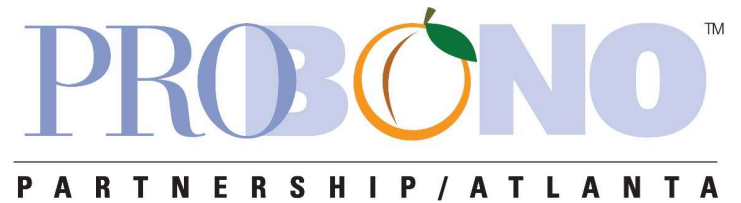


Welcome

Our Presentation

Will Begin at 12pm

- All viewers are muted. Audience cameras cannot be turned on.
- Who's with us today? Feel free to share your nonprofit's name in the chat box.



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Practical
Considerations for
Nonprofit Employers

Alex Milios and
Lori Shapiro

September 4, 2024

Mission of Pro Bono Partnership of Atlanta

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals.

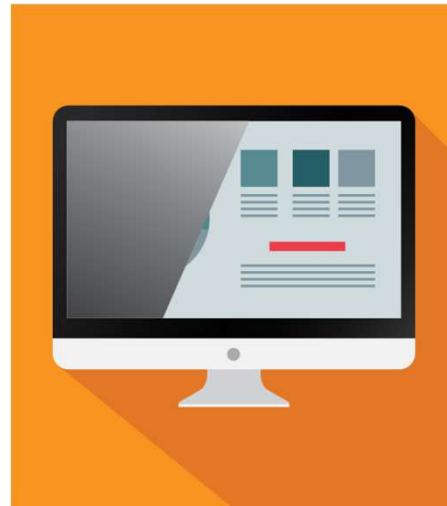
We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

PBPA Learning Center for Georgia Nonprofits

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Client Criteria

In order to be a client of Pro Bono Partnership of Atlanta, an organization must:

- Be a 501(c)(3) nonprofit.
- Be located in or serve the greater Atlanta area.
- Serve low-income or disadvantaged individuals.
- Be unable to afford legal services.
- Employ at least one paid staff person.

Visit our website at www.pbpatl.org to apply.

Legal Information

This webcast presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.

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HAPPY CARE BUILDERS, INC.

- Happy Care Builders, Inc. is a nonprofit that builds and operates childcare centers for homeless families.
- Lisa is the Executive Director of Happy Care.
- Happy Care employs 25 people and has 3 childcare centers.
- Let us tell you a bit about some of Happy Care's workers to provide a framework for our discussion today.

HAPPY CARE BUILDERS, INC.

- Mark, a Happy Care employee, was doing a very good job as the Program Coordinator for Happy Care so Lisa decided to move him to a management role.
- In May of 2024, he was promoted to Program Director and given an increase in salary to \$40,000 per year.
- Mark now supervises the work of 2 part-time teachers who also help develop programming and oversees all of the programming for the childcare centers. Mark is responsible for identifying, designing and rolling out the new programming.
- He normally works a 40-hour week and has done so since the change in his position.
- Last week, there was a major initiative to implement a new program and to communicate about the new program to teachers and parents. In addition to his normal 40-hour work week, Mark worked 3 extra hours in the evening to help coordinate with teachers and meet with parents. Happy Care did not pay him overtime.

ISSUES?

POLL 1: Happy Care Builders

Does Happy Care owe Mark overtime pay?

Please vote:

Yes

No

Not Sure

Fair Labor Standards Act (FLSA)

- **Purpose:** Establishes minimum wage, overtime pay, recordkeeping, and youth employment standards.
- **Scope:** Applies to most employers, including nonprofits.
- **Key Provisions:**
 - **Minimum Wage:** Ensure compliance with the federal minimum wage rate.
 - **Overtime Pay:** Requires overtime pay (1.5 times the regular rate) for hours worked over 40 in a workweek for non-exempt employees.
 - **Recordkeeping:** Maintain accurate records of hours worked, wages paid, and other employment details.
 - **Youth Employment:** Adhere to restrictions on the employment of minors.

FLSA – Exempt or Non-Exempt

- Employee Classifications:
 - **Exempt Employees:** Not eligible for overtime pay. Must meet specific salary and job duty requirements.
 - **Non-Exempt Employees:** Eligible for overtime pay at 1.5 times the regular rate for hours worked over 40 in a workweek.
- Salary Basis Test
 - To qualify as exempt, employees must generally be paid a salary of at least **\$844** per week (as of July 1, 2024) – increased from \$684 per week
- Duties Test
 - Exemptions apply to executive, administrative, professional, and certain other roles based on job responsibilities.

