CAPLAW update
FALL 2011

Evaluating Cost-Saving Workforce Options in Leaner Times

By Sheena Knox and Eleanor Evans, Esq., CAPLAW

In the face of potential federal budget cuts, many Community Action Agencies (CAAs) are evaluating cost-saving workforce options – from laying off staff to reducing hours to freezing wages. To help CAAs in their efforts to weather tough financial times and protect themselves against potential employment claims, this article provides an overview of some of the more common approaches CAAs may take to reduce staffing costs, as well as some of the key federal legal issues to consider when weighing these options. Because each CAA's situation is different and state laws vary and may provide more protection to employees than federal law, it is important to consult with an employment attorney in your state before implementing any of these options.

Layoffs

One of the most common responses to an economic downturn is to lay off (i.e., terminate) employees. Layoffs raise a number of legal and practical issues, such as potential discrimination and retaliation claims, decisions about whether and how to pay severance, and, in some cases, compliance with layoff notification laws.

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CAPLAW Conference Prepares CAAs for Future Challenges

By Cara Loffredo, CAPLAW

As Community Action Agencies continue working to improve the lives of low-income communities and families, they face an uphill battle of their own against federal and state budget cuts and increased competition for funding. Over 450 Community Action professionals joined CAPLAW for its 2011 National Training Conference in Minneapolis, June 15-17, to confront these obstacles and to obtain information critical to ensuring good governance, fiscal stability and legal compliance.

The conference's opening session featured a greeting from the CAPLAW board, a warm welcome to Minneapolis from Bill Davis, Executve Director of Community Action of Minneapolis, and remarks by Yasmina Vinci, Executive Director of the National Head Start Association. Mark Greenberg, Deputy Assistant Secretary for Policy at the U.S. Department of Health and Human Services' Administration for Children and Families, delivered the opening keynote address, in which he presented the Obama Administration's perspective on the current climate in Washington and the future of the Community Services Block Grant program.

"[I] Enjoyed the high quality speakers, excellent facilities, and great location in downtown Minneapolis."

Recipients of the Robert M. Coard Conference Scholarship, Joseph Costello of Tri-County Community Action Program, Inc. and Catherine Johnson of Inter-County Community Action Council, were also recognized during the opening session.

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For membership information visit *www.caplaw.org* or call (617) 357-6915.

Future Challenges

(Continued from cover)

The 2011 conference offered a number of new training opportunities, including: a new resource development track; six additional workshops; new roundtable discussion topics; and the opportunity to participate in two free half-day training seminars before the start of the conference. Over 50 people attended these seminars, choosing between an in-depth exploration of financial planning and modeling techniques in "Financial Strategies for an Uncertain Future" and a crash course on CAA legal basics in "CAA Legal Essentials: Introduction to Grant Law, CSBG and Head Start."

Conference attendees also heard from representatives of the CSBG network national partner organizations about the future of the CSBG program – first during a discussion panel entitled "What the Future Holds for CSBG" at Thursday's luncheon and then during a legislative update from David Bradley, Executive Director of the National Community Action Foundation on Friday morning. Congressman Keith Ellison, who represents the Minneapolis area, delivered a passionate closing keynote address.

Many also viewed the great work of local CAAs while experiencing a sampling of what makes the Twin Cities a top destination during the Twin Cities Highlights Tour. Participants were welcomed by staff of Community Action of Minneapolis which showcased their innovative weatherization program and by staff of Community Action Partnership of Ramsey and Washington Counties which discussed their progressive self-sufficiency program and the pros and cons of building ownership. The tour included viewing the Stone Arch Bridge over the Mississippi River, exploring Summit Avenue (site of historic houses, churches, synagogues, and schools) and visiting the Minnesota History Center.

CAPLAW's board and staff thank all those who attended this year's conference, as well as the many presenters and volunteers who helped make it a success. We hope you will join us next year for CAPLAW's 2012 National Training Conference in San Diego, June 4 -6.

About CAPLAW

CAPLAW is a nonprofit membership organization dedicated to providing the legal and financial resources necessary to sustain and strengthen the national Community Action Agency (CAA) network. For over 45 years CAAs have been fighting poverty, helping individuals become self-sufficient, building communities, and changing lives. Nationwide, approximately 1,000 CAAs leverage almost $10 billion in total funding, and provide a multitude of services, including job training, Head Start, economic development, energy assistance, and housing. Through its in-house legal staff and a network of private attorneys, CAPLAW provides legal and financial consultations, training, and publications on a wide variety of legal and management topics. This assistance enables CAAs to operate legally sound organizations and to promote the effective participation of low-income people in the planning and delivery of CAA programs and services, thereby enhancing CAAs' ability to provide the nation's poor with opportunities to improve their quality of life and to achieve their full potential.

CAPLAW Promotes Team-Based Approach to Financial Leadership

By Linda Delauri, Ed.M., CAPLAW

CAPLAW recently partnered with the Iowa Community Action Association (ICAA) to pilot a free workshop focused on strengthening the financial leadership of Community Action Agencies (CAAs). On July 11, Community Action professionals from 11 Iowa agencies convened to explore ways to "power up" their CAAs' financial leadership capacity. CAPLAW presented the workshop as part of its National Nonprofit Financial and Grants Management Training Program.

ICAA executive director Lana Ross was instrumental in bringing CAPLAW's "Powering Up Your Financial Leadership Team" workshop to the ICAA Annual Training Conference in Des Moines. "Our conference [is] very intentional on bringing in presenters and workshop materials that increase the skills and knowledge of our [member CAA] staff," she says. "One big area where we've seen a need for more information and training is the financial complexities of our Community Action Agencies. This component of our work is ever-changing – new regulations, new requirements – all of that plays into the need to keep our staff informed and able to understand the guiding principles of managing the finances of an agency."

CAPLAW worked with Kay Sohl of Kay Sohl Consulting to develop "Powering Up Your Financial Leadership Team." Sohl, co-author of the *Oregon Nonprofit Corporation Handbook*, also facilitates CAPLAW's CAA Financial Network and serves on the national planning committee for the American Institute of Certified Public Accounts (AICPA) National Not-for-Profit Conference. In developing the pilot workshop, Sohl drew upon her experience providing advice and training on financial, capacity building, and sustainability issues to more than 5,000 nonprofit organizations, including many Community Action Agencies nationwide.

According to Sohl, "financial leadership is more than grants management or compliance; it's financial analysis. Effective financial leadership uses financial data to inform strategic decision making." She stresses that all CAA leaders must ask themselves: What financial data are essential to assessing the financial health, financial risk, and financial opportunity? And, how do we ensure the right people are fully informed and engaged in the decision making?

New Financial Realities Demand Improved Communication and Cooperation

As government cutbacks and the continuing recession push more Americans into poverty, Community Action Agencies face escalating demand for services with static or shrinking resources to meet that demand. Now, more than ever before, CAA board members, executive directors, finance managers, and resource development managers need to work together effectively to build and maintain financially healthy organizations. Board participation is a must. When asked whether a vital role/perspective was missing from their team, many of the CAAs who participated in the pilot said "yes; it was the board perspective."

"Now, more than ever before, CAA board members, executive directors, and finance managers, and resource development managers need to work together effectively to build and maintain financially healthy organizations."

According to ICAA executive director Ross, there has been a shift from boards "thinking about the future" to focusing on how the agency is doing financially and in terms of its service delivery. "The role of the board has changed," she says, "it's all about understanding the complexity of governing, providing oversight, and how the agency operates. [Boards] are feeling a lot more pressure than they used to – especially those that have been around for a long time. The financial side of the agency is a lot more complex than it used to be so they're feeling uncertainty about their ability to understand it clearly."

