



NONPROFIT *MATTERS*

A Bulletin for Nonprofit Organizations
Distributed by the Public Law Center

January 2009, Volume 4, Issue 1

In This Issue

[Considering Layoffs? Consider This...](#)

[Combining Nonprofit Organizations](#)

[Significant Changes to Form 990](#)

[Updates from the IRS](#)

[New Laws Affecting Your Clients](#)

[New Laws Affecting Nonprofits](#)

[Upcoming Workshops](#)

[About COLAP](#)

Dear Friend,

If you are receiving this for the first time, Nonprofit **Matters** is a semi-annual newsletter for nonprofits about current legal issues that impact organizations and your clients. This edition in particular reflects the uncertainty of these times as we feature an article about the potential pitfalls in implementing layoffs, a reality that some organizations are no doubt facing. The article suggests steps to carefully consider when terminating an employee. There is also a short article on the pros and cons of merging or consolidating with another nonprofit as an alternative to dissolving. I hope you find this information useful and will forward this newsletter on to others. As always, if you have any questions about the information provided, or any other legal question for that matter, please do not hesitate to contact me.

[Diamond Tran](#)

Staff Attorney

Community Organizations Legal Assistance Project (COLAP)

714.541.1010 x293

[Join Our Mailing List!](#)

Nothing in this newsletter should be construed as legal advice. For more information about complying with the various laws mentioned in this newsletter, please consult a legal or tax professional.

Considering Layoffs? Consider This...

By [Jessica Linehan](#), Dorsey & Whitney LLP



The nationwide rash of layoffs has not spared nonprofit corporations. Donations and scarcity of funding sources all impact an organization's ability to maintain a paid staff. Unfortunately, many organizations are forced to cut staff even as demand for services at these organizations intensifies. Layoffs, like all termination, must be handled with particular care.

All termination decisions should be analyzed in the context of what the organization's response would be in the event that a terminated employee claimed that the discharge was unfair or discriminatory. When identifying the employees to include in a layoff, make decisions based on legitimate business needs. Specifically, the organization must avoid any impermissible ground or assumption in making a layoff decision such as the person's age, medical leave status, gender, or ethnicity.

Selecting Individuals for Layoff

Where economic demands require an organization to cut staff, keep the following steps in mind:

- Before carrying out any layoff, review any employment handbooks, personnel manuals, and offers of employment that would affect the ability of the organization to lay off the employee. For example, make sure there are no employment handbook policies, stand-alone policies or internal memoranda that would suggest that an employee has the right to a job on a basis other than "at will." Particularly if the employee had a specific offer letter or a contract, review such documents to ensure that there are no limitations on the employee's layoff or other obligations associated with that termination.
- Review past practices and procedures that might be relied upon by a laid off employee to support a claim that he or she should not have been let go. For example, if there are employees in similar positions or situations who were not laid off, examine the layoff decisions in this broader context.
- Document the need for a layoff and factors for the termination. Occasionally employers fall into the trap of thinking that a reduction in force is an obvious non-discriminatory reason for a discharge that

does not require further documentation. As a result, employers either do not adequately document the grounds for layoff, or do not have any individual who can clearly explain the economic conditions resulting in the decision to reduce the workforce. To avoid these pitfalls, thoroughly document the need to reduce the position and the reasons for identification of that specific employee or group of employees to avoid any claim that economic conditions were merely an excuse for wrongfully terminating an employee or that it was a manufactured layoff.

· Avoid obvious retaliation-type cases. Even reduction in force cases that are clearly prompted by substantial changes in economic conditions require close scrutiny of layoffs involving, for example, women immediately returning from childbirth leave, an individual who has filed a discrimination charge, or a person who has recently filed a sex harassment claim. Although employees on leave or otherwise bearing protected characteristics generally are not necessarily entitled to preferential treatment, the presence of such protected characteristics or activities may create the appearance of pretext that is harder to defend against in the event of a claim by the employee.

Carrying Out The Layoff

Layoffs unavoidably carry the risk of future claims by the terminated employee. Organizations can minimize the risks of litigation by careful decision making and fairly carrying out the layoff process. The following procedures and principles should be considered:

· Identify a person who is responsible for coordinating the reduction in force so that the individual can double check each of the decisions and be able to explain any apparent inconsistencies, as well as the essential reasons for each layoff.

· It is important to have a consistent and truthful explanation of the need for the layoff. Be honest about the reasons for the reduction in force.

· Set aside enough time for the layoff decisions to allow for respectful exchange. Employees who are treated courteously and respectfully are less likely to explore legal action. Be sure to document the key points discussed by both parties in this discussion.