Common Nonprofit Exemptions

Executive Exemption

- Primary duty is management of the company or a department within the company
- Customarily and regularly direct the work of 2 or more full-time employees (or the equivalent)
 - E.g., Part-time employees work 80 hours combined
- Authority to hire or fire other employees, or make recommendations that carry weight on significant employment decisions

Common Nonprofit Exemptions

Administrative Exemption

- Primary duty is performing office or non-manual work directly related to the management or general business **operations of the company, or the company's clients**
- **Work includes** exercise of discretion and independent judgment with respect to matters of significance

FLSA – Recent Developments

- Updated Salary Threshold for Exempt Employees
 - As of July 1, 2024, the DOL has raised the minimum salary threshold for exempt employees to \$43,888 per year (\$844/week).
 - On January 1, 2025, this threshold will increase to \$58,656/year (\$1,128/week).
- Some challenges are pending – BUT cannot rely on a court overturning the changes until it actually happens

FLSA Compliance

- Best to comply with FLSA
- Put job description in writing; ensure accuracy; job descriptions alone do not determine exempt status
 - Employee's actual day-to-day duties are most important consideration in determining exempt status
- Most employees are non-exempt from FLSA (and more in light of salary threshold change)
- Must be paid overtime for every hour over 40 in one week: do not allow off-the-clock work; pay for all hours worked (Note: can discipline if violate policy requiring approval but must pay)
- Have employees keep accurate time records

HAPPY CARE BUILDERS, INC.

- After Sarah, one of the employees, brought Ben, an acquaintance of hers, in as a volunteer for a few weeks to help with maintenance work, the organization's Executive Director, Lisa, decided that he was doing great work, and engaged Ben as an independent contractor.
- He has been assisting the maintenance department in this capacity for the last 6 months. He works with the organization about 20 hours per week, doing tasks as assigned by Lisa, and submits invoices to be paid.

ISSUES?

POLL 2: Happy Care Builders

Should Ben have been brought on as an employee or an independent contractor?

Please vote:

- Employee
- Independent Contractor
- Not Sure

FLSA – Independent Contractors

- Employee Classifications:
 - Independent Contractor:
 - Limited protections – not covered by most employment laws.
 - Responsible for paying their own taxes, including Social Security and Medicare.
 - Employee:
 - Protected by laws such as minimum wage, overtime, and anti-discrimination.
 - Employer withholds income taxes and pays Social Security, Medicare, and unemployment taxes.

FLSA – Independent Contractors

- Classifying a worker correctly:
 - Behavior Control
 - **Employee** – Employer dictates how, when and where work is done. May provide training.
 - **Independent Contractor** – Determines their own work methods, schedule, and procedures. Usually brings specific skills or expertise, may not require training.
 - Financial Control
 - **Employee** – Employer pays a regular wage, regardless of business profits or losses. Often reimbursed for job-related expenses. Minimal investment in the job.
 - **Independent Contractor** – paid per project or job, responsible for their own business expenses, often invests in tools or resources.
 - Relationship Nature
 - **Employee** – Employer has a continual relationship, may receive benefits such as health insurance, retirement, PTO, subject to employer's termination policies.
 - **Independent Contractor** – Project-based, does not receive benefits, governed by a contract.

FLSA – Recent Developments

- **Increased Focus on Worker Misclassification**
 - The DOL has increased audits and penalties for misclassifying employees as independent contractors.
 - The DOL will apply six factors to determine whether an employee is an independent contractor.
 - A key issue is whether workers are economically dependent on a potential employer or in business themselves.
- **Heightened Penalties**
 - Penalties for FLSA violations have been significantly increased in 2024.
- **Manager/Supervisor Liability for FLSA Violations**
- **Telework and Remote Work Guidance**
 - DOL issued new guidance on tracking hours for remote employees.

HAPPY CARE BUILDERS, INC.

- Ben was hired as an employee after Lisa considered the risks of maintaining his independent contractor status.
- One day, Lisa calls Ben, and asks him to help with improvements being made to one of the care centers run by the organization. Lisa expects that the work will take about 6 weeks.
- Sarah's office is in the same center and near the area where the work will be done. Ben will be repairing and painting one of the play areas and the outside walls of the building and then maintaining the area, including spraying for mosquitoes.

