



HAHN AGENCY, INC.

NON-PROFIT LIABILITY EXPOSURES

A non-profit organization faces many liability exposures. These liability exposures can be broken down into different categories. These categories are defined really by the insurance coverage that responds to them. The main liability exposures to non-profit organizations are as follows:

toplist

General Liability Exposures	Slip & Fall.
Workers Compensation	Do you really need worker's compensation insurance?
Professional Liability	Some professional liability exposures may not be covered by Directors and Officers Insurance.
Employee Benefits Liability	Leave it to the Professionals
Fiduciary Liability	Be careful with that financial advice!
Auto Liability	Don't own a vehicle? You still have the exposure.
Directors & Officers Liability	The great unknown.

General Liability Exposures [top](#)

Known as premises liability or office liability coverage. These are the most commonly insured types of liability exposures. This coverage comes as part of a "package" providing building and contents coverage. The Insured Perils under General Liability are as follows:

	Means Bodily Injury, Sickness, or
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<p align="center">Bodily Injury</p>	<p>Disease sustained by any person which occurs during the policy period, including death at any time resulting there from.</p>
<p align="center">Property Damage</p>	<p>(1) physical injury to or destruction of tangible property which occurs during the policy period , including loss of use thereof at any time resulting there from.</p> <p>(2) loss of use tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.</p>
<p align="center">Personal Injury</p>	<p>Other than Bodily Injury arising out of one or more of the following offenses:</p> <p>False arrest, detention or imprisonment.</p> <p>Malicious prosecution.</p> <p>Wrongful entry or eviction.</p> <p>Oral or written libel and slander.</p> <p>Oral or written violation of privacy.</p>

Worker's Compensation Exposure and Coverage top

Worker's Compensation provides coverage in two parts. Part one is the statutory benefits for the injured employee. Part two is the "Employer's Liability" coverage.

You are required by law to pay certain benefits to employees injured on the job. In exchange for these guaranteed benefits, the employee gives up direct legal action against you for bodily injury liability. The employee, however, can take action against a third party, and that third party can then take legal action against you. This is where employer's liability coverage comes into play. Employer's Liability coverage is part of the worker's compensation policy and will respond to these "third party over" type claims. An example of this type of claim is as follows:

Employee is working at their desk, and the desk fails, falling on the employee and causing a compound fracture in the employee's leg. The employee collects his worker's compensation benefit. The injured employee then hires an attorney to sue the manufacturer of the desk. The desk manufacturer then sues the YOU since you used the desk for something other than its intended purpose. The employer's liability coverage will respond to this type of claim.

Worker's Compensation coverage is REQUIRED by law.

Please remember that you have NO defense in the event an employee is injured and you do not carry worker's compensation coverage. You WILL pay the statutory benefit to the injured employee. Bankruptcy is not an option. The personal assets of the directors and officers WILL be attached if there are no other assets. Directors and Officers coverage WILL NOT defend the D&O's and the organization if you fail to maintain workers compensation coverage.

Professional Liability [top](#)

Directors and Officers Insurance does indeed provide coverage for Professional Liability. However, there are two very important reasons why you should look at a separate policy for professional liability

1. Directors and Officers does not provide for Bodily Injury claims.

Certain organizations, such as clinics or counseling centers, may be sued due to bodily injury caused by the act or decisions by a professional at that non-profit organization. Directors and Officers coverage excludes coverage for claims of bodily injury. The general liability policy provides coverage for bodily injury claims, but excludes professional liability exposures altogether.

2. The directors and officers policy may specifically exclude coverage for certain business practices of a non-profit organization.

For example. Most directors and officer policies that our office has available provides coverage for Y2K. However, if your business is helping other non-profit organizations become Y2K compliant, than the directors and officers policy will specifically exclude that exposure.

Employee Benefits Liability Exposure and Coverage [top](#)

Employee Benefits Liability applies to errors made by the human resources individual in your organization responsible for administering the employees benefits. Liability arising from providing erroneous information concerning group health, COBRA, worker's compensation, and other employee benefits can be insured by purchasing an employee benefits liability policy. This coverage can be extended from your general liability coverage with some insurance companies. This coverage is NOT provided by directors and officers insurance.

Fiduciary Liability Exposure [top](#)

Fiduciary Liability arises when promised results are not met, or when you are accused of giving bad financial advice. Directors and officers coverage does pick up this exposure to a degree. You will NOT have any coverage if you recommend Pension investments to your employees. Pension fiduciary liability can be avoided by offering a range of financial choices and having your pension plan administered by a third party.

Auto Liability Exposure and Coverage [top](#)

Liability arising out of the ownership or use of an automobile. If you own vehicles, purchase the insurance. If you do not own vehicles, add hired and non-owned auto liability to your General Liability coverage. If you frequently rent vehicles, add hired physical damage coverage to your auto policy and avoid paying the rental car waiver fees.

Directors & Officers Liability Exposures & Coverages [top](#)

These exposures are so complex that they need their own web page. Please see [Directors and Officers Liability Exposures](#) which is part of the [Directors and Officer Insurance Section](#).

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HAHN AGENCY, INC.

WHY PROTECT DIRECTORS AND OFFICERS?