"This could be a great leadership development opportunity for an organization that is trying to bring someone along to step up to a more engaged financial leadership role on the board," says Sohl, adding "if board members don't understand the underlying financial strengths and limitations of the CAA, it's hard for them to evaluate the impact of rapid changes in funding and make sound financial decisions."

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Supreme Court UPDATE

Oral Complaints: Casual Workplace Banter or Properly Filed Wage and Hour Claim?

By Timothy Ramsey, CAPLAW

You're walking through the office and one of your staff members complains about not being paid for all the hours she worked. No big deal, right? After all, the employee hasn't filed a written complaint with your human resources department. Think again! A recent U.S. Supreme Court decision establishes that an employer may be found liable for retaliating against an employee who orally complains about a possible violation of the Fair Labor Standards Act (FLSA). The anti-retaliation provision of the FLSA at issue in *Kasten v. Saint-Gobain Performance Plastics Corp.* protects employees who have "filed any complaint" with their employer from unlawful discharge or discrimination because of their complaint.[1]

In the past, it was unclear whether oral complaints were considered "filed" in the same way as written complaints were. It has generally been accepted that written complaints provide employers with "fair notice" — i.e., notice to an employer that an employee is asserting some right under the FLSA. Because written complaints are tangible documents presented to an employer, it is usually easy to conclude that a complaint is filed, thus triggering protection against unlawful retaliation by the employer. However, until *Kasten*, courts reached varied conclusions on oral complaints.

The Facts and Arguments

In *Kasten*, the employer, Saint-Gobain Performance Plastics Corp., terminated its employee of three months, Kevin Kasten, after issuing him four disciplinary warnings for repeated failure to properly clock in and out of work. In response, Kasten filed a lawsuit alleging that Saint-Gobain wrongfully discharged him in retaliation for his oral complaint to his supervisor and other personnel that the location of the of time clocks prevented employees from receiving credit, and being paid, as required by the FLSA, for time spent putting on and taking off work-related protective gear. Kasten claimed that he repeatedly brought this problem to his employer's attention, to no avail. Specifically, Kasten informed a shift supervisor and other personnel on numerous occassions that "it was illegal for the time clocks to be where they were." He also informed Saint-Gobain's human resources manger and operations manager that if he were to go to court over the issue he would win. These actions, Kasten alleged, caused the company to discipline and eventually terminate him.

Saint-Gobain, on the other hand, argued that Kasten was terminated because he failed to properly clock in and out and never "filed any complaint" as required by the FLSA to establish a retaliation claim. Saint-Gobain contended that it would be unfair to be held liable, since unlike written complaints, oral complaints fail to provide employers with fair notice that an employee is asserting a claim under the Act.

The Supreme Court Opinion

The Supreme Court held that the anti-retaliation provision of the FLSA provides protection to employees against retaliation for oral complaints of a violation of the Act. The FLSA provision at issue makes it unlawful for employers:

> To discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.[2]

The Court determined that oral complaints can satisfy the "filed any complaint" language required by the anti-retaliation provision, so long as they provide fair notice to employers. In reaching its conclusion, the Court determined that the plain meaning of the phrase "filed any complaint" is subject to competing interpretations and turned to the original intent of the Act.

The Court reasoned that limiting the anti-retaliation provision to written communications would undermine the FLSA's basic objectives. The anti-retaliation provision was designed to provide employees with protection from employers retaliating against them for filing a complaint, ensuring that employees do not "quietly accept substandard conditions." The Court, looking to the time period when the FLSA was adopted (the late 1930s), reasoned that a

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Supreme Court UPDATE

Employer Liability for USERRA and Other Discrimination Claims Expanded

By Timothy Ramsey, CAPLAW

Employers beware – you may be held liable for the discriminatory intent of your supervisors and managers. A recent decision issued by the U.S. Supreme Court expands the circumstances in which an employer may be found liable for employment discrimination under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). In *Staub v. Proctor Hospital*, the Court held that an employer who terminates an employee based on a supervisor's actions that were motivated by anti-military prejudice may be held liable for employment discrimination, even though the ultimate decision maker was not motivated by discriminatory intent.[1]

Under USERRA, an employer's liability is established if a person's military service is a motivating factor in an employer's adverse employment action. USERRA was designed to ensure that employees who are in the military will not be discriminated against because of that service. In many respects, USERRA is very similar to Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of race, color, religion, sex, or national origin."

In *Staub*, the Court established liability under USERRA by applying the "cat's paw" theory of liability, which derives from the 17th century fable "The Monkey and the Cat." In the fable, a clever monkey uses flattery to convince a gullible cat to pluck chestnuts from a fire. The cat burns its paws and the monkey sits back and eats the chestnuts. The contemporary analogue is a biased supervisor who convinces the decision maker to take an adverse employment action based on inaccurate, incomplete, or misleading information.

Traditionally, cat's paw liability has been restricted to circumstances where the non-decision maker exercised such "singular influence" over the decision maker that the decision to terminate was the product of "blind reliance." This required the decision maker to be almost completely subject to the influence and hostility of the non-decision maker. However, *Staub* expands cat's paw liability for employers by holding them liable for the discriminatory actions of non-decision makers that result in an adverse employment action even when the employer may have considered other non-discriminatory factors. *Staub* thus makes it easier for employees to succeed in their employment claims.

The Facts and Arguments

Vincent Staub worked as an angiography technician for Proctor Hospital until he was fired in 2004. While employed, Staub was an active member of the United States Army Reserve and his duties required him to attend drill one weekend per month and to train full time for two or three weeks a year. Staub's immediate supervisor, Janice Mulally, and her supervisor, Michael Korenchuk, were hostile to Staub's military obligations. One time, Mulally noted that "Staub's military duty had been a strain on the department" and scheduled him for additional shifts without notice so he would "pay back the department for everyone else having to bend over backwards to cover [his] schedule for the reserves." Another time, Korenchuk asked one of Staub's co-workers to help him "get rid of" Staub, and on another occasion, referred to Staub's military obligations as "a bunch of smoking and joking and a waste of taxpayer's money."

Shortly thereafter, Mulally issued Staub a disciplinary warning for violating a company rule that required him to stay in his work area whenever he was not with a patient. A few weeks later, Staub's supervisor claimed that Staub again violated this rule. Staub disputed his supervisor's allegations. Relying on Staub's supervisors' accusations, Linda Buck, Proctor's personnel officer responsible for terminating employees, reviewed Staub's personnel file and fired him. Staub challenged Buck's termination decision through Proctor's internal grievance process, arguing that his supervisors' accusations were fabricated. Nonetheless, Buck adhered to her decision to fire Staub without following up with Staub's supervisors regarding his accusations.

Staub then sued Proctor under USERRA, claiming that his discharge was motivated by hostility to his military service. He claimed that the discriminatory actions of both of his supervisors influenced Buck's ultimate decision to terminate him.

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Nonprofits Beware: Your Employees' Blogs, Facebook Posts and Twitter Tweets May Be Protected by the National Labor Relations Act

By Ronald W. Taylor, Venable LLP
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Savvy nonprofits have long understood that the employment-at-will doctrine — namely, that the employment relationship may be terminated by either party for any reason — while still very powerful, has many fissures that work to limit the grounds for which employees may be disciplined or discharged: federal and state fair employment statutes (e.g., Title VII, ADAAA, ADEA), employment torts (e.g., wrongful discharge), and implied contracts (e.g., some employee handbooks or policies). Because nonprofits are typically not unionized, nonprofits have also typically overlooked the National Labor Relations Act as a possible limitation on their right to discipline or terminate at will. But recently, nonprofits seeking to enforce work rules or to restrain employee criticism of them or their policies in social media such as Facebook and Twitter have received important reminders of the need to consider the provisions of the NLRA — even if the nonprofit is not unionized.

