FINAL TRANSCRIPT

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**ACC - Employment Best Practices For the Non-Profit Organization

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PRESENTATION

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

Good afternoon and good morning, everyone. This is the webcast for the Association of Corporate Counsel, entitled "Employment; Best Practices for the Nonprofit Organization."

My name is Robert Amberg. I am Senior Vice President General Counsel of Retirement Housing Foundation. I will serve as the moderator for this webcast. We have a very distinguished panel. I will now go through their biographies and introduce them to you.

Steve Garrett (ph) is on the panel. He is the Associate Vice President, General Counsel and Corporate Secretary for the Texas A&M Research Foundation. Mr. Garrett joined the research foundation in 1982.

In his current position, Mr. Garrett is responsible for the overall legal interests of the research foundation, providing legal advice and guidance to the board of trustees, senior management and the managers of the functional areas of the organization, including human resources and risk management. Prior to joining the Texas A&M Research Foundation, Mr. Garrett was an attorney with a private practice in Birmingham, Alabama.

He received his J.D. from Cumberland School of Law, Samford University in Birmingham, Alabama in 1980, and a B.A. from Vanderbilt University in 1977. He is a member of the bar of the State of Texas. Mr. Garrett also serves as a member of the nonprofit Association Committee of the Association of Corporate Counsel and serves as Chair of the subcommittee on webcasts.

Also joining us are two fine lawyers from Jackson Lewis in New York. Philip Rosen is the managing general partner of the New York City office of Jackson Lewis, LLP, one of the nation's largest law firms, representing management exclusively in workplace law and related litigation.

Mr. Rosen lectures extensively, conducts management training and advises clients with respect to corporate strategies, business ethics, reorganizations and reductions in force; purchase-sale transactions, sexual harassment and other workplace conduct rules; compliance with the Americans with Disabilities Act, wrongful discharge and other workplace litigation; corporate campaigns and union organizing matters, collective bargaining, arbitration and National Labor Relations Board proceedings.

He is an accomplished author. He has written articles entitled "Labor Relations Consideration for the New High Technology Company," for the Santa Clara Computer and High Technology Law Journal," published in 1986; "Substance Abuse; A Crisis in the Workplace," published in the July 1987 issue of Trial Magazine; "Legal Implications of Substance Abuse Testing in the Workplace," published by the Notre Dame Law Review.

"Is Your Early Retirement Package Courting Disaster?" published by Personnel Journal in its August 1988 issue; "Playing by Fair Rules," published by HR Magazine in its April '91 issue; "Responding to Union Organizing Campaigns," published in 1984 as a

part of Matthew Bender's Business Law Monograph Series. "Don't Get Nailed," published in the January '97 ProEmp Journal; "Taking on a Unionized Company; You Can Do It," published in the May 1998 ProEmp Journal.

"Managing Expatriate Employees; Employment Law Issues and Answers," published in the Winter 2000 Journal of Employment Discrimination Law; "Managing A Nonprofit Effectively Under the Equal Employment Opportunities Laws," published in the Nonprofit Governance Executives Guide Second Edition; "DOL Final Regulations on White Collar Exemptions; What Employers Need to Know," published in the June 2004 issue of Inside HR/NY.

Mr. Rosen received his B.A. Cum Laude in 1976 from the University of Rochester, was awarded the degree of Juris Doctor from New York University Law School of Law in 1979. He received the American Jurisprudence Award for Labor Law in 1978.

Mr. Rosen is a member of the bars of the State of New York and District of Columbia. These biographies are online, by the way, in case you want to do any more research on these articles that I've mentioned.

Richard I. Greenberg, a partner in the Jackson Lewis New York City office, was admitted to the bar of the State of New York, federal district court for the southern district of New York. Mr. Greenberg graduated from Cornell University School of Industrial Labor Relations in '92, earned a Juris Doctor degree from Brooklyn Law School in '95.

He advises both unionized and union-free clients on a full range of labor and employee relations matters. With respect to traditional labor matters, Mr. Greenberg represents clients in collective bargaining negotiations, labor disputes, grievances, arbitration's, proceedings before the National Labor Relations Board and of state and federal courts.