Why protect Directors and Officers at all? Between Immunity Statutes, personal insurance and waivers of liability, these board members should be adequately covered. Good point, let's look at the protection afforded by these devices along with what is NOT provided.

Also, let's look at the benefits of providing this important insurance protection to the directors and officers. toplist

Protection for Directors and Officers through their personal insurance or through volunteer Protection Statutes.

Protection for Directors and Officers through Transfer or Waiver of Liability.

Benefits to the Non-Profit Organization in protecting its Directors and Officers.

Protection for Directors and Officers through personal insurance or through volunteer protection statutes top

Q. Since actions of the directors and officers are personal, why do we, as a non-profit organization have to obtain coverage? After all, aren't the directors and officers immune from liability due to volunteer protection statutes? Even if they do not have immunity from legal action, their personal homeowner's liability coverage should protect them.

A. Personal Acts of directors and officers are not adequately covered by volunteer protection statutes and personal liability insurance:

Volunteer protection statutes are inadequate

To limit the liability of volunteer board members, many states have enacted volunteer protection statutes. Generally these State and Federal Statutes are inadequate since:

Does not apply to allegations of gross negligence or willful misconduct, a common allegation.

Does not apply to violations of federal statutes.

Coverage provided by personal homeowner's policies is inadequate.

Industry Standard HO-3 personal homeowner's policy.

Policy does not provide any coverage.

Expanded homeowner's policies, such as those written with Fireman's Fund and Chubb Insurance Group

*Personal Injury coverage provided for "business acts" with respect to serving on a non-profit board for no remuneration.
No Wrongful Acts coverage.*

Expanded homeowner's policy written with Royal Insurance.

Provides up to \$20,000.00 in Wrongful Acts coverage for being a volunteer in a non-profit organization. Employee benefits liability is NOT covered

Protection for Directors and Officers through Transfer or Waiver of Liability. [top](#)

Q Our by-laws have a provision which reads as follows:

SECTION 16. INDEMNIFICATION BY CORPORATION OF DIRECTORS AND OFFICERS

The directors and officers of the corporation shall be indemnified by the corporation to the fullest extent permissible under the laws of this state.

Doesn't this provide complete protection to the directors and officers?

A Yes and no.

- *Some liability exposures cannot be transferred by law, (exculpatory agreement).*
- *This provision in the by-laws does not protect other members of the non-profit .*
- *If liability is transferred to the organization, how will organization pay?*

As a non-profit organization you have funds earmarked for a charitable purpose along with funds for administrative expenses. There has never been an instance in Illinois were funds for charitable purposes have been allowed to be used for the defense of legal action taken against the organization. Are the costs going to come out of the administrative expenses?

Q. Can't we just eliminate our liability by having parties that do business with us sign waivers holding us harmless from all liability arising out of our actions?

A. A contractual provision purporting to relieve or "excuse" a party of liability for negligence is an exculpatory contract. Court rarely favor these disclaimers of liability. Courts will interpret them narrowly against the party attempting to limit its liability and often declare them illegal since they can go against public policy.

In other words, waivers are meaningless.

Benefits to the Non-Profit Organization in protecting its Directors and Officers. [top](#)

Brain Drain:

You want to attract the "best and the brightest" for their talents. Potential volunteers may be reluctant to join if not adequately protected for their actions as Directors and Officers

Social Responsibility:

A moral obligation to protect those that help and serve your organization.

Perpetuation and reputation of non-profit entity:

You do not want it to get around town that serving as a board member in your organization can result in a personal financial hit.

You want to make sure that you have the resources for competent legal representation to ensure that your non-profit organization can survive a lawsuit for alleged wrongful acts with its reputation intact.

Remember, these acts by the directors and officers have an effect on the non-profit organization. The organization, including its employees, trustees and volunteers should be a named insured on a directors and officer policy. Acts leading to a claim covered by a directors and officers policy can result from actions of all of the individuals of the organization, not just the directors and officers.

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HAHN AGENCY, INC.

DIRECTORS AND OFFICERS INSURANCE: HOW TO BUY SMART.

Remember, you have to carefully review each directors and officers insurance proposal along with the policy contract to make sure you are receiving adequate protection for your premium dollar. Let's analyze the expanded directors and officers liability policy available from Chubb Insurance. This expanded policy is called an Association Liability policy and expands the named insured to include the Organization along with employees, volunteers, trustees and the directors & officers.

Chubb offers an excellent product with excellent representation. Let's analyze the policy by breaking it down into its four main components: toplist

<u>Declarations</u>
<u>Insuring Agreement</u>
<u>Definitions</u>
<u>Exclusions</u>
<u>Conditions</u>

Two additional areas have to be looked at when searching for the ideal contract. These items are as follows:

<u>Endorsements Specific to your Organization</u>
<u>Other things to look for in an ideal contract.</u>

DECLARATIONS top

The declarations page contains the information particular to the individual insured. The information particular to your organization and coverage details are entered or typed into a declarations page. The following seven items are the most important parts of the Declaration page. Pay special attention to these items when reviewing proposals for your non-profit organization.