The NLRA provides workers with a protected right to engage in concerted (or group) activity for purposes of collective bargaining or "other mutual aid or protection." This right includes communications with one another about the terms and conditions of their employment. Critically, the NLRA's protection applies to nonsupervisory employees regardless of whether the employees belong to a union. Disputing conditions of employment is typically activity protected by the NLRA, but an employee engaged in protected concerted activity can lose the protection of the NLRA if his or her conduct is "opprobrious." In other words, while nonprofits are entitled to maintain order and respect in the workplace, employees engaged in concerted activity are permitted some leeway for impulsive and intemperate behavior. When balancing those rights and deciding whether an employee's otherwise protected complaint tips the balance and loses protection, the National Labor Relations Board — the federal agency charged with enforcing the NLRA — weighs four factors: (1) the place where the discussion occurred; (2) its subject matter; (3) the nature of the employee's conduct; and (4) whether the employee's conduct was provoked in any way by an employer's unfair labor practice. *Atl. Steel Co.*, 245 NLRB 814, 816 (1979).

One reminder that the NLRA can protect even nonunion employees from discipline for offensive conduct came last summer. In *Plaza Auto Center, Inc.*, Case No. 28-CA-22256 (Aug. 2010), an employee was called into a meeting with the company's owner after making several negative comments about various employment conditions, including compensation, in employee group meetings. The owner told him that he should not discuss pay and that if he did not trust the company, the employee should work elsewhere. The employee became upset and responded by calling the owner a "f***ing crook" and "an a**hole," adding that the owner was stupid, unliked and talked about behind his back. The employee was fired.

The NLRB concluded his firing was illegal. Applying the four factor test described above, the NLRB found factors 1, 2 and 4 favored the employee, and that the employee's conduct (factor 3) "not so opprobrious" as to render his conduct unprotected because it was provoked by the employer's failure to answer his questions and the employer's suggestion the employee could work somewhere else. See also *Kiewit Power Constructors Co.* v. *NLRB*, No. 10-1289 (D.C. Cir. Aug. 3, 2011) (comments by employees in response to warnings about excessive break time that things would "get ugly" if they were disciplined and that the supervisor should bring his boxing gloves were not physical threats but protected, though intemperate, comments).

Another reminder to nonprofits of the vitality of the NLRA came in American Medical Response — the notorious Facebook case. That case involved a complaint filed by the NLRB against AMR, an ambulance service, in October 2010. The complaint alleged that AMR unlawfully terminated an employee for posting negative remarks about her boss on Facebook and that AMR's Internet-use policy overbroadly prohibited employees from making negative comments about the company. Ultimately, the case resolved with AMR agreeing to revise its rules to ensure that they do not improperly restrict employees from discussing their wages,

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2011 OMB Circular A-133 Compliance Supplement Issued

By Tammy Ricciardella, BDO Institute for Nonprofit Excellence℠
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On June 1, the Office of Management and Budget (OMB) issued the 2011 Circular A-133 Compliance Supplement (the Supplement) dated March 2011. The Supplement is available on OMB's website at *http://www.whitehouse.gov/omb/circulars/a133_compliance_supplement_2011* in both pdf and Word format. The full version of the Supplement is over 1,500 pages in length. You can download the entire Supplement or sections of the Supplement from the website. The Supplement is applicable to audits of fiscal years that begin after June 30, 2010 and supersedes the 2010 Supplement.

As in the past years, Appendix V lists the changes from the previous Supplement. There were 19 new programs added to the Supplement and five new programs added to the Student Financial Aid Cluster. There is also a summary of specific changes to programs listed by Catalog of Federal Domestic Assistance (CFDA) number. Throughout the Supplement, items that pertain to funds received under the American Recovery and Reinvestment Act (ARRA) are identified in boldface print.

The following is a summary of some of the major changes from the 2010 Supplement.

New Requirements for the Federal Funding Accountability and Transparency Act (FFATA) of 2006 and subsequent 2008 Amendments

One of the most significant changes to the Supplement is in Part 3, Compliance Requirements, for both Reporting and Subrecipient Monitoring. These sections have been modified to include the new compliance requirements and suggested audit procedures relating to FFATA. FFATA put into place a new federal reporting system for direct recipients of non-ARRA funds that requires the reporting of certain subawards. Under FFATA, a subaward is defined as a legal instrument to provide support for the performance of any portion of the substantive project or program for which a recipient received a grant or cooperative agreement award and that is awarded to an eligible subrecipient. For grants and cooperative agreements, the effective date of FFATA was October 1, 2010, for all discretionary and mandatory awards equal to or exceeding $25,000 with a new Federal Assistance Identification Number (FAIN) made on or after that date. A recipient must report each obligating action of $25,000 in Federal funds for any subawards. The reporting is made to the FFATA Subaward Reporting System (FSRS) and is required to include the date of the subaward, subaward amount, subaward number and other details. The auditor will be selecting a sample of recipient payments for first-tier subawards to determine that all amounts reported are supported by documentation and to determine that the filing was completed in a timely basis.

Comparison of ARRA and FFATA Requirements

The Reporting compliance requirement section in Part 3 also includes a new table that helps auditors distinguish for purposes of the OMB Circular A-133 audit the reporting requirements that apply to reporting by recipients under ARRA and those that apply to reporting under FFATA.

Part 4 Applicability of FFATA Reporting

There is a new section entitled Subaward Reporting under the Transparency Act that is now included in each program and cluster in Part 4. This new section notes whether FFATA reporting is "applicable" or "not applicable." There are several reasons why FFATA reporting may not be applicable to a program and/or cluster, such as: (1) there are no subawards under the program, (2) the program is exempt because it is ARRA funded, or (3) the program is not a grant or cooperative agreement. If you have programs or clusters with both ARRA and non-ARRA funding, the FFATA reporting only applies to the non-ARRA funds.

Clarification Regarding ARRA Section 1512 Reporting

The Reporting section in Part 3 has been updated to clarify the requirements of the quarterly reporting requirement under Section 1512 of ARRA (Section 1512 reporting). OMB has clarified in the Supplement that when recipients do not have the actual expenditure amounts for the quarter within the 10

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Q&A What Should We Think About Before Accepting a Donation of Real Estate?

By Eleanor Evans, Esq., CAPLAW

Q: A business in our community just contacted us and wants to donate a building to our nonprofit Community Action Agency (CAA). The business wants to complete the donation by the end of the month. What issues should we consider before accepting the donation?

A: While a donation of real estate sounds like a great opportunity – especially if your CAA is tight on space – it is important not to rush to accept the gift. Owning real estate can involve significant expenses and potential liability. Therefore, your CAA should conduct the same degree of due diligence before accepting a gift of real estate as it would if it were buying the property.

It is also important to be aware of IRS reporting requirements associated with non-cash gifts in a case where the donor seeks to claim a charitable contribution deduction for the donation.

Due Diligence

Potential environmental liability is one of the biggest drawbacks of acquiring real estate, whether through a gift or otherwise. Under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), an owner of real property may be liable for environmental clean up of the property even if the owner was not involved in or did not actually know of environmental contamination on the property. The cost of environmental remediation may be enormous. Therefore, it is critical that, before accepting the donation, your organization obtain an independent environmental inspection of the property, as well as information and documents relating to past use of the property and its environmental condition.

Your CAA should work with a real estate attorney in your state to conduct due diligence on environmental and other issues before deciding whether to accept the donation. If the donation still seems attractive after the due diligence is conducted, your organization's board should vote on whether to accept the donation. If the board votes to accept the donation, the attorney may then ensure that the deed to the property is transferred to your organization and recorded properly.

