Personnel and Employment Matters

The area of employment law has become increasingly important in recent years. New laws governing the employment relationship have increased and existing laws have expanded while charges of discrimination filed with the Equal Employment Opportunity Commission and filings of employment-related lawsuits have increased. Employers need to exercise caution when making decisions involving hiring, compensation, benefits, supervision, discipline and termination. Churches are not totally immune from this flurry of activity in the employment arena. While some laws and regulations exempt religious organizations or particular types of claims against religious organizations, there are other laws that do not exempt religious organizations (for example, many state worker's compensation laws do not exempt churches; some state disabilities and discrimination laws do not exempt churches).

Increasingly, disgruntled employees and former employees of religious organizations — as well as disgruntled clergy — are filing lawsuits in an effort to have the courts address their bitter feelings toward their employer, church or denomination. As a general rule, many courts find they have no jurisdiction over discrimination and other employment claims filed by clergy. **Courts try to avoid dealing with disputes between clergy and churches because it is impossible to address these lawsuits without becoming entangled in the church's polity and ecclesiastical jurisdiction, which the Supreme Court has repeatedly held is not permissible. Part of the protection of the First Amendment of the Constitution of the United States and many state constitutions is to prevent the courts from meddling in a church's internal polity. The courts are generally very respectful of that important protection.**

Many churches, middle governing bodies, and other church entities have become increasingly interested in developing personnel policies that describe the employment relationship with staff and give guidance on how to handle particular types of common personnel issues. The Presbyterian Church (U.S.A.) *Book of Order* contains some information on employment and its provisions are, of course, mandatory. The Human Resources Department of the Presbyterian Church (U.S.A.), A Corporation also has information available at (888) 728-7228 ext. 5237. In addition, many churches and middle governing bodies have developed and continue to refine their own policies for addressing employment and personnel matters, including sexual misconduct, sexual abuse, and sexual harassment. To address sexual misconduct, abuse, and sexual harassment, the 207th General Assembly (1993) adopted the Presbyterian Church (U.S.A.) Sexual Misconduct Policy and Its Procedures, which was updated by the Assembly in 2010. The General Assembly has included a provision in the *Book of Order* that requires each council to implement a sexual misconduct policy. The Policy and Its Procedures sets out useful guidelines and samples, although it is only mandatory for the national agencies of the church. It is available through the Office of the General Assembly and can be found on the Creating Safe Ministries webpage https://www.presbyterianmission.org/legal-resources/creating-safe-ministries/ .

Employment law, especially regarding clergy and other church staff, is a rapidly evolving area. We welcome your suggestions and especially welcome you sharing the policies and procedures used in your church, presbytery or synod.

Employment law varies from state-to-state, which is why it is important to consult with a local attorney in your state regarding employment-related matters. Resources may often also be found on the internet, typically through state departments of labor websites.

A. Federal Laws Coverage

Many federal laws regulate an employer's actions in its relationship with its employees. The theory of federal government ability to legislate over that relationship is typically under the U.S. Constitution's Interstate Commerce Clause in which the federal government may assert jurisdiction into states and over organizations involved in interstate commerce. Typically, most organizations, having a certain number of employees, can be assumed to be in interstate commerce, and therefore many federal laws set a certain number of employees as the threshold on which coverage by the federal law applies. Of course, whether or not your church or council is subject to a local, state or federal employment law should not be construed as permission to engage in discriminatory employment practices.

The following is a short summary of federal and some state laws affecting employers who have the required number of employees:

> **Civil Rights Act of 1964 (Title VII) as amended:** bans discrimination based upon race, color, religion, sex, or national origin in employment; applies to companies of 15 or more employees. Sexual harassment is a form of sex discrimination. Discrimination based upon sex includes discrimination based upon pregnancy. This law is enforced by the Equal Employment Opportunity Commission (EEOC) and the Department of Labor. There is a limited exception for religious organizations to enable them to restrict job positions to those of their own religious faith. In the leading case on the matter, the Supreme Court has given religious organizations very broad powers to require religious qualifications for their employees. However, that does not give license to discriminate as to other protected categories (ex. race, age) if it is subject to local, state or federal discrimination laws. So, for example, while a church may be permitted to not select applicants because their religious beliefs are not those of that church, the church cannot discriminate against applicants because of their race or age. Most states and cities have similar civil rights laws that govern employers with fewer than 15 employees. In addition, some states and cities have included other protected categories in their laws, such as sexual orientation and veteran status. *See* http://www.eeoc.gov/facts/qanda.html .
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> **Pregnancy Discrimination Act:** This Act amended Title VII and prohibits discrimination against a female employee because she is pregnant. If a woman is able to

work, she must be permitted to work under the same conditions as other employees. If she becomes unable to work for medical reasons, she is entitled to the same rights to benefits and leave as other workers who become unable to work for medical reasons.

Age Discrimination in Employment Act of 1967 (ADEA): The ADEA generally prohibits discrimination against employees age 40 or older. The ADEA applies to companies with 20 or more employees; it prohibits employers from failing or refusing to hire or from discriminating in terms or conditions of employment or firing employees on the basis of age. This law is enforced by the EEOC. Again, most states and some cities have parallel laws prohibiting age discrimination and those laws govern employers with fewer than 20 employees. *See* http://www.eeoc.gov/laws/types/age.cfm .

Older Workers Benefit Protection Act of 1990: amended the Age Discrimination in Employment Act to prohibit age discrimination with regard to employee benefits. This law is also enforced by the EEOC. *See* https://www.eeoc.gov/laws/types/age.cfm .