Insurance Company	Nothing is more important than the insurance carrier you elect to write your directors and officers insurance. Purchasing Directors and Officers Insurance is really like retaining a law firm. The coverage is only as good as the company standing behind the contract. There are several outside organizations like the two listed below that can provide financial information on insurance companies: AM Best Rating Services Moody's Financial Rating
Named Insured	Is the named insured correct? Are all subsidiaries (especially for profit subsidiaries) and interests listed on the policy?
Limits of Liability	Is the limit adequate? Are the defense costs included or outside of the policy limit?
Policy Period	Does the policy run for just one year? Longer terms are available and recommended.
Deductible	Select highest deductible you can afford. Does the deductible apply to defense costs?
Reporting Period	Applies to claims made policies. Is the additional premium for this option reasonable
Retroactive Date	Is there a retroactive date? Pending or Prior Date? What is it?

INSURING AGREEMENT top

The insuring agreement spells out the obligation of the insurance company to the insured. This includes the insuring clause which lists what perils are covered along with definitions of key words in the contract. This section includes verbatim reprints from the Chubb contract page along with my interpretations in italics.

CHUBB INSURANCE –INSURING AGREEMENT

In consideration of payment of the premium and subject to the Declarations, limitations, conditions, provisions, and other terms of this policy, the Company agrees as follows:

Insuring Clause

The **Company** shall pay on behalf of an **Insured** all **Loss** which such **Insured** becomes legally obligated to pay on account of any **Claim** first made against such **Insured** during the **Policy Period** or, if exercised, during the Extended Reporting Period, for:

- **Wrongful Act,**
- **Employment Practices, or**
- **Personal Injury or Publishers Liability**

committed, attempted, or allegedly committed or attempted, by such Insured before or during the Policy Period.

Spousal Liability

If a **Claim** against an **Insured Person** includes a claim against the lawful spouse of such **Insured Person** solely by reason of such spouse's status as a spouse or such spouse's ownership interest in property which the claimant seeks as recovery for an alleged **Wrongful Act** of such **Insured Person**, all loss which such spouse becomes legally obligated to pay on account of such claim shall be treated for purposes of this policy as a **Loss** which such **Insured Person** becomes legally obligated to pay on account of the **Claim** made against such **Insured Person**. All limitations, conditions, provisions and other terms of coverage (including the Deductible Amount) applicable to such **Insured Person's Loss** shall also be applicable to such spousal loss. However, coverage shall not apply to the extent any **Claim** alleges any act or omission by such Insured Person's spouse.

- *All words in boldface are defined in the policy contract.*
- *As you can see, the policy applies to wrongful acts, employment practices, and personal injury. You should not consider a directors and officers policy that does not include all of these perils.*
- *Spousal liability simply extends coverage to the spouse of the insured person defended by the contract with respect to the claim against the insured person.*

DEFINITIONS [top](#)

One of the most important parts of the policy. The definitions give you the scope of coverage provided by the insured perils. You must always read the definition of the

insured perils to see what is **REALLY** covered under the policy.

CHUBB INSURANCE – DEFINITIONS

Claim means a:

written demand for monetary damages, civil proceeding commenced by the service of a complaint or similar pleading, criminal proceeding commenced by the return of an indictment, or formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document, against an Insured for a Wrongful Act, including any appeal therefrom.

Defense Costs means

that part of Loss consisting of reasonable costs, charges, fees (including but not limited to attorneys' fees and experts' fees) and expenses (other than regular or overtime wages, salaries or fees of the trustees, committee members, volunteers, directors, officers or employees of an Organization) incurred in defending any Claim and the premium for appeal, attachment, or similar bonds.

Employment Practices means

a Wrongful Act constituting wrongful dismissal, discharge or termination of employment, breach of any oral or written employment contract or quasi-employment contract, employment related misrepresentation, violation of employment discrimination laws (including harassment), wrongful failure to employ or promote, wrongful discipline, wrongful deprivation of a career opportunity, failure to grant tenure, negligent evaluation, employment related wrongful infliction of emotional distress.

- *Employment practices coverage is the least standardized coverage from policy to policy. Just because the policy says that employment practices is covered does not mean that you are adequately insured. Let's compare the definition above with a definition from another insurance company:*

"Such Wrongful Acts include, but are not limited to: discrimination, whether based upon race, sex, age, national origin, religion, disability or sexual orientation; sexual or racial harassment; libel, slander or other defamation; invasion of privacy; or interference with or breach of any employment contract, whether oral, written, express or implied."

- *As you can see, the number of items that would trigger coverage are considerably less. The definition gets around this by including the expression, "not limited to". However, I would not want to depend upon the insurance company's interpretation of this statement in the event a claim occurs. In the case of employment practices liability it is best that the legal basis that are covered are spelled out.*

Financial Impairment means

the status of any Organization resulting from (i) the appointment by any state or federal official,

agency or court of any receiver conservator, liquidator, trustee, rehabilitator or similar official to take control of, supervise, manage or liquidate the Organization, or (ii) such Organization becoming a debtor in possession.

Insured

means any Organization or any Insured Person.

Insured Capacity means

the position held by any Insured Person in any Organization, but shall not include any position in any entity other than such Organization, even if such Organization directed or requested that such Insured Person serve in such other position.

Insured Person

means any natural person who has been, now is or shall become a duly elected director or trustee, duly elected or appointed officer, employee or committee member (whether or not salaried) of an Organization, and any natural person acting in a voluntary capacity on behalf of an Organization and at the specific direction of such Organization.