In conducting due diligence, your organization should consider issues such as:

- The value of the property.
- Whether the donor has clear title to the property, or for example, whether the property is being transferred subject to any mortgages, liens, or easements (your organization should have a title search done and obtain title insurance).
- As noted above, whether there are any potential environmental problems with the property.
- Whether all taxes have been paid on the property.
- If your organization is planning to use the property:
  - Whether the property is in a good location and is properly zoned for the use your organization plans to make of the property.
  - If changes are required to make the property suitable for your organization's planned use, the approximate cost of those changes and what source of funds your organization would use to make those changes. If your organization plans to use federal grant funds, it is important to check before acquiring the property whether the funds can be used for that purpose.
- If your organization is planning to sell the property rather than use it for its own operations, what the market is like for the property (for example, how long might it take to sell the property).
- The amount of "carrying costs" associated with the property, such as taxes (look into whether your organization would be subject to those taxes or would be exempt from real estate taxes because it is a 501(c)(3) organization), insurance, maintenance and security and whether your organization has the funds to cover those costs (and, if it

is planning to cover those costs from federal grant funds, whether the carrying costs are an allowable use of those funds).

- Whether any violations of state, local or federal law exist on the property.
- Whether the donor has made any contractual or other commitments to others regarding the property.
- Whether the property is the subject of litigation or threatened litigation.

Keep in mind that there will be costs associated with conducting due diligence (e.g., attorneys' fees, environmental inspection fees, title search fees etc.) and additional fees if your organization decides to accept the donation (e.g., title insurance, transfer fees etc.). Be sure your organization has funds to pay for these fees.

IRS Requirements and Gift Acceptance Policies

Donors seeking to claim charitable contribution deductions for certain noncash donations must complete IRS Form 8283, "Noncash Charitable Contributions." In the case of a noncash donation valued at more than $5,000, the IRS requires that the donor obtain an independent appraisal of the property and that the donee organization (e.g., your CAA) complete and sign Part IV of Form 8283 acknowledging receipt of the gift. Before submitting the form to your CAA for acknowledgment, the donor must fill in the donor's name and identifying number and, in Section B, Part I, line 5, column (b), a description of the property. A representative of your organization authorized to sign your organization's tax returns or specifically authorized to sign Form 8283 should sign the form and return it to the donor. The donor is then required to give a copy of the fully completed Section B of the form to your CAA.

If your organization sells, exchanges or otherwise disposes of the contributed property reported on Form 8283 within three years of the date of the gift, it will need to file IRS Form 8282 "Donee Information Return" with the IRS within 90 days of the disposition and provide the donor with a copy of the completed Form 8282.

Your CAA will need to report the donation on its IRS Form 990 by answering "yes" on Part IV, Question 29 and by completing Schedule M. Information on the donor and the donation must also be included on the Form 990's Schedule B, "Schedule of Contributors." Depending on the circumstances, there may be other places on the Form 990 where disclosure of the donation is required. Your CAA should consult with its tax preparer about this.

"Owning real estate can involve significant expenses and potential liability. Therefore, your CAA should conduct the same degree of due diligence before accepting a gift of real estate as it would if it were buying the property."

Form 990 Schedule M also asks whether the organization has a gift acceptance policy that requires the review of any non-standard contributions. Such a policy is not required, but your board should consider adopting a policy that sets out the procedures for acceptance of real estate gifts and other property and gifts on which donors have placed restrictions.

Required IRS Disclosure: Any tax advice contained in this article is not intended or written to be used, and cannot be used by any taxpayer, for the purpose of avoiding penalties under the Internal Revenue Code or promoting, marketing or recommending to another party any matters addressed herein.

Leaner Times

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"Because performance evaluations are often a factor in selecting employees to be laid off, it is important to ensure that they are conducted regularly for all employees and that employees are being evaluated on the basis of uniform criteria."

Layoffs may prompt affected employees to file discrimination or retaliation claims against their former employer. These claims typically allege that the employee was treated unfavorably by the employer because of the employee's age, disability, race, color, sex, national origin and/or religion or that the employer terminated them in retaliation for asserting legally protected rights.[1] Proper documentation of the layoff process may help CAAs defend against these types of claims. For example, a CAA should document the economic conditions triggering a layoff (such as cuts in specific grants) and any cost-saving measures implemented prior to the layoff, i.e., where employees are being laid off due to funding reductions or elimination of specific grants, the documentation should mention that fact. It is also important to design and document an objective process for selecting employees to be laid off. CAAs should consider forming a committee comprised of human resources and other key management personnel to design the selection criteria and to evaluate employees using those criteria. Because performance evaluations are often a factor in selecting employees to be laid off, it is important to ensure that they are conducted regularly for all employees and that employees are being evaluated on the basis of uniform criteria.

If your CAA is considering laying off unionized employees, be sure the layoffs comply with the collective bargaining agreement(s) covering those employees.

CAAs laying off large numbers of employees may be subject to the federal Worker Adjustment and Retraining Notification (WARN) Act. In general, the WARN Act applies to private employers (including nonprofit CAAs) with 100 or more employees. (However, this total excludes employees who work an average of fewer than 20 hours a week and employees who have worked for the employer for fewer than six out of the last 12 months.) Federal, state, and local government entities that provide public services (such as public CAAs) are not covered by the law. The WARN Act requires covered employers to provide notice 60 days in advance of mass layoffs and plant closings. This notice must be provided to affected workers or their representatives (e.g., their labor union), to the state dislocated worker unit, and to the appropriate unit of local government.[2] For additional information about the WARN Act, visit the following U.S. Department of Labor website *http://www.doleta.gov/layoff/warn.cfm*. If a CAA is contemplating laying off large numbers of employees, it should consult with an attorney in its state to determine whether the WARN Act and/or a state law equivalent applies.

In some cases, CAAs may want to provide severance payments to terminated employees. Keep in mind that federal grant funds may be used to pay severance only where severance is required by: (1) law; (2) an agreement between the employer and the employee; (3) an established policy that constitutes, in effect, an implied agreement on the organization's part; or (4) the circumstances of the particular employment.[3] Thus, if a CAA wants to provide severance to employees being laid off, it should plan ahead and adopt a policy (or agreements with specific employees) that specifies under what circumstances and to which employees' severance will be paid.[4] It should also budget for severance pay.[5]

Wherever possible, a CAA should make severance payments contingent on the release by employees of their legal claims against the organization. Note that certain laws, such as the federal Age Discrimination in Employment Act (ADEA) require specific release language and procedures; state laws may include additional requirements regarding severance.[6] Therefore, it is important to work closely with an attorney in your state to structure severance arrangements and to draft severance policies and agreements.

Pay Cuts, Reductions in Wages and Hours, Converting Full-Time to Part-Time

Implementing pay cuts, reducing employees' hours and wages on a continuing basis, or converting full-time employees to part-time are less drastic alternatives than layoffs. When considering these options, be aware of the federal Fair Labor Standards Act (FLSA)[7] issues involved and check with an employment attorney in your state about whether any state laws apply.

Generally, the FLSA requires employers to pay employees at least the federal minimum wage for all hours worked and one-and-a-half times their regular rate of pay when employees work over 40 hours within an established work week.

