

**PAS DE DEUX:
LABOR AND EMPLOYMENT ISSUES
IN THE ARTS AND NONPROFIT WORLD**

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Texas Accountants and
Lawyers for the Arts**

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A WORD ABOUT TEXAS ACCOUNTANTS AND LAWYERS FOR THE ARTS

Texas Accountants and Lawyers for the Arts (TALA) was formed in 1979 to meet the legal and accounting needs of artists and arts organizations. TALA is the largest provider of both pro bono legal and accounting services to the arts in the United States. TALA volunteers throughout Texas handle more than 500 matters per year. This amounts to more than one million dollars annually in donated services to the arts and cultural community.

Since 1979, Texas Accountants and Lawyers for the Arts (TALA) has provided free accounting and legal services to arts nonprofits and artists from all creative disciplines, including visual artists, musicians, actors, dancers, filmmakers and writers. TALA's volunteer attorneys and accountants donate their time to artists and arts organizations that are unable to afford professional services. Without TALA, their problems would remain unresolved and their interests unrepresented.

TALA provides counseling and representation regarding arts-related accounting and legal matters, including:

- Nonprofit Organization Formation
- Contract Negotiation & Review
- Copyright, Trademark & Patent
- Arts-related Landlord/Tenant Issues
- Dispute Resolution/Arts Mediation
- Tax-Exempt Status
- Estate Planning for Artists
- Public/Private Funding for the Arts
- Basic Accounting Systems

Clients are screened and matched with volunteers by TALA's staff of attorneys. To find out more about TALA, call TALA at 800-526-8252, ext. 201. In Houston call 713-526-4876 x 201. Or email us at info@talarts.org. Visit TALA's webpage at www.talarts.org.

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Extensive revisions in both state and federal statutes over the last few years have necessitated an overhaul of this handbook. Special thanks to the firm of Jackson Walker L.L.P, and its partners, our author, Lionel M. Schooler, Labor and Employment Law Section, and Richard Burleson, liason and member, TALA Board of Directors, for revising and editing this handbook. Mr. Schooler's additions bring us all into the modern world of sexual harassment charges and provide valuable advice on avoiding them. Mr. Schooler has also had the foresight to include the web addresses of all governing agencies listed in the appendix.

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*"Work protects us from three great evils:
boredom, vice, and poverty"*

Candide

PROLOGUE: Using This Handbook

This handbook is designed to give you basic information about the employment relationship from the arts and nonprofit employer's perspective - getting into the relationship, doing it right, and ending it as gracefully as possible. Our aim is to alert arts-related organizations to some of the most basic legal requirements and consequences of various workplace activities. The information in this handbook should be in your hands as a workplace supervisor, personnel director, officer or director. It includes information about actions for the organization to take and actions for you to take as your organization's representative in the Work relationship.

Employment law has become an increasingly complicated area in the past few years. Both a generally litigious society and an economic downturn have contributed to more lawsuits being filed, and both employees and employers are now, more than ever, concerned with how to protect themselves before, during and after the employment relationship. State and federal laws control different elements of the relationship, and the resulting morass of legislation makes it difficult for anyone to keep up with the latest developments. This places a particular burden on a nonprofit or performing arts organization that cannot afford specialized legal advice at the drop of a hat. This handbook describes some of the most basic and most important laws affecting the employment relationship, with a special focus on issues affecting arts and nonprofit organizations as employers. Because of the complicated and diverse nature of employment law, this handbook can only make you aware of the issues involved with the employment relationship and help you decide which areas warrant spending the time and money required to get customized professional legal advice. Never assume that because a federal or state regulation does not include your type of organization within its stated requirements that you are therefore immune from liability.

Jane S. Lowery, Esq.
Executive Director
Texas Accountants and Lawyers for the Arts

INTRODUCTION: A BRIEF HISTORICAL PERSPECTIVE

The work relationship is probably the oldest human relationship outside of the marital union. Whether willingly or not, human beings have been working for each other for thousands of years. One would think after so much time the ground rules would have become pretty simple. The actual history of the world of work, especially as it applies to the arts, is rather more complicated and far more intriguing. Looking at the employment relationship in this sort of historical continuum reveals how this relationship reflects the cultural, social and political milieu of its time.

Long before the Romans forced their artisans to join job-specific groups called guilds, workers of all kinds, including artists, attempted to associate in occupational groups, primarily to raise income by limiting competition. Over time, in Europe, membership in a particular guild became hereditary and usually compulsory. Freedom of choice in the earning of a living was unknown. In the Middle Ages, the functional descendants of Roman slaves became the serfs so integral to the manorial system. In the land-based economy of the medieval period, the serf and his descendants were bound to the land. And the "employer," or lord of the manor, was himself judge and jury in matters concerning his loyal work staff, including artists.

In the Renaissance, the artist-worker obtained a different sort of status by devoting his energies both to producing everyday objects and to crafting the more refined arts for the appreciative affluent citizens of that time. These artisans continued to see the rise of their craft in the eyes of their society.

Of course, performing artists throughout the centuries have been difficult to peg because of their traditionally vagabond existence. Take for example the street artists - of the Italian *commedia dell'arte*. No organization or localized ties whatever marked these wandering groups of masked players with their productions completely improvised, consisting of no written dialogue and only the most nebulous of story line. The term "commedia dell'arte" literally means "comedy of the (actor's) guild." But it was only in the 1550s that these impromptu groups began to organize into companies who then gained their own reputations according to the genius of the individual players within a group. Once organized by what was usually a husband and wife effort, the troupe would stay together for years, forming their own internal employment relationship.

Throughout the centuries, however, most artisans still maintained little freedom of choice or mobility in their calling, as eighteenth century France demonstrates. Legislation in France at that time strictly limited the movement of what were then called "journeymen." Employers, or "masters," sought to control the movement of their workers and had legislation passed forbidding a worker to leave his place of employment without ample notice to the employer. Any other employer was forbidden to hire such a journeyman unless he could produce a certificate from his previous employer acknowledging the employee's completion of work obligations with the previous employer.

Just as these examples show the employment relationship as a product of the very class-

conscious times, the United States experience after the Revolution shows a more upwardly mobile, egalitarian mood. This liberated atmosphere helped American artisans rise through the ranks to become, if not as the merchant class, at least enormously better off socially and economically than their counterparts in Europe. Equality did not develop overnight, however, and artisans for some time had to accept a rather dim stereotype that portrayed them as barely above the station of manual laborers. This social standing is revealed in the connotation which contemporary society had for the term "mechanic," which was at the time the commonly used expression for all skilled artisans and tradesmen. discussed.

WHERE ARE WE NOW?

In the United States the current state of the employment relationship is just as revealing of our political and cultural beliefs. We are coming closer to a substantive convergence of the ideals of the Declaration of Independence, which declared all men equal and equally entitled to the pursuit of happiness. Slavery hindered the immediate realization of Revolutionary ideals, but we have steadily been improving opportunity in the workplace, which in turn allows for social mobility. Unlike the Middle Ages, no rigidly enforced class structure prevents a person from improving his or her place in life.

To realize the ideals of the democratic society in the workplace, however, each citizen must pay a price. That price is an increasing quantity of government regulations that aims to create a more level playing field for all American workers. From safety in the workplace to a fair wage and limited work week, government regulation may be viewed as the price we pay for espousing freedom and equality for all. This is not to say all government regulation is wise, just or efficient. This is only a reminder of how and why we have arrived at this point in our social history of confusing and sometimes conflicting regulatory requirements affecting how we run our businesses.

This handbook will illustrate the basic concepts of employment law with examples that reflect some of the nontraditional contemporary employment situations found in nonprofit and performing arts organizations. Do not assume that because our examples do not closely parallel your own experiences, that they do not apply to you. Always keep as open and objective a mind as you can in looking at your own organization to see where there is room for improvement or cause for concern.

EMPLOYEE OR INDEPENDENT CONTRACTOR?: WHY DOES IT MATTER?

Determining whether an employment relationship exists at all can be as tricky as deciding who is an "employer" and who is an "employee." Not only is there a wealth of legal concepts that determine whether an employment relationship exists, but also provisions in particular federal laws offering their own definition of "employer" and "employee" for discrete purposes. Naturally, these definitions are not interchangeable. In nonprofit and performing arts organizations these labels may be difficult to apply because of the hybrid work situations that are typically found in such organizations.

Employment categories may involve not only the traditional permanent employee, but also temporary employees, non-paid employees and "pure" volunteers. A work supervisor's knowledge of the difference between a non-paid employee and a "pure" volunteer is significant, for it determines the organization's liability according to the employment law concepts set out in the rest of this handbook. A non-paid employee may be someone who, for all practical purposes, is an employee according to the tests you will see described later. The fact that wages are not currently being paid does not automatically put that worker into the volunteer category. The administrative assistant, for example, may have duties such as ordering supplies, renting equipment, placing orders for printing, folding and mailing fundraiser invitations. This worker may be working with the expectation that wages will be paid at a later time whenever the coffers may allow. The "pure" volunteer is the person rendering services without the expectation of payment. Another distinction between the two is the worker's capacity to represent the organization or to enter into contracts on behalf of the organization. This worker's representation of the organization in making these contracts with vendors points to the category of non-paid employee.

Because your organization is connected to artists and the arts, you also have another concern in addition to your relationship to your office staff. Looking at the position of artists comparable to the sixteenth-century acting troupes, you should also focus on the artists with whom your organization is associated in various ways.

It is easy to see that such relationships in contemporary times pose many possible legal conundrums. When, for example, do these players cross the thin line between non-paid employees and independent contractors or employees? When does the casual art support operation become an employment relationship?

Keep in mind the various people you have wandering in and out of your organization performing the numerous services required to keep it going. Start thinking about where these people fit in terms of the categories discussed in this handbook; then think about how you might better set out their responsibilities and your own expectations. The importance of thinking about this aspect of your organization will become very clear as you continue reading.

Whether you need to comply with various laws regulating employers will generally depend on whether an employment relationship exists, that is, whether there is an employer-employee

relationship. Determining whether a worker is an "employee" or an "independent contractor" is very important because a worker's status as a non-employee relieves the employer of much paperwork and regulatory compliance. In the arts this can be one the most difficult issues to resolve. For example, is the piano teacher at the music school an independent contractor simply because she teaches private lessons in the school after hours?

The Internal Revenue Service has set out numerous factors that it uses to identify "employees" or "independent contractors." All factors have to be carefully applied to each set of circumstances. The importance of each factor will vary depending on the context in which the individual performs services. Your organization's own designation of the relationship is frequently immaterial to the IRS. Although the list of factors discussed here was developed by the IRS for its own purposes, you may use it as a basic frame of reference for determining worker status under most federal and state laws.

WARNING: Some federal and state laws have their own tests for determining employment status. These tests may be similar to the checklist below or they may be much broader. In some cases independent contractor status will not exempt the employer from complying with a particular law. Do not rely exclusively on this checklist without reviewing the standard under the various applicable laws. This list is primarily used to determine whether the employer is required by law to withhold Social Security and income taxes, pay matching "FICA" contributions. Some other instances in which one would use this list are in determining whether your organization is required to comply with the National Labor Relations Act and whether the worker is covered by provisions of the Occupational Safety and Health Act. Those laws, and others presented in detail in other chapters.