Genetic Information Non-Discrimination Act of 2008: This law prohibits discrimination by employers on the basis of genetic information. Genetic information is broad and includes not just results of genetic tests, but also tests of family members and information from a medical history of an employee. Remedies for violation of this Act are the same as those provided under Title VII. This law is enforced by the EEOC. *See* https://www.eeoc.gov/laws/types/genetic.cfm .

Occupational Safety and Health Act of 1970 (OSHA): a regulatory system designed to aid worker safety; the current threshold for required reporting is one employee or more engaged in secular activities. Employees performing or participating in religious services are not covered by OSHA. This law is enforced by Occupational Safety and Health Administration. The Act covers organizations to the extent engaged in commerce (see discussion of Fair Labor Standards Act). *See* http://www.osha.gov/ .

Immigration Reform and Control Act of 1986: bans hiring non-U.S. citizens who do not possess the authorization to work in this country and provides fines up to $10,000 for each illegal immigrant hired and in some cases imprisonment; all employers (even of one person) must fulfill the document verification provisions of the Act. Failure to do so can result in penalties. The discrimination provisions apply to four or more employees. This Act makes it an offense to refuse employment to anyone whom the employer believes may be an illegal immigrant but turns out not to be; applies to companies with four employees or more. Employers are required to verify employment eligibility within three days of hire of a new employee by completing the I-9 form. It is important to keep copies of the evidence of employability: green card, passport, driver's license, Social Security card, birth certificate, or citizenship papers as set forth on the I-9 form. The I-9 form must be kept by the employer for the longer of the following: three (3) years after the date of

hire or one (1) year after termination of employment. In the 1980s this law was unsuccessfully challenged on religious grounds. Churches must comply with the law. This law is enforced by the U.S. Citizenship and Immigration Service (USCIS). See additional immigration information in **Section 7: Immigration**.

Worker Adjustment and Retraining Notification Act of 1988 (WARN): this notice of plant-closing legislation requires 60 days written notice of large-scale layoffs and plant closings; the law applies to companies with 100 or more employees. WARN is enforced through a civil lawsuit which can be filed in U.S. district court. *See* http://www.doleta.gov/programs/factsht/warn.htm .

Americans with Disabilities Act of 1990 (ADA), as amended in 2009: covers both treatment of employees with disabilities and architectural requirements for buildings; it applies to companies with 15 or more employees. The law requires employers to make reasonable accommodation for qualified employees with disabilities that substantially limit one or more major life activities (examples - caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working) absent a showing of "undue hardship" and expense on the employer. If significant risks to health and safety of others cannot be eliminated by providing reasonable accommodations to an employee with disabilities, the ADA does not require hiring of that individual. Qualified individuals with a disability are those who can perform the essential job functions with or without accommodations. This law is enforced by the EEOC. The ADA contains provisions permitting churches to discriminate in hiring based on religion. There is also an exemption for churches relieving them of the requirement to comply with provisions related to building accessibility to public accommodations by the disabled, but this does not relieve a church of the responsibility to make a reasonable accommodation for a disabled employee. Congress amended this law in 2009 to restore much of its original intent. Consult with your attorney to ensure compliance. Many states and cities have parallel laws that may cover employers with fewer employees. For information on the amendments implemented in 2009, *see* http://www.eeoc.gov/laws/regulations/adaaa-summary.cfm .

Fair Labor Standards Act of 1938 (as amended by the Equal Pay Act of 1963): contains standards for minimum wage ($7.25 effective 7/24/09), and overtime pay of time and one-half to non-exempt (non-managerial) employees working over 40 hours a week; also regulates child labor providing that anyone age 18 or older may work, but employees who are younger are subject to restrictions related to hazardous work and work hours, and provides for a minimum wage. There is a limited exception for religious camps operating no more than seven months a year. While churches that are not engaged in "interstate commerce" are not subject to the act, many activities fall into this gray area. Consult with your local employment attorney. The Department of Labor may view any entity with employees as covered by the Act, including churches. The operation of a day

care facility, preschool, or school will subject a church to coverage by the Act. Further, the requirements of the Act cannot be avoided by classifying a worker as an independent contractor to avoid paying the employee overtime. Ministers are professional employees and are exempt from the overtime pay requirement. This law is enforced by the Department of Labor's Wage and Hour Division. New overtime rules may be enacted in 2019. Consult the U.S. Department of Labor web site (http://www.dol.gov/), for further information and training. Many states also have wage and hour laws. *See* https://www.dol.gov/general/topic/wages

Equal Pay Act of 1963: The Fair Labor Standards Act was amended by the Equal Pay Act to require equal pay for equal work, regardless of the employee's sex. This law applies to all employers. *See* https://www.eeoc.gov/laws/statutes/epa.cfm .

Family and Medical Leave Act of 1993, as amended in 2009: Applies to private sector employers who employ 50 or more employees in 20 or more workweeks in the year leave is sought. Eligible employees may take up to twelve weeks of unpaid, job-protected leave with continued benefits during a twelve-month period for the birth of a child, care of a newborn, placement for adoption, or foster care, to care for a spouse, son, daughter, or parent with a serious health condition, or the employee's own serious health condition or due to a qualifying exigency when a spouse, son, daughter or parent is on active duty or is called to active duty in the military. In addition, an employee who is a spouse, son, daughter, parent or next of kin of a service member can take up to 26 weeks of job-protected leave to care for member of the armed forces who suffers a serious injury or illness. To be eligible the employee must have worked for the employer at least twelve months and at least 1,250 hours during the immediately preceding twelve months, at a work site where 50 or more employees are employed within 75 miles of the work site. There is no specific exception for churches, but if a church employs fewer than 50 employees it is not covered by the federal law (some states have their own family and medical leave laws that govern employers with fewer than 50 employees). The employer's obligation is triggered by the employee's notice to employer of need to take leave under the Act or upon employer's learning that an eligible employee needs leave for purposes covered by the Act. The employer must provide eligibility notice within 5 business days and then should require medical certification from the affected person's physician. "Serious health condition" covers inpatient care and continuing treatment by a health care provider. This law is enforced by the U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division. Due to the complexity of this law, it is a good idea to work with an attorney who specializes in employment law to ensure compliance. For information on the amendments in 2009 see http://www.dol.gov/whd/fmla/finalrule/factsheet.pdf .