However, employees may be exempt from the minimum wage and overtime requirements if they perform certain duties set forth in the FLSA and if (for most exemption categories) they are regularly paid a predetermined salary of at least $455 a week. Improper deductions from an exempt employee's predetermined salary will require the employee to be treated as non-exempt.[8] An employee's status as exempt or non-exempt will influence how the CAA structures any of these options.[9]

Non-Exempt Employees

Under the FLSA, an employer is required to pay non-exempt employees only for the hours they work. Therefore, an employer may implement pay cuts, reduce the hours and wages of non-exempt employees on a week-to-week basis or convert them from full-time to part-time without violating the FLSA as long as the employer continues to pay them at least minimum wage for all hours worked and overtime pay when applicable. If an employer converts a full-time employee to part-time, it should officially document the change in status and any related reduction in fringe benefits.[10]

Exempt Employees

An employer is not prohibited from reducing the predetermined salary amount paid regularly to exempt employees during a business or economic slowdown, provided that it follows certain requirements when implementing the reduction. Whether the employer is cutting all employees' pay by 15 percent or changing exempt employees' work schedules (for example from 40 hours per week to 25 hours per week) and reducing their salaries accordingly, the employer must follow the same requirements so that any type of salary reduction:

- Is applied on a prospective and semi-permanent or permanent basis;
- Is not implemented merely to evade salary basis requirements;
- Does not bring wages of employees in most exemption categories below $455 per week; and
- Reflects the long-term business needs of the organization (i.e., is not a short-term, day-to-day or week-to-week reduction).[11]

As with non-exempt employees, if the employer converts a full-time employee to part-time, it should officially document the change in status and any related reduction in fringe benefits.

Furloughs

Furloughs – or temporary leaves of absence without pay – are another possible cost-saving measure.

Non-Exempt Employees

Because the FLSA requires employers to pay non-exempt employees only for the hours they work, an employer may furlough non-exempt employees for partial days, full days or full work weeks and reduce their pay accordingly without violating the FLSA. If non-exempt employees perform any work during the furlough period, they must be paid for the actual hours they work.[12] Therefore, a CAA implementing this alternative should communicate and enforce a strict no-working policy during the furlough period – including prohibiting furloughed employees from checking voicemails or emails. One way to facilitate compliance with no-working policies is to require employees to turn in their employer-provided cell phones and personal digital assistants (PDAs) during the furlough period.

Exempt Employees

In general, under the FLSA, an employer cannot deduct from an exempt employee's salary because of variations in the quantity of work performed. So, if an exempt employee performs any work during a workweek, the employee usually must be paid his or her full salary for that week. However, an employer may furlough exempt employees by requiring them to take off one or more entire work weeks. The employer may deduct pay for a furlough week from an exempt employee's predetermined salary as long as the employee performs no work during that entire workweek. Therefore, the employer should implement a strict no-working policy of the type described above during furlough weeks.[13]

Additionally, because the FLSA permits employers to reduce exempt employees' pay for full-day absences from work for personal reasons other than sickness or disability, a CAA may ask for volunteers to take full days off without pay. If an exempt employee volunteers, the employer may take deductions from the employee's salary for those days. However, the choice must be entirely voluntary; the employer must not pressure or coerce exempt employees to take days off. In addition, exempt employees who volunteer to take days off must perform no work on those days.[14]

Public CAAs have somewhat more flexibility in structuring furloughs of exempt employees than do nonprofit CAAs. Under the FLSA, state and local government entities – including public CAAs – may reduce an exempt employee's hours and pay from week to week for budget reasons without destroying the employee's exempt status on a permanent basis. However, during the week(s) in which an exempt employee's

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hours are reduced, the government employer must treat the employee as non-exempt – i.e., require the employee to record all hours worked, pay the employee at least minimum wage for all hours worked and pay the required overtime premium if the employee works over 40 hours during the week.[15]

Reductions in Fringe Benefits

Reducing or eliminating certain fringe benefits is another cost-saving alternative. Some examples of this alternative include: reducing employer contributions to retirement plans; reducing the employer share of health insurance premiums; increasing health insurance co-pays or deductibles; or switching to a health insurance plan with lower premiums. These changes will require working with your CAA's benefit plan providers. They may also require consultations with advisors such as your retirement plan auditor or an employee benefits attorney. (For example, certain changes to your organization's health insurance coverage – such as increasing employee's share of premiums, increasing co-pays or deductibles or switching to a new plan – may have implications under the new health care reform law that your organization should discuss with an employee benefits attorney.) Board approval of the changes and amendments to plan documents may also be necessary. CAAs can also eliminate or reduce other types of fringe benefits, such as employer-provided cars, cell phones or PDAs.

Hiring and Wage Freezes

One of the least disruptive cost-saving alternatives is a hiring freeze. As positions become vacant due to normal attrition, a CAA may consolidate or restructure its operations to spread the work among the remaining employees. It is important to be aware of and acknowledge the extra work placed on the remaining employees and the possible decrease in employee

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on the radar: Are CAAs Required to Comply with E-Verify?

It depends on the state where the Community Action Agency (CAA) is located. E-Verify is a federal internet-based system created to supplement the I-9 Form used to verify that individuals are eligible to work in the United States.[1] The system is free for employers and is operated by the U.S. Citizenship and Immigration Services (USCIS) and the Social Security Administration (SSA). As a matter of federal law, use of E-Verify is voluntary for all employers except federal contractors. CAAs generally receive federal grants and not contracts and therefore are not usually considered to be federal contractors. However, some states have passed laws requiring employers, including CAAs, to use E-Verify. For example, Arizona enacted the Legal Arizona Workers Act in 2007 which requires employers to use E-Verify, with the consequence of suspension or revocation of an employer's business license if it is found to have intentionally hired an unauthorized worker.[2] Earlier this year, the U.S. Supreme Court upheld Arizona's E-verify law.[3]

Even if your state currently does not require E-Verify, there may be federal laws mandating E-Verify in the future. Bills have been introduced both in the House of Representatives and the Senate, which, if passed, would require all employers to use E-Verify and would increase penalties for employers who violate immigration laws. The Senate version seeks to eventually eliminate the Form I-9, replacing it solely with E-Verify.

With all of the recent E-Verify developments, CAPLAW suggests the following action items for CAAs:

- Determine if state laws require your CAA to use E-Verify. Check out these website links for information about states requiring employers to use E-verify *http://www.ncsl.org/?tabid=13127* and *http://www.williamsmullen.com/resources/detail.aspx?pub=686*.
- Even if E-Verify is not required in your state, make sure your employment policies are clear about instructing employees to properly complete all I-9 forms.
- If your CAA decides to use E-Verify, remember that using it does not eliminate the need to complete an I-9 form for all newly hired employees and to pay attention to the differing requirements of E-Verify and the I-9 Form.

See end notes on page 19.

Financial Training

(Continued from page 3)

Financial Data Informs Strategic Decision Making

"Powering Up Your Financial Leadership Team" offered tools and strategies to improve communication, and facilitate strategic thinking and joint problem solving among CAA leaders. Sohl led participants through a series of exercises designed to help them assess the financial health of their CAA. Topics explored included:

- Understanding the CAA's Business Model
- Critical Choices for CAAs
- Financial Decision-Making
- Financial Information Needs
- Financial Communication Tools
- Strategic Leadership

The Iowa pilot drew a mix of participants, including some who attended as their CAA's sole representative and others who attended in teams of two to five members. While all gained knowledge, the team-based participants benefitted most. Northeast Iowa Community Action (NICA) brought five members including both senior leaders and up-and-coming program managers. According to NICA Deputy Director Bill Iverson, the session provided a great opportunity for the team to understand what makes a Community Action Agency function properly. "I always think it's a good idea to go through and review the big picture to see if we are on course," he says. While the NICA team did not include a board member, Iverson wishes it had. "We are struggling with new board members who look at our budget. They say things like 'Why don't you take that money from LIHEAP and or that money for the health program and help keep the Head Start center open?' They do not understand that money comes with strings attached. I think it would be great to include board members."