- *Insured person should include the above and the organization itself, not just directors and officers.*

Interrelated Wrongful Acts means

all causally connected Wrongful Acts.

Loss means

the total amount covered under this policy which any Insured becomes legally obligated to pay on account of any Claim made against any Insured for Wrongful Acts for which coverage applies, including, but not limited to, damages, judgments, settlements, costs and Defense Costs. Loss does not include (i) any amount not indemnified by an Organization for which any Insured Person is absolved from payment by reason of any covenant, agreement or court order, (ii) any amount incurred by any Organization (including its board of directors or any committee of the board of directors) in connection with the investigation or evaluation of a Claim or potential Claim by or on behalf of any Organization, (iii) fines or penalties (including punitive or exemplary damages) imposed by law, (iv) the multiple portion of any multiplied damage award, (v) the future salary or benefits of a claimant who has been or shall be hired, promoted or reinstated to employment pursuant to a settlement order or other resolution, or (vi) matters uninsurable under the law pursuant to which this policy is construed.

- *Does not include punitive damages*
- *Does not include future salary of reinstated employee*
- *Does not insure matters uninsurable under the law.*

Organization means

any entity designated in Item 1 of the Declarations.

Personal Injury or Publishers' Liability means

a Wrongful Act constituting false arrest, wrongful detention or imprisonment, malicious prosecution, defamation, invasion of privacy, wrongful entry or eviction, infringement of copyright or trademark, unauthorized use of title, plagiarism, or misappropriation of ideas.

- *Definition is pretty much the same from company to company.*

Policy Period means

the period of time specified in Item 3 of the Declarations, subject to prior termination in accordance with section 20 of this policy.

Policy Year means

the period of one year following the inception of this policy or any anniversary thereof, or, if the time between inception or any anniversary and the termination is less than one year, the lesser period.

Pollutants

means any substance located anywhere in the world exhibiting any hazardous characteristics as defined by, or identified on a list of hazardous substances issued by, the United States Environmental Protection Agency or a state, county, municipality or local counterpart thereof. Such substances shall include, without limitation, solids, liquids, gaseous or thermal irritants, contaminants, smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste materials. Pollutants shall also mean any other air emission, odor, waste water, oil, oil products, infectious or medical waste, asbestos or asbestos products and any noise.

Subsidiary means

any non-profit corporation, community chest, fund or foundation that is exempt from federal income tax as an organization described in section 501 (c)(3) of the Internal Revenue Code of 1986, as amended, if more than 50% of the outstanding securities or voting rights representing the present right to vote for the election of directors in such organization is owned or controlled, directly or indirectly, in any combination, by one or more Organizations.

- *Any for-profit subsidiaries must be specifically listed in the Declarations in order to be covered.*

Wrongful Act means

any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted, by an Organization or an Insured Person, individually or otherwise, in their Insured Capacity, or any matter claimed against such Insured Person solely by reason of serving in such Insured Capacity.

- *The definition of Wrongful Acts from company to company is pretty much the same.*

In conclusion, always read the definitions since they will change or perhaps, limit the coverage under the contract. The employment practices definition should be closely examined since the definition will vary greatly from insurance company to insurance company.

EXCLUSIONS [top](#)

The exclusions list what the insurance company does not intend to cover under the policy. These exclusions do give back some coverage for certain circumstances.

Exclusions – Chubb

The Company shall not be liable for Loss on account of any Claim based upon, arising from, or in consequence of:

Any circumstance if written notice of such circumstance has been given under any policy of which this policy is a renewal or replacement and if such prior policy affords coverage (or would afford such coverage except for the exhaustion of its limits of liability) for such Loss, in whole or in part, as a result of such notice.

- *Will not provide coverage for claims made on prior policy period.*

Any demand, suit or other proceeding pending, or order, decree or judgment entered for or against any Insured on or prior to the Pending or Prior date set forth in Item 6 of the Declarations, or the same or any substantially similar, fact, circumstance or situation underlying or alleged therein.

- *No coverage for claims made prior to retroactive date in declarations.*

Any deliberately fraudulent act or omission or any willful violation of any statute or regulation by such Insured, if a judgment or other final adjudication adverse to such Insured establishes such a deliberately fraudulent act or omission or willful violation.

- *No coverage for deliberate, illegal acts.*

such Insured having gained in fact any profit, remuneration or advantage to which such Insured was not legally entitled.

- *No coverage for unlawful gain by an insured.*

Based upon, arising from, or in consequence of (i) the actual, alleged or threatened discharge, release, escape or disposal of Pollutants into or on real or personal property, water or the atmosphere; or (ii) any direction or request that the Insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants, or any voluntary decision to do so; including but not limited to any Claim for the financial loss to any Organization, its security holders or its creditors based upon, arising from, or in consequence of the matters described in (i) or (ii) of

this exclusion. Provided, however that this exclusion shall not apply to any Claim for wrongful dismissal, discharge or termination of employment of any Insured Person in retaliation for such Insured Person's actual or threatened disclosure of the matters described in (i) or (ii) of this exclusion.

- *No coverage for pollution. However, employment practices coverage applies in the event an employee sues the organization for wrongful termination due to whistleblowing of polluting activity.*

any written, oral, express or implied contract or agreement; provided, however, that this exclusion shall not apply to (i) Employment Practice, or (ii) that part of Loss which constitutes Defense Costs.

