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Not-for-Profit Legal Update: What policies does my organization really need to adopt?

- November 28, 2019



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New Requirements for Sexual Harassment Prevention in New York

- Amy L. Hemenway, Esq.



NYS Minimum Standards for Sexual Harassment Prevention

- Part of budget legislation signed April 12, 2018
- Policy
- Training
- Turns best practices into mandates

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Sexual Harassment – The Basics

- Hostile work environment (HWE) – unwanted, unwelcome actions directed toward another individual because of the individual's sex, which cause the recipient discomfort, humiliation, and/or interfere with job performance
- Quid quo pro – person in authority tries to trade job benefits for sexual favors
- Can occur between any two or more individuals, regardless of gender
- Single incident may qualify depending on severity
- Sexual harassment prohibitions apply to all employers
- Protections extend to non-employees (e.g., volunteers, interns, vendors)



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Sexual Harassment – Employer Liability

- Strict liability – acts by owners and other high-level managers, and possibly for lower level managers and supervisors if they have a sufficient degree of control over working conditions
- Liability for co-worker harassment depends on knowledge and whether employer attempted to stop or prevent the behavior
- Complaints to a manager or supervisor = knowledge to the employer
- Individual liability under NYS law



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Retaliation is Unlawful

- Law protects individual who engage in protected activity
- Requires adverse action, which includes any action, more than trivial, that would dissuade a reasonable worker from making or supporting a charge or complaint
- Extends beyond the victim/complainant
- Liability for retaliation is not conditioned on liability for harassment



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Sexual Harassment Prevention Policy

- Timing – should already be in place
- Must provide to each employee, in writing (primary language), and post in workplace
- Defense to liability for co-worker harassment if employees have a reasonable opportunity to complain and employer takes prompt and effective corrective action



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Sexual Harassment Prevention Policy – Minimum Standards

- Effective policies will:
 - Explicitly prohibit sexual harassment and retaliation
 - Explain sexual harassment and include examples of prohibited conduct
 - Provide a means for employees to alert management to potential harassment (include complaint form)
 - Include procedure for timely and confidential investigation
 - Require prompt and effective corrective action for violations
 - Clearly state that sanctions will be taken against employees who engage in prohibited sexual harassment and managers or supervisors who knowingly permit such behavior



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Sexual Harassment Prevention Policy – Minimum Standards

- Additional requirements:
 - Include information concerning federal, state and local laws concerning sexual harassment
 - Explain remedies available to victims and inform employees of available administrative and judicial forums for adjudicating complaints



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Sexual Harassment Prevention Training

- New employees – as soon as possible
- All other (current) employees – on an annual basis, with the first round to be completed no later than October 9, 2019
- Training should be provided in the employee's primary language



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Sexual Harassment Training – Minimum Standards

- Interactive
- Explain sexual harassment and provide examples of prohibited conduct
- Include information about federal and state statutory provisions concerning sexual harassment and available remedies
- Include information about employees' rights of redress and available forums
- Address conduct by supervisors and any additional responsibilities for such supervisors (e.g., immediately report)



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Other Employment Policies

- Don't lose sight of EEO and harassment generally
- Must have policies
- Recommended policies



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Questions

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Not-for-Profit Privacy and Data Security Considerations: Do you have what you need?

Daniel J. Altieri, Esq.
November 28, 2018



Why Should You Care? Because Bad Guys Don't Discriminate.

- Privacy and data security is not an industry-specific concern
 - Certainly not limited to for-profit board rooms
- Cancer Services of East Central Indiana — Little Red Door
 - Hacked last year; data went missing from server
 - Staffer inadvertently downloaded malware from email
 - Wanted \$43,000
 - Didn't have any private info — so they ran with what they could get — published letters to families on Twitter
- Lesson: Hackers will take anything from anyone
 - donor information, health information, volunteer records, billing information, W-2 information for employees
- And it's not always the bad guys!



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Who is Watching to See Whether You're Getting Protection Right?

- The people you care most about
 - Donors, employees, etc.
- Attorney General
- FTC
 - What courts say
 - California Dental Assn. v. FTC, 526 U.S. 756, 759 (1999): "We hold that the Commission's jurisdiction under the Federal Trade Commission Act (FTC Act) extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members."
 - What the FTC says
 - "The bedrock principle is that if any group - including non-profits - collects information about people, they should protect it. Imagine if donors' credit cards are exposed because of a phishing scheme, or if the network gets blocked by a ransomware attack. That can be devastating not just for the organization and leaders like you, but also for the communities that rely on the group's services. To help protect the organization's network and data, make cybersecurity part of the everyday routine."