Personal Responsibility and Work Opportunity Reconciliation Act of 1996: generally referred to as federal welfare reform, contains a requirement that all employers

report new hires to the employer's respective state agency. The appropriate state agency varies from state to state. One purpose of this law is to locate parents who avoid child support payment obligations by moving and changing jobs. There is no exclusion for small employers or religious organizations. The designated state agency may be a child support enforcement agency or state labor department.

Unemployment: by virtue of inclusion in the Presbyterian Church (U.S.A.)'s Federal Group Tax Exemption Ruling, churches and middle governing bodies are exempt from federal unemployment tax. However, individual states (ex. New York) may impose an unemployment tax on certain nonprofit organizations even though they are exempt from the federal tax. Organizations should consult their tax advisers concerning liability for the state unemployment tax.

Worker's Compensation: This is a matter of state, not federal, law. There is no per se exemption for churches, and coverage depends upon the specific state law. It is important to determine who is considered a covered employee for state law purposes. This is also a very important area for insurance coverage. Consult your insurance agent about worker's compensation coverage for your church's employees.

National Child Care Protection Act of 1993: This Act allows (does not require) states to require that certain child care providers make mandatory background checks on child-care workers (both employees and volunteers). States will have the right to designate certain organizations, such as day care centers, nurseries, schools, and possibly Sunday schools, as child-care providers. Churches and presbyteries should become aware of their state's requirements regarding the designation of child-care providers. The National Child Care Protection Act was amended in 1999 by the Volunteers for Children Act to enable (not require) child care providers designated by state law as qualified entities to contact an authorized agency of the state to request nationwide criminal fingerprint background checks. To find out if churches are designated as qualified entities in your state, contact a local attorney. There are advantages and disadvantages to any screening process; select a screening process that best suits the needs of your church.

NOTE: in 2016 the General Assembly approved the Child/Youth/Vulnerable Adult Protection Policy and its Procedures. In addition, the *Book of Order* now requires all councils of the church to implement a child protection policy. While the Assembly's policy only applies to its national agencies, it can be used as a model for other councils. The Policy can be found on the Creating Safe Ministries webpage. *See* https://www.presbyterianmission.org/legal-resources/creating-safe-ministries/ under Resources.

Employee Polygraph Protection Act: This Act may apply to churches engaged in interstate commerce and prohibits requiring or suggesting employees or job applicants

submit to polygraph tests. Consult with your attorney to determine whether your church is engaged in interstate commerce and covered by the Act.

Bankruptcy Discrimination: Section 525 of the Bankruptcy Code prohibits private employers from discriminating against a person who is or has been a debtor in bankruptcy, with some exceptions. This is a complicated area of the law and employers should consult with their local attorney when they plan to take an employment-related action against an employee known to the employer to be involved in a bankruptcy, past or present.

Uniformed Services Employment and Re-employment Rights Act of 1994: In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA). This federal law secures a variety of rights to employees called to military service. This law provides that an employee who leaves to train or serve in the uniformed services must be re-employed upon return and has a right to certain benefits during absence and upon return, provided the employee's service does not exceed five years and the employee did not receive a dishonorable discharge. There is no exemption for churches or small employers. The employer is not required to re-employ under specified limited circumstances set forth in the Act. This law is enforced by the U.S. Secretary of Labor and may be referred to the U.S. Attorney General for further action. *See* https://www.dol.gov/vets/programs/userra/

In cooperation with other General Assembly offices, the Board of Pensions wrote USERRA Questions and Answers: (http://www.pensions.org/availableresources/bookletsandpublications/documents/userra_qa.pdf).

1. Posting Requirements

The following is a list of the federal laws that require covered employers to post notices for employees. First, determine whether you are a covered employer. Many of these laws may be inapplicable because the church or middle governing body does not meet the minimum number of employees or does not engage in interstate commerce. Second, the Free Exercise clause of the First Amendment exempts ministers and, in some cases, other core religious employees from some of these laws. These notices need not be posted if you are not a covered employer:

- The Fair Labor Standards Act (minimum wage and overtime) (https://www.dol.gov/general/topics/posters)

- Equal Employment Opportunity (https://www1.eeoc.gov/employers/poster.cfm)

- Occupational Safety and Health Act (OSHA) (https://www.osha.gov/Publications/poster.html)

- Employee Polygraph Protection Act (https://www.dol.gov/whd/regs/compliance/posters/eppac.pdf)

- Family and Medical Leave Act (FMLA) (https://www.dol.gov/whd/regs/compliance/posters/fmla.htm)

Posters for all of the above, except Equal Employment Opportunity, may be obtained from your local office of the U.S. Department of Labor. For a poster covering Equal Employment Opportunity, contact your local office of the Equal Employment Opportunity Commission. **NOTE**: Many states have posting requirements in addition to those required by federal laws. Consult with your attorney on posting requirements.

B. HIPAA: Health Insurance Portability and Accountability Act Privacy Rules

The Health Insurance Portability and Accountability Act (HIPAA) privacy rules prohibit unauthorized disclosure by covered entities of individually identifiable health information (protected health information). In general, local churches and middle governing bodies are not "covered entities" under the HIPAA privacy rules. Covered entities are health plans, health care providers and health care clearinghouses. If, for example, a local church or middle governing body directly operates a health clinic, then it would be a health care provider and, consequently, a covered entity.