· If the reduction in force involves a substantial number of people, consider having an attorney analyze whether the reduction in force disproportionately affects one segment of the workforce (e.g., older workers).

· If there are any open positions within the organization, even if it involves fewer hours, or less pay or prestige, offer it to the employee

slated for layoff, assuming he or she is qualified. If any positions open up, even if you know the employee has found a new job, offer it to the employee before opening the position up to others. Additionally, tell the affected employee how they can learn of any new open positions and follow through by posting any openings.

After making the decision of which employee to lay off, be prepared to provide the employee's final paycheck on his or her last day, along with the required unemployment insurance notice. Also, be prepared to pay out an employee's accrued but unused vacation or PTO, regardless of whether your handbook or policy provides for a less restrictive procedure. If the employee receives insurance benefits through the company, be sure that notice of COBRA rights is given.

Layoffs are difficult for all parties involved. Careful decision making and planning are your best protections against claims against the organization. The Public Law Center may be able to provide legal assistance through pro bono counsel.



Combining Nonprofit Organizations

By [Matthew Montgomery](#), *Stradling Yocca Carlson & Rauth*

These are challenging times for many organizations, particularly in the nonprofit sector as the recession forces an increasing number of Americans to rely on services provided by nonprofit organizations while at the same time organizations are receiving less funding as a result of the economic downturn. Unfortunately, many nonprofits

must limit their services or elect to dissolve. Organizations that are struggling to sustain their operations should also consider merging or consolidating with another nonprofit.

It is common to find various organizations providing similar services and competing for limited funding from identical sources in the community. Many smaller organizations provide the same services as larger organizations, which may be interested in further expanding. These organizations may be able to operate more efficiently as a single entity. They often reduce their overhead and personnel costs and may therefore be better able to serve their community.

Merger

Mergers are commonly used in combinations of organizations of

unequal size, but may also be used for similarly sized organizations. One organization (usually the larger one) will typically absorb the other. The surviving organization assumes the disappearing organization's assets and liabilities, and often will operate the disappearing organization's facilities. Mergers allow larger nonprofits to expand their operations. A merger can also ensure that a community will not lose the services of the smaller nonprofit in difficult economic times. Another benefit of merging is that the surviving nonprofit may not need to reapply for charitable tax exempt status with the IRS after the merger is consummated.

Consolidation

Consolidations are commonly used to combine organizations of similar size. When a consolidation takes place, both of the original organizations are dissolved and a new organization is formed. A consolidation is often seen as a fresh start, whereas a merger is generally seen as an expansion of the surviving organization. Consolidations allow two or more organizations to pool resources and reduce operating costs. Unfortunately, when organizations consolidate, the new organization must reapply for charitable tax exempt status with the IRS. Organizations considering merging or consolidating should speak to an attorney about the potential tax ramifications of either combination.

A merger or consolidation is not the right choice for every organization. If, for example, two organizations with conflicting cultures merge, the remaining organization might experience internal conflict, decreasing efficiency. Combination can also lead to increased short term costs, such as severance pay for terminated employees. Organizations should weigh the positives and negatives of a merger or consolidation before undertaking any action.

Legal Steps Required

In California, nonprofit organizations must receive the Attorney General's written consent prior to merging. Organizations that are being dissolved in a merger or consolidation are required to coordinate with the Franchise Tax Board. California requires various additional notices be filed with state agencies prior to the combination. Organizations that are considering merging or consolidating should consult with an attorney for specific legal guidance. The Public Law Center may be able to provide legal assistance through pro bono counsel.

Significant Changes To Form 990

As mentioned in previous editions of this newsletter, the IRS has been making major revisions to [Form 990](#), which certain public charities are required to file annually starting in 2009 for the 2008 tax year. The final form, which can be found at the [IRS website](#), has substantial new disclosure requirements regarding the organization's governance and compensation practices. Organizations should closely examine how those requirements will affect their practices and specifically whether new or revised policies and procedures should be adopted.

In an effort to foster transparency and accountability in the nonprofit sector, the IRS added 30 governance-related questions to the form, which consists of an [11-section core form](#) supplemented with 16 schedules. A checklist helps filers determine which schedules to complete.

For additional resources on preparing to file the redesigned Form 990, review these [5 new mini-courses](#) by the IRS that walk you through the entire form and frequently used schedules. In addition, a presentation by the [Insight Center for Community Economic Development](#) details how to stay in compliance with the new forms. Click [here](#) to view the presentation.

