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Non-Profit Legal Landscape
Business and Technology Institute
Eastern Illinois University

March 2006

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Tim Leighton counsels clients on trust, estate, succession, tax and commercial matters, including business development and administration, association/foundation management and charitable planning. His business clients are mostly closely held enterprises and nonprofit organizations, especially those with formation, transition and development needs, as well as those seeking strategies to recruit, retain and reward key people. He helps clients find better ways to secure peace of mind and to preserve and grow assets, especially families with meaningful net worths and others with dependency concerns such as school-aged children and people with disabilities. He serves as trustee with substantial assets under management. The National Arbitration Forum has appointed Tim to serve as mediator and/or arbitrator for the resolution of business and other complex disputes.

In addition to practicing law in Central Illinois and metropolitan Washington, DC, Tim is a Certified Financial Planner™ practitioner, licensed insurance producer, and formerly registered securities representative. By combining expertise and experiences as both lawyer and financial professional, he helps clients plan strategically and efficiently. He is a Visiting Professor at Illinois Wesleyan University where he teaches Introduction to Risk Management and previously taught Insurance at Illinois State University. He had worked as Director of Business and Estate Planning for the Central Illinois member firm of Northwestern Mutual Financial Network and continues collaborating with professional financial advisors in serving clients.

Tim earned his law degree from George Washington University while a legislative aide to U.S. Sen. Pete Wilson of California and Executive Director of the American Bankruptcy Institute. Government service includes leading the staff of U.S. Rep. Richard Baker of Louisiana, advising U.S. Rep. Tom Tauke of Iowa, and interning in the Jimmy Carter White House. Tim was lawyer/lobbyist for two groups representing family businesses, American Financial Services Association and National Association of Truck Stop Operators. As Executive Vice President and General Counsel of a Central Illinois based enterprise which developed and operated travel centers, Tim was chief financial and administrative officer, leading development, human resources, risk management and strategic planning. He earned his honors baccalaureate from Georgetown University, financing his education with a consulting practice in the non-profit community.

Tim has helped some thirty non-profits secure tax exemption determinations, define business structures, and manage other challenges. He enjoys the overall direction and details of organizational dynamics, advising Boards and officers on strategic planning, transitions, management and compliance. Tim is a member of the Robert C. Underwood Inn of Court. His Bar Admissions include state and federal courts in Illinois, Maryland, Virginia and the District of Columbia, as well as the U.S. Supreme Court. Continuing legal and financial education are on the agenda each year.

Pro bono publico activities include current service to National Association of Insurance and Financial Advisors as President of the Bloomington-Normal chapter, Illinois Wesleyan University Associates as a board member, Community Players Theatre as General Counsel, and BroMenn Foundation as Planned Giving Council member. Tim was Treasurer of the McLean County Bar Association, Ambassador and Government Affairs Committee member chairing the Legislative Forum of McLean County Chamber of Commerce, Special Counsel to the Episcopal Bishop of Washington, Vestrymember for two faith communities, President of Convention II, Inc. (America's model constitutional convention of high school students), and President of the Alliance of Small Business Owners.

Debra Leighton is an active Hospice Volunteer (and Registered Nurse not presently in practice). With their children Kathryn, Caroline and Grace, the Leightons make their home in Bloomington, Illinois.

Non-Profit Legal Landscape
Business and Technology Institute
Eastern Illinois University
March 2006 outline

Non-profit organization (may be tax exempt or not):

distinctly American
historically: charity
interaction of “members” / “volunteers” and “staff” / “professionals”

Any entity:

business plan
SWOT
financial projections (A/L/I/E); pro formas
periodic review

ownership; control

taxes

licenses

professional regulation

Department of Labor

liquor; weights and measures

county clerk

name

child support enforcement

immigration reform and control

intellectual property

environmental

marketing/development

doing business with the state

business advisors

accountant and bookkeeper

attorney

risk - insurance, noninsurance, transfer, retention, avoidance

banker

employee recruit / retain / reward

legislators

financing

debt

equity

incentives

successors

private

public, especially incentives, women and minority owners

resources

private - Associations, foundations, universities, think tanks, SCORE

public

federal (SBA, various departments/agencies)

Illinois

Small Business Development Centers;
Procurement Technical Assistance Centers;
International Trade Centers
Small Business Environmental Assistance Programs
First Stop Business Information Centers
Guide for Organizing Non-Profits in Illinois:
business.illinois.gov/startup.cfm and
http://www.ilsos.net/publications/pdf_publications/c16524.pdf

county, local, regional, international

Nonprofit entity specifically:

Entity

tax status

minimum of three directors if corporation (\$50 filing fee, \$5 renewal; \$25 expedited)

federal income tax

Illinois income tax

Illinois sales tax/exemption - charitable, religious, educational or senior citizens

Illinois Attorney General Registration

Illinois Charitable Trust Act

Illinois Charitable Solicitation Act

All employers must post posters conspicuously in every workplace:

State of Illinois

Child Labor Law (Regulates Work of Those under 16)

One Day Rest in Seven Act (Odrisa)

Illinois Wage Payment and Collection Act

Equal Pay for Equal Work (Men/women)

Minimum Wage Law and Overtime

Toxic Substances Disclosure

Unemployment Insurance Benefits

Victims' Economic Security and Safety Act

Workers Compensation

Federal

Equal Opportunity - Race, Color, Religion, Sex, National Origin - Title VII of the Civil Rights Act

Disability - the Americans with Disabilities Act

Age - the Age Discrimination in Employment Act of 1967, as Amended

Sex (Wages) - Title VII of the Civil Rights Act and the Equal Pay Act of 1963

Employee Polygraph Protection Act

Family and Medical Leave Act

Job Safety and Health Protection (OSHA)

Migrant and Seasonal Agricultural Worker Protection Act

Fair Labor Standards Act

Federal Minimum Wage; Overtime

Child Labor Act
Notice to Workers with Disabilities (re special minimum wages aka Commensurate Wage Rates)
Uniformed Services Employment and Reemployment Rights Act of 1994

new hire reporting

Employers in Illinois required to report persons hired or rehired within 20 days of first day on the payroll: Employee's name, address and social security number, (the employee's first day of work is also requested, but is not mandatory); and the employer's name, address, and federal employer identification number (FEIN). An employer is also asked to provide an address where income withholding orders should be sent, if different from the FEIN address, but this information is optional.

Employee classification

Volunteer Employee

Reliance on donated services to accomplish mission, purposes

Show intention for implied contract of employment:

1. the intent of the parties
2. evidence of payment
3. bargaining for a quid pro quo

To determine whether a person is truly a volunteer and not an employee, the U.S. Department of Labor considers the following factors:

1. Does organization receives benefit from services performed;
2. Is position regularly scheduled and/or performed or whether it comes and goes;
3. how much time is spent in the volunteer activity
4. whether the services performed are of the kind typically associated with volunteer work; and
5. compensation expectations and/or given

Impact / application - FLSA / overtime

Employee v Independent Contractor

IRS test: control, training, tax, relationship, contract, etc.

US Dept of Labor test: economic reality test

Illinois Worker Compensation test: gratuitous relationship no coverage

Illinois Unemployment Insurance test:

Control/Direction

Outside scope of usual service or of the business of enterprise

Independently established trade, profession, business

Exempt v non-exempt

FLSA exempt: professional, administrative, managerial; sales; highly skilled tech/computer; salaried

Nonexempt: hourly skilled and non-skilled

Liability for unpaid overtime

Non-profits: voluntary services at special times of need

DOL factors in determining if truly a volunteer and not an employee:

- a. whether services are voluntary, no coercion, advancement, penalty
- b. whether activities are predominately for employee's own benefit;
- c. whether employee does not replace another employee or impair the employment opportunities of others
- d. whether the employee serves without contemplation of pay;
- e. whether the activity takes place during the employee's regular working hours or scheduled overtime hours;
- f. whether the volunteer time is insubstantial in relation to the employee's regular hours

Full-time v part-time: eligibility for benefits? 40? 32? 30?

Regular v seasonal: eligibility for benefits?

Introductory v probationary: beware at-will doctrine; employment contracts and employee handbooks

Compensation

Employment contracts v at-will

Key person or not:

disclosure of compensation, benefits, expense allowances;
excessive pay, private inurement; ordinary and necessary

Liability issues

Errors and omissions arise from employed, compensated and volunteers

Vicarious liability; respondeat superior - three elements impose liability

- 1) employment or volunteer relationship
- 2) caused by negligence of employee or volunteer
- 3) employee/volunteer acting within scope of employment/assignment

Diminution of Doctrine of Charitable Immunity in Employment Torts

Divert resources from charitable mission; benefit humanity, not org
Might mitigate but probably not eliminate

Federal Volunteer Protection Act of 1997: not liable if

- 1) acting in scope
- 2) duly authorized
- 3) no willful, intentional, criminal misconduct, flagrant disregard
- 4) no licensure issues

Limited Liability of Directors and Officers

- 1) serving without compensation
- 2) organized pursuant to Illinois Non-Profit Corporation Act; and
- 3) exempt from federal income taxation