Mr. Greenberg also advises clients on the legal aspects of remaining union-free. With respect to employee relations matters, Mr. Greenberg has extensive experiences assisting clients in numerous industries in the profit, for-profit and nonprofit sector, with the development and maintenance of personnel policies and personnel infrastructures.

Mr. Greenberg also advises clients on compliance with a myriad of federal and state employment laws, including the FMLA, FLSA, ADA, ADEA and WARN, as well as new legal developments impacting labor and employment practices and policies.

I am Robert Amberg. I serve as Senior Vice President General Counsel of the Retirement Housing Foundation, which is one of the largest providers of senior housing and services in the U.S. I've served in this position since October of 1990. I will just leave it there, and I want to also mention that the two attorneys of Jackson Lewis are available after the seminar for any questions you may have, and I'll read their emails to you.

Phil Rosen is rosenp@jacksonlewis.com. Richard Greenberg is at greenber@jacksonlewis.com. These email addresses do appear in the PowerPoint presentation, so again, any questions after the seminar, you are welcome to provide those to the two attorneys of Jackson Lewis.

The emails during the seminar should be addressed to me, Robert.amberg@rhf.org, and we will accumulate those and if there's time - hopefully, there will be at the end of the session - we will be reading those emails to the panel and having some discussion.

This seminar will be available for one hour after the conclusion, and I'm told by ACC that it will be archived for a period of one year. With all that being said, I thank you for your attention. I thank you for joining us, and I will now turn the program over to Phil Rosen.

Philip Rosen, Managing General Partner, Jackson Lewis LLP; Thanks, Bob. It's my pleasure to be involved in the program with ACC and with all of you.

The goal of this program really is to give you, as is mentioned, employment best practices for the nonprofit organization, and what we will try to do is give you preventive, proactive steps. But first, it's important, in order to do that, that you know the law

and some of the current trends, and then obviously, in the second portion of this, we'll also be talking about developing specific best practices which are legal and practical.

And in terms of the law, it really is the laws all cover the entire range of the employment relationship, whether it be recruitment in other pre-hire issues, whether it be hiring, workplace policies for existing employees, workplace practices, evaluations, discipline and separation. And if you look at slide 2, then the key piece that is the foundation for all of this is Title 7 of the Civil Rights Act of 1964.

While there are many other laws, and we will go through them, much of the basis of the employment relationship really is Title 7. And as many of you know, Title 7 prohibits discrimination in a variety of protective characteristics which include race and color and religion, sex and national origin, and while we know that on this call there will be large and smaller not-for-profits, Title 7 applies to employers with 15 or more employees.

Now, if you have less than 15 employees, remember that as we will talk about later on for a second, there are also state and local laws that might impact upon an employer, so if you fall below that 15 and are on the call, that does not mean that some of these same characteristics might not be protected under some other law that might affect your organization.

If you were to think about it from this slide for a moment, and while many of us since 1964 have looked at this and said, "Okay, we understand the basics of employment law," because a lot of it deals with equal treatment and avoiding stereotypes and being careful about what statements you make to people, and ensuring that things are job-related and policies are applied uniformly, let me give you a little bit of a sense of the trends for a moment, because I think that's important as well.

And in 2004, the number of EEOC charges, which is the last fiscal year that has been completed, the EEOC, the ranking of charges is that race still remains the number one EEOC charge that's filed in 34.9% of the cases. The second highest number of charges that are filed are sex and gender charges, and they're considered one under the classification of the EEOC, with about 30.5%.

The third is retaliation, which could apply to any of these in their existing employees once a charge is filed, for example, where you then find, "What am I going to do with that existing employee who has filed a race discrimination charge," as one example. And oftentimes, the tougher situations in terms of defending these charges as we do on behalf on management, is not to prove that the initial action that was taken against that individual, such as a failure to promote somebody where they argue that it's based on race and the employer can prove that there were job-related reasons why they took that action.

The more difficult situation oftentimes is retaliation once that charge is filed and what has the employer then done with that individual. Fourth would be age discrimination. Fifth is disability discrimination. Sixth is national origin. Seventh is religion and the last is equal pay.