FACTORS TENDING TO INDICATE THAT YOUR WORKER IS AN "EMPLOYEE"

<i>Instructions</i>	The person for whom the services are performed (the supervisor on behalf of the employer) has the right to require compliance with instructions (whether this right is exercised or not). This control factor is the one most often cited in cases and rulings to conclude that a worker is an employee.
<i>Training</i>	Job-specific training indicates that the supervisor wants the services performed in a particular manner.
<i>Integration</i>	Integration of a worker's services into the employer's operation generally indicates someone subject to direction and control (See "Instructions" above).
<i>Services Rendered Personally</i>	If the specific worker's personal services are required, the employer presumably is interested in controlling development of the method used to accomplish the work, as well as the results.
<i>Continuing Employee Relationship</i>	A continuing expectation of an employer-employee relationship may exist even though the work is performed at irregular intervals.
<i>Set Hours of Work</i>	Hours of work set by the supervisor indicates control.
<i>Full Time Work Required</i>	Requiring full-time attention to the employer's work obviously restricts the worker's ability to do other work.

<i>Doing Work on the Employer's Premises</i>	Requiring the work to be done on the premises suggests control over the worker.
<i>Set Order or Sequence of Tasks</i>	Requiring performance of services in a set order usually means the worker is not free to follow his or her own pattern of work, but instead must follow the employer's established routines and schedules
<i>Oral or Written Reports</i>	Requiring the worker to submit regular reports to the supervisor indicates a degree of control.
<i>Payment by Hour, Week or Month</i>	Paying on such a regular basis generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the total cost of the job.
<i>Payment of Business and/or Traveling Expenses Unreimbursed Expenses</i>	Paying such expenses in the absence of a "time and expenses" project agreement, generally indicates the employer retains the right to regulate and direct the worker's activity in order to control expenses. The extent to which a worker has unreimbursed business expenses has been highlighted by the IRS as one indicia of status as an "independent contractor." Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important.
<i>Furnishing Tools and Materials</i>	Furnishing significant tools and materials tends to show the existence of an employer employee relationship.
<i>Right to Discharge the Worker</i>	An employer's right to discharge should the worker not follow instructions indicates control.
<i>Worker's Right to Quit</i>	The worker's ability to end the relationship with the employer at any time the worker wishes without incurring liability indicates an employer-employee relationship.
<i>Coverage Within Group Health Insurance</i>	Participation in group health benefits ordinarily made available only to employees could transform an independent contractor into an employee. It depends upon the wording of your group health insurance plan. Be aware that the IRS, in Publication 15-A identified below, states as one of the indicia to determine whether the relationship of the individual is that of "employer" or "independent contractor," " <i>whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay.</i> "

FACTORS TENDING TO INDICATE THAT YOUR WORKER IS AN "INDEPENDENT CONTRACTOR

The absence of employer control in the factors listed above potentially indicate independent contractor status. In addition, the IRS has identified other factors indicating the existence of such status.

<i>Hiring, Supervising and Paying Assistants</i>	If one worker hires, supervises, and pays his or her assistants under an agreement by which the worker is responsible for the requested result, the worker is usually seen as an independent contractor.
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Significant Capital Investment

If the worker invests in facilities not typically maintained by employees, and these are used by the worker to perform the hired service, the worker is generally viewed as an independent contractor.

Realization of Profit or Loss

A worker who can realize a profit or suffer a loss as the result of his or her work is generally viewed as an independent contractor.

Working for More Than One Firm at a Time

If a worker performs significant services for several unrelated persons or firms at the same time or over the course of one year, the worker is generally viewed as an independent contractor.

Making Services Available to the General Public

A worker who makes his or her services regularly available to the general public is generally viewed as an independent contractor.

For certain types of artists, different employment situations abound. For example, a famous opera star may work as an independent contractor. Through an agent, the performer is booked for a week or a month with various opera companies throughout the world. While the music will have been selected by the opera company, the director may have very little control over the way the star chooses to perform it. In contrast, a singer may accept a more permanent but more restricted relationship with an employer. In another case, an advertising agency engaged a singer on behalf of a sponsor company to perform personal services. The singer agreed to be present at rehearsals and to prepare for the program. He had to defer to the agency and/or the sponsoring company as to their judgment about what would be required to make the broadcast successful. He was not allowed to appear in any other radio program (whether for pay or not) during the contract. The IRS concluded that the sponsor, as well as the advertising agency acting on the company's behalf, had the right to exercise control over the singer's services to an extent sufficient to establish an employer-employee relationship between the company and the singer, with predictable tax results for both parties.

Actors often take on different types of assignments from different companies. In a case concerning both an actress and a narrator, the actress worked for a film company from time to time, but also was engaged in business as a television writer and producer. She often played in one scene in a motion picture with a simple set and no other actors. She provided her own costume and spoke a few sentences of dialogue from a script. The company gave her technical instructions and paid her the rate prevailing for actors for her time. The narrator was given no instructions regarding diction, interpretation or delivery, and the speed or pacing of his delivery was only determined by the length of the scene he was narrating. He was given instruction by the company in technical matters, and he was given instruction as to the pronunciation of technical, medical or foreign words. He was paid by the company at the rate prescribed for narrators, or on a flat-fee basis.

The IRS found both artists to be employees of the film studio. The Service's view was that the producers formulated an overall plan, selected the necessary performers, determined the services to be provided, instructed the performers concerning interpretation, execution and timing of the mate assigned to them and maintained supervision over all phases of the production to bring the individual efforts of each performer into an integrated whole as contemplated by the original plan. The Court concluded that the company had sufficient control over the actress and the narrator to cause them to be employees.

So-called “freelance” writers usually work as independent contractors. Such writers will prepare an article or book on a topic of his or her own choosing, and at his/her own expense. When the project is completed, the writer submits it to a publisher in hopes of having it accepted for publication. Similarly, scriptwriters may prepare unsolicited scripts for movies or plays. However, a writer may also be an employee (intentionally or inadvertently). In one case, an advertising agency engaged a scriptwriter on behalf of the sponsoring company. The agency agreed to pay the writer a certain amount for each script that was used. The agency could reject any or all scripts for whatever reason. Any script material written and used during the life of the contract became the property of the agency, which had exclusive rights to any copyrights. During the life of the contract, the writer could not write for any other radio program or accept any employment without first securing the written consent of the agency. The Court concluded that the writer was not engaged in the composition and sale of original works. He was not able to write original plays or stories that were his exclusive property to offer to other producers as he desired. Consequently, the company, acting through its agent, the advertising agency, was found to be the employer of the writer.

Try your hand at analyzing whether the performing artists are independent contractors or employees in these cases:

HINT: DO NOT CONFUSE THE TERMS "CONTRACT LABOR" AND "INDEPENDENT CONTRACTOR." A WORKER WHO PERFORMS SERVICES FOR AS SMALL A TIME PERIOD AS TWO HOURS MAY STILL BE AN EMPLOYEE, REQUIRING THE EMPLOYER TO COMPLY WITH APPLICABLE LABOR LAWS.

CASE 1: You are the manager of an opera company. You have the unique opportunity to hire Dame Wanda to star in your next production of Carmen. Dame Wanda is a recognized star, famous for her interpretation of the lead in this opera. She is also temperamental. The diva will arrive two weeks before the opening to rehearse with your company. While she may deign to rehearse with your musicians and singers, you know that she will perform the role in her own unique way. You will be allowed no interference. After the stunning performances have ended, it is time to pay Dame Wanda. Must you withhold income and Social Security taxes?

CASE 2: You also have lesser lights who perform in your operas. They are on contract, but only during "the season," which extends from September through May. These lesser lights will perform at least some part in each opera co sometimes a small role, sometimes a major part. The amount each is paid varies depending on the importance of his or her role, but the pay will not be below stated minimum. During the season each such performer must be available to company. Must you withhold taxes?

CASE 3: Actual opera performances typically are for about one of each out of each month of the season. During performance week, you hire acts to perform during intermissions. For example, mimes may mingle with the guests while a poet may give a reading to audience members who prefer to remain in their seats. These "added attractions" are hired strictly for each performance week, and different performers may be hired for different productions. While new acts have to audition, they generally perform as they see fit, within the time established by the intermission

periods. Once their week-long contract period ends, they are free to move on to other engagements. Must you withhold taxes?

ANSWERS: In Case 1, the manager can exercise some guidance in dealing with this worker. Yet, it is doubtful that anyone could exercise sufficient control over Dame Wanda making the Diva an employee. Thus, you should feel comfortable treating her as an independent contractor, completing a Form 1099, and not withholding taxes. In Case 2, involving lesser lights, you probably are dealing with employees. Although their compensation may vary, they have a commitment to the company of some duration and the company can control their actions during that time. You should treat them as employees, withholding taxes and forwarding the requisite W-2 forms. Case 3, involving specialty acts, describes a situation involving individuals who have a short-term commitment to you. You have, at best, negligible control over the way they perform. They give every appearance of being independent contractors. Consequently, you should report their compensation on a year-end Form 1099 and are not required to withhold as no employee status exists.

THE EMPLOYMENT RELATIONSHIP

Once the employment relationship is established, the confusing process of complying with federal and state law begins,

EMPLOYMENT AT-WILL

In Texas, the typical employment relationship is characterized by a legal concept known as the employment-at-will doctrine." This concept means that, unless there is a written contract to the contrary, either the employer or the employee may terminate the employment relationship at any time, for any reason or for no reason at all. Thus, without a written employment agreement there is generally no implied promise that either party will act in good faith or deal fairly with the other in terminating the relationship. NOTE: Even with a written employment agreement, it is still possible to have an "at-will" employment relationship if that is the term of employment specified in the agreement,

The at-will doctrine is not absolute. Several federal and state laws limit the circumstances under which an employee can be fired. For example, Texas has created a "public policy" exception that prohibits an employer from firing an employee who refuses to perform an illegal act that is punishable by criminal penalties. Similarly, an employee who inquires of the proper authorities whether a delegated job duty is illegal may not be fired simply for making the inquiry. This exception is a narrow one, and it has not been extended to an employee's refusal to perform an illegal act for which he could be sued rather than fined or is imprisoned.

Because an at-will relationship exists, unless there is a written agreement to the contrary, the employer must use common sense in the course of the relationship so that no written documentation or correspondence with the potential employee may be construed as a written employment contract for a specific time claim that you have promised an employee a specific length of employment with your organization, be careful of the context in which you give the salary per year in your written contract or the employment offer. Instead, state the compensation in terms of per week or month, or accompany the annual figure with a statement that the use of the annual payment calculation is for convenience only and does either side to any specific length of employment.

Employee handbooks or manuals are good to have on hand where they describe the policies and terms of employment applicable to all employees. This problem of vague policies relayed only by word of mouth. Should your organization decide to have a handbook, make sure it is written in language sufficiently plain and direct that a person of average intelligence can understand it without confusion and misinterpretation, and include simple definitions of technical and legal terminology. The general rule is that a handbook is not an employment contract. However, some former employees have been successful in establishing that a handbook did constitute written employment contract that limited the employer's ability to terminate employees. You may want to have each employee, on receiving a copy of the handbook, sign a brief disclaimer stating that nothing in the handbook establishes an employment contract for a fixed term.