There are two categories of disclosures where local churches, as non-covered entities, may be affected by the HIPAA privacy rules. One instance is disclosure of protected health information of a church member and the second is disclosure of protected health information of an employee.

- **Church Member's Protected Health Information**. Again, a church with respect to its member is not a covered entity. The HIPAA privacy rules permit a hospital to provide the name, general condition, room number and religious affiliation in a directory accessible by clergy and permits this information to be given to those who ask for the patient by name, unless the patient has objected. It is not a violation of the HIPAA privacy rules for a minister to access the information in the hospital directory and then subsequently disclose the information to the congregation. If a member has notified the church that the member does not consent to such disclosure, any subsequent disclosure may amount to an invasion of the member's privacy. The best approach is to obtain a written consent from the member to make disclosures. However, if this is not practicable, then notice of the church's practice should be posted or placed in the church bulletin from time to time with an opportunity for members to notify the church if they object to disclosure of their information. A notice in the church bulletin might include the following:

  When a congregation member is ill or injured, we inform fellow members and pray for you by name—seeking the comfort and healing of the Risen Christ. If you do not

want members informed or your name and illness stated in these congregation prayers, please notify the pastor in a brief written note.

A related issue is how much to disclose. This is a good discussion to have with your session. For example, you may decide it is enough to say, our member John Smith is hospitalized and he has asked for your prayers as opposed to our member John Smith is hospitalized with X disease or condition which is serious and can cause, etc., etc. Tact and sensitivity may be called for rather than oversharing details and embarrassing someone.

- **Church Employee's Protected Health Information**. The church, as an employer, may need to request disclosure of an employee's protected health information from a health care provider, for example, in connection with an employee's return to work after a medical leave. The church employer requesting the protected health information will be required to submit to the health care provider an authorization signed by the employee that in the provider's opinion complies with HIPAA. If the church employer does receive an employee's health information, this information should be used solely for the narrow purposes it was gathered. Otherwise, it should be held in a secured confidential file separate from the employee's personnel file.

For further information see the Department of Health and Human Services' Office for Civil Rights - HIPAA web site (http://www.hhs.gov/ocr/privacy/), and "Are Prayer Lists Illegal?" Church Law & Tax Report, Vol. XVIII, No. 2, March/April, 2003. Church Law & Tax Report is a publication of Christian Ministries Resources. You can subscribe by calling (800)222-1840.

C. Potential Problems in Hiring and Firing Employees

1. Interviewing

a. Lay Persons

In formulating questions for interviewing lay persons, the two most important guidelines are to ensure that each question be related to the job for which the applicant is applying and that the questions be asked of all applicants for the position. Questions should not be posed to applicants in order to determine their race, marital status, age, sex (including pregnancy), national origin, citizenship, genetic information or disability. Because a religious organization may discriminate based on religion, the church or presbytery may require the employee be Presbyterian or may indicate applicants who are Presbyterian will be given preference, but should be prepared to explain why.

i. Examples of Prohibited Questions

What year did you graduate from high school? (Can learn of age)

Could you enclose a photograph with your resume? (Can learn of race, national origin, sex, or age)

Are you married? (Illegal inquiry about marital status)

Have you ever been arrested? (Some racial-ethnic groups are arrested at a higher rate than others and this question could lead to race discrimination.)

What is your native language? (National origin discrimination)

Are you handicapped? (Disability discrimination)

What medications do you currently take? (Disability discrimination)

How old are you? (Age discrimination)

Do you plan to have children? (Sex discrimination)

Are you pregnant? (Pregnancy discrimination)

Do you have a drug or alcohol problem? (Disability discrimination)

ii. Examples of Permitted Inquiries (Job Related)

Have you ever been fired or otherwise had your employment involuntarily terminated?

There is a gap in the time frames shown on your resume. Tell me about that.

If hired, can you prove you are at least 18 years of age?

Can you show proof of eligibility to work in the United States?

Are you able to perform essential functions of this job with or without accommodation?

Would you be willing to travel?

If you need to compile applicant tracking information for affirmative action purposes, for example, do not ask for this information on the employment application unless it is on a perforated portion at the bottom that will be separated from the application and not available to the decision maker.

b. Ministers

In the civil law arena, the protections of the First Amendment to the Constitution of the United States give the nominating committee and the committee on ministry much greater flexibility in posing questions to a minister. The *Book of Order* indicates that a nominating committee take care to consider candidates without regard to race, ethnic origin, sex, marital

status, age, or disabilities (F-1.0403). Any interview questions must comply with the Presbyterian Church (U.S.A.)'s Constitution. If a search committee has questions related to this topic, the committee should contact its committee on ministry, the presbytery office, or OGA Constitutional Services.

Of course, the *Book of Order* sets out many provisions applying to the employment and call of a minister. See, for example G-2.08.

