRISE NO. 1



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## **SURPRISE NO. 1**

- The New Jersey Law Against Discrimination
  - Applies to all employers in the State who have at least one employee
  - Does NOT exempt not-for-profit organizations
  - NFPs are held to the same standards as for profit organizations
    - Even though they have less resources
    - Even though they have reduced admin budget to help with compliance issues

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# LAW AGAINST DISCRIMINATION BASICS

- What does it say?
  - Cannot discriminate in the terms and conditions of employment
    - Hiring
    - Promotions
    - Pay practices
    - Discipline
    - Benefits
  - On the basis of any protected characteristic or perceived protective characteristic
  - Cannot subject an employee to “harassment” on the basis of a protected characteristic

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## PROTECTED CHARACTERISTICS

- Race or color
- Religion
- National Origin, Nationality, Ancestry
- Age
- Sex – includes pregnancy and sexual harassment
- Marital status, domestic partnership, civil union status
- Affectional or sexual orientation
- Gender identity or expression
- Atypical heredity cellular or blood trait, genetic information
- Liability for military service
- Physical or mental disability

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## **SPECIAL NOTE: SEXUAL HARASSMENT**

- Unwelcome sexual advances
- Requests for sexual favors
- Verbal or physical conduct of a sexual nature
- Two Types of Sexual Harassment:
  - Quid Pro Quo
  - Hostile Work Environment

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## QUID PRO QUO

- When the employer OR its agent
- Expressly or impliedly attempts to make submission to sexual demand as a condition of employment
  - Employee believes she/he must tolerate sexual advances or engage in a sexual relationship to:
    - Get hired
    - Remain employed
    - Receive promotions
    - Get better compensation
  - Unlawful to condition more favorable treatment
    - Promotions
    - More favorable assignments
    - Availability of OT

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## HOSTILE ENVIRONMENT

- Employee is subjected to sexual, abusive, or offensive conduct
- Because of his/her gender
- If conduct is severe or pervasive
- And creates an environment that a reasonable person of the same gender would believe is altered and has become hostile or abusive
- Conduct does not have to be sexual in nature or involve physical contact
- Example:
  - Woman is subject to taunts because of her gender
  - Sexual stereotypes
  - Graphic displays of pictures
  - Jokes
- Same conduct if based on a protected characteristic – also unlawful

# HYPOTHETICALS

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## **HYPO #1 – GOOD NATURED RIBBING?**

Facts: Our NFP is a fun place to work. We are like a family with good natured teasing and lots of laughter.

Guys in the office make fun of Neal because he is an administrative assistant to the Executive Director. Neal answers the phone, handles his boss's correspondence, runs errands, schedules her appointments, and makes her copies and scans. The guys tease him that he is doing "woman's work" and this conduct happens almost every day. Neal puts up with this for awhile but one day in the office he blows up and tells the guys to "go f\*\*\* themselves." One of the guys complains to you.

You meet with Neal to discuss his use of profanity in the workplace. You are ready to write him up and he talks tells you about the teasing.

Now what?

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## **HYPO # 2 – THE INTERVIEW**

Facts: Our NFP is a fun place to work. We are like a family and everyone tends to stay with our organization for a long time. A recent retirement has prompted you to interview to fill the position of fundraising development. You want to make sure you hire the “right” person for the culture and who will be with you for long time. There is considerable training that is involved and it will take awhile for the new employee to get up to speed.

You meet with Mary. She is well credentialed and looks like she would be a great fit for the position. But you are concerned. She is 28 and has an engagement ring on her finger. You are concerned that she will not be focused on her job because she is getting married. You are also concerned that she will soon become pregnant and take off months, or worse, will not return after she has the baby.

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## **HYPO # 2 – THE INTERVIEW (CONT.)**

Can you ask her about her plans?

- Wedding plans
- Honeymoon plans
- Pregnancy
- How she feels about being a working mom and the whole work – life balance?