- *Breach of contract not covered. Cost to defend is covered.*
- *Breach of employment contract IS covered.*

The Company shall not be liable for Loss on account of any Claim:

For mental or emotional distress (except with respect to Employment Practices), bodily injury, sickness, disease, or death of any person, loss of use of tangible property whether or not it is damaged or destroyed, or damage to or destruction of any tangible property.

- *Bodily Injury and Property Damage is excluded. However*
- *Emotional distress for employment practices is provided.*

For an actual or alleged violation of the responsibilities, obligations or duties imposed by the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act (except the Equal Pay Act), the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act, amendments to or rules or regulations promulgated pursuant to these laws, or similar provisions of any federal, state or local statutory law or common law. Provided, however, that this exclusion shall not apply to any Claim for retaliatory treatment of an Insured Person with respect to actual or threatened disclosures by such Insured Person of any actual or alleged violation of the Fair Labor Standards Act or the Occupational Safety and Health Act.

- *Employee Benefits liability coverage is excluded.*

For liability of others assumed by any Insured under any written, oral, express or implied contract or agreement except to the extent that an Insured would have been liable in the absence of the contract or agreement; or

- *Contractual Liability excluded.*

Brought or maintained by or on behalf of any Insured except:

A Claim that is a derivative action brought or maintained on behalf of an Organization by one or more persons who are not Insured Persons and who bring and maintain such Claim without the solicitation, assistance or participation of any Insured, or a Claim for Employment Practices.

- *Insured vs. insured is excluded except those brought on behalf of the organization against an insured person.*
- *Insured vs. Insured does not apply to Employment Practices.*

CONDITIONS top

- *Pretty much standard from company to company.*

PARTICULAR ENDORSEMENTS top

Remember, this type of coverage will usually have endorsements and exclusions that are particular to your non-profit organization. It is **VERY IMPORTANT** that you obtain full copies of the endorsements in question and read them over carefully. The only time these endorsements are attached is when the insuring company is uncomfortable with some aspect of your operations.

There will always be an endorsement that makes the overall contract comply with particular laws in your State.

OTHER THINGS TO LOOK FOR: top

Duty to Defend

- *This provision obligates the insurance company to defend you for claims. This is better than reimbursing you for claims expenses, since you will not have to come up with funds other than the deductible.*

Option to Settle.

- *Some insurance companies give you the right NOT to settle the claim. However, if you elect not to settle, the insurance company will only pay out their original settlement offer amount plus defense costs.*

Since the policy is a legal contract, it will not be written in plain English. However, the wording should not be vague, confusing, or incomprehensible. Avoid contracts that use these tactics to obscure coverage provided by the policy. Remember, READ EVERYTHING. Insist that you obtain the COMPLETE quotation from your agent or insurance company!

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HAHN AGENCY, INC.

EMPLOYMENT PRACTICES LIABILITY. LEGAL BASIS FOR EMPLOYMENT CLAIMS

Claims concerning employees account for the majority of lawsuits facing a non-profit organization and its directors and officers.

Employment claims just did not appear out of thin air. The current frenzied litigation over the rights of employees has evolved due to basic common law and statutory changes in the legal system. In order to control these types of losses, you have to know where they come from. The common law and main statutory basis for employment practices claims are as follows: toplist

<u>The Employment-at-Will Doctrine</u>
<u>Contract-Based Exceptions to the Employment-at-Will doctrine.</u>
<u>Tort Claims Arising from the Employment Relationship.</u>
<u>Selected Statutory Basis for Employment Litigation.</u>
<u>Statutes if you do business with Government</u>
<u>State Statutes</u>
<u>State and Federal Whistleblower Protection Legislation.</u>
<u>Other Statutory Protections</u>

The Employment-at-Will Doctrine [top](#)

Many claims are brought because organizations are not aware of the many Federal, state and local laws governing the employment relationship. Learning the legal bases for employment claims is the first step in planning loss prevention strategies.

Traditionally, in the absence of a contract for a specific duration, both employers and employees were free to terminate the employment relationship at any time. Employers did not need cause to terminate employees, and employees did not need cause to quit.

- *Employer can fire and employee can quit without explanation.*

Over the years, legislatures and courts developed numerous exceptions to the employment-at-will doctrine. Employees today have more claims against their employers primarily because there are more avenues for pursuing remedies to perceived unfair treatment. This is true not only in discharge situations, but also with respect to hiring, promotion, discipline and other employment-related decisions.

Even employees covered by union contracts, while not working "at-will," can take advantage of federal, state and local employment legislation and many state common law, (nonstatutory), claims unrelated to their collectively bargained agreements. The following discussion focuses on the various exceptions to the employment-at-will doctrine and other claims common in employment litigation.

Contract-Based Exceptions to the Employment at will doctrine.

[top](#)

Breach of Contract

If an employer expressly agrees, orally or in writing, to hire an employee for a specific period of time, to discharge only for just cause, or to abide by progressive disciplinary procedures, that agreement will usually be enforceable. Employers may be liable for breach of contract based on informal writings, employee handbooks, or even on oral statements made to employees or prospective employees.