In Texas, handbooks are viewed as the "bible" of the employment relationship. In the absence of a written agreement to the contrary, they will govern subjects such as vacations, holidays, benefits, and hours of employment. They also can govern subjects such as arbitration of disputes of information at the employer's business.

EMPLOYMENT AGREEMENTS

Artists and nonprofits rarely use, but could benefit from, written for employment agreements for several reasons. First, for the employee's benefit, the agreement clarifies the responsibilities of the position and the employer's expectations. This document may decrease the leeway an employer otherwise has to terminate an employee without cause. Second, an employment agreement can give the supervisor an objective basis upon which to assess the employee's job performance. Having this basis is an advantage since the personnel manager can work from this agreement to develop objective performance evaluations that then form the basis of the employee's personnel file. As you will see elsewhere in this handbook, written objective documentation illustrates the employer's efforts at fair and reasonable treatment of its employees and is essential in preparing the employer to meet any potential claims or lawsuits by former employees. The better your documentation, the more quickly and effectively you can dispose of claims. An employment agreement is not necessary for every employee you may have. The decision is up to your organization's management whether to undertake the task of writing an effective job description to be the basis for each position. The list below includes some suggestions for basic elements of an employment agreement.

WHAT TO INCLUDE IN A STANDARD EMPLOYMENT AGREEMENT

The only essential elements of any written agreement are statements and regarding compensation, duration and bases for termination. In addition, consistent statements describing:

- hours per week to be worked, including any scheduling requirements or flexibility of scheduling;
- the rate at which the work will be paid, distinguishing if appropriate between wages and salaries;
- overtime compensation policy and the categories of work which will be compensable as overtime (See section below on Fair Labor Standards Act);
- specific duties of the job;
- policy regarding accrual and use of any paid or unpaid leave designated for purposes such as vacation, sickness, or family care.
- reporting and evaluation procedures;
- other benefits, if any; and most importantly,
- the precise conditions under which termination can occur. You may if you choose state the conditions as those of the basic at-will relationship in which the employee can be terminated at any time and for any or no reason.

In addition to these items specific to each relationship, please consider providing a designated and agreed mechanism for dispute resolution such as mediation or arbitration, which may salvage a working relationship instead of ending it by lawyer-to-lawyer conflict.

WHEN THERE IS NO WRITTEN EMPLOYMENT AGREEMENT

In the best of all possible worlds, you and your future employee would mutually agree on and set out in writing every detail of the proposed employment relationship. However, in the real world, undocumented agreements, informal conversations and misunderstandings abound. A disgruntled employee may one day be able to assert that some higher-level supervisory employee promised this or that, and before you know it, your organization may find itself defending against claims of an enforceable oral contract (you bet there is such a thing). This section may convince you to be more firm in requiring your organization to develop a policy for written agreements, and to train supervisors to avoid statements which, taken out of context, appear to be informal promises and assurances. An oral employment contract presents at least two problems: First, it may alter the usual at-will relationship, unbeknownst to and unintended by the employer; and second, alternatively, it may not be legally enforceable, unbeknownst to the employee, because of a traditional legal tenet known as the Statute of Frauds.

The employer's problem occurs primarily when its hiring representative makes an informal "welcome aboard" statement implying that job security is conditioned only upon the employee's doing a satisfactory job. This informal assurance may be deemed to modify the at-will relationship. The employer could then be restricted to discharging the employee only for cause. The employee's problem, that he may not have an enforceable employment agreement, can arise even though both parties may at the time of the making of the oral contract, truly intend to adhere to the terms of the agreement. But, if the agreement entails a job duty or assignment that cannot possibly be completed within one year, the statute of frauds renders the oral agreement unenforceable. Texas law requires a writing of any agreement that cannot possibly be performed within one year.

Another group of problems that arise out of oral communication regarding employment invoke the legal theory of misrepresentation, whether deliberate or accidental. This principle could be used to show that, although you had no intention to create an employment contract, if your prospective employee reasonably relies on your statement and suffers some economic damage, then a (nonexistent) employment claim can be enforced against your organization usually by money damages.

EXAMPLE: You contact a dancer or musician in another state him there is work available for artists like him in your community, and ask whether he is available for a long-term permanent engagement with your company. The artist interprets this conversation as an offer of employment, packs his bags, puts his house up for sale, and arrives on your doorstep just as the ink is drying on your contract with another artist.

He clearly has incurred a detriment in relying on your representations.

The obvious goal is to eliminate the most likely sources of such disputes - inappropriate statements by your personnel managers. This example should not of a scare you into cutting off the employee's telephone privileges nor make the you interview between you and your prospective employees uncomfortable because of a paralyzing fear of litigation. This is not the way to begin a productive work relationship. Clear and precise conversation between your

recruiter and the per prospective employee at the outset should prevent any misunderstandings later. For this reason, a written pre-employment communication is always preferable. P

Other reminders:

- Train your hiring personnel to avoid oral promises or general assurances that may be construed as commitments or contracts.
- Advise upper management employees of the dangers of making oral shows promises or assurances that could be taken as overruling personnel not employees about some aspect of the prospective job.

LIMITATIONS ON THE AT-WILL EMPLOYMENT RELATIONSHIP

Federal and state laws affect the traditional at-will relationship as much as court cases do. These laws basically state that an employer may not retaliate against an employee by terminating him or her when the employee exercises certain protected rights, such as filing a discrimination charge, filing a worker's compensation claim, filing an unfair wage or labor practice claim or suit, serving on a jury, attending a political convention, undertaking military service, or other similar protected actions. Later sections of this handbook discuss some of the significant laws and regulations in more detail, but many are consolidated here for easy reference. This list is by no means exhaustive.

National Labor Relations Act;

Title VH of the Civil Rights Act of 1964;

Civil Rights Act of 1991;

Occupational Safety and Health Act (OSHA);

Fair Labor Standards Act;

Worker Adjustment and Retraining Act;

Employee Retirement Income Security Act (ERISA); and

The Americans with Disabilities Act of 1990 (ADA).

The Family and Medical Leave Act of 1993.

EQUAL OPPORTUNITY LAWS

NOTE: Employers are generally by law required to post notices informing employees and job applicants of their rights under the various federal statutes prohibiting discriminatory employment practices. For any organization performing a social function and receiving federal funds, a poster from the United States Equal Employment Opportunity Commission advises employees or job applicants of the federal agency's worker assistance program. Failing to post this notice may be a basis for excusing a complainant's late filing of any discrimination charges.

TITLE VII OF THE 1964 CIVIL RIGHTS ACT

The law is the pre-eminent employment discrimination statute of the modern era of employee rights. It prohibits discrimination on the basis of race, color, national origin, sex, or religion. It also establishes an elaborate enforcement scheme centered in the federal Equal Employment Opportunity Commission. This law requires employees who charge discrimination in employment to file a claim first with the EEOC before being allowed to proceed with such claim in court, law also provides as damages only "make whole" relief such as back pay, reinstatement and, in appropriate cases, front pay, all premised on the idea of providing relief for an employee who suffers a detriment which he or she would not have suffered but for discrimination. A claimant under this law cannot seek items such as mental anguish or pain and suffering.

CIVIL RIGHTS ACT OF 1991 (CRA)

The Civil Rights Act of 1991 reinforces many other federal laws that prohibit discriminatory employment practices. The CRA changes prior law by allowing (with limitations) recovery and punitive damages for such things as mental anguish and pain and suffering, in addition to the "make whole" remedies of Title VII (identified above). The CRA has generally complicated settlement negotiations of employee claims because of the availability of compensatory and punitive damages. As with the overall employment landscape, employer can limit potential liability by maintaining detailed documentation of disciplinary action and performance appraisals, by giving adequate warning to employees of substandard performance, and by having a review process which includes as many decision makers as feasible.

AMERICANS WITH DISABILITIES ACT (ADA)

This Act's purpose is to open up job opportunities and various facilities and events to qualified individuals with a disability. The ADA is customarily viewed as another civil rights act. The ADA affects arts-related employers. It also affects their physical facilities, including museums, exhibition spaces and performing arts centers, because these venues meet the ADA's definition of traditional "public accommodations." Owners and managers of public accommodations are affected by the ADA both in hiring procedures and in providing public access to the public portions of the facility and to the employees workplace. Several excellent brochures have been published which describe in greater detail the extensive provisions of the Act. Please see the list in Appendix 2.

HIRING PROCEDURES UNDER THE ADA

An employer may not discriminate in hiring based on a person's disability where that disability does not interfere with the ability to perform the essential functions of the job. Where the disabled person is otherwise qualified for the job, but lacks the ability to perform tasks only marginally related to the essential functions of the job, the ADA requires that the prospective employee be "reasonably accommodated." Among the many ways of "reasonably accommodating" an employee are:

- job restructuring through delegating marginally related tasks to other workers;
- hiring an assistant, such as a workstudy student or intern, whose job duties include providing assistance to the disabled employee with tasks marginally related to the job's essential function;
- modifying the worker's schedule; acquiring equipment, such as print magnifiers for partially blind employees;

and other similar adjustments.

As the employer's interviewer, you may no longer directly ask if the applicant is "disabled" or "handicapped." Rather, you must limit the inquiry to whether the applicant is capable of performing "essential" job functions required of the position. This means that you have to have a job description for the open position which clearly identifies the "essential functions" of the job. Another potentially taboo area of inquiry may be whether any worker's compensation claim has been filed with a previous employer. The cautious employer will do well to alert hiring personnel to avoid this subject completely, as well as inquiries about the medical history of the applicant.

You may, however, ask the applicant how he or she will perform the essential functions of the job. You may also require the applicant to demonstrate how he or she will perform these functions. You have the obligation to ensure that a job function is identified as "essential" is actually that, essential.

Note: AIDS is considered a disability under the ADA. A person with the AIDS virus who can perform the essential functions of a job may not be denied that job solely because of this disability, if it substantially impairs a major life activity, such as seeing, hearing, walking or working. The same is true of alcoholism the ADA does not protect a drunk employee in the workplace, but it does protect the recovering alcoholic. (Conversely, the ADA protects neither drug abusers nor recovering drug abusers.) The designation of disability under the ADA does not extend to homosexuality or transsexuality. The preferred way to handle employees who have difficulty working with an employee who has AIDS or who is HIV-positive or who is a recovering alcoholic is through an education program or resource center. The employer would do well to articulate clearly a workplace policy concerning harassment and related discrimination of all kinds and then to enforce that policy through timely response, employee education and attention to complaints by management at all levels.

PUBLIC ACCESS

"Access" under the ADA is a much broader concept than simply supplying wheelchair ramps. The ADA mandates modifications to existing structures and programs even though these may be difficult to accomplish where financial resources are low or where such things as historic or environmental preservation concerns are important. Proof of undue hardship in complying with the required modifications may excuse strict compliance and allow only partial compliance. While the ADA does not require structural change to an existing building in cases where the change would be very difficult, financial considerations alone do not determine hardship. You will have to demonstrate that all feasible outside funding sources have already been considered before non-compliance will be excused. There has been little interpretation of this portion of the ADA, and the criterion used to assess compliance in the few reported cases has been "structural impracticability." Therefore, knowing what degree of financial hardship may excuse compliance remains to be seen. To be on the safe side, the employer should make a concerted effort to find the necessary funding.

