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**Institute for Organization Management**

**2022**

#### *CURRENT LEGAL ISSUES*

#### *FACING YOUR ORGANIZATION*

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**I. SOCIAL MEDIA**

**so·cial me·di·a**

*noun*

:websites and applications that enable users to create and share content or to participate in social networking.

A. legally unique; but then again, not so much so.

B. Association Polices

1. Defamation (libel/slander)

2. Breach of contract

3. Antitrust

4. IP

5. Discrimination/sexual harassment

6. Music licensing

7. GDPR

C. Employee Policies

1. Hiring

2. Personal phone calls

3. Email

4. Expectations of privacy

5. Discrimination/sexual harassment

6. “Time”

7. BYOD (security, etc.)

D. Suggested policies

1. Employee acknowledgment

E. Corporate Identity Theft

1. Cyber White Collar Crime.

a. Extract money/data from accounts, tax ID

b. Make unauthorized purchases

c. Search for trade secrets, confidential materials

d. Steal phone and utility services

e. Create fake documents with your logos and graphics

2. How Committed.

a. Order merchandise/services with stolen credit card

b. Phishing attacks to get company’s banking or credit information

c. Change corporate registered agent

d. Dumpster diving

3. Prevention

a. Check your status regularly with SOS

b. Keep computer systems, firewalls, protections up to date

i. Do periodic system cans/audit

c. Office security---shred

d. Monitor internet---search your entities’ name

4. Insurance

a. Online cyber liability

b. Identity theft insurance

**II. OVERVIEW OF ANTITRUST LAW FOR TRADE ASSOCIATIONS**

A. APPLICABLE LAWS

1. Sherman Act

1. Section 1: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.”

a. Per se violations include price fixing, group boycotts, market allocation agreements, and tying arrangements.

b. Rule of reason applies to other types of joint action that may be beneficial.

c. Associations are, by definition, “combinations” that may act in restraint of trade.

2. Section 2: Prohibits monopolization, attempts to monopolize, and combinations or conspiracies to monopolize any part of trade or commerce among the several states, or with foreign nations.

3. Section 15: Treble damages.

2. Clayton Act

1. Exempts unions from antitrust laws.

2. Prohibits price discrimination.

3. Federal Trade Commission Act

1. Established FTC.

2. Authorizes FTC to prevent “unfair methods of competition,” and “unfair or deceptive acts or practices.”

B. PROBLEM AREAS FOR ASSOCIATIONS/CHAMBERS

MEMBERSHIP/EXPULSION

1. Reasonable membership restrictions are permitted provided they are not anti-competitive. An association cannot expel a member because it competes with another member.

2. Membership standards must be objective, and are less likely to be upheld if businesses must join in order to compete effectively in the market.

3. Code of Ethics enforcement is always dangerous, especially if competitive conduct is in question.

4. Association products and services should be available to non-members. Non-members may be charged a reasonably higher fee.

5. Due process. Reasonable opportunity to contest facts on which expulsion is based.

a. Notice of charges—stated clearly and specifically.

b. Failure to satisfy membership standards.

c. Ethics violation.

d. Hearing before an unbiased tribunal.

e. Notice of hearing.

f. Right to cross-examine witnesses.

g. Opportunity to refute charges.

h. Recommended—appeal to a different authority.

PRICING PRACTICES

1. Price fixing – per se violation

2. Other required or prohibited—encouraged or discouraged--economic activity may also be a per se violation.

a. Boycott: Concerted refusal to conduct business with a vendor or customer.

b. Tying: Requiring the purchase of a more competitive (relatively less desirable) product in order to purchase a less competitive (more desirable) product. E.g., Microsoft is charged with tying Explorer to Windows.

3. Safeguards

a. Clear agenda.

b. Meeting monitor/antitrust policy.

c. Carefully prepared minutes.

d. Consult counsel.