Now, while national origin and religion are at the bottom of that list, and they're still covered by Title 7, they have gone up significantly over the past few years, particularly in the post-9/11 world where it's important to consider how you're treating individuals in the workplace who might be Muslim or might be of Arab descent. These numbers stayed relatively constant in the last year, from 200 to 2003.

So while there has been some increase on some of these areas and some decrease, overall, that gives you a little bit of snapshot, so you need to be cognizant of that as you're going forward on a day-to-day basis, and even if you have policies and you say to yourself, "My policies are fine," think about it again based on the percentages that I've just described.

So if you go to slide 3, the Pregnancy Discrimination Act prohibits discrimination on the basis of pregnancy, childbirth or other related medical conditions and would be unlawful once again in areas such as hiring. But oftentimes what comes up is not a hiring situation when it comes to pregnancy; it's how would I treat that individual's request for a leave and how would I treat that individual's return to employment, how long do I provide health insurance and what are some of the fringe benefit issues?

Later on we're going to talk about attendance-related issues in the workplace, and Rich will talk more about the inter-relationship between some of these laws which might be Pregnancy Discrimination Act, it might be the Family and Medical Leave Act, it might be the Americans with Disabilities Act and some of the worker's comp laws.

Going on to slide 4, religious accommodations. It's one thing to say that religion in the workplace -- and there's a certain amount of charges in the post-9/11 world. The kinds of things that tend to come up that are covered by Title 7, religious discrimination is one of those areas where a reasonable accommodation would be required under appropriate circumstances if it does not create an undue hardship.

So, for example, if an individual were to say, "I need a place to pray five times a day. I need about 10 minutes," because that's a religious requirement of an existing employee, and it might be an existing employee who has not really requested this in the past. It might be somebody who, for the first time is saying to you, "I've decided that this is important to me and I'd like a time and place to pray."

That is something that, if it does not create an undue hardship so that you can cover the situation where, for example, I had one in a retail store where there might have been, let's say, 100 employees who were working in the store at any one time and 1 or 2 people were asking whether or not they could go in the back room into the break room to pray, that would not ordinarily be an undue hardship, and the same once again with a not-for-profit.

Just because you are a not-for-profit does not mean that even though it might have some impact, that you shouldn't allow that situation or that it wouldn't be appropriate and not be an undue hardship for you. Again, that is a fact-sensitive issue, but typically we find with most employers it would not be an undue hardship.

Similarly, the ability to wear religious garb, that might be appropriate, might not be appropriate, typically would be permissible. Take the situation of somebody who is a person who's on the phone all the time and most of their contact is over the phone.

Let's assume that they are attempting to solicit contributions for the not-for-profit. Under those circumstances, the religious garb is a non-issue in most cases. Moving on to slide 5, and again, we will take questions that you can email to Bob Amberg during the course of this that we will take at the end of this presentation.

Moving on to the Age Discrimination Employment Act, that prohibits discrimination against individuals age 40 or older with respect to any condition of employment. And again, while you see that this applies to 20 or more employees, because it's different than Title 7, once again remember that there also will be state or local laws that would impact on this.

In some jurisdictions, for example, the age doesn't matter at all. It doesn't matter if it's over 40 or under 40, if you're discriminating against somebody based on age, that persons could be 25 and still have a valid claim under state or local law.

The Americans with Disabilities Act of 1990 prohibits discrimination on the basis of disability, perceived disability or history of a disability. So the more obvious situation is someone with a disability who is asking for under the law a reasonable accommodation would be appropriate. This is on slide 6.

Under the law, somebody might have a disability, but a perceived disability would be the same situation. Let's assume, the context used to come up at the beginning, when the ADA was initially passed, some of the examples were things like if somebody was perceived to have AIDS, but might not have AIDS if they're HIV positive.

If that's perceived as a disability and the employer treats them differently in the workplace, then they would be covered by the ADA. Similarly, a history of a disability comes up in situations where somebody, for example, may have had cancer and they are in remission and they've been more than five years, so they're considered medically to be cured, in some respect; then even though they have the history of a disability, if they were not hired into the workplace because you were worried about your healthcare costs, that would be a history of a disability and it would be a violation of the ADA.