For buildings where such "retrofitting" is demonstrated to be extremely costly, a less rigorous standard of accessibility compliance may be used. The more rigorous standard will be applied with full force for new construction where accessibility can be more economically and easily incorporated into the structure. For historic buildings whose architectural idiosyncrasies make modification difficult, the ADA provides alternative standards. To qualify for these less demanding alternatives the building must meet two criteria:

- It must be listed or be eligible for listing in the National Register of Historic Places or be designated as an historic structure by state or local law; and
- The federal or local preservation agency must agree that the standard modification requirements of the Act would threaten or destroy the historic significance of the structure.

The following is a checklist to help you get started or complete your compliance process under the Americans With Disabilities Act:

- Determine whether your organization is required to comply under the public accommodations or other provisions.
- Make jobs accessible by modifying your hiring procedures.
- Determine the "essential functions" of all job positions.
- Reduce essential functions to writing and have it readily available for job applicants.
- Delete from your current hiring procedures any standards, criteria, tests or applications which would result in disqualifying an individual solely or primarily because of a disability or because an individual is regarded as having a disability.

EXCEPTION: If the test is for a skill specifically required for the position, and an applicant's disability causes him or her to fail the test, such a test is not considered discriminatory under the ADA. However, such a test to be legitimate must actually measure the skills and aptitudes it purports to measure, and they must be more than marginally related to the job.

- If you require job applicants to take a medical exam, change the policy so that the medical exam is required only after an offer of employment that is conditioned on a satisfactory medical exam.
- Work with your disabled employees to find ways to accommodate them reasonably in

performing job duties so that they enjoy all benefits of employment enjoyed by your other employees. For example, if an employee requests a top-of-the-line typewriter available for individuals with dyslexia, and you provide an other version just as reliable, but not as fancy, you will satisfy the reasonable accommodation requirement.

- Determine whether undue hardship prevents you from complying with the reasonable accommodation requirements.
- Make facilities accessible by removing architectural barriers in existing facilities, including communication barriers that are structural in nature, if that is reasonably achievable.
- If your organization cannot fully comply with the required dimensions for doorways and ramps, take other steps to make the facility more accessible, such as having a ramp with a steeper slope than that specified under the Act. NOTE: Such alternative measures may be undertaken only if they do not pose a health or safety threat to the public.
- If undue hardship prevents you from modifying your facility, show you are developing a plan to make your goods and services readily available to the disabled in some other way.

Employers with employment practices that violate the ADA will be subject to paying not only the rejected worker's direct economic losses but also additional punitive damages where the discrimination is shown to be intentional. If, however, the employer can show that it has made a good faith effort to comply and has attempted to work with the disabled individual to reasonably accommodate him or her, the employer should not be liable for any damages.

Tax credit is available for businesses with fewer than 30 employees or with less than \$1 million in gross receipts. The federal government will allow a 50% non-refundable tax credit up to \$5,000. The business is required to pay the first \$250 toward the reasonable accommodation. For reasonable accommodation efforts that cost more than \$5,000, up to \$15,000 is available as a tax credit.

AGE-BASED DISCRIMINATION

The Age Discrimination in Employment Act (ADEA) makes it unlawful for an employer to discriminate in the workplace based on a worker's age. The target age group is employees forty years of age and older. The concept is fairly clear. To avoid potential problems in the case of employees taking early retirement, some employers may consider asking a departing employee to sign a release waiving any claim under the ADEA. Asking for such a release is lawful (and the release is effective) only if the departing employee gives it "knowingly and voluntarily." A later piece of legislation, the Older Workers Benefit Protection Act (OWBPA) clarifies the definition of knowing and voluntary. To be enforceable, the waiver must at a minimum:

- be written in ordinary English for a person of average intelligence;
- specifically refer to rights and claims under the ADEA and the OWBPA;
- not waive rights or claims which may arise after the date of the waiver,
- only waive rights in exchange for some benefit in addition to that which the employee would already be entitled to receive;
- be in writing and advise the employee to consult an attorney;

- include a 21 day waiting or "cooling off" period to consider whether to sign the waiver, and
- provide a 7 day rescission or cancellation period following the execution of the waiver before it becomes effective and enforceable.

Age discrimination laws also bar employers from refusing to hire or promote an otherwise qualified worker based solely on the worker's age within the protected "40 and over" range.

MATERNITY AND FAMILY LEAVE

The Family and Medical Leave Act, effective August 5, 1993, requires employers with 50 or more employees working within a 75-mile radius to offer workers as much as 12 weeks of unpaid leave because of an employee's own serious illness, because of childbirth or adoption, or to care for a seriously ill child, spouse or parent. This law applies to nonprofits and requires employers to continue health care coverage during the leave and guarantee workers the same or comparable jobs upon their return. Employers may exempt "key" (the highest paid 10% of their workforce) workers and workers who have not worked at least 25 hours per week for the last year.

The stated purpose of laws prohibiting unfair employment benefit practices is that such statutes should guarantee equal opportunities to all employees. This philosophy has an impact on such things as how an employer should offer a family leave policy to parents, especially mothers. The potential for discrimination suits abounds. Be aware in forming your family leave policy that pregnancy is a protected disability to be treated the same as any other medical condition granted leave, whether paid or unpaid, for an employer with more than 15 employees.

SEXUAL HARASSMENT

What is it?

How does the employer avoid it in the workplace?

The issue of sexual harassment is one of the most confusing areas for employers. Employers rarely screen employees or prospective employees for "political correctness" or "sensitivity." But you may find your organization being sued for harassment because someone is deficient in these character traits. Such liability arises because of a legal concept known as respondeat superior; that is, the concept that an employer may be held liable for the unlawful acts of its employees when those acts are committed in the workplace. Because of the rapid increase in claims of sexual harassment over the years, and the confusion surrounding the scope of sexual harassment and how to deal with it, the following outline is submitted to try to simplify as much as possible this very complicated subject.

WHAT IS SEXUAL HARASSMENT AND WHEN IS IT ILLEGAL?

DEFINITION OF SEXUAL HARASSMENT: TWO TYPES

"Quid Pro Quo": Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- a. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
- b. submission to or rejection of such conduct by an individual is used as the basis for

employment decisions affecting such individual.

"Hostile Environment": Unwelcome conduct of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive work environment.

- a. Sexual harassment may so poison a working environment as to alter a "term or condition or privilege" of employment, even if the harassing conduct does not result in a discharge, denial of promotion, reprimand, etc.
- b. If a sexually offensive work environment exists, an employee need not prove she suffered a tangible job detriment to prove sexual harassment. The distinction between invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected sexual advances may be difficult to discern. However, this distinction is essential, because sexual conduct becomes unlawful only when it is unwelcome. Conduct is unwelcome in the sense that the employee did not solicit or invite it, and in the sense that the employee regarded the conduct as undesirable or offensive.

WHEN DOES CONDUCT CREATE AN OFFENSIVE WORK ENVIRONMENT?

The conduct must be pervasive, so "as to alter the conditions of employment and create an abusive working environment," and the conduct must be "sufficiently severe and persistent to affect seriously the psychological well being of employees". Four factors are used in analyzing the circumstances to determine whether a hostile work environment exists:

- a. the frequency of the discriminatory conduct;
- b. the severity of the conduct;
- c. whether the conduct is physically threatening or humiliating or a mere offensive utterance; and
- d. whether the conduct unreasonably interferes with an employee's work performance.

WHOSE CONDUCT CREATES LIABILITY FOR SEXUAL HARASSMENT?

SUPERVISORS

Generally, an employer is liable for a supervisor's sexual harassment, even if the employer has no actual or constructive knowledge of such harassment (i.e., the employer will be held strictly liable for the supervisor's *quid pro quo* sexual harassment). Even if a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, the Supreme Court has stated that an employer can be liable, nonetheless, "where its own negligence is a cause of the harassment." An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, an employer may defend by proving:

- a. that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- b. that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

No such defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

CO-WORKERS

An employer is liable for sexual harassment by co-workers if the employer (or its agents or supervisors) knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

OTHER SITUATIONS CREATING SEXUAL HARASSMENT LIABILITY

- "Social Requirements"*** Requiring or implicitly inferring that an employee must socialize with business customers or submit to unwelcome sexual advances from customers as an unstated term or condition of employment.
- Preferential Treatment*** Providing opportunities for advancement, pay raises, favored treatment, etc. to those who submit to sexual overtures and flirtations.
- Same-Sex Harassment*** All the rules apply to a claim of harassment, even if the harasser and the target are of the same sex.
- "Consenting Adults"*** An employee need not demonstrate that her actual participation in conduct of a sexual nature was involuntary; all she needs to show is that the alleged sexual advances were unwelcome.
- Dress Requirements*** Requiring women to wear sexually provocative uniforms or outfits that tend to cause the wearer to be subjected to unwelcome sexual comments or other such conduct.
- Unequal Verbal/Physical Conduct Creating Unequal "Conditions of Employment"*** Repeated/pervasive use of physical force or verbal abuse directed toward female employee on an unequal basis because she is a female may be sexual harassment even though the physical/verbal abuse itself is not sexual in nature.

RECOMMENDATIONS FOR PREVENTING SEXUAL HARASSMENT

How do you protect your organization from a claim of sexual harassment?

There is no foolproof method for doing this, but there are certain steps that an employer can take.

First, create a strongly-worded written policy against sexual harassment and publicize it to all employees; e.g., bulletin board postings, handbook statements, letters to managers. Although the existence of a policy and a complaint procedure do not necessarily shield an employer from liability, the United States Supreme Court has held that these are factors to be considered in determining employer liability in hostile environment cases.

For this policy to be most effective, it should be set out separately, accompanied by examples of conduct prohibited by the policy, and not be buried in a general anti-discrimination policy.

To be effective, the policy should:

- be specific with respect to sexual harassment;
- set forth an effective complaint procedure to be followed by employees who believe they have been a victim of harassment (grievance or complaint procedure);
- the complaint procedure set forth in the policy should include the on of individuals other than the employee's supervisor with whom the employee can discuss the situation;
- the policy should be widely disseminated to the employees and posted on company bulletin boards;
- the employer should reinforce the substance of its policy against sexual managers and supervisors and provide them with training concerning matters such as how to respond if a complaint of harassment is lodged with them and how to recognize conduct that might be subject to harassment claims.

Further, during the pre-employment process applicants should be made aware that the company follows the requirements of those laws that prohibit discrimination in the workplace, including laws prohibiting sexual harassment. New hires should be asked to sign an acknowledgment of their receiving and understanding of the sexual harassment policy and complaint procedure. Employees should be encouraged to report incidents that they consider to be sexual harassment at the earliest possible stage. Supervisors should be educated about their responsibility to prevent harassment and about ways in which they can spot and correct it. (You could, for example, make each supervisor's performance contingent upon how well the supervisor performs in preventing and correcting sexual harassment.)

Finally, there are particular situations that should be monitored closely because they usually constitute traditional “trouble spots”:

- office romances,
- office parties,
- bulletin board cartoons and office jokes,
- retaliation after an EEOC charge, or
- Internet/e-mail.