2. Background Checks in General

Employers are finding themselves in lawsuits over their hiring and firing practices. Failing to properly investigate a prospective employee's background could result in legal liability for negligent hiring or negligent retention if that employee later injures someone. Conducting background checks before hiring and before allowing employees to start work is always a good idea, as is having applicants sign a release to obtain such background checks. A background check is especially important for employees who will be working with children, counseling, handling funds, or operating church vehicles. Investigation of the applicant's background should involve contacting personal and employment references as well as conducting a criminal records investigation. Some background checks may amount to consumer investigative reports under the federal Fair Credit Reporting Act. A few guidelines to follow in conducting these types of background checks are: (a) Keep the investigation work-related; (b) obtain written authorization from the potential employee; (c) disclose negative information to the potential employee before adverse action is taken; (d) give the potential employee an opportunity to dispute the accuracy of the information; (e) do not ask references legally impermissible question (see examples above 9n C(1)(a)); and, (f) consult with a local attorney to create a consistent process for conducting background checks. Employers should create a simple release form for reference checks. Sample language:

> "I hereby authorize any investigator of [Name of Church Employer] bearing this release to verify and obtain any information from schools, residential management agents, former and current employers, religious bodies, criminal justice agencies and individuals relating to my activities. This information may include, but it is not limited to, academic, residential, achievement, performance, attendance, personal history, disciplinary, criminal conviction records, and any judicial or ecclesiastical proceedings involving me as a defendant. I hereby direct and authorize you to release such information upon request to the bearer. I hereby release [Name of Church Employer], and any individual or group, including record custodians, from any and all liability for damages of whatever kind or nature which may at any time result to me on account of compliance or any attempts to comply, with this authorization. A copy of this signed form is to be considered as valid as the actual signed form."

If the information obtained in a reference check is inappropriately used or disclosed, the employer could later be found to be liable to the employee or prospective employee for defamation or violation of privacy. Local churches and presbyteries should develop reference checking procedures in conjunction with their local employment attorney.

See the discussion of the National Child Care Protection Act of 1993 set out earlier in this Section.

3. Background Checks for Ministers

Pursuant to *Book of Order* G-2.0504 a: **Installed Pastoral Relationships The installed pastoral relationships are pastor, co-pastor, and associate pastor. A teaching elder may be installed in a pastoral relationship for an indefinite period or for a designated term determined by the presbytery in consultation with the congregation and specified in the call.**

Under the *Book of Order* the congregation elects a nominating committee that works with the committee on ministry of the presbytery (G-2.0802). Once the nominating committee identifies a candidate, that candidate is presented to the presbytery to receive and consider the presbytery's counsel on the merits, suitability, and availability of those considered for the call through the committee on ministry (G-2.0803). The nominating committee should take care to consider a candidate without regard to race, ethnic origin, sex, marital status, age, or disabilities (F-1.0403).

The nominating committee of the church and/or the committee on ministry of the presbytery should exercise reasonable care in checking the minister's background. **Reference checkers should consult with the committee on ministry and/or the presbytery executive.** If the reference and background checks reveal previous incidents of misconduct, including sexual misconduct, Richard Hammar's *Pastor, Church and Law* recommends the following factors be considered before hiring the minister:

> "(a) the nature and severity of the previous misconduct; (b) the frequency of the previous misconduct; (c) how long ago the misconduct occurred; (d) whether the minister received counseling; (e) the competency and effectiveness of any counseling received; (f) the likelihood that the minister will repeat the same type of misconduct now; (g) the possibility of legal liability if a jury concludes, on the basis of all evidence, that the church or denomination was negligent in hiring the minister."

In situations where a candidate has a history of sexual misconduct, employer councils would be wise to be very cautious about hiring such a candidate. Knowingly hiring someone with a background of sexual misconduct could create significant liability if that candidate engages in sexual misconduct after hire. Always consult with local counsel before making such a decision. You may be putting employees, members, and guests at risk in those hiring situations. Further, your insurer may be unwilling to defend you in litigation if the minister engages in misconduct

and may refuse to pay any judgment as a result of litigation. The same logic applies to hiring non-ministerial staff with a background that shows a past history of sexual misconduct.

4. Job Descriptions and Performance Management

Job descriptions define the essential and nonessential functions of a position. Job descriptions can be shown to interviewees who may be asked if they can perform the essential functions of the position. If the applicant says no, this provides a basis not to extend an offer of employment. If the applicant says yes, but later plainly demonstrates he cannot perform the essential functions, this may provide a basis to sever employment. Job descriptions are useful in providing job information to the employee and supervisor, information for performance appraisals, information in situations calling for review under the Americans with Disabilities Act (can the employee perform the essential duties, with or without reasonable accommodations), and information for the employee discipline process.

The performance appraisal should be conducted at least annually. Supervisors should manage employee performance throughout the year, documenting conversations with the employee regarding good and unacceptable performance. Any documentation should contain only facts, not generalizations or assumptions. For example, if a church staff person is tardy in arriving to work 3 out of 5 days each week, week after week, month after month, and the church has warned the staff person several times that repeated tardiness will not be tolerated, the tardiness — and the warnings to the staff person — should be documented in the person's personnel file. If the situation becomes intolerable and the church decides to terminate the person's employment, then the documentation in the file will serve as an important record of **what** transpired, **when** it transpired, and **how** it was handled. If the discharged staff person tries to challenge the decision, the detailed records will provide an important defense for the church in support of its decision. Having the employee sign disciplinary write-ups and evaluations will make it difficult for the employee to claim surprise in further discipline or termination. When performance management is an ongoing process, the annual performance review will be unlikely to contain assessments that surprise the employee. Performance appraisals should be truthful appraisals. It is unhelpful to both the employee and the church employer to gloss over or fail to document performance problems. Truthful appraisals are important as a tool to inform employees of deficiencies in an effort to improve their work performance and in the defense of adverse personnel actions.

Employees should be given an opportunity to review and comment on their performance evaluations. The evaluation should be signed by the reviewing manager and the employee to indicate that the review occurred, not that the employee necessarily agrees with the review. If the employee refuses to sign indicating that the review has occurred, the manager may note that fact on the appraisal form.

5. Compensation

As a federal tax-exempt organization, all Presbyterian Church governing bodies are prohibited from paying unreasonable compensation to their staff. Unreasonable compensation is compensation above what would ordinarily be paid for like services by like organizations under like circumstances.