HAPPY CARE BUILDERS, INC.

- Ben gets started with the painting. Sarah comes outside to see what Ben is doing and starts to cough.
- The next day, Sarah pokes her head into Lisa's office. Lisa has just hung up from a phone call. Sarah tells Lisa that she is pregnant and asks to move to a different location while the work is being done since the chemicals are bothering her.
- Lisa tells Sarah that there is no other space for Sarah, and that her work needs to be done where her office is now.

ISSUES?

POLL 3: Happy Care Builders

Does Happy Care need to accommodate Sarah's request?

Please vote:

- Yes
- No
- Not Sure

Pregnant Workers Fairness Act (PWFA)

- **Purpose:** Requires employers to provide reasonable accommodations for workers affected by pregnancy, childbirth, or related medical conditions.
- **Scope:** Applies to employers with 15 or more employees, including nonprofits.
- **Key Provisions:**
 - **Reasonable Accommodations:** Modifications to work duties, more frequent breaks, or temporary leave.
 - **Non-Discrimination:** Prohibits discrimination or retaliation based on pregnancy-related conditions.
 - **Health and Safety:** Ensure a safe working environment for pregnant employees.

PWFA – Recent Guidance

- **Broader Coverage of Pregnancy-Related Conditions**
 - Expand the definition of “pregnancy-related medical conditions” to include abortion, miscarriage, stillbirth, fertility treatments, and menstruation.
- **Expanded Accommodations**
 - Now includes options like flexible schedules, extended breaks, and remote work.
- **Simplified Process**
 - Employers can choose not to request medical documentation for pregnancy-related accommodations.
- **Interactive Process Requirements**
 - Employers must timely respond and engage in good faith efforts to find accommodations.
- **Record-Keeping and Reporting**
 - The 2024 guidance introduces additional record-keeping requirements for accommodations requested and provided.

Other Relevant Concerns

- **Title VII**
 - Prohibits pregnancy discrimination
 - Requires reasonable accommodation of religious practices
- **Americans With Disabilities Act (“ADA”)**
 - Requires reasonable accommodation of disabilities in the workplace
- **Expanded Protections for Nursing Mothers**
 - PUMP Act – employers are required to provide reasonable break time and private space for nursing mothers. (also required by Georgia Breastfeeding Law)
- **Family and Medical Leave Act (“FMLA”)** (provides leave entitlement with reinstatement rights to certain eligible employees if the employer has 50 or more employees)
 - Remote Employees are FMLA Eligible
 - To be eligible, a worker must be employed at a worksite where 50 or more employees work within a 75-mile radius.
 - Clarification re Workweek Holidays
 - Holidays occurring during the workweek do not reduce the amount of the employee’s entitled leave, unless the employee is scheduled to work that day.

Recent Developments

Religious Accommodation: Recent case has made it more difficult to deny accommodation. Previously, employer was required to show that granting the accommodation would result in a minimal hardship for the employer.

- Groff v. DeJoy (June 2023): an employer must show “that the burden of granting an accommodation would result in **substantial increased costs in relation to the conduct of its particular business.**”

HAPPY CARE BUILDERS, INC.

- The next morning, Lisa rethinks her response to Sarah.
- She tells Sarah that she was distracted by another work issue yesterday, congratulates her on her pregnancy, and schedules a meeting with Sarah to discuss options for addressing Sarah's concerns about the work environment.
- They agree that Ben will work in that facility only in the mornings, and that Sarah will work from home in the mornings and then come into the facility in the afternoon when no work is being done.
- Sarah thanks Lisa and indicates that she is satisfied with this resolution.

HAPPY CARE BUILDERS, INC.

- Mark, the Program Director, directly supervises a white man, Kevin, and a black woman, Stella.
- Mark grants Kevin's request for time off to visit his dying sister. When Kevin returns, Mark confronts him and yells at him for not reading his "damn email" while he was away.
- From then on, Mark regularly hovers over Kevin as he works to make sure he doesn't "mess up." Mark also yells and shakes his fist at Kevin when he is angry at him.
- Mark does not behave the same way with Stella, and, although occasionally irritable, generally engages in friendly banter with her.
- Mark sometimes permits Stella to leave the office early and does not monitor her work performance.

ISSUES?

POLL 4: Happy Care Builders

Does Mark's behavior create risk for Happy Care?