GRIEVANCE PROCESS

For any sexual harassment policy to be workable, there must be official channels readily accessible by an aggrieved worker to voice a harassment complaint. Such channels would include an employee's supervisor, but because a supervisor can sometimes be the accused harasser, the policy in place requires designating more than the supervisor as the company's representative to field complaints. Also, and just as important, employees at all levels should be made aware of the complaint procedures adopted by you. Complaints should be timely and rigorously investigated, when they are made, and action should be taken when required. Anything less could needlessly expose the employer to legal action.

WORKERS COMPENSATION THE BASIC STATE LAW SYSTEM

Worker's compensation is the product of a belief that employers should bear the financial burden of on-the-job injuries, whether at fault or not. For the employer who maintains worker's compensation coverage, an injured employee's only remedy is through this system. The system relieves employers of any liability under common law negligence, that is, the employer can't be sued for negligence in maintaining the workplace. The cost of injury becomes, through insurance, a regulated cost of business. Texas does not require employers to carry worker's compensation insurance. In those states not requiring employers to purchase compensation insurance, employers may "opt out of the plan," but to do so exposes them to potentially much greater damages in injury suits brought by their employees.

Certain organizations or working situations have generally been exempted by state laws from mandatory coverage including:

- certain nonprofit institutions,
- firms with fewer than 6 employees,
- domestic workers, and
- casual laborers.

However, exemption from the state law requiring participation in the state program does not result in exemption from liability for injury claims and associated lawsuits. In addition, contracts with many large arts organizations and labor unions can require your organization to have worker's compensation or similar insurance coverage despite the exemption from the system.

In addition to the above exceptions, volunteers and independent contractors are not covered under a basic worker's compensation insurance policy. Generally, independent contractors must provide their own compensation type insurance. Depending on the situation and contract, your organization ordinarily should be indemnified by the independent contractor for his or her negligence; your organization can also require that it be named as a co-insured with the contractor on an insurance contract, or even be indemnified for your organization's own negligence.

Remember: not all nonprofit arts associations or organizations run the same risks. A museum slide library usually presents a significantly less risky work environment than a theater with stage riggings, backdrops and so forth.

Should you decide that you need or want worker's compensation insurance, there are two ways to acquire it: either through commercial insurance companies or state insurance pools or funds. Commercial insurance is generally used to provide this coverage, although some states are limited in the sources they may use.

Nonprofit organizations, however, face the same risk management analysis as for-profit employers choosing to get out of the system.

You also need to be aware that Texas protects employees who are injured on the job, or claim they have been, from retaliation by employers for filing or prosecuting workers' compensation claims.

OPTING OUT OF WORKER'S COMPENSATION

Drastic increases in compensation insurance premiums have led many employers to "opt out" of the state law system by choosing self-insurance. Employers who choose self-insurance are turning more and more often to specialized medical insurance policies that cover their employees for workplace accidents only. Such policies need very close scrutiny, as do the companies offering them, since this is an area where vulnerable employers can easily be taken in by "insurance" companies with inadequate resources or by out-of-state (or offshore) companies which can't be forced to pay a claim since they are not licensed by the state insurance board to do business in the state. (You do have your copy of TALA's handbook, "Insurance - A User-Friendly Guide for the Arts and Nonprofit World" don't you?)

Although the decision to opt out is primarily a business one, there are many legal considerations and practical concerns that your management should consider before making this rather drastic decision. Management personnel should, minimum, consider the following issues as they affect your particular organization:

- lost operating funds paid out on a major claim versus cost of premiums
- claims history of your organization compared to risk history of similar organizations;
- likelihood of a serious injury claim, despite claims history;
- likelihood of being sued by an employee;
- likelihood of a third-party suit to indemnify you;
- depth of your organization's current workplace safety awareness plan
- frequent requirement by others you contract with that you carry compensation insurance; followed and
- administrative cost of investigating, monitoring and following up claims made against you;
- ability to afford the cost of a reasonable alternative to compensation insurance, such as specialized employee medical insurance;
- ability of officers, directors and possibly association members and pay individual claims and suits (consider also how this potent problem will affect your ability to attract and keep these individuals);
- legal costs of preparing an ERISA plan so you can provide the alternative insurance while maintaining your tax-exempt status
- costs of setting up and monitoring a strict safety plan;
- cost of providing and monitoring medical care for injured employees;
- ability to have funds available at the time of actual payment of the medical bills and lost

wages of the injured employee;

- costs of investigation and legal fees to defend suits as these fees become due; and
- cost of excess or umbrella coverage to protect against catastrophic loss.

Some of these considerations are a function of your organization's size, some are a function of your funding structure, and some are a function of the types of work your employees perform. The risk management plan must be an intricate and comprehensive one, in any case.

Should you decide to forego the compensation System in Texas, the Texas statute requires written notice to employees within fifteen days of the effective termination date of coverage and written notice by certified mail to the Texas Worker's Compensation Commission not later than ten days after notifying the employer's compensation insurance carrier of the employer's decision to terminate. You also have to obtain certification from the State of your self-insured status and demonstrate the ability adequately to fund any claim that is made.

WORKER PROTECTION LAWS

The laws and regulations presented in this chapter deal with protection of your workers' physical safety and job security.

WORKERS ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

This federal law requires employers with more than 100 workers to give 60 days advance notice to the employees and local government of any contemplated facility closing or mass layoff, in order to give the employees the opportunity to seek other employment or retrain, and to give the governmental units an opportunity to do advance planning for services and tax base adjustments.

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

The Occupational Safety and Health Act applies to practically all private employers, including nonprofit and charitable foundations. OSHA and its associated regulations consists of a vast number of intricate requirements for making the workplace safe. It includes reporting requirements for compliance and for workplace injuries. The law requires the employer to maintain the workplace free from recognized hazards which may cause injury, seriousness or death to employees. For purposes of OSHA, an employer may even be deemed the "employer" of its independent contractor. Thus, organizations may need to provide safety rules and equipment for both employees and contractors. Keep in mind, however, that although an independent contractor or even a volunteer may not strictly fall within your obligations under OSHA, these individuals may still sue your organization under common law for negligence.

If you are an employer who uses loaned personnel from an employment agency, your duty towards those employees will be determined by looking at how the employees* wages are paid and who pays them, as well as by using a "control" test similar to that used by the IRS to determine independent contractor versus employee status.

FAIR LABOR STANDARDS ACT (FLSA)

The FLSA establishes minimum wage and hour standards and criteria for determining proper overtime payments.

It is a frequently misunderstood and misapplied law. What follows is a fairly simplified description of the FLSA to aid you in complying with its requirements. If you are in doubt about any of these, you can consult with your counsel, or you can call the local office of the U.S. Department of Labor for guidance.

First, what is the overtime requirement?

An employee who is not "exempt" from overtime must receive compensation of at least 1-1/2 times the regular rate of pay for any work performed beyond forty hours per week.

The "week" in question is a calendar week, that is, a seven consecutive day period (168 consecutive hours). The work week may begin at any time on any day of the week. Typically, a calendar work week will run from Monday (the first work day of a typical work week) through Sunday, but it can start on any particular day. Therefore, a person who works four 12-hour days over a weekend (Thursday through Sunday, in this example) is as eligible for overtime pay as a person who works five 9-hour days (e.g., 8 AM to 6 PM with one hour for lunch, Monday through Friday). Also, a non-exempt employee who is paid bi-weekly (for a typical 80-hour work period) and who works, for example, 44 hours the first week of the period and 36 hours the second week of the period is entitled to four (4) hours of pay at the overtime rate, even though he or she worked a "total" of 80 hours during this bi-weekly period, including working less than 40 hours in the second week.

Second, who is not exempt from overtime laws?

This is, unfortunately, a complicated question, particularly in the arts world. It is, nevertheless, not determined by the method of payment, i.e., whether someone is paid a salary as opposed to an hourly wage does not determine whether that person is exempt.

It is perhaps easier to describe, in very general terms, who is "exempt" from overtime. The following job descriptions identify employees who usually are exempted from the minimum wage and maximum workweek standards of the FLS A.

Executives: Employees with the authority to hire and fire, exercise some discretionary powers, supervise at least two full-time employees, and generally manage the business;

Administrators: Employees who primarily do non-manual work directly affecting the basic operation of a business and who must regularly use their own discretion and judgment; and

Professionals: Employees who work in a professional capacity, who either use some type of advanced, specialized knowledge in their work or rely on originality and creativity in some artistic field (teachers involved in anyway with imparting knowledge would be included in this category).

Keep in mind that the job title you use ("Manager", for example) will not determine eligibility to be exempt from overtime. In this case, substance usually triumphs over form.

Third, can you negotiate away an employee's right to be paid overtime?

No. The FLSA applies no matter what the employee's regular wage is, and an employee's right to overtime compensation exists even if the employee has an employment agreement that does not mention such compensation.

Can you regulate away an employee's right to be paid overtime?

Yes and No. An employer may state as its organization's policy that overtime work must be authorized first. An employer may also state, for example, that an employee should not perform work off-site and then claim overtime pay as a result. However, once work is completed in excess of forty hours in a calendar work week, whether with or without the employer's express or

implied consent, the lack of prior authorization will not defeat the employee's for overtime pay. It may subject the employee to a reprimand or other suitable form of discipline for failure to follow clearly established, WRITTEN, company policies and procedures; but it cannot be the basis for denying proper pay for work already performed.

Also, an employer cannot bargain away an employee's rights under the FLSA. Any employment contract that violates the terms of the FLSA is void.

NATIONAL LABOR RELATIONS ACT (NLRA)

The National Labor Relations Act and related federal law prohibits an employer from discharging or otherwise disciplining an employee for any union-related activity or other concerted activity. Specifically, the NLRA makes it an unfair labor practice to interfere with any of the rights the Act grants to workers to organize and bargain collectively.

In addition, under the NLRA a worker cannot be fired for refusing to engage-in clearly unsafe work.

The NLRA covers employers with more than \$ 50,000 per year in sales and/or purchases in interstate commerce. A nonprofit organization is not excluded when its employees are doing activities covered by the NLRA. Certain types of employees, however, do not fall with the Act, such as those employed in supervisory capacities.

To qualify as an employee under the NLRA the worker must:

- be an employee under the type of test used to distinguish between employees and independent contractors; and
- must be employed by a business engaged in commerce and meeting certain requirements in dollar volume in sales or purchases.

The National Labor Relations Board, which has numerous regional offices as well as a directly active Washington office, handles labor relations inquiries and complaints and has highly respected procedures for mediation and arbitration of labor-related disputes. It is a prime local resource for both employers and employees with questions concerning labor law issues. The NLRB makes a determined effort to maintain the attitude and appearance of neutrality between unions, employees and management, though many of its own employees have long experience in one or another of the three areas.

Even, though you may not be directly covered by the NLRA in your relationship with your own workers, take care. When you deal with third parties who have union collective bargaining agreements covering some or all of their employees, you may be subject to the terms of that collective bargaining agreement. As an example, when putting on a benefit performance at a theater that has union agreements with its stagehands and musicians, you must observe those agreements and hire union musicians and stagehands unless you have a special agreement to use the space only. The proceeds of more than one benefit performance have gone to resolve union disputes involving third-party union collective bargaining agreements.