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## KEYS FOR HIRING AND PROMOTION

- Prohibited Questions
  - You cannot ask about any protected characteristics
  - This includes age, race, marital status, religion or disability
  - Do not ask: “What year did you graduate?”
    - This may be an unlawful reference to age
  - Do not ask: “How old are you?” “What is your date of birth?”
  - Do not ask: “What organizations do you belong to?”
  - What holidays do you celebrate?
    - This may be an unlawful reference to race or religion
  - Do not ask: “What is the state of your health”
    - This may be an unlawful reference to disability
  - Do not ask: “Are you single or married?” “Children?” “Plans for children?”



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## A WORD ABOUT RETALIATION

- The LAD has an anti-retaliation provision
- What does this mean?
- If an employee engages in protected activity, an employer may not retaliate against that employee because he/she engaged in that activity
- Three components:
  - Protected activity – making a claim, filing a lawsuit, participating in an internal or external investigation, threatening to make a claim
  - Material adverse employment action – bad review, demotion, failure to promote, discipline, termination
  - Causal connection – “but for” the employee engaging in protected activity, the adverse action would not have occurred
- Defenses:
  - Didn’t know about the protected activity
  - Legitimate reason for the action

# HYPOTHETICALS

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## **HYPO # 3 – I DIDN'T GET A RAISE BECAUSE...**

Facts: Our NFP is a fun place to work. We are like a family with good natured teasing and lots of laughter. Some of the younger employees like to talk about their “fun” weekends and “hookups.” Some of the conversations can be graphic and the jokes off color.

Jenny pulls you aside one day and says she is uncomfortable. She overhears this banter, and since its an open area with cubicles, if she wants to get her work done, she has no choice but to stay put and be forced to hear the “lewdness.” You tell her you will get to the bottom of this. The co-workers confirm that they have these conversations and were unaware that Jenny even heard the conversations or was offended. They agree to stop having the conversations. Things improve.

But, on the next review, Jenny is told her job performance isn't meeting expectations and that her pay will be lowered by 15%. Jenny thinks it is in retaliation because she complained.

What do you think?

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## TIPS ON ESTABLISHING DEFENSES

Facts: Jenny was struggling in her position for months before she complained. She missed deadlines, handed in incomplete or wrong work, you had to re-do her work or reassign her work.

Will this help defeat her claim for retaliation? Aren't these legitimate reasons for the action?

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## BEST PRACTICES

- Did Jenny know about the performance issues?
- Did you document the performance issues?
  - In writing?
  - Reviews? Are they consistent with the problems you are describing?
- Did you follow the discipline process in the handbook? Do you have a handbook?
- Did you try a PIP (performance improvement plan)?
- Did you suggest additional training for Jenny so that she could bring her performance up?
- Are you holding Jenny to the same performance standards as her peers, or are you being more critical because:
  - Her gender
  - Her age
  - She complained

# SURPRISE NO. 2



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## SURPRISE NO. 2 – “BAN THE BOX”

- New Jersey enacted legislation that precludes a prospective employer from inquiring about criminal background at the preliminary stage of the employment process
  - On the employment application
  - During screening telephone call
  - During the first interview
- Only after the prospect has gone through the initial stage, and you have decided he/she is a viable candidate can you inquire about criminal background
- You can advise candidate that background check, including criminal background check is required for all employment candidate
- If you are doing this advising, make sure you advise everyone the same thing



*Have you  
ever been  
convicted?*

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## BEST PRACTICES

- Is your employment application up to date?
- Have you coached anyone who interviews about the new law?
- Are your policies and handbook up to date on this?
- Is there a special law that requires the candidate to be free of a criminal background?
  - If so, there may be an exemption to ban the box

# SURPRISE NO. 3



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## SURPRISE NO. 3 – MY INDEPENDENT CONTRACTOR IS AN EMPLOYEE

- Many NFPs use temporary workers, or project workers, and consider them to be independent contractors
- Misclassification of an employee as an independent contractor is an area that both the IRS and the state or federal Department of Labor enforce
- The “totality” of the working relationship must be considered
  - Does the NFP have the right to control the result of the work **BUT NOT** how the work is done – the nature and degree of control is important
  - Is the work performed an integral part of your business
  - An independent contractor bears some risk of loss and has investment in the business – such as own equipment or resources
  - Does the independent contractor have other clients and sources of income outside of your business