Peer Learning Model

A key question raised by the pilot is whether some CAAs might be reluctant to embrace peer learning in financial matters. In the 2012 Powering Up workshop, teams will analyze their own financial situation, explore strategies that fit their organization, and receive feedback from Sohl and other participants. While some CAAs may be hesitant to share financial data in a group setting, Sohl encourages hesitant financial officers to "let others learn from what you have figured out." She also stresses that board members and CEOs will not fully benefit from looking at sample financials. They need to be looking at their own CAA's information to engage in meaningful discussion that will be useful to their organization.

ICAA's Ross agrees. "The ICAA board is deeply committed to the philosophy that we are all in this together," says Ross, "so if any one of us has an issue, then all of us have an issue, so what do we need to do to help each other so that we are all on the high road."

Are You Ready To *Power Up* Your Financial Leadership Team?

CAPLAW plans to refine and repeat Powering Up Your Financial Leadership Team in 2012. The session is a free, intensive, hands-on workshop for CAAs committed to developing their leadership capacity and financial literacy – with an emphasis on improving communication and cooperation between senior managers and the board.

The full-day session – tentatively scheduled for June 6, 2012 in San Diego, CA – will bring together teams from up to 10 CAAs to work through a series of challenges for their CAAs and to engage in peer-to-peer learning with members of their own teams and the leadership teams of other CAAs.

Who Should Attend?

- Teams of 3-5 CAA financial leaders who are committed to improving communication and cooperation
- Each team must include the executive director, top fiscal officer, and at least one board member (i.e., treasurer, chair or other member of finance committee).
- Other potential team members might be the senior leader responsible for resource/fund development and/or the chair of the board fund development (fundraising) committee.

Stay tuned to *www.caplaw.org* for developing information on the training!

Oral Complaints

(Continued from page 4)

narrow interpretation of the Act would be incompatible with the purposes for which it was enacted, namely to protect illiterate, less educated, and overworked employees. Illiteracy rates were particularly high among employees at the time, and to require them to reduce their complaints to written communications would have been a substantial hardship. To provide further support for its original intent analysis, the Court examined interpretations of the anti-retaliation provision from other federal administrative agencies, specifically the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC). Both agencies interpret the anti-retaliation provisions as providing protection for oral complaints.

The Court also addressed the concern raised by Saint-Gobain that oral complaints do not provide employers with fair notice about whether an employee is actually making a complaint under the Act, or simply speaking from frustration. The Court adopted a "reasonableness standard" to determine if an employer has received fair notice of any complaint, written or oral. As long as the oral complaint is "sufficiently clear and detailed" for a reasonable employer to understand that the employee is asserting some protected right under the Act, it will be considered to have been "filed."

Implications for CAAs

Post-*Kasten*, it is clear that oral complaints are protected under the anti-retaliation provision of the FLSA, as long as they provide fair notice to the employer that the employee is asserting rights under the Act. Oral complaints, because they are often difficult to discern, require special attention from employers. As a result, to ensure compliance with the FLSA, employers should consider:

- Implementing a reliable policy and process for documenting and investigating oral complaints. By doing so, if an employer is sued by a current or former employee for retaliation under the FLSA, the employer will have some record or database to search to determine the specific details of the complaint.

- Training supervisors and managers in the complaint process. It is essential that all supervisors and managers become familiar with the entire complaint process and learn to properly identify and document authentic oral complaints. As *Kasten* demonstrates, an employee informing a supervisor or manager that a particular practice is illegal may constitute a valid oral complaint.

- Regularly educating all employees about the complaint process. Employees should receive information explaining how a complaint can be filed orally or in writing. Furthermore, all employees should be constantly informed of any updates to the complaint policy.

Following these suggestions will afford employers additional protection against potential lawsuits. Often, litigation is a battle of credibility between disputing parties and adopting and implementing a sound complaint policy will strengthen an employer's ability to prove that actions were taken for lawful, non-retaliatory reasons.

See end notes on page 19.

USERRA

(Continued from page 5)

Proctor, on the other hand, argued that an employer is not liable under USERRA unless the actual decision maker acted for a discriminatory purpose.

The Supreme Court Opinion

The Court held that under USERRA an employer is liable for employment discrimination based on the biased actions of supervisors and other company officials even if the ultimate decision maker was not biased himself. USERRA specifically provides that:

> A person who is a member of…or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership… or obligation.[2]

USERRA further provides that an employer is liable for unlawful discrimination if the individual's protected status is a "motivating factor in the employer's action."[3] This language is also in other federal anti-discrimination laws, such as Title VII.[4]

In *Staub*, the central issue was how to construe the phrase "motivating factor." Prior to *Staub*, it was unclear whether the discriminatory actions of non-decision makers that resulted in the termination of an employee could be classified as motivating factors in the employer's action. However, in its *Staub* decision, the Court, relying on the cat's paw liability theory, clarified the phrase by creating three requirements for liability.

"Prior to Staub, it was unclear whether the discriminatory actions of non-decision makers that resulted in the termination of an employee could be classified as motivating factors in the employer's action."

First, the non-decision maker must take some action against the employee motivated by hostility or bias against protected uniformed service obligations. The Court found that the supervisor's comments to Staub about his military obligations and the supervisor's having issued Staub a disciplinary warning satisfied this requirement.

Second, the non-decision maker must actually intend to get the employee fired, demoted, or otherwise penalized. The Court found ample evidence that Staub's supervisors specifically intended that he be terminated. One of the supervisors stated that she was trying to "get rid of" and was "out to get" Staub.

Finally, the non-decision maker's discriminatory actions must be one of the causes of the decision maker's adverse employment action. The Court determined that there was evidence that the supervisor's actions motivated the personnel officer's decision to fire Staub. Specifically, the Court noted that Buck's termination notice expressly stated that Staub was terminated because he had ignored the directive in the supervisor's disciplinary warning.

Additionally, the Court refused to adopt a "hard-and-fast" rule absolving an employer of liability where a decision maker conducts an independent investigation. The Court reasoned that even with an independent investigation, a non-decision maker's discriminatory report may still be a motivating factor for the decision maker's ultimate adverse employment action. Furthermore, the Court clarified that the expansion of cat's paw liability did not include circumstances where an employer's independent investigation results in an adverse action for other, nondiscriminatory reasons.

Implications for CAAs

Staub represents an expansion of cat's paw liability for employers in USERRA claims and other types of employment discrimination actions where an employee's protected status is a "motivating factor" in the adverse employment action, even if the ultimate decision maker did not discriminate against the protected employee. Although the Court applied cat's paw liability under USERRA, the Court's analysis and reference to other types of discrimination claims suggests that cat's paw liability may be expanded in the context of such claims. To comply with the potential broad scope of liability, employers should:

- Review an employee's past conduct and work history before initiating an adverse employment action. As *Staub* demonstrates, a proper independent investigation requires an employer to do more than rely solely on personnel files or recommendations from supervisors. Consequently, an employer should speak with the subject employee about the allegations and review other available information. Although the Court makes it clear that an independent investigation might not completely absolve an employer of liability, it bolsters an employer's case should an employee file an adverse employment action.
- Create a complaint policy and procedure that requires documentation and careful review of all complaints and disciplinary actions against an employee. A second layer of review should provide an employer with greater protection if an employee files an adverse employment action.
- Ensure that supervisors, human resources staff, and other organization officials are informed of the federal discrimination laws. Proper training should help reduce the risk of inadvertent discriminatory conduct by supervisors.

