

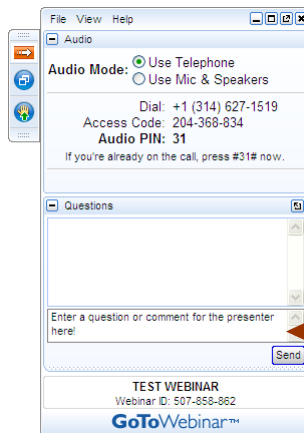


EVENTS AND TRAININGS

upcoming CAPLAW trainings on the legal and financial issues critical to CAAs



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Working With Personnel Policies and Procedures
for CAAs

CAPLAW Attorney Network Webinar

June 8, 2016

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Agenda

1. HR directives in CSBG Organizational Standards
2. Lobbying and political activity policies
3. Drug-Free Workplace Act
4. New DOL salary requirements for exempt employees
5. Practice tips in drafting and reviewing CAA HR policies

CSBG Organizational Standards

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What are the CSBG Organizational Standards?

- History
- Purpose
- Federal role
- State role
- Impact on CAAs
- Office of Community Services Memorandum No. 138

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CSBG Organizational Standards: Standard 7.1 (Not applicable to public CAAs)

- CAA has written personnel policies reviewed by attorney and approved by board within past 5 years
 - Recommend attorney who has expertise in employment law in CAA's state and is familiar with CAA and its programs
 - Ideally, both reviews would take place together
 - Options for record of legal review
 - Written communication from attorney
 - Invoice with specific entry for policy review
 - Minutes of meeting(s) showing discussion of policies
 - Options for record of board review
 - Minutes of meetings
 - Votes approving policies

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Standard 7.2

- Make available employee handbook (or personnel policies if no handbook) available to all staff and notify staff of changes
 - Part of orientation process
 - Signature of receiving employee
 - Best practice: discuss policies rather than just providing a copy or making it available
 - Paper or electronic?
 - Signatures or acknowledgments of receipt of changes, with training
- Public CAAs follow local governmental policies on this issue

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Standard 7.3

- Written job descriptions for all positions, updated within past 5 years
 - Key for determining numerous legal issues and defending against many legal claims
 - Send to medical provider for determining status and reasonable accommodation under ADA and fitness for duty to return to work after FMLA and ADA leave
 - May be useful to defend discrimination claim by showing that applicant for position or promotion did not meet job requirements or that individual was not a “qualified” person with a disability
- Requirement that descriptions be updated within past 5 years not applicable to public CAAs

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Standards 7.4 and 7.5

- Board conducts performance appraisal and reviews and approves compensation of CEO/ED within each calendar year
 - Be careful about timing – each calendar year
 - What is an appraisal? Who conducts and approves it and comp.?
 - Compensation surveys
 - Required if primarily paid with Head Start funds
 - Comparables required to satisfy IRS “Intermediate Sanction” safe harbor
 - Cap on Head Start salaries: \$185,100 in FY 2016 (Exec. Level II)
 - Include salaries, bonuses, periodic payments, severance pay, value of any vacation time or compensatory or paid leave benefit not explicitly excluded and FMV of any employee benefit not explicitly excluded
 - Health, medical, life insurance, disability, retirement or any other employee welfare or pension benefit are explicitly excluded
 - No Head Start or other federal \$ may be used to pay any part of compensation that exceeds cap

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Standards 7.4 and 7.5 – Public CAAS

- Public CAAs follow local governmental procedure for performance appraisal and compensation of CSBG department head

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Standard 7.6

- Must be policy in place for regular written evaluation of employees by their supervisors
 - Not a very specific standard
 - But key for defending discrimination claims
 - Review format regularly and train supervisors
 - Ensure appraisals are specific enough and include examples, and avoid discriminatory stereotypes
 - Be careful of criticizing attendance if absence based on justified reasons, such as FMLA or ADA
 - Does not require that 100% of employees have annual review
- Public CAA follows local governmental policies for regular written evaluation of employees by their supervisors

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Standard 7.7

- CAA has whistleblower policy approved by board
- CAPLAW website has sample policy
- To whom does policy apply?
- How is policy publicized?
- What type of conduct does it cover?
- What are penalties for noncompliance?
- Is reporting required by employees?
- Public CAAs – Provide copy of existing local govt whistleblower policy to board members