Promissory Estoppel

The doctrine of promissory estoppel is a vehicle used, in certain jurisdictions, to enforce promises in the absence of a contract. Promissory estoppel claims are often brought in the same lawsuit with breach of contract allegations, as an alternative theory of liability.

To recover on a promissory estoppel claim, an employee must prove that the employer made an unambiguous promise, that the employer reasonably expected the employee to rely on the promise, and that the employee in fact relied. The employee must also prove that the reliance was detrimental, and that an injustice can be avoided only by enforcement of the promise.

The classic promissory estoppel situation arises when an employee or prospective employee quits another job, relocates, or declines another employment opportunity in return for the employer's promise, usually a promise of job security. The doctrine has been applied so broadly, however, that employers may be bound by a wide variety of communications to employees, including policy statements, employee handbooks, or statements made by company representatives during job interviews.

- *Break a promise to an employee to Their detriment.*

Covenant of Good Faith and Fair Dealing

Some states have adopted an "implied covenant" of good faith and fair dealing in the employment relationship. This covenant, first recognized in certain commercial transactions, has been used by some courts to impose an obligation on employers not to discharge unfairly. Depending upon the jurisdiction, claims for breach of the covenant of good faith and fair dealing may be brought in contract, or as claims for personal injury (tort claims), or both.

Tort Claims Arising from the Employment Relationship [top](#)

Tort claims, (for personal injury to the employee), are common in workplace litigation. They are often brought along with contract claims, since they may permit employees to seek compensatory damages for physical and emotional harm not available in contract actions, as well as punitive damages.

Public Policy

Most states now recognize a claim for discharge in violation of public policy. These claims can give rise to contract or tort damages, depending on the jurisdiction. They frequently arise when employees are terminated for exercising their statutory rights, performing statutory duties, or engaging in an activity that public policy dictates should be protected.

- ***Getting Fired for "whistleblowing" on Organization.***

Although "public policy" cannot be precisely defined, examples of recognized public policy violations include cases where employees are fired for refusing to commit a crime for the employer, refusing to commit perjury to protect the employer, or for "whistleblowing" to law enforcement or regulatory authorities. Courts have also recognized public policy claims based upon termination for serving jury duty or pursuing workers' compensation claims.

Invasion of Privacy

There are four different categories of invasion of privacy. They are: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public.

In the employment context, invasion of privacy claims most often involve the "unreasonable intrusion" category. To prove this type of invasion of privacy, employees must show that the employer intentionally intruded upon their solitude, seclusion, or private affairs or concerns, and that the intrusion would be highly offensive to a reasonable person. Employer drug testing programs, searches of employees' belongings or vehicles, eavesdropping, monitoring of electronic communications, wiretapping, surveillance and similar activities are often the subject of invasion of privacy claims.

Defamation

Employees are suing their employers or former employers with increasing frequency for defamation, alleging that the employers made derogatory statements about them to coworkers, third parties, or to

prospective employers in response to reference requests.

To prevail on a claim of defamation, the employee must establish: (1) that the employer intentionally made a false and defamatory statement of fact about him; (2) that the statement was made to a third party by the employer; (3) that the recipient understood the defamatory meaning; and (4) that either the statement caused him injury or was of a type for which the law requires no proof of injury. When the defamatory publication is made orally, it is considered to be slander. If the publication is in writing, the claim is one for libel.

An employer is generally not liable when an employee repeats a defamatory statement made by the employer only to the employee. Some courts, however, have held that the employer is responsible if there is reason to believe that the employee will, at some point, be compelled to repeat the defamatory statement. This doctrine of compelled self-publication has been applied when a job applicant is forced to reveal that he or she was discharged by a prior organization for theft, embezzlement or other wrongful conduct.

Intentional and Negligent Infliction of Emotional Distress

To establish a claim for intentional infliction of emotional distress, the employer must intentionally engage in "extreme and outrageous conduct." The most widely accepted definition of extreme and outrageous conduct is that it be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Given this definition, most courts have found that termination alone does not establish this tort.

In addition to proving outrageous conduct, employees seeking to recover for intentional infliction of emotional distress must suffer distress that is reasonable and serious.

Like intentional infliction of emotional distress claims, negligent infliction claims require employees to sustain severe emotional injury. In addition, some states require that the employees be placed in some physical peril of which they were aware before this claim can be brought. Other states do not recognize this claim at all in the employment context.

Selected Statutory Basis for Employment Litigation. Employment Discrimination Laws [top](#)

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination by employers because of race, color, religion, sex (including pregnancy), or national origin. Title VII is probably the best-known anti-discrimination statute and is a frequent source of claims. It applies to employers with 5 or more employees.

Most claims under Title VII are established through the use of two major theories. The first theory, known as "disparate treatment," makes it unlawful for employers to treat certain individuals differently from others based on their protected status or traits.

The second theory, known as "disparate impact," applies when employment practices that appear neutral

on their face operate more harshly on one protected group than another and cannot be justified by business necessity. Disparate impact cases often are used to challenge education requirements and other neutral hiring criteria. The disparate impact analysis has also been used to challenge excessively subjective promotion practices. Employees can raise claims under either or both theories.

As a result of amendments to Title VII made by the Civil Rights Act of 1991, victims of unlawful discrimination may recover not only the "make whole" relief formerly available, such as back pay, front pay, lost benefits, reinstatement and reasonable attorney's fees, but may, under certain circumstances, also recover both compensatory and punitive damages.