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OMB Compliance

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days allowed, they must use the "best available data" for the full quarter which can include estimates. So, if a recipient has two months of finalized data and the third month can only be estimated due to the timing of the reporting, this final month can be reported based on estimates. However, the recipient should have a process in place to review the reports they submitted and compare the estimated amounts to the actual finalized results, to determine if there are any material differences that would require that the report be corrected during the continuous correction period. If there are no material differences between the estimates used on the report submitted and the actual finalized results, the recipient does not have to correct a submitted report. This clarification states that the "lag" method being used by some entities is not acceptable and if used would be considered a compliance finding. OMB did state that the finding would not be considered a material weakness or affect the compliance opinion and would not have questioned costs associated with the finding. The "lag" method is where a recipient is using the finalized financial data from two months of the quarter but due to not having the final month closed due to the timing, they used the last month of the previous quarter.

"...the recipient should have a process in place to review the reports they submitted and compare the estimated amounts to the actual finalized results..."

Clarification of Buy American Act Requirements

The Procurement and Suspension and Debarment compliance requirement in Part 3 has been modified to include additional information related to international agreements and the Buy American Act. Entities with funds that are used for purchases of iron, steel and other manufactured goods should review these clarifications.

Update to Subrecipient Monitoring

The Subrecipient Monitoring compliance requirements in Part 3 have been updated to add the requirement that non-ARRA first-tier subrecipients must obtain DUNS numbers as part of eligibility for a subaward. The update also clarifies that for ARRA awards, a subrecipient is not required to be registered in the Central Contracting Registration (CCR) at the time of the award.

Contacts for A-133 Audits

A table has been added to the Supplement that provides programmatic contact information for programs by CFDA number to obtain specific information about a federal program or its programmatic requirements. OMB notes that these are program contacts and they are not familiar with the nuances of A-133, so only programmatic questions should be posed to these individuals.

Disaster Waivers

Appendix VI provides updated information on the waivers and special provisions granted by Federal agencies. Many of the waivers and/or special provisions are directed toward recipients affected by Hurricanes Katrina and Rita in 2005.

Exclusion of Certain ARRA Programs from the Single Audit Requirement

Included in Appendix VII of the Supplement is a list of ARRA-funded programs that are not covered by the Single Audit requirements, and therefore, are not required to be included in the Schedule of Expenditures of Federal Awards (SEFA) or in the determination of major programs. This appendix has also been updated to include a list of ARRA programs that are not covered in Parts 4 and 5 of the Supplement but that are potentially subject to an A-133 audit.

ARRA Findings Requirements

Included in Appendix VII to the Supplement is a paragraph that notes that the details of findings reported for ARRA funds must include explicit identification of the applicable ARRA programs that are affected by the finding.

Appendix VII Reminders

Appendix VII continues to follow the same guidance introduced in the 2010 Supplement regarding the effect of ARRA expenditures on the major program determination process and the fact that ARRA funds need to be separately identified in the SEFA and on the Data Collection Form. In addition, the clarification remains that an entity cannot be a low-risk auditee if they have not submitted their A-133 reporting package to the Federal Audit Clearinghouse within the nine-month time period. The OMB guidance that recommends that agencies not grant extensions to grantees is repeated again. It is recommended that organizations review the 2011 Supplement for a full list of changes that may affect them and ensure they have complied with all the applicable compliance requirements.

For more information, contact Tammy Ricciardella, director, at *tricciardella@bdo.com*.

Nonprofits Beware

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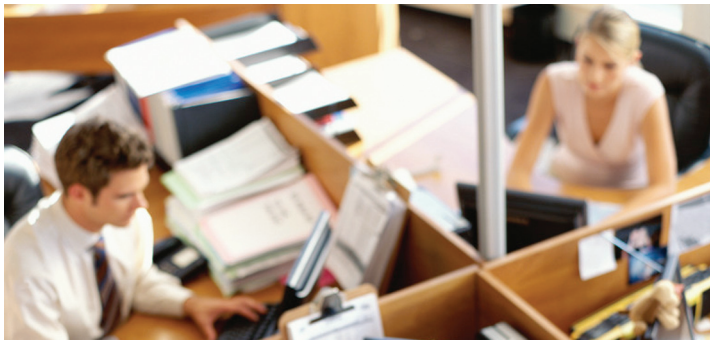

hours and working conditions with co-workers and others while not at work, and agreeing that it would not discipline or discharge employees for engaging in such discussions. AMR, as it turns out, is one of over 100 such cases recently filed by the NLRB.

Cases such as AMR have led to widespread review of social media policies by nonprofits and other employers grappling with understanding what their policies could lawfully regulate, as well as the types of employee commentary or criticism protected from censure under the NLRA. Three recent advice memoranda from the NLRB's Office of General Counsel provide some additional guidance in this area. Unlike the situation in AMR, in each of the three opinions, the NLRB found that employees posting job-related complaints in social media were not engaged in concerted, protected activity under the NLRA.

In the first opinion, *JT's Porch Saloon and Eatery, Ltd.* (July 7, 2011), the employee, a bartender, complained on Facebook to his stepsister that he hadn't had a raise in five years and that he was doing "waitress" work without tips. He also called the customers rednecks and stated that he hoped they "choked on glass as they drove home drunk." According to the memorandum, although the posting addressed the terms and conditions of employment, the employee's discharge was not illegal because the employee did not discuss the posting with his co-workers and there was no evidence that any co-workers responded to it. In short, the evidence established that the employee was simply responding to a question from his stepsister, a non-employee.

In *Wal-Mart* (July 19, 2011), the employee was discharged after posting profane comments on Facebook critical of store management. As in *JT's Porch Saloon and Eatery, Ltd.*, the NLRB concluded that the employee's Facebook postings were merely an expression of individual gripes as opposed to protected concerted activity. In this case, at least two co-workers responded; however, their messages reflected their perception that the posting was individual and not group activity.

Finally, in *Martin House* (July 19, 2011), an employee, a recovery specialist in a residential facility for homeless individuals, many of whom suffer from mental illness and substance abuse, posted demeaning comments concerning her employer's clientele. The employee was not a "Facebook friend" with any of her co-workers but, unfortunately for her, was a Facebook friend of one of her employer's former clients, who saw the postings and reported them to her employer. The NLRB found her discharge lawful because there was no evidence of protected concerted activity: the comments did not mention any terms or conditions of employment, the posting was not discussed with any co-workers, and the comments were not for the purpose of inducing group activity or an outgrowth of collective concerns of the employee or her co-workers.

What Do These Cases Mean?

Although in each of the three opinions the employee's comments were found to be individual gripes and not protected concerted activity, the matters nevertheless highlight the need for a careful analysis of the potential difficulties in sustaining the discipline or discharge of an employee because of workplace complaints or his or her postings on Facebook, Twitter or other social media. Indeed, the dispositive evidence in the three opinions, from the employer's point of view, is to some degree serendipitous. Thus, had evidence surfaced that the employee in *JT's Porch Saloon and Eatery, Ltd.* discussed his concerns with co-workers, or had one or more of them seen and responded to his posting agreeably, a different result may have been obtained. Likewise, in *Wal-Mart*, had the co-workers shared similar concerns about the object of the employee's gripe, the activity could have been found to be concerted and protected.

Because the nonprofit will likely not know whether co-workers joined or otherwise commented on any posting, the opinions also highlight the difficulty of knowing whether social media postings may be concerted protected activity under the NLRA until it is too late. Thus, although the recent opinion letters can be read to be consistent with the traditional view that nonprofits, like all other employers, are entitled to maintain order in the workplace, the factual specificity of the opinions actually highlights the limitations on that right and the need to proceed cautiously when considering whether to discipline an employee because of his or her comments, intemperate or otherwise, in a blog, tweet or other social media posting.