The Form 990 is due 4 ½ months after the close of your fiscal year. For example, if your fiscal year ends June 30th, your 990 is due on November 15th; if your fiscal year ends December 31st, it is due May 15th. There are significant penalties for late filings, but an extension can be requested if necessary.

Updates From The IRS

The IRS recently streamlined the process of becoming a 501(c)(3) public charity. As of September 9, 2008, it no longer issues advance rulings. If your organization is operating as a 501(c)(3) public charity under an advance ruling, you need to check the expiration date to determine how the new procedure will affect you. If your advance ruling expires on or after June 9, 2008, you will not need to file IRS Form 8734 to document that you meet the public support test. Your advance ruling letter is proof of your 501(c)(3) public charity status. If your advance ruling expired before June 9, 2008, you must file [Form 8734](#). Otherwise, your organization will be reclassified as a 501(c)(3) private foundation, making it subject to excise taxes and restrictions on its activities.

Last month, the IRS issued [Notice 2009-3](#) announcing relief for 403 (b) retirement plans that do not have a written plan in place by January 1, 2009. The IRS extended the deadline for plan sponsors to adopt new written plans or amend existing plans to satisfy the requirement of the final 403(b) regulations. This extension will give plan sponsors additional time to put their plan documents in place.

The IRS released the 2009 version of its mandatory [Federal W-4 form](#). All employers are required to have the most recent version of the W-4 form available for employees.

As a reminder, many tax-exempt organizations whose gross receipts are normally \$25,000 or less are required to file electronically [Form 990-N](#), also known as the e-Postcard. This requirement applies to tax periods beginning after December 31, 2006. For organizations whose tax period ends December 31st, Form 990-N is due May 15th. Organizations that fail to file for 3 consecutive years risk revocation of their tax-exempt status. For more information, visit the IRS website.

New Laws Affecting Your Clients

Access to Justice: [AB 2448](#) requires that no fee waiver application can be denied without a judicial officer's review, and that all applicants who have their applications denied be provided with specific reasons for the denial and an opportunity to request a hearing or submit a revised application. It also provides for recovery of those fees in those cases in which there is a judgment in favor of the litigant who obtained the fee waiver; he or she receives a substantial settlement; or other changed circumstances that allow the fees to be paid.

Children & Youth:



[AB 534](#) makes it a misdemeanor for any person to publish information describing or depicting the physical appearance of a child, the location of a child, or locations where children may be found with the intent that another person use the information to commit a crime against a child and the information is likely to aid in the imminent commission of a crime against a child. Additionally, it authorizes a child's parent or legal guardian to seek a preliminary injunction enjoining any further publication of that information.

[AB 2300](#) automatically enrolls children on Medi-Cal in the free and reduced-price school lunch program.

Disability: [SB 1608](#) promotes compliance with existing disability laws by clarifying the law and establishing a new commission to evaluate and provide recommendations on disability issues. It includes an important provision clarifying that plaintiffs may recover damages only for a violation they personally encountered or that deterred access on a particular occasion, rather than for alleged violations that may exist at a place of business but did not cause a denial of access. Both disability rights advocates and business owners supported the new law.



Domestic Violence/Sexual Assault: [AB 2052](#) allows an individual to terminate his or her residential lease by notifying the landlord in writing that he or she or a household member was a victim of an act of domestic violence, sexual assault, or stalking, and intends to terminate the tenancy. The new law requires the tenant to attach a copy of a temporary restraining order or emergency protective order, or a copy of a specified written report by a peace officer, to the notice.

HIV Testing: [AB 1894](#) requires all group and individual health insurance plans to pay for an HIV test regardless of whether the testing is related to a primary diagnosis or the patient is showing symptoms.

Immigration: A recent landmark settlement with USCIS offers amnesty to tens of thousands of undocumented immigrants. The settlement applies to individuals who entered the US on a valid visa, but fell out of status between 1982 and 1988. USCIS will begin accepting applications starting February 1, 2009, and individuals have until January 31, 2010, to file.

New Laws Affecting Nonprofits

Charitable Rollovers:

Federal lawmakers recently restored the IRA Charitable Rollover, giving individuals the opportunity to make donations to charities directly from their Individual Retirement Accounts (IRAs) without counting the distributions as taxable income. This incentive was reenacted as part of the Emergency Economic Stabilization Act of 2008 ([HR 1424](#)) on October 3, 2008.

Early learning:

[SB 1629](#) creates an advisory committee to develop a quality rating

system for early childhood programs.