<https://www.ftc.gov/news-events/blog/business-top/2018/10/25/2018-10-25-privacy-protection> October 25, 2018



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Getting Out Ahead of It: Your Privacy Policy

- Things to include:
 - what is collected
 - how it is collected
 - how it is protected
 - how it is used
 - who it is shared with
 - when it is destroyed
- Generally, a best practice. But could be required:
 - Children's Online Privacy Protection Act
 - HIPAA
 - states
 - California - Cal Bus & Prof Code § 22575 - if you operate website for "commercial purposes"
 - Connecticut - Conn. Gen. Stat. § 42-471 - if you collect SS Nos.
 - Massachusetts - 201 CMR 17.00 - requires WISP
 - Alabama - Code of Ala. § 8-38-3 - reasonable "security measures"
 - Oregon - ORS § 646A.622 - reasonable "safeguards"
 - GDPR



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Be Ready: Incident Response Plan

- Identify
- Contain/Remediate
- Notify
- Recover



Plan considerations

- Key Question: Is it sufficient and practical?
- Consider:
 - Involvement of key personnel, inside and outside
 - Timely engagement of counsel (privilege)
 - Preservation of evidence
 - Dealing with law enforcement
 - Allowing for proper assessment of whether notification is required
 - Proper messaging



Hedge Your Risk With Insurance.

- GCL likely not enough
 - If it's even applicable to breaches, likely narrow definition of "Privacy Injury": No coverage for fines or penalties, which are almost always implicated in cyber breach
- Cyber coverage
 - what kind?
 - What coverage?
- Application concerns



Questions

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Thank you!



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New York Non-Profit Corporation Policies
November 28, 2018



Conflict of Interest Policy

- Under NPCL 715-a, required for all NY nonprofit corporations
- Board or Board committee must handle conflict of interest
- Policy should
 - define conflict of interest
 - specify who handles conflict
 - prohibit lobbying and participation by interested person
 - require record of proper handling and vote
 - require questionnaire for new directors and annually all directors
 - specify procedures for related party transaction

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Whistleblower Policy

- Under NPCL 715-b, required for NY nonprofit corporations with 20 or more employees and >\$1M gross revenues
- Employee, officer or director must be designated to administer policy and report to Board or Board committee to handle
- Policy should
 - protect directors, officer, employees and volunteers who blow whistle in good faith
 - prohibit participation in deliberations/vote by interested persons and directors who are employees
 - must distribute Policy to all directors, officers, employees. Also those volunteers who provide substantial services

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Investment Policy

- Under NPCL 552(f), required for all NY nonprofit corporations with institutional funds
- Institutional funds do not include program-related assets
- Policy should
 - provide guidelines on what investments are allowed or prohibited; levels of risk
 - clarify the delegation of duties for management of institutional funds
 - identify criteria against which the investment performance will be measured
 - specify policies and procedures for expenditure of institutional funds
 - provide guidance for ongoing oversight of investments

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Document Retention and Destruction Policy

- Best practices (IRS Form 990 question)
- Policy should
 - provide guidelines on what to keep, how long, and what to destroy
 - original versus copies
 - hard copies and digital data
 - impact of privacy laws (don't retain personal information longer than necessary)
 - impact of litigation hold and other mandatory retention requirements
 - nonprofits serving minors may need to retain records at least until statute of limitations run (age of majority plus several years)



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Gift Acceptance Policy

- Best practices (IRS Form 990, Schedule M question)
- Policy should provide guidelines on what to accept and what to reject.
- Accepting some types of gifts may run counter to the nonprofit's values.
- Caution regarding gifts with many strings attached.
- Some gifts are burdensome (real estate with environmental problems, motor vehicles, outdated equipment, race horses, etc.)
- Policy should list steps to follow, such as signing IRS Form 8283 and filing Form 8282.



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Other Policies

- See handout
- Some mandatory, depending on facts
- Many are best practices



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If you adopt a Policy...

- If a nonprofit adopts a policy, be sure to follow it.
- Potential liability for noncompliance with policies.
- Revisit and update policies from time to time.
- Stay abreast of new legal requirements and best practices.



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Questions

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