STATISTICAL REPORTING/BENCHMARKING

1. Permitted, if done correctly to avoid price/cost reporting problems.

2. Guidelines

a. Voluntary participation-no penalties for nonparticipation.

b. Non-members may participate at reasonably higher fee.

c. Report past activity; avoid excessive detail.

d. Independent data collection and analysis.

e. No individual company data is retained, published, or disclosed to competitors.

f. Reports use aggregate or average data.

g. Data available to all participants--members/non-members; vendors/customers.

h. Avoid discussion and analysis in meetings.

STANDARDS AND ACCREDITATION

1. Product standards

a. Subject to rule of reason – benefit to customers

b. Objective standard established by broad consensus of industry.

c. Performance-based standards, not process-based or ingredient-based.

d. Independent testing.

e. Open to all.

f. Potential liability if standard is based on bad science

g. Personnel/company accreditation

2. Recognized body of knowledge—periodic updates.

3. Reasonable education/service requirements.

4. Reasonable experience requirements.

5. Appropriate testing—written and practical.

6. Re-certification may be required.

JOINT RESEARCH

1. Subject to rule of reason. Damages may be limited by the National Cooperative Research and Production Act of 1993, 15 U.S.C. §§4301-4306, if the joint venture is disclosed to the public.

2. Permissible if “necessary and constructive” and not accompanied by “unduly restrictive collateral agreements.”

3. Favorable factors – common law

a. Basic research--not applied.

b. High cost – difficult for industry firms to bear alone

c. Public interest – e.g., reduce pollution, improve safety.

d. Results available regardless of membership.

LOBBYING

1. Lobbying by associations to request that the government restrain trade is generally permitted. First Amendment issues, and the fact that the government independently decides to restrain trade, are significant.

2. Exceptions

a. “Sham” lobbying that itself is a restraint of trade.

b. Lobbying with respect to a purely commercial government activity.

c. Lobbying in a manner that violates the law, e.g., making misrepresentations, fraud, perjury, or bribery.

d. “State action” does not include mere approval of private action—the state must require or compel the anti-competitive action.

**III. EXECUTIVE AND EMPLOYEE CONTRACTS**

It is often said that the law is not static, nor does it exist in a vacuum; that is no more obvious than in the area of nonprofit CEO agreements. Nonprofit executive’s agreements have begun to mirror contracts for their counterparts in the for-profit world (with executive perks such as automobiles and club dues, compensation packages with deferred income and working remotely) while still under the umbrella of the nonprofit organization and the watchful eye of the IRS. On the other side of the equation is typically a savvy Board, acting on advice from professionals, with the goal of retaining the executive but under terms most favorable to the organization.

Understanding the elements and the value of an employment contract is incredibly important for those seeking a position as a CEO of a non-profit organization for the first time or even for those moving from one CEO position to another. Managing the process of renewing a contract or considering life after serving as the CEO of a nonprofit organization are also considerations.

**Your First Contract**

Preparing to negotiate your first executive employment agreement can be a very smooth process if you have educated yourself in advance.

If the organization has a savvy human resources executive or an executive search firm is involved, the search committee is likely knowledgeable of what an employment agreement entails in the current market. However, if the organization is managing the search on its own, it may be unclear to you whether it is offering an employment agreement or how well it has thought through this process.

Consulting an attorney is also an important part of this process – particularly if you are not familiar with employment law or the laws of the state in which the organization making the offer is located. The attorney retained by the organization you are negotiating with – even if familiar to you – represents the organization, not you.

**Key Elements**

Salary – Often the first consideration but not necessarily the most important. While providing you your current income stream how quickly can it be cut off (see term below)? Is there a possibility of severance for any early termination? For highly compensated individuals, is there the possibility of setting-up a deferred compensation plan so that realization of the income can be deferred to a time when you are likely to be in a lower income tax bracket?