Under the ADA, if you were to look at slide 7, it requires reasonable accommodations for qualified employees if it would not be an undue hardship to the employer. The keys to that would be "qualified employees." So, for example, if you have two employees who you think are terrific and you've made a decision that one is more qualified than the other for a promotion or for hire, if it were an applicant, then "qualified," if it's based on the essential functions of that job and not non-essential functions, then you have a right to pick the one who is more qualified for that position.

If you find that two candidates are equally qualified or a person with a disability is more qualified for the position but needs some reasonable accommodation to perform the essential functions of that position, then you would be required to go through what's called an interactive process to talk with that person and determine whether or not there's some reasonable accommodation that would not be an undue hardship that you could make.

If you get involved in that situation, oftentimes that's where you pick up the phone and you talk to someone who, if your in-house counsel, as many of the people on the phone are and you can handle this situation, that's great, but this may be one where you're in-house and you say, "I have a little less expertise and I need to reach out to somebody," we get calls on things like this to say let's talk about the reasonable accommodations that would be appropriate or wouldn't be appropriate under this situation."

Going to slide 8 is the Family Medical Leave Act, and the FMLA requires and applies to the employers with 50 or more employees, and this is primarily a question of unpaid -- because that's what the FMLA requires - unpaid medical leaves under certain circumstances which are listed as serious health conditions, birth/adoption of a child, serious health conditions of a family member, are a few of the examples.

But it is primarily a request for unpaid leave, and under the law today - and it's much more developed than it was in 1993 - this is one that's easier to follow the right process to administer, because a lot of it is a question of filling out the right paperwork. The questions of how this interacts in your workplace is something Rich will talk about a little bit more, because of the interaction with the ADA, for example, interaction with workplace practice and interaction with whether you decide to give somebody a paid leave under some circumstances.

Finally, on slide 9 we're talking about sexual harassment in the workplace, and with each of these topics, what we're trying to do is give you an overview and a snapshot for issue identification, because we could do an entire webcast solely on any one of these slides. And under the law, if you were to break it down into the quid-pro-quo-type harassment which is, "You do something for me and I'll do something for you," the situation of a supervisor typically saying that, "In order for you to get time off or a raise or something else, a promotion, then we want you to do something for me, which is to go out with me," for example.

And that's the difference, remember, welcome or unwelcome sexual advances that you see at the top on the first bullet on this slide. Hostile work environment, which is more of could be employee to employee, could be supervisor to employee, could be outside customer-vendor fund, somebody who's funding your organization; that is much more of the statement and the conduct which again, once again, many employers have policies in place.

This is question of training, this is a question of ensuring that you have the right complaint resolution mechanism in place, and this applies, even though we've titled it "sexual harassment," this really applies to all of the areas that are protected under the law, including age, sex, race, disability, that we've mentioned previously, and this is the one which oftentimes requires more training and more employee training as well.

Going to slide 10, that's where we talk about always watching out for the additional state local law protection. So I'm going to stop here and ask for any questions or comments from the panelists before we go on to the Fair Labor Standards Act section.

Steve Garrett - *Texas A&M Research Foundation - Associate Vice President Counsel*

This is Steve Garrett. I'd make one comment about the employee, trying to determine who is an employee in your organization and be careful with your volunteers as to whether they're true volunteers or do you provide remuneration to them.

A lot of times organizations will forget about these individuals and depending on your remuneration policies, they may be counted or they may not, depending on your jurisdiction. You should be careful about that.

Phil Rosen - *Jackson Lewis, LLP - Managing General Partner*

And similarly, if you looked at the sexual harassment or other harassment issue, then you might find that a volunteer is not considered and, you know, you're not worried about the number of employees - because that's a very good point - but you are worried that they are in your workplace and they are either having an impact on other employees by what they say and how they say it - racist remarks, inappropriate remarks - or maybe that they feel that there is a highly charged atmosphere or inappropriate statements that are made by co-employees.

Unidentified Speaker

If I could just add one point to what Steve just said about being careful with the counting of our volunteers, the same concern arises in regard to contractors.