Detailed and helpful information is set out in Intermediate Sanctions subsection in Section 8: Taxation, in this Manual.

6. Terminations

Most states recognize the doctrine of employment at will, meaning the employment relationship between the employer and the employee may be terminated by either the employer or employee at any time with or without cause. If employment is at-will and if the church or middle governing body has an employee handbook, this at-will relationship should be stated in the handbook, along with disclaimers that the handbook is not a contract of employment nor a guarantee of future employment, and so forth. If a contract of employment with the employee exists, that eliminates the "at-will" relationship and the employee's rights upon termination will be governed by the employment contract. Some states recognize oral and implied employment contracts. In those states, the employment contract may not have to be in writing to be enforceable. A termination in violation of a state or federal law will be subject to legal challenge. For example, a typical employee cannot be discharged on the basis of age, sex, race, or for any other unlawful reason.

While an employee can be terminated at-will, if there is a legitimate reason for termination and if it is well-documented (ex. Theft, violence, poor performance), the employee may be wise to tell the employee the reason for termination. It is equally wise to make sure there is plenty of documentation to back up the reason for termination.

In addition, an employer that discharges an employee in retaliation for exercising the employee's rights or obligations under state or federal law may be found liable for wrongful discharge. For example, if an employee files an EEOC complaint for race discrimination, he cannot be terminated for filing the complaint.

Termination of a minister's employment must be consistent with the written call and any applicable provisions of the *Book of Order*. As noted above, because of constitutional protections, most civil courts will not hear a lawsuit filed by a minister against the church or presbytery. Such relationships are not ordinary civil employment. They are ecclesiastical relationships defined by Presbyterian Church (U.S.A.) polity and governing bodies.

D. Resources

There are a number of websites on which employers can find information concerning employment issues:

U.S. Department of Labor (http://www.dol.gov/)

U.S. Equal Employment Opportunity Commission (http://www.eeoc.gov/)

U.S. Citizenship and Immigration Services (http://www.uscis.gov/portal/site/uscis)

U.S. Occupational Safety and Health Administration (http://www.osha.gov/)

E. Advantages and Disadvantages of Personnel Policies

There are several important advantages to personnel policies on certain key issues:

- **Uniform statement of information**: Creating policies and handbooks or manuals is a uniform method to inform employees about the terms and conditions of their employment. It informs employees of compensation policy and benefits policies. It provides information on what is expected of employees and their duties with regard to certain aspects of their employment. Having such written, formal policies helps avoid ignorance, confusion, and misinformation about how matters will be handled at work, such as the employer's intolerance for harassment and discrimination and how such matters should be reported and what holidays are recognized by the employer.

- **Consistency**: Policies can help ensure that certain situations are handled in a consistent manner (Examples: holidays; work schedule; reimbursement of business expenses) — and that all staff are treated equally.

- **Strong statement of acceptable and unacceptable conduct**: Policies inform staff and others about conduct that is acceptable and unacceptable in a work setting and the consequences of engaging in unacceptable conduct. The existence of a policy makes it more difficult for a staff person to say s/he did not understand this type of behavior would not be condoned (Examples: policy on the use of alcohol during work hours or while traveling on church business; policy on sexual abuse and harassment). U.S. Supreme Court cases (*See* **G. Anti-Harassment Policy** for a discussion of these cases.) make the existence and communication of a sexual harassment policy and complaint procedure very important. Without such a policy and complaint procedure, the employer may be open to vicarious liability for sexual harassment unknown to the employer. .

- **Protection from liability exposure**: Policies can help protect a church from liability exposure. For example, if an employer has a policy prohibiting employees from using the employer's computer system to illegally engage in file-sharing, that may provide a defense if someone in the music industry sues and claims that the employer aided and abetted an employee's illegal conduct by not having a policy that notifies employees that they are prohibited from using the employer's computer system to engage in illegal file-sharing.

There is one major disadvantage to personnel policies:

> If an organization adopts a policy and then does not follow it — or follows it only with respect to certain staff — there is an increased risk of liability exposure to the organization for claims of discrimination. Some states will apply personnel policies as legally binding; some states will not. Having clear disclaimers in a handbook is important ("this handbook is not a contract of employment or an agreement for continued employment or for specific compensation or benefits"). Of equal importance is training of supervisors and executives. These folks must be trained on the employer's handbook and policies and informed how the policies should be implemented. Encouraging supervisors and executives to consult with the human resources official of the organization also helps to foster consistent application of policies across the organization. Consult with an employment attorney in your state as you consider personnel policies. Also, check with other churches and governing bodies in your area to determine if they have personnel policies. These policies may be a helpful model.
>
> Personnel policies and handbooks should be updated annually, if possible. Laws are amended, new laws are passed, technology develops, and you discover new issues in employee relations each year that are not addressed in your policies or handbook. It is recommended that employers maintain a file in which they keep notes about new laws which should be included in their handbook, situations not covered by handbook policies, and ideas for human resources and personnel committees to discuss which might be included in a handbook.

F. Common Personnel Policies

Each church and governing body needs to decide for itself whether to adopt personnel policies, who should be covered by each policy (lay/clergy; full/part-time staff); and which types of policies should be included in a set of policies. Subjects that are commonly included in personnel policies are the following:

- **Hiring policies** (recruitment; job posting; immigration; references; hiring of relatives; promotions; statement of "at-will" employment; etc.)

- **Salary administration** (pay periods; overtime; time card procedures; wage assignments; performance reviews; etc.)

- **Operations** (work schedule; etc.)

- **Benefits** (health insurance; disability; life insurance; pension; bereavement leave; worker's compensation; social security; unemployment compensation, if applicable; vacation; holidays; maternity and paternity leave; sick leave; jury duty; personal days;

policy on HIV/AIDS; attendance records; leave of absence; family and medical leave; continuing education; etc.)