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Standards 7.8 and 7.9

- All staff participate in a new employee orientation within 60 days of hire (7.8)
 - Public CAAs: Follow local government policies for new employee orientation
 - Document in personnel files
- Conduct or make available staff development/training (including ROMA) on ongoing basis (7.9)
 - No specific topics, other than ROMA, required
 - Document in personnel files

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General Guidance and Self-Assessment

- National Community Action Partnership (CAP) has online materials available
- Self-assessment tool, including guidance on each standard:
 - http://www.communityactionpartnership.com/storage/cap/documents/STANDARDS/self_assessment_tool_private_caa_final_standards_updated_may_2015.pdf
- Online videos available on CAP website
- States may have varied the standards
- Check with other CAAs as to how state is interpreting the standards

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Lobbying and Political Activity Policies

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UGG: 2 CFR 200.450 and 200.454 - Lobbying

- Lobbying costs are generally unallowable
 - But 501(c)(3)s may engage in an insubstantial amount of lobbying with unrestricted funds
- “Lobbying,” for purposes of using federal grant funds, includes activities to influence legislation, ballot referenda, and obtaining federal government and contracts, and to improperly influence federal regulatory actions
 - Includes introduction, enactment, opposition to, or modification of legislation at state or federal (but not local) level
 - Just because it’s considered “education” of legislators or public doesn’t mean it’s not lobbying
- Costs of membership in organizations whose primary purpose is lobbying are unallowable

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UGG 2 CFR 200.450, cont. - Lobbying

- Narrow exceptions to unallowability of lobbying costs exist
- But annual federal appropriation acts are broad; they limit use of appropriated funds for almost all lobbying on any legislation or regulatory or administrative action, except federal regulations and federal administrative actions
- Best to adopt policy prohibiting use of federal funds for all type of lobbying in order to avoid complicated hair-splitting
- Carve out lobbying activities from costs, including compensation, paid with indirect cost rate
- Allocate share of indirect costs to lobbying costs

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Political Activity

- Political activity by CAAs prohibited by many laws
 - 501(c)(3)s may not engage in “electioneering” activity
 - UGG prohibits use of federal grant funds for costs associated with a political party, a campaign, a political action committee or other organization established for the purpose of influencing elections
 - No CSBG-funded programs may use CSBG funds, provide services, or use employees in a manner that identifies such programs with:
 - Any partisan or nonpartisan political activity
 - voter registration activities;
 - transportation to the polls or similar activities; or political activities
 - Hatch Act provisions applicable to CAAs and Head Start
 - CAA or Head Start employees whose salary is paid 100 % from CSBG or Head Start funds may not run for public office in partisan election
 - Additional restrictions on political fundraising

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Lobbying and Political Activity Policy Best Practices

- CAPLAW Model Political Activity Policy available on website
- Make sure you have reviewed policy recently – many changes in past few years
- Ensure that lobbying costs are appropriately allocated and paid for
 - Any employee engaging in lobbying for the CAA or using CAA worktime or other resources should receive approval of upper-level management
 - Review Form 990 to understand what information, on a CAA-wide basis, needs to be collected related to lobbying

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Drug-Free Workplace Act

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2 CFR Part 182: Obligations of Federal Grantee

- Make good faith effort to maintain a drug-free workplace:
 - Publish a drug-free workplace statement and establish a drug-free awareness program for employees; and
 - Take actions concerning employees who are convicted of violating drug statutes in the workplace
- Identify all known workplaces under your federal grants

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Drug-Free Workplace Statement

- Statement must:
 - Tell employees that unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace;
 - Specify actions that you will take against employees for violating that prohibition; and
 - Notify each employee that, as a condition of employment, s/he:
 - Will abide by the terms of the statement; and
 - Must notify you in writing if s/he is convicted for a violation of a criminal drug statute occurring in the workplace within 5 calendar days of the conviction.

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Drug-Free Awareness Program

- Establish an ongoing drug-free awareness program to inform employees about—
 - The dangers of drug abuse in the workplace;
 - Your policy of maintaining a drug-free workplace;
 - Any available drug counseling, rehabilitation, and employee assistance programs; and
 - The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

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Notification to Federal Agency of Convictions

- Notify federal agencies in writing if an employee who is engaged in the performance of a grant informs you about a conviction, or you otherwise learn of the conviction
- Notification must—
 - Include employee's position title and identification number(s) of each affected grant on which employee worked;
 - Be sent within 10 calendar days after you learn of conviction; and
 - Be sent to every federal agency on whose grant the employee was working. It must be sent to every awarding official or his or her official designee, unless the agency has specified a central point for the receipt of the notices.