Just because an entity deems someone a contractor, even if they have them sign a contractor agreement, if in reality they're an employee, they come to work, they sit at a desk every day, you're just paying them in a different way, you will not be able to universally exclude them from being counted as an employee for jurisdiction just based on your assertion that they are a contractor. That's an area where many employers run into some legal concerns.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

This is Bob speaking, and let me just share a couple of quick practical illustrations of the material that was just given. Let me start with the FMLA.

Our organization has been involved in a few disputes on FMLA and they center on the need to send out notice to place an employee on FMLA within two business days, and so also, a main issue also is when they are scheduled to come back and having the right documentation in place for their return to work. Sometimes disputes arise over that.

In addition, it's not just for the employee but for immediate family members; spouse, children and parents, and the employer is still obligated to pay for the employee's health insurance coverage.

On the discrimination and civil rights issue, I think the organization ought to have some transparency, a place for people who feel they are discriminated against to go without fear of retaliation, and the organization needs to be set up to remedy situations. Things that we've done here include site visits by our corporate staff, as well as diversity training and counselors and things of that nature.

Religious accommodation, my organization is affiliated with the United Church of Christ. We do have certain educational programs about the United Church of Christ, our CEO is a minister, and so we do get into some of these religious issues, but all of those religious-oriented activities are strictly voluntary because we don't want to force any of the organization's relationships or religious beliefs on any employee.

Age Discrimination in Employment Act requires significant language in releases. If you're settling up with an employee on severance or things of that nature and you want to get a release, if they're over 40, ADEA has certain required language, and I'm sure the attorneys of Jackson Lewis can assist with that. And that's my comments.

Richard Greenberg - *Jackson Lewis, LLP - Partner*

Okay. So, Bob, I'm going to move on now and go into the wage an hour area.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

Great.

Richard Greenberg - *Jackson Lewis, LLP - Partner*

Okay. This is Richard. The next two topics that we're going to briefly discuss are both in the wage an hour arena.

The first is going to be a general overview of the Fair Labor Standards Act. Two pronged, basically touching on volunteers and touching on the major exemptions under the law. And then, finally, for a couple of minutes, we'd like to lay out some problem areas we see every day.

First, I'd just like to make one initial comment, and this is one thing that all of our wage-an-hour attorneys say on a daily basis. No matter how many years we practice it, no matter how sophisticated an employer is, there isn't one employer in the country that doesn't have some type of wage-an-hour violation.

The laws are arcane, the Fair Labor Standards Act was written in the thirties, numerous state laws add additional requirements. So if everything I'm saying here is like, "Oh, my god, we don't do that," don't think in any way that your organization is out of the ordinary. These issues are universal to all organizations.

So let's start with the Fair Labor Standards Act. The Fair Labor Standards Act is a federal law that governs wage an hour, but in reality, the Fair Labor Standards Act is really only concerned with two main issues.

First, whether or not employees are exempt or nonexempt. If an employee is exempt, which I'll touch on in a moment, they are not entitled to overtime pay or minimum wage. If an employee is nonexempt, they're entitled to minimum wage and overtime.

So the first evaluation under the law is simply whether or not someone is exempt or nonexempt. And then the second issue is, assuming that someone is nonexempt, whether or not they're receiving minimum wage, which is currently $5.50 an hour, for their first 40 hours of work, and whether or not they're receiving time-and-a-half minimum wage or time-and-a-half their regular rate of pay for all hours worked over 40 in a work week.

And there are also loads of discussions in the statute regarding what time is compensable, but the general concept here is that many, many, many of the areas where there are wage-an-hour disputes - commissions, bonuses, items travel pay, items such as that - those are almost universally covered by state law. In general, under federal law, it's really just minimum wage and overtime.

On slide 11, we put a notation just regarding New York law and New York's higher (ph) minimum wage merely to highlight the issue that just because you're in full compliance with federal law does not mean that you're immune to wage-an-hour liabilities under state law. In fact, using New York as an example, it's really scary because under federal law, the worst statute of limitations is three years, while under New York law for a violation, an employer can be required to go back six years as a matter of course.