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Nonprofits Beware

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More generally, the spate of cases filed by the NLRB and its recent opinion letters demonstrate the need for nonprofits: (1) to review their policies to ensure that they are not overbroad and constitute potential unfair labor practices by themselves (e.g., a written policy stating that compensation is private and may not be discussed with co-workers); and (2) to review proposed disciplinary actions to avoid potential claims under the NLRA and other federal and state employment laws. While any disciplinary decision is obviously highly fact-specific, a few general reminders to minimize or avoid potential liability when considering whether to and the extent of any discipline are as follows:

- What will be the articulated reason for the action? Remember, if the explanation changes, the chances of employee victory in court are increased dramatically.
- Do the grounds for discipline accord with the employer's policies?
- Does the action violate a public policy or appear to be retaliatory (due to timing or other reasons)?
- Was an adequate investigation of the triggering event done? Have pertinent records been reviewed? Is the articulated reason documented in warnings and performance appraisals? How strong is the supporting evidence?
- Was the employee given an opportunity to refute the contention? Does the employee have a sympathetic defense? Are there any circumstances a judge or jury might consider as excusing the employee's misconduct?
- What do comparisons to other similar infractions within the organization reveal? If they were handled differently, what is the justification for the difference in treatment?

The law in this area is evolving. For now, it is probably safe to say that if the employee could not be disciplined for a comment made around the office water cooler, it could be viewed as folly to discipline him or her simply for saying it on Facebook or some other social media. But definitely stay tuned as the relevant law appears to be an ever-developing, moving target.

For more information, please contact Mr. Taylor at *rwtaylor@Venable.com* or at 410-244-7654.

NONPROFIT*numbers*

Daring To Lead 2011 Calls for Increased Financial Literacy Among Nonprofit Leaders

Daring to Lead 2011: A National Study of Nonprofit Leadership, analyzes the results of a survey of more than 3,000 nonprofit executive directors and offers a snapshot of leaders confronting the realities of managing for sustainability in a deep recession. The survey, which was produced in partnership by CompassPoint Nonprofit Services and the Meyer Foundation and which is available at *http://daringtolead.org/*, reveals that the recession has "amplified pre-existing economic challenges" including insufficient cash reserves and low levels of executive and board financial literacy.

Among the findings:

56 percent of nonprofits that rely on government sources for more than half of their income report less than three months of cash reserves.
40 percent of executive directors rate their own financial analysis skills as "basic."
39 percent of executive directors report their boards do not engage in strategic decision making.

The study authors question "the degree to which board leaders are partnering with staff on fundamental questions of business model and sustainability," and point to the need for a "clearer understanding on the part of executives and boards about the financial condition of their organization, its business model, and the meaning of sustainability."

Daring to Lead 2011 includes several calls to action. Among them, nonprofit leaders should:

Invest Time in the Board. Executive directors should build their own financial management skills, and provide information and context to help the board better fulfill its role in both financial oversight and ensuring financial sustainability.

Implement Board Practices Widely Recognized as Effective, including conducting periodic training for board members on how to read the organization's audit and financial reports, and engaging in financial or business planning to better understand the organization's financial sustainability.

Expand the Board's Role Beyond Financial Oversight, including going beyond review of past performance to exploration of business model strengths and weaknesses; and presenting boards with dashboard and visual metrics around program, finance, and fundraising such that the interdependent elements of an organization's business model are regularly reinforced.

Develop New Strategies for Strengthening Boards, including developing improved systems for placing and training board members that can address the huge, ongoing demand for skilled and engaged board members.

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morale as a result. Also note that this approach may increase staffing costs for non-exempt employees if the increased work load results in their working additional hours.

Holding employees' wages at their current level is yet another option. Before implementing a wage freeze, check the terms of any collective bargaining agreements or employment contracts. Also ensure that salaries paid to employees hired during a wage freeze are consistent with those paid to existing employees. Finally, keep in mind that while your organization can freeze non-exempt employees' hourly wage rates, it must still pay them for all hours worked, including overtime pay, if applicable.

Conclusion

In tough economic times, CAAs should consider short-term and long-term goals and work creatively to implement cost-saving measures to help them stay on the path towards those goals. Although the cost-saving measures outlined in this article are discussed separately, a CAA may choose a combination of the options to best meet its needs.

See end notes on this page.

The CAPLAW Update Newsletter is part of the National T/TA Strategy for Promoting Exemplary Practices and Risk Mitigation for the CSBG program and is presented by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration of Children and Families, Office of Community Services Cooperative Agreement Number 90ET0429 and 90ET0432. Any opinion, findings, and conclusions, or recommendations expressed in this newsletter are those of the authors and do not necessarily reflect the views of the U.S. Department of Health and Human Services, Administration of Children and Families.

Article Endnotes

Workforce Options in Leaner Times

1. *See* Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.; Americans with Disabilities Act, as amended, 42 U.S.C. § 12101 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq..
2. 29 U.S.C. §§ 2101-2109.
3. 2 C.F.R. § 230 (OMB Circular A-122), App. B, par. 8.k.
4. Two U.S Department of Health and Human Services Departmental Appeals Board (DAB) decisions illustrate that failing to have such a policy or agreement in place is likely to result in severance payments being disallowed. *See Alcoholism Center for Women*, DAB No. 222 (1981) and *South Central Florida Health Systems Council*, DAB No. 488 (1983). These decisions are available online at http://www.hhs.gov/dab/decisions/index.html.
5. Note that under federal cost principles and Internal Revenue Code requirements for tax-exempt organizations, compensation – including severance – paid to employees must be reasonable. For nonprofit CAAs, where an employee receives more than $150,000 in compensation (including severance) for the year, information about that employee's compensation, including severance paid, may need to be reported to the IRS on Schedule J of the organization's Form 990. In some cases, states also require nonprofits to report certain severance payments to their state charity regulators.
6. *See* 29 U.S.C. § 621 et seq.; *see also* 29 C.R.F. § 1625.2.
7. 29 U.S.C. § 201 et seq.
8. 29 U.S.C. §§ 206, 207; *see also* 29 C.F.R. § 541 et seq.
9. 29 U.S.C. §§ 206, 207; *see also* 29 C.F.R. § 541 et seq.
10. *See* Department of Labor (DOL) Fact Sheet #70 available online at http://www.dol.gov/whd/regs/compliance/whdfs70.pdf.
11. 29 C.F.R. § 541.602 (a); DOL Fact Sheet #70.
12. DOL Fact Sheet #70.
13. *See* 29 C.R.R. § 541.602 (a).
14. *See* 29 C.R.R. § 541.602 (a); DOL Fact Sheet #70.
15. 29 C.F.R. § 541.710.

Oral Complaints: Casual Workplace Banter or Properly Filed Claim under Wage & Hour?

1. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011).
2. 29 U.S.C.A. § 215 (emphasis added).

Employer Liability for USERRA and Other Discrimination Claims Expanded

1. *Staub v. Proctor Hosp.*, 131 S.Ct. 1188, 1194 (2011)
2. 38 U.S.C. § 4311(a)
3. 38 U.S.C. § 4311(c)
4. *See Staub*, 131 S.Ct. at 1191; *see also*; 42 U.S.C., § 2000e-2(a), (m)

Are CAAs Required to Comply with E-Verify?

1. *See* Instant Verification of Work Authorization, U.S. Citizenship and Immigration Services, available at *http://www.uscis.gov.*
2. *Ariz. Rev. Stat. §§23-211, 212, 212.01.*
3. *Chamber of Commerce of the U.S. v. Whiting*, 131 S.Ct.1968.