Clearly, the amount is of concern. As stated above, numerous benchmarking resources exist. Furthermore, “salary” is rarely ever a flat amount anymore. Percentages, bonuses, and other creative formulas are more common than ever. Nevertheless, in the end, the determination of your salary will be the intersection of the amount the organization can afford and your perceived value to the organization.

Term—a common error is the assumption that every contract is for a term of years, which provides the executive with a desired level of job security. For general discussion, written contracts come in three forms: “at-will” open ended agreements that, while setting forth with specificity the exec’s relationship with the organization during the employment relationship, still clearly states that the relationship is “at-will” and can be terminated by either party for any or no reason (without consequence). The second contract can have the same result but is a little more deceptive in how it is presented. This agreement acknowledges a term, e.g., a three-year agreement which automatically renews for additional one-year terms…, but, placed in the separate termination provision is language that allows a Board to terminate the agreement on, e.g., 3(?) months notice “without cause”. In this case, the exec’s “3 year deal” is at best a 90-day contract. The third option is a contract that provides the exec security in that it is a multi-year deal and the only way it can be terminated by the organization is for cause; “cause” typically being defines as a “substantial breach of a material aspect of the agreement”.

Bonus Opportunity—With a frugal Board, or a financially challenged organization, often a bonus can be the exec’s financial savior. An important aspect of a bonus, however, is the means by which it is awarded. Is it based purely a subjective determination by the Board or a more objective analysis of meeting performance goals (e.g., increase income X%, increase membership by Y%, cut membership attrition). A bonus should reward an exec for his/her contribution to the organization and, thus, is often best tied to clearly defined goals with the bonus itself clearly articulated in advance. This also avoids having your bonus tied up with organizational politics.

Benefits – In addition to the “traditional” benefits, paid vacation, health insurance and sick leave, and a retirement plan, the sky can be the limit: health clubs, country clubs, membership in professional organizations, continuing education, expense budget (business vs. coach class), car allowance, life insurance, disability insurance, moving expenses, rewards points (credit cards, frequent flier), companion travel, home office expenses, etc. But keep in mind all benefits are not “free”. Many can result in taxable events to the exec. Also, some important related issues include: Who is the beneficiary of the insurance policies? Is vacation use or lose?

Retirement Plans—Deferred compensation is one of the few benefits available to nonprofit executives, and even so, there are significant limits under federal tax laws. Nevertheless, whatever options exist should be considered.

1. Qualified retirement plan

2. Non-qualified plan

a. 457(b) ($18,000)

b. 457(f) Must have a substantial risk of forfeiture

3. Get a lawyer to draft a contract

Termination—An exec’s job security is dependant upon the termination language and its clarity. First, prior to termination, an exec’s job duties should be set forth with specificity. Thus, a contract that only allows for termination “for cause” will provide an exec a blue print for success in his/her job. Ambiguous, incomplete, or catchall language, could be detrimental to an exec. The contract should also spell out who must approve termination. Preferably it should be the Executive Committee (if one exists) or the Board (whichever has the most consistent working relationship with the exec) and it should always require a super majority vote (even if the vote is for termination for cause).

Severance—Negotiating severance at the outset of a contract can, at times, be a very difficult task (e.g., the prospective employer’s prior exec left under less than favorable circumstances and the Board feels “burned”) or can be an easy term to settle (with both parties going into the agreement renewed and invigorated). An industry standard is one month for every one year of service to the organization. But this standard is not always clearly understood. Does it apply only at the end of the natural term? How do you deal with early termination without cause? With cause? Generally, the stated standard would apply to a “natural” term end (a contract not to be renewed). Early termination without cause should warrant payment for the balance of the contract AND possibly some additional severance. Despite the initial anticipated reaction of NO severance for a cause termination, severance has been awarded in cause cases (depending on the severity and certainty of the “cause” events”). For contracting purposes, the best an exec can hope for in this latter category is for the contract to be silent.