CHILD LABOR

Aren't those adorable little ten year olds handing out programs and helping out at your late-evening monthly fund-raiser at which a local children's choir is performing? And don't you feel good giving each of them five bucks for their work each month. What adorable little federal offenses under the FLSA and/or NLRA! Remember, except for certain defined types of jobs, no one under 14 can work except under the direct supervision of their parents in non-hazardous occupations in a business owned or operated by the parent or custodian. Your unquestioning acceptance of "proof of age" documentation is no defense to liability, if you actually knew or had reason to know that, e.g., the 15-year-old was actually just 12.

One of the defined categories of permitted child labor is employment as an actor or performer in motion pictures or theatrical, radio or television productions. The actor/performer category is strictly interpreted. Young people aged 14-15 can work on a limited paid basis as long as the school day and work week limitations are observed. Somewhat greater latitude is allowed with 16-17 year old part-time workers in terms of work hours and types of work assignments. Young workers may not engage in any of a long list of tasks which have been designated as hazardous, even when under supervision of an experienced adult.

Note also that Texas requires employers to obtain certificates of age for young workers from the federal government.

Be careful in categorizing young workers as volunteers, especially if you are paying adults to do the same types of work. Technically, a volunteer does not fall within the child labor laws, but whether the child can actually make the decision to be a volunteer is not always clear. Is there absolutely no expectation on anyone's part that the child will ever be paid for his or her work, or is there some expectation that this could at some point develop into something lucrative? All the issues you considered at the beginning of this handbook about identifying actual employees applies to child workers, in addition to further concerns and restrictions.

And, as you may have surmised, young performers may be union members and their school or other organization may be a "union shop" workplace.

Call your local NLRB office for details if you have any connection with young artists or young helpers. Penalties for violations of the child labor laws can be astonishing, and include personal liability for the responsible individuals in the organization, fines reaching \$10,000 per day per violation and as much as six months in federal prison.

MINIMUM WAGE

Just a brief word - take care. Remember that adult part-time workers as well as full-time workers are entitled to be paid the federal minimum wage if they are employed by businesses in interstate commerce. Under the "McDonald's" law and other limiting laws, certain classes of part-time worker such as teenagers or employees who get part of their compensation from tips may be paid less. States may vary the minimum wage laws for workers in business not covered by the federal act.

EMPLOYEE TESTING AND MONITORING DRUG POLICIES AND THE WORKPLACE

The federal Drug-Free Workplace Act became law in 1988. This Act applies to all federal employees as well as employees of referral agencies and of organizations that receive government contracts and grants. The DFWA does not require a drug testing policy per se, but it does require covered employers to:

- publish a policy prohibiting the unlawful manufacture, distribution, dispensing, possession or use of controlled substances in the workplace;
- provide workers with a copy of the policy statement;
- establish a drug awareness and education program for employees;
- notify the appropriate federal agency of employee drug offense convictions in the workplace;
- take appropriate personnel actions against workplace substance abusers; and
- make a good faith effort to comply with all requirements of the DFWA.

Individual states may have their own legislation addressing drug use in the workplace. Texas, for example, has a policy that is stricter than federal law. The Texas law includes a prohibition against the use of alcohol or inhalants as well as other illegal substances in the workplace. This policy only applies, however, to firms that carry worker's compensation insurance and have more than 15 employees.

DRUG TESTING

Use of drug testing, especially through urinalysis, is becoming increasingly commonplace for employers because of the disruptions, absenteeism, accidents and lowered productivity associated with drug abusing employees. However, a drug testing policy may invade the employee's right to privacy by disclosing an after-hours substance use that in no way affects the employee's ability to fulfill his or her workplace obligations. For this reason, the most common and accepted form of employee drug testing has been "for cause" testing. This means that the employee is not tested unless he or she manifests on the job some objectively recognizable signs of impairment.

While the federal drug-testing laws deal with discrimination in drug testing, Texas has no restriction on employee drug testing by private employers.

The basic urine test is not 100% reliable as a drug test. Although it will certainly pick up many illegal substances, other substances may also give a positive result. To ensure an accurate test result you should have as part of your organization's overall policy a provision for a follow-up test by a more accurate (and usually more expensive) procedure.

Drug testing for employees has been justified most readily in cases in which there are safety or health concerns heavy machinery or highly technical skills, and fellow workers or the general public is high. You may increase the chance that a court would find your organization's drug

testing policy legally enforceable as a reasonable intrusion on the employee's privacy right if the policy is clearly articulated in writing, reasonably limited, and combined with a workplace substance abuse awareness program. Consider a mandatory meeting for all current employees where you explain the policy and have the employees sign a written acknowledgement of their consent to the policy as one of the terms of employment. If an employee does not comply with the policy and if the policy reasonable, you may terminate the substance-abusing employee without fear of liability in a wrongful discharge suit.

If your employees are working under a union master agreement, federal law requires that before implementing an alcohol or drug testing program must bargain with the union. You may implement your testing program without the union's agreement only after an impasse in bargaining has been reached.

POLYGRAPH TESTS

Some employers maybe surprised to learn that giving an employee a law polygraph or "lie detector" test is now unlawful, except in very limited circumstances. The Employee Polygraph Protection Act of 1988 (EPPA) The essentially eliminated this test as a means to screen job applicants. The EPPA prohibits an employer from refusing to hire, disciplining, discharging or discriminating against any employee or job applicant:

- for refusing to take a lie detector test,
- based on the results of such test, or
- for taking any actions to preserve his or her rights under the EPPA.

The only conceivable exception available to a nonprofit or arts hi organization would be the "ongoing investigation" except permits an employer to require an employee to submit to a polygraph test who is reasonably suspected of involvement in a workplace incident that results in economic loss or injury to the employer's business. To fall within this exception the employer must show a specific incident of economic loss motivating the set investigation, such as embezzlement. Random testing of employees is always prohibited. As a compliance requirement, a notice must be posted in a conspicuous place outlining employees' rights under the EPPA.

PERFORMANCE APPRAISALS

You heard it here first.

You must evaluate every employee's job performance in writing.

Hopefully, this blunt statement will reinforce the message that it is extremely important to have clearly set out policies and carefully kept personnel regarding hiring and firing employees. Part of the documentation that will be helpful to you in preventing a discharge from becoming a lawsuit is the employee's performance appraisal file. All employers have a performance appraisal system, though it may be more informal and random in one case than another. The absence of a formal written system increases the likelihood that you are probably reviewing your employees subjectively and without uniform guidelines. This lack of objectivity can result in inconsistent or indefensible appraisals.

You should make a conscious effort to develop some sort of appraisal or performance review system appropriate for your organization. To begin, take a realistic look at what you do now in the way of reviewing performance. Do you provide regular feedback to let employees know what is expected and how they are meeting or falling short of expectations? Or do you let things slide until they reach a boiling point?

There probably is no single best system. The important points to remember are to give fair warning and then reasonable opportunity for the employee to correct and improve any performance deficiencies. This practice shows in the event of a dispute, that the employee was treated fairly and was discharged because of a grudge or simply at the whim of a supervisor. It also to a general sense of fairness in the workplace, boosting morale and lowering employee turnover.

EMPLOYEE BENEFITS

*"You can be young without money but you can't be old without it...
because to be old without it is just too awful."*

Tennessee Williams, *Cat on a Hot Tin Roof*

The concept of employee benefits such as welfare and pension funds finds its origins in the medieval era. The trade guilds for the various artisans assumed the responsibility which employers usually have today, that of providing for both current workers, in the form of health insurance, and past workers, in the form of retirement savings plans. In 1798, the first United States Congress followed up on the European practice and made health care mandatory for merchant seamen. However, performing artists such as musicians lacked both the prestige and the political and economic impact to warrant such treatment. Thus were born the Jeffersonian era "mutual aid societies" which mirrored the European guilds for artisans. These societies were initially concerned with taking care of member artists by way of disability or death benefits. As you can imagine, such mutual aid societies in the United States are considered the precursors of what we know today trade unions. Yet even as late as the first half of the 20th century, Americans generally opposed the concept of providing employee health insurance. Welfare benefit plans providing for any form of health insurance are also of recent vintage and are not yet fully accepted.

Vacation pay is also a relatively new concept in this country, dating back only to 1915. Since then it has rapidly gained acceptance.

Other benefits such as disability pay and sick leave have been around for a longer time for traditional employees, having been developed about the same time as the pension plan concept was evolving.

As you may expect, the law is constantly evolving in the area of employee benefits. This area is becoming increasingly complex and expensive for employers and increasingly worrisome for employees, as benefits are tied to less and less stable employment relationships.

For discussion purposes we will look at some of the older benefit concepts first and work our way toward the most recent laws.

SOCIAL SECURITY

Every employer is required to withhold the Federal Insurance Contributions Act (FICA) and Medicare taxes from wages paid to an employee, and to place in a specially designated account the employer's own contribution to these taxes. The Social Security Act defines "employer" very broadly to be anyone with one or more paid employees. Determining who is an employee is a question of who ultimately controls the worker's performance. True independent contractors do not have this tax withheld; they remain liable for the employer's share, and its payment is their responsibility.

The tax must be taken out at the time wages are paid. Even if the employee is terminated before the next pay per from the wages paid. The amount of the tax is based on the total amount of wages or other compensation paid to the employee. Reimbursements to the employee for travel or other expenses are not considered wages.

WARNING: Failure to withhold, regardless of the reason or the person within the organization who caused the failure, carries a 100% **personal** liability for all executive and financial management employees of the employer, including nonprofit board members. Therefore, when in doubt, **withhold**. **No matter how much one of your employees wants to be paid in cash, without any deductions for withholding, you will sleep better at night, unconcerned about knocking on your door, if you properly document all payments of compensation and properly withhold, as required.**

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

The general rule is that employers are not required to give employees any benefits of any kind. Offering some package of benefits, however, has become an important if not crucial means of attracting the best employees. If you do offer a retirement plan, 401(k) Plan, health plan or any other benefit to any group of your employees, you have entered the tangled web known as ERISA. This federal law provides, among other things, for a specific regulatory structure for pension plans which enjoy various federal tax privileges.

Among the primary concerns for employers providing pension plans are maintaining an adequate funding level for the plan and making it equally available to all eligible classes of employees.

ERISA preempts any state laws regarding employee benefits. Thus, ideally, there is some degree of benefit uniformity throughout the United States. ERISA is very broad and may come into play when you least expect it. It is defined as affecting "any plan, fund or programs...which (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." Thus ERISA applies to pension plans and welfare benefit plans, although the requirements for each differ somewhat. period.

Some of the basic structural requirements for an ERISA-qualified (tax sheltered) plan are:

- a written instrument- correspondence confirming
- designation of one or more fiduciaries, or fund trustee obligated to manage the funds for the benefit of the employees;
- a description of how payments are made to and from the plan;
- a statement of how the plan can be amended; and
- availability of the written instrument to every participant. mout

The requirement that the plan be in writing is not an absolute one. For example, an informal group health plan for employees will be within ERISA, even if it is not in writing, where the employees would otherwise not have any sort of protection for their benefits. All that is required

for an unwritten plan covered by ERISA is that the plan applies to a definite class of employees and that the employer is making a contribution to the plan or is administering the plan in some capacity.

For employers and employees alike, mastering some basic ERISA jargon is helpful in understanding the elements of a pension plan.