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## CONSEQUENCES OF MISCLASSIFICATION

- If the worker is really an employee – can be subject to payment of taxes and penalties
- Liability for social security, disability, and other employer contributions
- Can be responsible for not providing benefits



# SURPRISE NO. 4



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## **SURPRISE NO. 4 – MY “VOLUNTEER” OR “INTERN” SHOULD HAVE BEEN PAID**

- Many NFPs depend on volunteers or interns
- Volunteers
  - It must be clear that the “volunteer” has no expectation of compensation
  - The volunteer cannot receive compensation: watch gifts!
- Interns in NJ
  - Must be part of a school to work program in NJ
  - Must be 16 years old
  - Collaboration between the school and the worksite
  - Productive work is incidental to learning objectives
  - Supervision by school and workplace mentor
  - Unpaid work is of limited duration and no guarantee of employment
  - Student worker does not displace a paid employee

# SURPRISE NO. 5



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## **SURPRISE NO. 5 – ISN'T EVERYONE WHO WORKS IN THE OFFICE ON SALARY?**

- New Jersey's Wage and Hour Laws apply equally to for profit and NFP employers
- If an employee is non-exempt, the employer must pay OT pay for hours in excess of 40 per week
- Misclassification of exempt and non-exempt is common to both FP and NFP employers
- Exempt Categories
  - Bona fide executive
  - Administrative
  - Professional
  - Computer professional
    - Computer systems analyst, engineer, programmer
  - Outside sales
    - Making sales or obtaining orders or contracts for services or facilities use
      - away from the employer's place of business

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## **EXECUTIVE EXCEPTION: REQUIREMENTS**

- Salary requirement (current \$455/wk)
- Be compensated on salary basis
- Primary duty of managing the company or a customarily recognized department or subdivision
- Customarily and regularly direct two or more FT employees
- Possess the ability to hire, fire, promote, demote, discipline, or change an employee's status

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## ADMINISTRATIVE EXEMPTION: REQUIREMENTS

- Minimum salary of \$455/wk and compensated on salary or fee basis
- Primary duty of performing office work of a non-manual nature related to the management or general business operations of the employer or employer's customers
- As a PRIMARY duty must exercise discretion and independent judgment for matters of significance. For example:
  - The employee formulates, affects, interprets, or implements management policies or operating practices
  - The employee carries out major assignments in conducting the operations of the company
  - Performs work that impacts operations or a business segment to a substantial degree
  - Ability to commit the employer financially to a significant degree
  - Can waiver or deviate from standard policies and protocols
  - Engages in planning long-term or short-term objectives
  - Represents the company in handling complaints, disputes, grievances

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## THE PROFESSIONAL EXEMPTION: REQUIREMENTS

- Creative Professional
  - Salary of \$455/wk and paid on salary or fee basis
  - As primary duty, performs work of invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- Learned Professional
  - Salary of \$455/wk and paid on salary or fee basis
  - As primary duty performs work that requires advanced knowledge of science, or leaning that is customarily acquired by prolonged course of specialized intellectual instruction
- Teaching Professional
  - Primary duty of teaching, tutoring, instructing or lecturing
  - In an educational establishment

# SURPRISE NO. 6



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## SURPRISE NO. 6 – PAID TIME OFF

- Under some circumstances an employee must be paid for time off
  - Policy that provides for this
  - Family Leave Insurance – if the employee qualifies
  - State disability leave
- Some cities and municipalities have enacted ordinances requiring employers that operate there to provide paid sick leave, the amount depends on the size of the employer
- Examples: Montclair, Trenton, Orange, Morristown
  - Public employees, union employees, public education employees are exempt from the law
  - NFPs are subject to the law



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## QUESTIONS?



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# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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