Employment
Law:
The US
Department of
Labor (DOL)



recently updated its regulations under the Family and Medical Leave Act (FMLA). The [final regulations](#) will help workers and their employers better understand their rights and responsibilities by consolidating all notice requirements into one section and clarifying conflicting provisions and time periods. The regulations also speed the implementation of new law that expands FMLA coverage for military family members. The DOL also issued a new FMLA poster reflecting the changes. Employers with 50 or more employees, and all public sector employers, are required to update their mandatory employee and applicant labor law postings with new FMLA posters.

Recent amendments to the Americans with Disabilities Act (ADA) expand worker protections. The [Americans with Disabilities Act Amendments Act of 2008](#) makes important changes to the definition of the term "disability" and expands the definition of "major life activities" by including 2 non-exhaustive lists. The Act also emphasizes that the definition of "disability" should be interpreted broadly.

Amendment to Executive Order 12989 requires all federal contractors, as a condition of entering into a federal government contract, to use [E-Verify](#), which is an electronic employment eligibility verification system operated by the Department of Homeland Security in conjunction with the Social Security Administration.

The US Citizenship and Immigration Services (USCIS) recently announced additional changes to [Form I-9](#). All employers, regardless of size, are required to fill one out for each new employee. This new version will take effect for new hires on February 2, 2009. The new form will be available at the USCIS website.

Local Parks: [AB 31](#) allocates \$400 million from Proposition 84 to address the need for neighborhood parks in the most park-poor communities throughout the state, consistent with Proposition 84 criteria. It creates a competitive grant program for distributing funds through eligible public agencies and nonprofit organizations.



For text and status updates of state law, visit the [Official California Legislative Information website](#).

UPCOMING WORKSHOPS

[Starting a New Nonprofit? The Reality Checklist](#)

[March 4th](#), 9am-12pm

[May 6th](#), 9am-12pm

[July 14th](#), 9am-12pm

[September 9th](#), 9am-12pm

[November 3rd](#), 9am-12pm

[Starting Off Right: New and Emerging Nonprofits](#)

(February 21)

[Important Legal Considerations Before Implementing Layoffs](#)

(March 11)

[Protecting Your Assets with Intellectual Property](#)

(June 10)

[The Roles, Responsibilities, Liabilities and Protections of Board Members](#)

(September 16)

[Nonprofits & Enterprise](#)

presented by the Insight Center for Community Economic
Development

(November 17)

These workshops are made possible through a partnership with the Volunteer Center of Orange County. To register, please visit their [website](#).



ABOUT COLAP

PLC's Community Organizations Legal Assistance Project (COLAP), through staff and pro bono volunteer attorneys, provides free transactional legal assistance to local non-profit organizations that face a variety of business law issues in areas such as contract law, employment law, fundraising law, corporate governance law, and real estate law. For instance, COLAP can match organizations with attorneys to review and draft bylaws, employment handbooks, service provider contracts, and commercial leases. COLAP also provides free legal assistance to those interested in starting new nonprofit organizations that benefit Orange County's low-income population.

In addition to providing direct representation on a number of business law related issues, COLAP assists organizations through a legal check-up program. Through this program, volunteer attorneys and law students conduct legal checkups of organizations to make sure they are complying with various state and federal laws. The service allows organizations to address legal issues before they become a problem. If nonprofits do not comply with legal requirements, they may be subject to administrative fines or they can even lose their tax-exempt status. This project helps organizations avoid these consequences.

For more information on COLAP services, please visit our [webpage](#), or contact [Diamond Tran](#).

ABOUT PUBLIC LAW CENTER

The Public Law Center, Orange County's pro bono law firm, is committed to providing access to justice for low-income residents. Through volunteers and staff, the Public Law Center provides free civil legal services, including counseling, individual representation, community education, and strategic litigation and advocacy to challenge societal injustices. Now in its 27th year, PLC is sponsored by the Orange County Bar Association and is supported by lawyers throughout the county.

PLC may be able to assist your clients who are low-income Orange County residents and have certain types of immigration, family law and civil legal problems, including: landlord-tenant, homeownership, collection, bankruptcies, consumer, estate-planning, discrimination, employment, adoptions, guardianships, custody matters, divorces involving children or domestic violence, and immigration work for survivors of crime or domestic violence. To determine whether your clients are eligible for services, please refer them to one of PLC's clinics at various homeless shelters and community organizations throughout the county.

Information about the days and locations of our clinics can be received by calling our front desk at 714-541-1010.

[Forward email](#)

 **SafeUnsubscribe®**

This email was sent to cfinklea@publiclawcenter.org by dtran@publiclawcenter.org.
Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).

Email Marketing by



Public Law Center | 601 Civic Center Drive West | Santa Ana | CA | 92701