- **Accountable reimbursement policy**

- **Annual performance review and corrective action** (evaluations; work rules; disciplinary action)

- **Retirement issues**

- **Termination and resignation issues**

- **Conduct issues and compliance with employment laws** (race and gender issues; sexual abuse and harassment; violence; code of ethics; conflicts of interest; confidentiality; etc.)

- **Complaint process**

- **Neutral reference policy for lay employees** giving only title and length of service (written release from employee allows for full disclosure)

- **Personal use of employer's equipment and software** (computers, cell phones, social networking, Internet, and email)

G. Anti-Harassment Policy

Sexual harassment is a form of sex discrimination under Title VII of the Civil Rights Act and is illegal under federal and state law. The EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature if rejecting the conduct results in an adverse employment action, or submitting to the conduct is explicitly or implicitly made a condition of the target's employment, or the conduct unreasonably interferes with the target's work performance or creates an intimidating or hostile work environment. While sexual harassment is traditionally thought to occur between male supervisors and female subordinates, it may occur between a female supervisor and a male subordinate, between supervisor and subordinate of the same sex, between co-workers of different sexes or between co-workers of the same sex. **Two U.S. Supreme Court decisions,** *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton***, make it essential that:**

- all employers have a strong policy against sexual harassment;

- all employees be made aware of it, preferably by annual training; and

- all employees be made aware of how to file a complaint with the employer and the employer's complaint process.

There are two types of sexual harassment: *quid pro quo* and hostile environment. In a *quid pro quo* (this for that) case, if the employee suffers a tangible job action (termination, demotion, loss of pay), the employer will be strictly liable to the harassed employee as will the individual harasser regardless of whether the employer had notice of the harassment.

In a hostile environment case where there is no tangible job action, but the employee proves she was subjected to unwelcome, severe, and pervasive conduct of sexual nature, the employer will be vicariously liable unless the employer can prove an affirmative defense establishing the exercise of reasonable care to prevent or promptly correct a sexual harassment and that the plaintiff failed to use these preventive or corrective measures.

The suggested preventive or corrective measures are:

- a strong, detailed policy against sexual harassment

- a complaint process with multiple avenues of reporting

- a annual training program to communicate the policy and the complaint process to the employees

- each employee should sign documentation indicating they completed the training and the training should be mandatory on at least an annual basis

In 1999, the EEOC issued enforcement guidance on employer vicarious liability for unlawful harassment by supervisors, extending liability to harassment based on an individual's race, color, sex (whether or not the harassment is of a sexual nature), religion, and national origin. For more information on this issue and on sexual harassment prevention, please see the Equal Employment Opportunity Commission's Enforcement Guidance: (http://www.eeoc.gov/policy/docs/harassment.html).

In addition, some state and federal courts have broadened the scope of *Ellerth* and *Faragher* to include harassment based on an individual's race, national origin, and disability. It would be advisable to implement similar preventive measures for these forms of harassment.

H. Personnel Records

Churches and middle governing bodies should work with their attorneys to have a clear understanding about the importance of keeping good personnel records — what to keep in those records and what not to keep in those records. It is advisable to put any and all records related to employment in a personnel file with a separate, locked file for medical records.

1. Access to Personnel Records and Confidentiality

There are state and federal laws that provide access to or protect confidentiality of certain personnel records. Middle governing bodies and churches should review these legal requirements

with their attorney. Medical information is particularly sensitive. It should be gathered only when there is a legitimate business reason to do so and then gathered, retained, and disclosed in strict compliance with applicable state and federal laws. A written consent to release medical information, signed and dated by the employee specifying the information to be released, must be obtained by the employer before any release of medical information. To comply with the Americans with Disabilities Act, any medical information should be kept in a separate, locked file, not the employee's personnel file and access should be strictly limited only to those with a clear need to know.

The following is the policy used by the Presbyterian Church (U.S.A.) General Assembly Mission Council; it is provided as a sample policy:

> **Personnel Records**
>
> The Employer maintains a personnel file on each employee, which is the property of the Employer. The personnel file includes such information as the employee's job application, resume, records of training, documentation of performance reviews and salary increases, and other employment records. Any medical or health information shall be maintained separately. Employees may review their personnel file by contacting HR. Employees may review their personnel file only in the presence of a member of HR, but employees cannot remove documents from personnel files. Former employees are not allowed access to their personnel file. Information in personnel files is confidential. Generally, only those with supervisory responsibility for the employee have access to the employee's personnel file.

2. Record Retention

The types of personnel records that must be retained by federal law include but are not limited to:

Record	Retention Period
Payroll records	3 years
Personnel records used in hiring, termination, and promotion	1 year from action
Records relevant to legal action or discrimination complaint	until matter is concluded
Time sheets	2 years
FMLA records	3 years
Immigration records	3 years from date of hire or 1 year after termination whichever is later
OSHA records	5 years log and summary of

	Injuries duration of employment + 30 years for medical exams

The safest course is to retain any and **all** records on employees for the length of their employment + the number of years within which an employee can file an action for discrimination or other employment related actions, in the employer's state. Employers should check with their attorneys for that information.

An employer should consider maintaining three types of files on an employee in its Human Resources office: (1) personnel file; (2) confidential file (interview evaluation, reference checks, EEO/affirmative action data, credit checks, and information regarding legal actions or complaints); and (3) medical information. As a general rule it is best for an employer not to maintain files with any employee medical information. The law in this area is in flux. If, however, a medical information file is maintained (due to ADA or FMLA needs), the employer should ensure this is a separate and confidential locked file. All filed should be secured under lock and key and access to such records should be limited, at all times.