Please vote:

- Yes
- No
- Not Sure

Title VII of the Civil Rights Act of 1964

- **Purpose:** Prohibits employment discrimination and harassment based on race, color, religion, sex, or national origin.
- **Scope:** Applies to employers with 15 or more employees, including nonprofits.
- **Key Provisions:**
 - **Discrimination Protections**
 - Race & Color: No discrimination in hiring, firing, or other employment practices
 - Religion: Reasonable accommodations for religious practices
 - Sex: Equal treatment irrespective of gender, including sexual harassment and National origin: protection against discrimination based on birthplace or ethnicity
 - **Harassment:** includes sexual harassment and hostile work environments
 - **Retaliation:** protection for employees who file complaints or participate in investigations.

Recent Developments- Harassment

- New EEOC Guidance on Harassment in the Workplace (April 2024)
 - Conduct within a virtual work environment, including electronic communications using private phones, computers or social media accounts, can contribute to a hostile work environment if they impact the workplace.
 - Employers can be held liable for harassment based on their employee's personal activity outside of the workplace, including over social media.
 - Actionable harassment can occur among employees of the same race, age, religion, gender, sexual orientation or other protected class (intraclass harassment)
 - Title VII includes protections against discrimination and harassment on the basis of sexual orientation and gender identification and expression.
 - Definition of harassment includes harassment based on pregnancy, childbirth, and/or related medical conditions (can involve issues, including but not limited to, lactation, using or not using contraception, or the decision to have, or not to have an abortion)
 - An organization may lose its defense that it took reasonable corrective action in response to an employee's complaint where a supervisor, responsible for reporting such conduct, failed to report and address such behavior.

Recent Developments- Race Discrimination

42 USC Section 1981 (part of the Civil Rights Act of 1866)

- **Purpose:** Prohibits race discrimination in the making of contracts by private parties (has been interpreted to include employment discrimination)
- **Scope:** Applies to all employers, including nonprofits.
- Fearless Fund Litigation (11th Circuit): court prohibits race and gender-based grant-making as a violation of section 1981; calls into question some programs seeking to address historic discrimination by providing benefits to minority groups

Age Discrimination in Employment Act (ADEA)

- **Purpose:** Prohibits employment discrimination against individuals 40 years of age or older.
- **Scope:** Applies to employers with 20 or more employees, including nonprofits.
- **Key Provisions:**
 - **Discrimination Protections:**
 - **Hiring & Firing:** No discrimination in hiring, firing, or any other employment practices based on age
 - **Job Assignments:** Equal treatment in job assignments, promotions, and training.
 - **Mandatory Benefits:**
 - **Benefits:** Equal benefits to employees over 40, including retirement and health benefits.

Americans with Disabilities Act (ADA)

- **Purpose:** Prohibits discrimination against individuals with disabilities in all areas of public life, including employment, public accommodations, and more.
- **Scope:** Applies to employers with 15 or more employees, including nonprofits.
- **Key Provisions related to employment:**
 - **Discrimination:** Prohibits discrimination in hiring, firing, promotions, and other employment practices.
 - **Reasonable Accommodations:** Requires providing reasonable accommodations for qualified individuals with disabilities.

ADA – Recent Developments

- Ali v. Regan (August 2024):
 - Employee with severe allergies worked in private office for many years and then worked from home for a short period while offices were re-organized.
 - Upon return to the office, to avoid a co-worker's heavy perfume, he requested a private office or a small conference room as an accommodation to avoid a co-worker's heavy perfume.
 - Employer offered only work from home.
 - Employee objected citing concerns about his home setup and the need for in-person collaboration, which was ignored by the employer.
 - Court reversed judgment for the employer and held that employers cannot necessarily rely on a prior accommodation that was provided- the employer failed to discuss other options and to take changes in the circumstances into consideration

Practical Considerations

- **Policies:** Develop clear policies related to non-discrimination and anti-harassment
 - Comprehensible; Defining prohibited conduct; Clear procedures for reporting and addressing complaints; Anti-retaliation; Confidentiality protections.
- **Training:** Regular training for employees and managers on policy requirements, respectful workplace practices, and how to address concerns.
- **Recordkeeping:** Maintain records of employment practices, including hiring, promotions, work hours, job duties, and disciplinary actions.
- **Reasonable Accommodations:** Ensure accommodation process for religious practices, disabilities, and pregnant workers.
- **Accessibility:** Ensure physical facilities as well as programs/services are accessible to those with disabilities
- **Review and Audit:** Regularly review policies and practices for compliance and effectiveness.

Questions?

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