If we turn to slide 12, we're now going to touch on the concept of volunteers. In the nonprofit setting, volunteers are permitted as long as they are performing traditional volunteer work. This is big difference from the for-profit sector.

In the for-profit sector, while many entities use volunteers and don't pay them, it is technically per se unlawful. While there can be certain sub-minimum wages and items requested from the government, in general, you cannot volunteer in the for-profit sector like you can in the nonprofit sector.

However, there are a couple of more terms that I just want to get out there, and I think the best way of doing this is reading exactly what the U.S. Department of Labor has said in opinion letters. What the U.S. Department of Labor has stated is that, " Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of religious, charitable and similar nonprofit corporations which receive their services.

The individual's intention is critical in determining whether the performance of work for a charitable private sector organization truly is voluntary. It is important to note that a volunteer cannot displace an employee."

So, simply put, and to try and summarize this is that it is permissible to have a volunteer. That volunteer must be doing traditional volunteer work, which generally should not be work being performed by paid employees. The volunteer should not displace a paid employee and there should be a clear understanding with the volunteer at the beginning of the relationship that there will be no remuneration.

Assuming that there is a misclassification of someone as a volunteer, there can be liability. We'd like to talk about in the next minute or so all the potential liabilities and items and actions that can be taken to potentially decrease those liabilities, and we're still on slide 12.

The first type of liability would be back wages. Obviously, if a volunteer is found by the Department of Labor through an awarded or through an internal claim or by a court through a lawsuit to have been a common law employee, that person would be entitled to back wages at least minimum wage and time-and-a-half minimum wage for hours over 40, subject to state law, for all hours worked.

There is really no defense to that if a finding is made that the individual was an employee and not a volunteer. The one thing that an employer can do to limit liability is that an employer can, even for volunteers, maintain records of volunteer hours work, so that then, even if someone makes the claim, they can't just say, "I used to volunteer 70 hours a week," and the employer having no ability to refute it.

The second major potential area of liability for misclassification is tax penalties. As we know, for employees we need to deduct Social Security, we need to deduct payroll taxes, we need to deduct worker's compensation, depending on the state, we need to deduct short term disability.

If we don't do that and someone is found to have been a employee, those are all monies that are going to be owed to the state. There really is not much of a defense to that whatsoever, other than to just make sure as much as possible that the practice of volunteers is regularly audited and that a department doesn't try and reduce costs by where there are two random separations suddenly saying, "We don't need to increase headcount, we're just going to replace them with volunteers."

The third major area of liability for misclassification of volunteers is in the benefit realm, and this is the area which unfortunately has the highest potential of liability; but fortunately gives an employer the most ability to protect itself from liability. Under most benefit plans it says that, for example, all active full-time employees are entitled to benefits.

If, for example, a volunteer -someone who is classified as a volunteer - is later found to have been a common law employee, technically, that person was eligible for benefits under the plan and the company and the employer and the plan could be liable

for any outstanding medical costs that this person had to handle out of pocket. This could be an extreme measure, especially in a situation where someone has a tragic accident.

However, to minimize these liabilities, an employer is given broad discretion in regard to its benefit plans. An employer, pursuant to its benefit plan, subject to certain limiting principles, can declare what classifications are eligible and ineligible for benefits and can put magic words in to the effect of "as classified by the employer."

So, for example, if a benefit plan says that anyone who is classified by the employer as a volunteer is ineligible for benefits, even if that person later asserts a claim and is found by a court to be a common law employee, that language in the benefit plan is almost universally a complete defense to any allegations for deprivation of benefits. It would not be helpful in regard to the tax issues or the wage-an-hour issues, but it would be helpful in that realm.

So that was a couple of minutes primer on volunteers. Now we're going to move into another prong of the FLSA, which is the concept of exempt versus nonexempt work, and what we'd like to do in about or 5 minutes is go over the major exemptions in a very thumbnail sketch and then point out common areas of misclassification that we see on a day-to-day basis.

Just as an aside, we want to point out that we are not at all noting every FLSA issue we see and there are loads of other major FLSA issues that we come up that we just will not be able to touch on today, the primary one being off-the-clock work. So I don't want anyone to feel that this is sort of an overall primer on the law.