Can still be sued so check D&O duty to defend language

Non dischargeability of federal and state tax liabilities

Employment related insurance

Unemployment Compensation Insurance
Workers Compensation Insurance
Directors and Officers Liability Insurance
Professional Acts and Omissions Insurance
Fidelity Bonds
Employment Practices Liability Insurance
Employee Benefits Liability Insurance

Personnel Practices for Employees and Volunteers

At-Will Employment in Illinois
Content of Personnel Policy Manuals and Employee Handbooks
Complex area; important; can't cover in this time

Equal employment opportunity
Disability issues
At-will employment policy
General employment issues such as hiring, orientation and training, working hours, preference for notices, performance appraisal, progressive discipline policies, job transfers and promotion, outside employment, employee classification, layoff, termination, and retirement
Compensation and pay practices, including compensatory time and overtime
Benefits, including holidays and vacations, retirement and savings plans, and educational assistance
Expense reimbursement
Safety and health issues
Meals/rest breaks, sick days, personal days, other short-term absences, FMLA, other long-term
Personal behavior issues such as use of drugs, smoking, sexual harassment, use of information systems (e-mail), conflicts of interest, and the policy on nondiscrimination and a productive work environment
Access to personnel files and updating personnel information

Language

“Personnel policy manuals”, “Employee handbooks”
clear, accurate, and up-to-date
Permissive v mandatory terms

Personnel Information Storage

Typically four types of records on applicants, employees, and former employees

- 1) Personal employment records file
- 2) Supervisors' records
- 3) Human resources management records
- 4) Employee medical records

Exclude from files
How long: statute of limitations
Employee access
The Health Insurance Portability and Accountability Act of 1996 (HIPAA)
excellent summary of HIPAA Privacy Rule at www.hhs.gov/ocr/privacysummary.pdf

Selection, Screening and Hiring Issues

Beware exposure for negligent selection, screening and hiring - if knew or should have known of harm to third persons; distinct from respondeat superior

Supervision and Supervisor Liability

Some is respondeat superior
Individual liability under FLSA, Equal Pay Act (up to \$10k or 6 mos or both)

Performance Evaluation Issues

no obligation to conduct; if do so, no discrimination or arbitrary/capricious

Sexual Harassment Issues

covered extensively elsewhere: quid pro quo and hostile environment

Conflict of Interest Issues

Employee duty of loyalty to Employer
When do Conflicts of interest arise?
Written policies
Some outside activities may be protected by law

Termination and Severance Issues

At-will; Contracts; Retaliatory discharge

Reference check: restrict information to avoid post-termination defamation charge. Limit to name, dates of employment, job title, employment status, and confirmation of salary. No discrimination.

EMPLOYMENT-RELATED LAWS

Federal Laws

Age Discrimination in Employment Act of 1967
Americans with Disabilities Act of 1990
Bankruptcy Code §525
Civil Rights Acts of 1866, 1964, and 1991
Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
Consumer Credit Protection Act
Drug-Free Workplace Act of 1988
Employee Polygraph Protection Act of 1988

Employee Retirement Income Security Act of 1974
Equal Pay Act of 1963
Executive Order No. 11246
Fair Credit Reporting Act
Fair Labor Standards Act of 1938
Family and Medical Leave Act of 1993
Federal Election Campaign Act of 1971
Federal Unemployment Tax Act
Higher Education Act of 1965
Immigration Reform and Control Act of 1986
Jury System Improvements Act of 1978
National Labor Relations Act
Occupational Safety and Health Act of 1970
Older Workers Benefit Protection Act
Pregnancy Discrimination Act
Rehabilitation Act of 1973
Uniformed Services Employment and Reemployment Rights Act of 1994
Vietnam Era Veterans' Readjustment Assistance Act of 1974
Whistle-Blower Claims
Worker Adjustment and Retraining Notification Act

State Laws

Child Labor Law
Disclosure of Offenses Against Children Act
Equal Wage Act
Human Rights Act
Medical Examination of Employees Act
Minimum Wage Law
One Day Rest in Seven Act and Eight Hour Work Day Act
Personnel Record Review Act
Right to Privacy in the Workplace Act
School Visitation Rights Act
Unemployment Insurance Act
Uniform Conviction Information Act
Wage Payment and Collection Act
Whistle-Blower Claims
Workers' Compensation Act

Local Laws - any applicable ordinances

Churches and Other Religious Organizations – Federal Law Regarding Clergy and Church Employees

The Church as Employer
The Minister as Employee
Clergy Housing Allowance
Exemption from Social Security Coverage
Self-Employed Social Security Contributions
Income Tax Withholding
Judicial Involvement in Clergy-Related Employment Disputes