Noncompete Clause—The name itself is self-explanatory. The issues an exec should be cognizant of are: How long will the exec be barred from “competing”? What is defined parameters of “competition” (ALL activity, as an employee/contractor/volunteer, for any business, non-profit, for-profit, related to the industry OR no other trade association that competes with the employer)? Are there any geographical restrictions (it would seem unreasonable to restrict someone who has worked for the Florida Society of Wine Tasters from going to work for the Montana Society. Suffice it to say, that the narrowest drawn non-compete provision, in terms of professional scope, time and geography is preferred.

Performance Measures and Job Duties— It is not coincidental that these two areas come last in the list and also serve as the summary for a successful agreement. Having clearly articulated job duties, as well as closely aligned performance measures, will allow an exec to understand his/her job as well as the tasks of direction of the organization and the staff. While salary and perks are the direct benefits of the job you are being hired for, some of the more unpleasant aspects we have discussed (termination, non-compete) can be avoided by negotiating with the Board these elements. Also, similar to the termination procedure, performance measures should be evaluated by the body most familiar with the exec and be passed by a super majority. Also, an exec should be diligent seeking out a review in order to remain informed as to the Board’s expectations.

Renewal-- Renewals do not include any unique elements of negotiation. However, there may be a shift in the priorities. For example, an exec who is entering into what could be his/her last contract may wish to have more money in deferred compensation.. Also, with each passing contract, an exec may command more benefits (larger bonus potential, increased severance package, additional paid vacation) in the negotiation as the proven incumbent tried and tested individual.

**Get It In Writing**

All CEOs should have the terms of their employment contracts, especially the termination provisions, clearly spelled out in writing. All too often, the unspoken expectations underlying a short letter or a vague contract disintegrate under the stress of conflict between the exec and the executive committee or board, or open warfare after termination. A clear, concise, and comprehensive document ensures that all parties understand the terms of the agreement, protects the exec when the volunteer leadership changes annually, and enables the employer’s staff or auditors to ensure that the employer properly reports the taxable elements of the compensation package to the IRS.

**Tax Issues**

The exec and his lawyer need to clearly understand which elements of the compensation package are taxable, and which are not. This is particularly important when considering various kinds of fringe benefits, such as companion travel, or nonqualified deferred compensation. Properly structured, these are tax-free or tax-deferred. Otherwise, they can present an unexpected tax bill for both the employer and the exec.

If the employer is exempt under §501(c)(3) or §501(c)(4), and the exec is renewing a contract or has otherwise been in a position of influence with the organization within the past 5 years, there’s an additional reason for putting the agreement in writing—to avoid an “excess benefit transaction.” (These rules don’t apply when the new exec has been an “outsider” before his or her new employment.) Under the intermediate sanctions” rules in §4958 of the Internal Revenue Code, the exec should ensure that the compensation is within the market range for the position, and does not include elements or amounts that would be considered unreasonable under the circumstances. Otherwise, the contract could result in an excess benefit transaction—in which the exec is paid more than a reasonable amount. When that happens, the exec would be responsible for repaying to the employer the excess over the reasonable amount, and paying a 25% tax on the excess amount to the IRS. In some cases, the directors who approved the compensation package could also be liable for a 10% tax. To minimize the likelihood that the compensation package will cause an excess benefit transaction, the entire package should be in writing; approved by the board or an authorized committee composed of members who are independent of the exec, e.g., the executive committee, after reviewing compensation data for comparable positions; and documented as to the date of approval, the members present for consideration and voting on the package, and the sources and nature of the comparability data relied on.

If there is any doubt about whether the compensation package might be an excess benefit transaction, the exec should obtain an opinion on the matter from his attorney. While this will cost some money, it will be useful insurance against repaying excess compensation to the employer and paying the 25% tax to the IRS.

**IV. PROPER TERMINATIONS**

A. Be prepared

B. Be decisive

C. The golden rule: Do not humiliate them

D. Is a release is necessary?