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Employee Action

- Within 30 calendar days of learning about an employee's conviction, employer must either—
 - Take appropriate personnel action against the employee, up to and including termination; or
 - Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a federal, state or local health, law enforcement, or other appropriate agency

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How are Violations Determined for Grantees?

- The agency head or his or her designee determines that—
 - Grantee has violated the specific requirements for a drug-free workplace statement, a drug-free awareness program, identification of workplaces, notification of federal agency of convictions or required disciplinary action or participation in drug treatment program of employee; or
 - The number of convictions for violating criminal drug statutes in the workplace is large enough to indicate that grantee has failed to make good faith effort to provide drug-free workplace

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Penalties for Violation by Grantee

- Federal agency may take one or more of the following actions—
 - Suspension of payments under grant;
 - Suspension or termination of grant; and
 - Suspension or debarment of recipient for a period not to exceed 5 years.

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Definition of Conviction

- A finding of guilt (including a plea of guilty or nolo contendere); or
- Imposition of sentence; or
- Both
- By any judicial body charged with the responsibility to determine violations of the federal or state criminal drug statutes.

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Definition of Drug-Free Workplace

- A site for the performance of work done in connection with a specific grant at which employees are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance

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Definition of Employee

- Employee of a grantee directly engaged in the performance of work under the grant, including—
 - All direct charge employees;
 - All indirect charge employees, unless their impact or involvement in the performance of work under the grant is insignificant to the performance of the grant; and
 - Temporary personnel and consultants directly engaged in the performance of work under the grant who are on grantee's payroll
- Does not include workers not on grantee's payroll (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on payroll; or employees of subgrantees or subcontractors in covered workplaces)

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New DOL Salary Requirements for Exempt Employees

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Key Facts

- Goes into effect December 1, 2016
- Minimum salary for exempt employees with salary requirements increased from \$455/week (\$23,660/year) to \$913/week (\$ 47,476/year)
 - Amount will be automatically adjusted every 3 years
- Up to 10% of salary may include non-discretionary commissions, incentives, and bonuses
- Highly compensated employee exemption increased from \$100,000 to \$ 134,004 per year
- Anticipated to make 4.2 million more employees non-exempt

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Impact on CAAs

- Significant number of employees likely to become non-exempt
- Employees may continue to be paid on salary basis, rather than hourly, but CAA must track and pay for all hours worked, and pay time and a half for hours over 40 in one week
 - Determine hourly wage by dividing regular weekly salary by regularly scheduled number of hours
- If total compensation increases, include increase in funding budgets

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Employer Options

- If employee doesn't work over 40 hours, reclassify to non-exempt and track hours, but no other change needed
- If employee does work over 40 hours now, employer may:
 - Raise salary to keep employee exempt
 - Maintain existing salary for regular hours and pay extra for additional hours (including time and a half for hours over 40);
 - Lower salary (but not below minimum hourly wage) and pay for additional hours;
 - Convert to hourly pay and pay for all hours worked; or
 - Limit hours to 40

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DOL Rule and Guidance

- 29 CFR Part 541
- DOL Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act (May 2016):
 - <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>
 - Good examples of implementation of rule and coverage for employees of nonprofits

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Policy Drafting and Review Practice Tips

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Policy Review and Drafting Practice Tips

- Consider separating employee handbook from personnel policies
- Remove or update outdated references to repealed or modified laws or executive orders
- Recommend that progressive discipline provisions give private CAAs flexibility to deviate and to terminate employment without cause (except in unionized CAAs)
- Include “no contract” and “at-will employment” language
- Include catch-all language in list of performance or conduct issues that could lead to discipline or termination

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Policy Review and Drafting Practice Tips

- Don't get **too** detailed; not every issue needs to be covered
- Ensure that provisions reflect current state and federal law
 - Sick leave
 - Payment of wages
 - Protected classes of employees
 - Genetic information, gender identity, sexual preference
 - Leave
 - Leave cut-off with no exceptions may violate ADA
- Harassment investigations – don't promise confidentiality
- Ensure that program-specific requirements for hiring, termination, and other issues are taken into account (Head Start, CSBG Performance Standards)

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