The total amount of certain types of compensatory and punitive damages available to victims of sex, disability, religious, and national origin discrimination is limited based upon the size of the organization being sued. A jury trial is also made available for disparate treatment claims. Before Title VII lawsuits are filed, however, employees complaining of unlawful discrimination must lodge a charge of discrimination with either the Equal Employment Opportunity Commission ("EEOC") or an equivalent state agency if one exists.

Sexual harassment is a form of sex discrimination prohibited by Title VII. The Courts have recognized two basic types of sexual harassment: (1) harassment that creates an offensive or hostile working environment, and (2) harassment in which a supervisor demands sexual favors as a condition of employment or in return for certain benefits. Employers must have a policy prohibiting sexual harassment and a procedure so that complaints of harassment can be raised and investigated. Title VII requires employers to take prompt and effective action to end sexual harassment when it is found to have occurred.

The Americans With Disabilities Act ("ADA")

The Americans With Disabilities Act ("ADA") prohibits employers from discriminating against otherwise qualified individuals with disabilities because of their disabilities. Individuals who have a history of disability, who are regarded as being disabled, or who associate with disabled individuals, are also covered.

Employees protected from discrimination are those who, with or without reasonable accommodation, are able to perform the essential functions of a given job. The law covers employers with 15 or more employees.

The ADA requires employers to make "reasonable accommodations" to individuals with disabilities of which they are aware, unless an accommodation would pose an "undue hardship" to the employer's business. Undue hardship is generally defined as an action requiring significant difficulty or expense, taking into account the employer's size and resources.

The disparate treatment theory and a modified disparate impact theory are applicable to the ADA. The remedies available under the ADA are the same as those under Title VII. The requirement that individuals file an administrative charge with the EEOC or an equivalent state agency before filing a lawsuit also applies.

The Age Discrimination in Employment Act ("ADEA")

The Age Discrimination in Employment Act ("ADEA") prohibits employers with 20 or more employees

from discriminating against persons age 40 or older because of their age. Most ADEA claims are brought under the disparate treatment theory. Few courts have accepted the disparate impact theory for age claims.

Remedies available under the ADEA consist primarily of back pay, lost benefits, reasonable attorney's fees, reinstatement or, under limited circumstances, front pay. A jury trial is available. If the employer's violation was "willful," victims may also recover liquidated (double) damages. A violation is willful if the employer knew that its conduct violated the ADEA, or showed reckless disregard for whether its conduct was prohibited. Administrative filing requirements also apply to ADEA claims.

The Civil Rights Act of 1866, Section 1981

The Civil Rights Act of 1866, Section 1981 provides that, "all persons within the jurisdiction of the United States shall have the same right. . . to make and enforce contracts . . . as is enjoyed by white citizens." The right to make and enforce contracts includes the right to enter into and enforce employment contracts and to be free from discriminatory employment practices in recruiting, hiring, compensation, assignment, promotion, layoff and discharge. Section 1981, however, applies only to decisions based on race and color. There is a right to unlimited compensatory and punitive damages and a jury trial. There is no requirement that a charge of discrimination be filed with the EEOC before a suit is brought.

Certain federal laws and executive orders apply to employers who have contracts or subcontracts with or receive financial assistance from the Federal government. [top](#)

Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving Federal financial assistance.

Executive Order 11246

Executive Order 11246 prohibits discrimination by Federal contractors and subcontractors because of race, color, religion, sex or national origin and requires affirmative action to ensure equal opportunity in employment.

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 prohibits employers with Federal contracts and programs receiving Federal financial assistance from discriminating against disabled individuals and requires affirmative action to advance qualified individuals with disabilities.

Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 prohibits employment discrimination on the basis of sex in educational programs or activities that receive Federal assistance.

The Vietnam Era Readjustment Assistance Act of 1974

The Vietnam Era Readjustment Assistance Act of 1974 prohibits job discrimination and requires affirmative action to employ and advance Vietnam era veterans and qualified special disabled veterans.

State Statutes top

Most states, and many local governments, have laws prohibiting discrimination in employment on many of the same grounds as the Federal statutes. The remedies available to alleged victims may differ from those provided under Federal law, and employees frequently bring claims premised on both state and Federal laws. Moreover, small employers with too few employees to be subject to Federal anti-discrimination laws may be covered by state statutes. Some state and local governments also protect individuals from discrimination on additional bases, such as marital status, sexual orientation, political beliefs or personal appearance.

State and Federal Whistleblower Protection Legislation top

State and Federal Whistleblower Protection Legislation generally protects employees to whom these laws apply from discipline, termination or retaliation for reporting the illegal conduct of their employers to appropriate enforcement or regulatory authorities, or for testifying in enforcement proceedings. Whistleblower protections typically are afforded only to employees who report employer violations that pose significant health or safety hazards to other individuals, property or the environment.