Two basic types of tax-qualified pension plans exist under ERISA: the “defined benefits plan” and the “defined contribution plan”. In the defined benefits plan, there is a promised level of monthly benefits regardless of the contributions made or the sufficiency of the fund over the long term. In this plan, it is the employer who assumes the risk of an unsuccessful investment that may result in the plan being “underfunded.” By contrast, in the defined contribution plan the employer promises a certain amount of funding each year (either a fixed amount or a percentage of salary profits), and that the amount is allocated to each participant’s account. Payment to the employee is then determined according to how well the investments perform. Thus, in the defined contribution plan, the employee bears the risk as to the success of the investment.

"Participation" is the most self-evident term and refers to the employee's belonging to the employer's program. The minimum employee age to participate in an ERISA-qualified pension plan is 21 years, although an employer must credit the employee for years of service after the age of 18 if the employee has in fact been working since that age. Also, credit must be given for an employee's time away from the workplace where such absences resulted from pregnancy, childbirth, adoption or care of a new born. Additionally, if an employee leaves a job for any period of time less than 5 years and then returns, those years of first time employment must be credited in determining when a participant's benefits are "vested."

"Vested" refers to the completion of the qualifying period after which a participant is eligible at retirement to receive full benefits under a plan. For a three-year vesting period. If an employee with two years of service retires, he or she will not have "vested" in the plan, and therefore would not get pension payments. A plan will always state the number of years of service required before vesting occurs. Should there be any change in this vesting schedule, current participants will not be compelled to adhere to the changed conditions of their pension plan. However, participants in the plan at the time of such a vesting change must be allowed the opportunity to choose between the original and the new schedule.

"Nonforfeitability" describes the point at which the employee's right to the benefit becomes legally enforceable. This concept includes not only the number of years of service required, but also the proper age at the time of retirement. Nonforfeitability and vesting are applicable only to those benefits that are "accrued," or for which the employee has completed all requirements for payment to begin. The plan must provide, however, that the right to receive a "normal retirement benefit" is nonforfeitable upon the "attainment of normal retirement age." This language is significant because it indicates that this requirement for full pension payments does not apply to early retirement plans. There has been much discussion of the requirements under ERISA regarding early retirement. Determining how to legally set up an early retirement plan is one area that requires expert legal advice, at least for now.

An "**accrued benefit**" is the amount that a fully vested employee would be entitled to receive if his or her employment terminated other than by retirement or firing for cause at that point. The plan will state the formula for determining, accrual. One incidental result of the formula may be that benefits are not accrued even though they are fully vested. Although ERISA does mandate minimum requirements for accrual methods, the accrual formula is a contractual arrangement, and ERISA does not supersede these contractual rights.

Two income tax terms you will see used to describe a pension plan are "qualified" and "non-qualified." In a qualified plan, the employee/participant may defer income taxation on benefits until they are actually received. The qualified plan is a tax advantage to the employer as well, since it can take deductions in the year in which it makes the contributions to the plan. The non-qualified plan is just the opposite the employer may not deduct contributions until the employee's interest actually vests.

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1985 (COBRA)

This federal law requires that an employer with more than 20 employees which provides its employees a group health benefits plan must in addition pay a premium for extended health insurance coverage. COBRA defines "employee" broadly to include corporate directors, independent contractors and self-employed individuals. Texas has a similar law that generally covers employers with fewer than 20 employees.

If an employee's employment is terminated, COBRA provides that employee's participation in the former employer's group health insurance coverage continues for up to 18 months (under Texas law for smaller employers the period would be six (6) months), with the employee paying the premium formerly paid by or deducted by the employer. The employer can also add a small percentage of the premium amount as an administrative cost. However, the former employee must make an "election" as to which coverage under the plan he or she wishes to continue. While termination is the usual event that qualifies an employee to make this election, a reduction in the employee's hours may also trigger a COBRA election. If the employee's employment is terminated for gross misconduct, no COBRA coverage is required. The continued eligibility for participation in the former employer's health insurance group terminates when the employee is employed by another employer.

A terminated employee's spouse or child who was or could have been beneficiary during the terminated employment is also eligible to be covered for the initial 18 months. And an additional 18 months of coverage is available to the beneficiary if certain events, occur, for example:

- death of the employee
- divorce or separation from the employee, or
- the employee's entitlement to Medicare.

An employer may require that notice be given if any of these events occur which extend the coverage for the additional 18 month period.

COBRA benefits to unemployed workers do not require the employer to continue paying for the health insurance. It only keeps the former employee in the health insurance plan's group coverage.

UNEMPLOYMENT COMPENSATION

Nonprofit institutions are technically exempt from paying taxes under the Federal Unemployment Tax Act (FUTA) while they maintain federal income tax exempt status. In Texas, non-profits with four or more employees are responsible for paying unemployment taxes; employers may elect to pay a tax of 2% of all gross wages paid, or to reimburse the State for actual unemployment compensation paid.

The for-profit organization, no matter how small, must pay the required federal unemployment tax. Again, whether an employer is obligated to conform with FUTA depends on whether there is an employment relationship. Merely labeling a worker as an independent contractor will not necessarily decide the issue. Under FUTA, an employer is defined as anyone who has paid out wages for any calendar quarter totaling \$1500 or more.

The amount of tax owed is based on a percentage of the total wages paid by the employer throughout the year. Determining this amount may be tricky because of the many variables which determine which types of payment to the employee count as "wages." Each court interpreting its state statute may define wages differently, but as an example, one court interpreted wages to include payment of any kind to employees, including bonuses.

When paid to a state unemployment compensation fund, these tax payments are deductible as taxes in computing the employer's federal income tax liability for the year. If a state does not classify these payments as taxes, they are still deductible as business expenses.

INTERNATIONAL CONCERNS: IMMIGRATION ISSUES IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA)

The stated purpose of the IRCA is to discourage employers from hiring illegal aliens to work in the United States. To accomplish this goal, the United States Bureau of Immigration and Customs Enforcement (formerly known as the Immigration and Naturalization Service (INS)), which is now part of the Department of Homeland Security, has placed the burden on every employer to verify the eligibility status of all new employees hired after November 6, 1986. An employer's failure to comply with the law's verification provisions can result in fines ranging from \$100 to \$1,000 per day per employee. A good faith effort to comply will not excuse the employer from potential liability, though it may mitigate the fine imposed.

Employers must verify a new employee's status within 72 hours of the employee's beginning work, through review of documents that prove identity and eligibility. Both identity and eligibility are proved by:

- possession of an U.S. passport (current or expired);
- possession of an unexpired foreign passport with authorization to work; or
- an alien registration, card ("green card" - which is not green) containing identification and authorization for employment.

Without at least one of the above documents, you must establish each employee's identity and authorization separately. The required Form 19 lists the various documents that will satisfy each of these requirements.

REMEMBER: It is not illegal to hire a foreign national. In fact, IRCA makes it an unfair employment practice for an employer of four or more employees to discriminate against a qualified job applicant on the basis of his or her citizenship. Employers should not, therefore, be intimidated by the regulations and paperwork involved in seeking the appropriate authorization for hiring a qualified foreign national.

EXCEPTIONS TO THE ACT

The IRCA does not apply to certain specially designated groups of labor providers. These include:

- independent contractors or contract labor;
- employees hired prior to November 6, 1986; and
- individuals involved in "casual domestic employment" who provide only sporadic or irregular services.

Caveat: The IRCA does not define the "independent contractor" exception precisely. To err on the side of caution, an employer should include in any contract a requirement that an independent contractor or sub-contractor will use only workers authorized to work in the United States and

that the employer will be indemnified from any legal or other expense incurred as a result of the contractor using unauthorized workers. Note that such an indemnification clause would not be valid in a contract between the employer and his employee.

VISAS

Changes in immigration law have purposely made more difficult the already complex process of securing visas for international artists and musicians. No longer will a simple travel visa suffice. In fact, an alien's application will be subject to a multiple review process involving consultations with local unions, and the U. S. State Department. However, all hope is not lost. A lot of advance planning and the help of an immigration lawyer can make reality of your dream of, seeing a great but obscure French troubadour group highlight your cultural these festival organizations these labels may be different.

The regulations affecting visiting artists and musicians creates two basic categories called "O" and "P." The "O" category is for aliens of "extraordinary ability" in the arts, athletics, education or science. To prove that your performer meets this high standard requires evidence such as awards and critical reviews by the media. The "P" category is for artists and entertainers, and the "P-3" category in particular is for artists or entertainers providing "culturally unique" programs. This category is easier to satisfy because it requires none of the documentation the "O" category. However, the United States caps the number of "P" category aliens per year at 25,000. The "O" category has no limit. Both categories also require that the alien prove the existence of a foreign residence that he or she does not intend to abandon.

TAX WITHHOLDING

Once your performers have made it legally into the United States, how do you tax their income? Generally, the same laws apply for withholding purposes as for resident U.S. employees or contractors. Their income is subject to federal income taxes as income earned in the United States (subject to various international income tax agreements and treaties). Dealing with tax treaties is the performer's problem, not yours, assuming you provide the correct tax withholding or 1099 documents. Remember, plan ahead and allow at least 2-3 months for the necessary paperwork to go through the proper channels. This process can be a difficult one, and you would be wise to enlist the help of an experience immigration attorney who, with only a modest amount of work, can help make your event an extraordinary one. An international agent or experienced artist's representative may also be a critical source of practical information the first time you take on this sort of challenge.

REPORTING AND RECORD KEEPING

With the laws at both the federal and state levels changing at a rapid pace, deciding what personnel paperwork to keep and what to discard can be frustrating. This section will answer at least some of your questions about recordkeeping requirements for most of the federal statutes we have just discussed. The laws are listed below in alphabetical order.

In addition, remember that many labor laws have notice-posting requirements, some of which are mentioned elsewhere in this handbook.

AGE DISCRIMINATION EMPLOYMENT ACT OF 1967

Keep this information for all employees for three years:

- name, address, and date of birth,
- payroll information, and
- occupation records.

Keep this additional information for only one year:

- promotion, demotion, and termination information, test papers, job applications, advertisements about job openings and job referrals.

AMERICANS WITH DISABILITIES ACT (ADA)

Retain all personnel or employment records for at a minimum of four years or until any particular dispute is resolved, whichever is later. If you have more than one physical location for your organization, you must maintain separate records for each location where 50 or more employees were or are employed. Data concerning racial and other personal criteria should be limited to:

- use of existing records,
- visual surveys or head counts,
- tally from personal knowledge, and
- self-identification.

Additionally, records pertaining to requests for reasonable accommodations must be retained for one year.

CIVIL RIGHTS ACT OF 1964 (TITLE VII)

In general, follow the same suggestions listed above for ADA.

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

ERISA has very strict reporting and recordkeeping requirements, primarily because of the fiduciary duties imposed by law on the person or entity administering an organization's employee benefit plan(s). Detailed information regarding the plan must be reported to four groups:

- the Internal Revenue Service,
- the Department of Labor,
- the Pension Benefit Guaranty Corporation, and
- all participants in the plan and their beneficiaries.

The report to the IRS must be filed no later than the seventh month following the end of the plan year.

FAIR LABOR STANDARDS ACT

Employers subject to FLSA must keep the following records for at least three years:

- direct hiring records;
- payroll records showing the sex of each employee, his or her
- occupation, and wages, hours and other terms of employment;
- collective bargaining agreements with unions;
- employment contracts with individuals; and
- profit-sharing plans and trusts.