3. Subpoena of Personnel Records

An employer can no longer simply produce documents in response to a subpoena, especially if the subpoena is issued by a court in another state. Upon receipt of a subpoena, the employer should consult with an employment attorney to determine how to respond to a subpoena. If there is no law on point, the employee should still be notified. If the employee objects, the employee may instruct the employee's own attorney to act to quash or modify the subpoena. At the same time, the employer should let the attorney who issued the subpoena know of the employee's objection. In any event, the employer should contact the issuing attorney to determine the issues in the matter that require the subpoenaed documents and obtain a release from the employee that mirrors the request contained in the subpoena.

4. Employee Privacy

The Fourth Amendment to the Constitution of the United States does not protect the privacy of employees of nongovernmental entities unless their respective state law indicates otherwise. Some states have laws addressing confidentiality of certain personnel records. Confidentiality of records is discussed under the **H. Personnel Records** subsection of this Manual.

Employers may want to monitor phone calls and email or conduct surveillance for quality assurance or safety compliance. The Electronic Communications Protection Act of 1986 created civil and criminal liability for the intentional interception and disclosure of any wire, oral or electronic communication. To avoid liability it is advisable to have a policy, published in an employee handbook, that informs employees that the employer's telephone and computer systems belong to the employer, that employees should have no expectation of privacy in

anything that is sent to, stored in or sent from the systems, and that the employer has the right to monitor any information and data in its systems. Employers should have employees sign a receipt for the policy or the handbook to show they received it and understand it.

Employees also have privacy rights in what they bring to work inside their clothing, inside bags and purses, in their offices and desks, and other work-related areas. The reasonableness of the expectation of privacy varies and the ability of the employer to search also varies and may depend upon state law. Consult with your local attorney before engaging in a search of any employee or his/her work area.

5. Privacy Issues Concerning HIV/AIDS

The Americans with Disabilities Act and state medical confidentiality laws protect the confidential nature of an employee's medical information, particularly whether he/she has AIDS or is HIV-positive. HIV is not transmitted by casual contact and, therefore, the employee's need for confidentiality typically outweighs any concern the employer may have about transmission.

I. Benefits Plan of the Presbyterian Church (U.S.A.)

By administering the Benefits Plan and the Assistance Program, The Board of Pensions of the Presbyterian Church (U.S.A.) serves ministers of the Word and Sacrament and lay workers of the Presbyterian Church (U.S.A.) throughout the United States and abroad.

Community Nature

The Benefits Plan has several unique features that collectively are referred to as "the community nature of the Plan." These features relate primarily to the Plan's funding, pension benefits, and family medical coverage. The Benefits Plan is a self-insured church plan that is funded by dues from Presbyterian churches and church-affiliated employing organizations, as well as the income and capital appreciation on the Plan assets. The dues contributed by the local church or an employing organization are based on a percentage of its employees' effective salaries and represent that employing organization's share of the cost of protecting the entire community.

The Benefits Plan

The Benefits Plan serves as a cornerstone for the ministry of the Presbyterian Church (U.S.A.). The pension, death, disability, and medical benefits, as well as the optional benefits, provide a comprehensive package of protection and financial assistance for participating church workers and their families.

The Benefits Plan provides two programs: the Traditional Program and the Affiliated Benefits Program. The Book of Order requires all churches to provide participation in the benefits plan of the Board of Pensions, including both pension and medical coverage. Dues are based on a percentage of each employee's compensation.

The Assistance Program

The Assistance Program of the Board of Pensions helps church workers whose personal financial needs exceed the bounds of the Benefits Plan, personal resources, and other means. It also provides grant opportunities and programs to build the practical skills needed to minister in today's world. The Assistance Program comprises a range of discretionary grant programs that complement the Benefits Plan. These grants are funded by gifts, legacies, endowment income, and half of the Christmas Joy Offering, not dues.

For More Information

For more information about the Benefits Plan and the Assistance Program, please reference the Benefits Plan document and other publications and forms available on Pensions.org.

The Board of Pensions of the Presbyterian Church (U.S.A.)
2000 Market Street
Philadelphia, PA 19103-3298
Phone: 800-773-7752 (800-PRESPLAN)

J. Board of Pensions Publications

These excellent resources are available by calling the Board of Pensions at (800)773-7752 (800)PRESPLAN) or on the Board of Pensions Web site:
(http://www.pensions.org/portal/server.pt)

- Benefits Plan Overview
- Benefits Plan of the Presbyterian Church (U.S.A.)
- Community Nature of the Benefits Plan
- Product Sheets
- Healthcare Summary Plan Description
- Retirement Pension, Death and Disability
- Medicare Supplement
- Retirement Savings Plan Summary Plan Description
- Benefits Administrative Handbook (For Churches & Employing Organizations)
- Benefits Administrative Handbook (For Presbyteries, Synods, & General Assembly Entities)

- Understanding Effective Salary
- Benefits Plan and Divorce
- A Shopper's Guide to Long-Term Care Insurance
- Tax Guide for Ministers & Churches
- Federal Reporting Requirements for Churches
- Information for Members Planning to Retire
- Benefits for Lay Employees
- Social Security Basics for Ministers and Churches
- Major Medical Continuation Program
- Stewardship of Life: Preparing an Advance Directive
- The Living Needs Benefit

K. Flexible Spending Accounts and Other Benefits

Federal tax laws now provide for Section 125 Flexible Spending Accounts which enable an employee to set aside portions of their salary on a pre-tax basis to pay for medical, dental, and vision expenses not covered under group insurance plans, as well as certain child care expenses. Section 132 of the *Internal Revenue Code* also provides certain tax benefits related to commuting and parking for employees.