Other Statutory Protections top

The Older Workers' Benefit Protection Act ("OWBPA")

The Older Workers' Benefit Protection Act ("OWBPA") in part restricts an employer's ability to settle actual or threatened age discrimination claims or to secure releases under the ADEA. Most significantly, if an employee has not filed a charge of discrimination or a lawsuit under the ADEA, a waiver of ADEA rights or claims will not be effective unless the employee is given at least 21 days to consider it and the ability to revoke the agreement for seven days after execution. When exit incentive programs are offered to a group or class of employees, this consideration period is extended to 45 days, and other requirements apply. All waivers of ADEA claims must be in writing, specifically refer to the ADEA and be supported by consideration. Employees must also be advised in writing to consult with an attorney before signing any release agreement.

The Family and Medical Leave Act ("FMLA") top

The Family and Medical Leave Act ("FMLA") requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for certain medical and family reasons. Employees are eligible for FMLA leave if they have worked for a covered employer for at least 12 months and have worked for the employer at least 1250 hours in the 12 months immediately preceding the leave. Finally,

the employees must be located at a U.S. worksite which, when combined with all of the employer's other worksites within 75 miles, has 50 or more employees. Some state and local governments have their own family and medical leave requirements.

Of course, these are just some of the current laws regarding employee rights and employer responsibilities. These laws are constantly being expanded and rewritten by the courts. Please consult a attorney for the impact of these laws on YOUR organization.

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HAHN AGENCY, INC.

WRONGFUL ACTS

Directors and officers liability claims arise in large part by failing to follow their common law duties as Directors and Officers of an organization. This failure to follow these common law duties are known as Wrongful Acts.

Directors and Officers Liability exposures encompass not only the directors and officers but every member of the non-profit organization including employees, trustees and volunteers. Any or all of these individuals can be named in a lawsuit. It is imperative that the named insured encompass all of these parties.

toplist

These duties are as follows:

Duty of Diligence.

Duty of Loyalty.

Duty of Obedience.

Duty of Diligence. [top](#)

Directors and officers generally must act with the care that a reasonably prudent person in a similar position would use under similar circumstances. They must perform their duties in good faith and in a manner they reasonably believe to be in the best interest of the corporation. Prior to making a business decision, D&O's must inform themselves of all material information reasonably available to them.

This duty requires not only reasonable behavior with respect to matters submitted for approval, but also requires reasonable inquiry and monitoring of corporate affairs. Although directors and officers are not insurers of the integrity of their subordinates or of general organizational performance, they are required to implement reasonable programs to promote appropriate organizational conduct and to identify improper conduct.

Duty of Loyalty. [top](#)

Directors and officers are required to refrain from engaging in personal activities which would injure or take advantage of the organization. They are prohibited from using their position of trust and confidence to further their private interests. This duty requires an undivided and unselfish loyalty to the organization and demands that there be no conflict between one's duty to the organization and self-interest. Examples of prohibited conduct in this regard include:

- D&O's may not realize secret profits or unfair gain through personal transactions with or on behalf of the organization.
- D&O's may not compete with the organization to its detriment.
- D&O's may not usurp an opportunity of the organization.
- D&O's may not realize personal gain from the use of material, nonpublic information.
- D&O's should avoid even the appearance of a conflict of interest.

Duty of Obedience. [top](#)

Directors and officers are required to perform their duties in accordance with applicable statutes and the terms of the organization's charter. **D&O's may be liable if they authorize an act which is beyond the powers conferred upon a corporation by its charter or by the laws of the State of Incorporation.**

Non-profit organizations are frequently regulated by a multitude of statutes, rules and regulations with which outside directors are typically unfamiliar. For example, charitable organizations may be subject to statutes regulating fund raising, political and business activities; hospitals may be subject to complex Medicaid reporting requirements; and publicly supported organizations may be subject to unusual terms and restrictions in various grant or financial assistance documents.

If the non-profit organization is exempt from federal or state income tax or if contributions to it are intended to be tax deductible, a myriad of additional restrictions and requirements may apply. For example, the corporation may jeopardize its tax exempt status if its earnings privately inure to the benefit of any individual, if it is operated for non-charitable purposes, if it engages in certain types of political or legislative activities, if it fails to file or obtain required returns or certificates or if as a private foundation it violates any of a series of rules prohibiting the appearance of self-dealing, large business holdings and the like. Failure to comply with these technical requirements may subject the D&O's to personal liability for the damage thereby caused to the organization and perhaps others.

Breach of these three basic duties form the core of the traditional claims against directors and officers. Further information on these basic duties along with the Business Judgment Rule can be found under the [General Principles](#) section of the Loss Control portion of this report.

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HAHN AGENCY, INC.

PERSONAL INJURY

Personal Injury coverage under a directors and officers policy is kind of a throwback to the time when the regular general liability coverage did not provide this coverage. Since this coverage is now provided by the standardized general liability contract, it may appear redundant to have personal injury under the directors and officers contract. **HOWEVER**, You have to remember that the general liability policy may exclude coverage for these Wrongful Acts based upon your non-profit operations.

Personal Injury is a set of Wrongful Acts that include:

- False Arrest
- Wrongful detention or Imprisonment
- Malicious Prosecution
- Defamation
- Invasion of Privacy
- Wrongful Entry or Eviction

Publishers Liability is made part of this personal injury coverage on the directors and officers policy. Publishers Liability is generally not included under the regular liability coverage,

Publishers Liability includes the following:

- Unauthorized use of Title
- Plagiarism or Misappropriation of Ideas.
- Infringement of Copyright or Trademark

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