The following supplemental records must be kept for at least two years: earnings records,

- wage rate tables, and
- worktime schedules.

Note: Some recordkeeping maybe required even for employees who may be exempted from other aspects of the FLSA. Be sure to find out whether any of your otherwise-exempt employees still require such recordkeeping. The EEOC may require you to submit reports at any time, so that an employee's exempt status can be verified.

IMMIGRATION REFORM AND CONTROL ACT OF 1986

Verification of the identity and eligibility of an employee to work in the United States must be done within-72 hours of the employee's first day of work. After verifying the appropriate documents proving identity and eligibility, the employer must attest on a form to having verified the employee's status, and the employee must attest on the same form that he or she is a citizen of the United States, an alien duly admitted into the U. S., or an alien authorized to work in the U.S. This form must be kept for three years after hiring or for one year after the employee's termination of employment, whichever is longer. Copies of the documents offered as verification must also be maintained with the form.

OCCUPATIONAL SAFETY AND HEALTH ACT

OSHA's recordkeeping requirements consist of three elements:

Log of injuries - The employer must "log" any injury or illness and its resolution on OSHA Form 200, or a reasonable substitute, within 6 working days following the occurrence.

Summary - The employer must compile an annual summary of injuries and illnesses (OSHA Form 200), which must be prepared by February 1 of each year.

Supplemental Records - On QSHA Form 101 the employer must describe in more detail the injuries and illnesses already "logged" and "summarized."

EXCEPTION: If your organization had no more than ten employees in the previous calendar year, you are exempt from maintaining these three types of records. But small employers must still report accidents resulting in fatalities or injuries and must comply with any OSHA recordkeeping procedures that specifically apply to them. Employers must also file the OSHA Form 200s that is used to compile statistics on industry accidents. To complete this form you will need to have such information as:

- the average number of employees, full and part-time;
- the yearly total of hours worked by the employees; and
- whether your organization has been subject to an OSRA inspection within the past year.

If a serious injury or fatality occurs, it must be reported to OSHA within 48 hours. OSHA then has six months after discovering the cause of the injury or fatality in which to issue a citation should a violation be found.

Generally, all employers must maintain records for five years after the occurrence of an injury or fatality. The reports do not have to be turned in to OSHA, but the reports must be readily available should they be requested.

Reports describing exposure to toxic or hazardous substances must also be accessible by the employee. Unlike other OSHA records, any records detailing such exposure and the identity of the toxic substance must be preserved for thirty years. Medical records must be kept for the time of the worker's employment, plus an additional thirty years after termination. After an employee requests access to these records, the employer must respond within fifteen days, assuming the employee is one authorized by law as a party entitled to such access.

CONCLUSION

Palms sweaty? Pulse elevated? Feeling a little faint and short of breath?

Welcome to the world of labor and employment law!

Do not despair.

All is not lost.

With some planning now you can actually do your work without fear of a stretch in the penitentiary. This Handbook alerts you to some critical issues in your relationship with your workers, including the most important recordkeeping and reporting requirements, as well as specific compliance actions, such as notice posting, proper hiring techniques, and access

programs for both jobs and facilities.

Please review your personnel procedures based on your new awareness of state and federal laws and regulations, as well as the activities that can expose your organization and you personally to lawsuits or fines.

Appendix One contains the addresses, telephone numbers and Internet sites of many federal and state agencies which can give you more information, as well as provide other excellent booklets on the topics covered in this handbook and on many other important issues that are beyond the scope of this small resource. Additional information and help is available from the labor organizations listed in Appendix Two.

You can help your organization's management and employees feel comfortable with their relationship and get on with the real work at handmaking the arts more accessible and enjoyable for everyone.

Texas Accountants and Lawyers for the Arts looks forward to your questions and comments about the issues raised here. If yours is a qualifying arts organization, we also look forward to putting you in touch with labor or employment lawyers and reporting specialists to get you started in developing your employment program.

APPENDIX 1

ADDRESSES

Equal Employment Opportunity Commission; www.eeoc.gov
1801 L Street NW
Washington, D.C. 20507
www.eeoc.gov
(800) 669-4000
(800) 669-6820 (TDD)

For information about ADA requirements regarding public accommodations and state and local government services contact:

U.S. Department of Justice: www.usdoj.gov
950 Pennsylvania Ave., N.W.
Civil Rights Division
Disability Rights Section - NYAV
Washington, DC 20530

Office on the Americans With Disabilities Act; www.usdoj.gov/crt/ada/adahom1.htm
(800) 514-0301
Civil Rights Division: www.usdoj.gov/crt/crt-home.html
Washington, D.C.
(202) 5140381 (TDD); (202) 5146193 (electronic bulletin board)

For specific information about ADA requirements for accessible design in new construction and alterations contact:

Architectural and Transportation Barriers: www.access-board.gov
Compliance Board
1331 F. Street, NW, Suite 1000
Washington, D.C. 20004-1111
(800) USA-ABLE;
(800) USA-ABLE (TDD)

For specific information about AIDA requirements for telecommunications contact:

Federal Communications Commission; www.fcc.gov
445 12th St., SW
Washington, D.C. 20554
(888) 225-5322
(202) 632-6999 (TDD)
fccinfo@fcc.gov

For more information about federal disability-related tax credits and deductions for business

contact:

Internal Revenue Service; www.irs.gov

Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220
(202) 622-2000
(800) 829-1040
(800) 829-4059 (TDD)

Department of Labor; www.dol.gov

200 Constitution Avenue NW
Washington, D.C. 20210

Public Information: (202) 523-7316; (866) 4-USA-DOL

Publications Information: (202) 523-1221

Wage and hour division: (202) 523-8305; (866) 487-9243

OSHA, General Legal Advice: (202) 532-6811; (202) 693-1999 or (800) 321-OSHA

Employee benefits division: (202) 357-0405

Labor-management laws division: (202) 523-8627; (202) 693-0123

Unemployment insurance div.: (202) 523-7831; (202) 693-3032

Pension Benefit Guaranty Corporation; www.pbgc.gov

1200 K Street NW
Washington, D.C. 20005-4026
Public Inquiries: (202) 326-4000; (800) 877-8339 (TTY/TDD)

National Labor Relations Board Region 16; www.nlr.gov

819 Taylor Street
Federal Office Bldg., Rm. 8A24
Fort Worth, Texas 76102
(817) 978-2921

Social Security Administration; www.ssa.gov

Office of Public Inquiries
Windsor Park Bldg.
6401 Security Blvd.
Baltimore, Maryland 21235
Public information: (800) 772-1213
Publications information: (410) 965-0945

Office of Special Counsel for Immigration; www.usdoj.gov/crt/osc

Related Unfair Employment Practices
950 Pennsylvania Ave., N.W.

Washington, D.C. 20530
Hotline: (800) 255-7688
oscrt@usdoj.gov

APPENDIX 2

RESOURCES

"The Americans With Disabilities Act: Your Responsibilities as an Employer"

Available free from the EEOC at (800) 669-4000;

www.eeoc.gov/publications.html

"What Business Must Know about the Americans With Disabilities Act."

Published by the United States Chamber of Commerce. \$21.00 for nonmembers,
\$14.00 for U.S. Chamber members at (800) 638-6582

APPENDIX 3

LIST OF UNITED STATES LABOR ORGANIZATIONS OF INTEREST TO THE ARTS

First, a word about the organization of unions. There are four levels to the union structure. 1) the local, 2) an intermediate level, 3) the state, national or international level and 4) the federation. The federation is the level at which lobbying the government usually occurs. The largest federation is known commonly as the AFL-CIO, American Federation of Labor-Congress of Industrial Organizations. This body is the leading advocate for American workers. For all levels mentioned, there are strict reporting requirements. These reports to the Department of Labor are public information and are available for viewing at the Washington D.C. office of the Labor Management Standards Enforcement Office. To find out more about a union in a particular geographical region, you may review copies of these same reports at a local office. See your local telephone directory under United States Government for the Labor-Management Service Administration in your area.

Actors' Equity Association (AAAA); www.actorssequity.org/home.html

165 W. 46th Street
New York, NY 10036
(212) 869-8530
info@actorssequity.org

American Federation of Labor-Congress of Industrial Organizations; www.afl-cio.org

815 16th Street NW
Washington, D.C. 20006
(202) 637-5000

American Federation of Television and Radio Artists (AAAA); www.aftra.org

260 Madison Avenue, 7th Floor
New York, NY 10016
(212) 532-0800
info@aftra.org

American Guild of Musical Artists, Inc. (AAAA); www.musicalartists.org

1430 Broadway
New York, NY 10018
(212) 265-3687
AGMA@MusicalArtists.org

American Guild of Variety Artists (AAAA)

184 Fifth Avenue, 6th Floor
New York, NY 10010
(212) 675-1003

Associated Actors and Artists of America (AFL-CIO)

165 W. 46th Street

New York, NY 10036
(212)869-0358

(Comprised of 9 autonomous branches, some of which are listed separately herein and include: Screen Actors' Guild; Actors' Equity Association; American Federation of Television and Radio Artists; American Guild of Musical Artists; American Guild of Variety Artists)

Glass, Molders, Pottery, Plastics and Allied Workers International Union (AFL-CIO);

www.gmpiu.org

608 E. Baltimore Pike
P.O. Box 1978
Media, PA 19063
(610) 892-0143

Graphic Artists' Guild; www.gag.org

90 John St., Suite 403
New York, NY 10038-3202
(212) 791-3400

Graphic Communications International Union; www.gciu.org

(AFL-CIO)
1900 L Street NW
Washington, D.C. 20036
(202) 462-1400

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (AFL-CIO); www.iatse-intl.org

1430 Broadway, 20th Floor
New York, NY 10018
(212) 730-1770

International Union of of Painters & Allied Trades, AFL-CIO, CLC

1750 New York Avenue NW
Washington, D.C. 20006
(202) 637-0700

www.ibpat.org
www.iupat.org

merged 1995 w/Amalgamated Clothing & Textile Workers Union

now, Union of **Needletrades, Industrial & Textile Employees**

275 7th Ave
New York 10001-6708
(212) 265-7000
www.uniteunion.org

National Writers Union; www.nwu.org

113 University PL, 6th Floor

New York 10003
(212)254-0279

Screen Actors Guild (AAAA); www.sag.org

5757 Wilshire Blvd. FA
Los Angeles, CA 90036-3600 LAB
(323)954-1600
(323) 549-6648 (TTY/TTD)

Screen Extras Guild, Inc. (AAAA)

3629 Cahuenga Blvd., West
Los Angeles, CA 90068
(213) 851-4301

United Furniture Workers of America (AFL-CIO)

1910 Air Lane Dr.
P.O. Box 100037
Nashville, TN 37210
(615)889-8860

Writers Guild of America, East, Inc.

555 W. 57th Street
New York, NY 10019
(212) 245-6180

Writers Guild of America, West, Inc.

8955 Beverly Blvd.
Los Angeles, CA 90048 _
(310) 550-1000 Funded t

Texas Accountants and Lawyers for the Arts

1540 Sul Ross

Houston, TX 77006

713-526-4876

713-526-1299 Fax

TALA Arts Mediation

1-800-526-TALA

www.talarts.com