So, turning to the exemptions, there are really 6 major exemptions under the law, and not all of these are respective by different state laws and some state laws even impose harder standards. So once again it points out the need to, after doing the federal analysis, always move on to the state analysis.

But the 6 major exemptions are first the executive exemption. To be an exempt executive, the individual's primary duty, while that's not a per se quantitative test, we do recommend as a matter of safety that you always think of it as being 50% of the time, and in fact, 60% of the time is required under various state laws, specifically, California.

But the individual's duty must be the management of a part of the business and he or she must regularly supervise 2 full-time employees per week or the equivalent of 2 full-time employees, such as 4 part-timers. Documentation of this supervisory responsibility is vital, especially if there are only 2 or 3 subordinates.

The second major exemption is the administrative exemption. In order to be an exempt administrator, the individual must be performing non-production work - it cannot be related to the productive work of the enterprise, but back-office work, such as human resources, accounting, items such as that - and the individual must regularly utilize discretion and independent judgment in performing new duties.

That means that the person really needs to think. If it doesn't matter if there's a manual that the person has to read to follow, if after one week on the job, as, for example, most accounts payable and accounts receivable clerks do, they really are just following rote procedures, they will not qualify as an exempt administrator because there is not sufficient independent discretion and judgment.

The third major exemption is the learned professional exemption. This basically requires an individual to have an advanced degree, which could be a college degree, that is necessary for the job, and in performing the job the person utilizes independent discretion or judgment.

Any job that just requires a college degree but not in a specific field generally is not a learned professional job. However, an accounting job, which requires someone to have an accounting degree and in which they really perform accounting work utilizing independent discretion and judgment, could qualify for the exemption.

The creative professional exemption is the next exemption we want to discuss, and that is really what it says it is. It's any job that requires a great deal of day-to-day creativity; an artist, a journalist - a real journalist, an art director. Someone who can definitely demonstrate on a day-to-day basis that their work emanates from their invention, imagination and talent.

The next exemption is the outside sales exemption. In order to qualify as an outside sales employee, the individual must spend at least approximately 50% of their time outside of the office making sales. This a widely misclassified exemption because many employers feel, well, the person works inside but they're calling people on the outside and they go to a meeting every now and then, so they're an exempt outside salesman.

That is not sufficient. They need to be significant time outside of the office, making and closing deals.

And the final exemption is a computer professional exemption. While computer professionals can also qualify for, for example, the administrative exemption, if the person is the head of information technology, or that same person for the executive exemption if, for example, they're supervising 10 MIS people, there is a specific computer professional exemption for those who perform systems analysis and programming.

The one thing I'd like to point out here is that in almost every organization there is your MIS person who sets up computers when people start, who comes and troubleshoots a word processing program. While that person may, on some occasions, qualify for the administrative exemption, that person does not qualify for the computer professional exemption because they are not doing computer systems analysis or programming.

The major areas of misclassification that we see on a daily basis that we'd like to talk about today are threefold. The first one is the one I just mentioned, which is technology personnel. The far majority of IT personnel should be classified as nonexempt. It is a major issue.

Often these people work extraordinary hours, so if there is any back-wage claim and there's no records of hours worked, liability can be immense. So one recommendation from today is that each organization strongly review its IT personnel for classification.

The second area that we see a major misclassification is telemarketers and other inside sales personnel. In general, if an individual is doing inside sales, unless that person is making over $100,000 a year or really has broad, broad independent discretion and judgment where you could argue that they're more of a broker than a salesman, that individual is nonexempt, and we have seen more and more claims brought by the Department of Labor and audits over inside sales personnel.

And the final area we'd like to point about in this realm are administrative assistants and executive assistants, and many organizations take the position that administrative assistants and executive assistants, because they're so important to the way we function and often have access to confidential data, are exempt as a matter of course. Unfortunately, that's not the case.

In general, an administrative assistant or an executive assistant is not exempt, is a nonexempt employee unless they are engaging in independent decision making on their own. So, for example, I may work for the president of the company and I may be doing highly confidential things all day long, but if my day is determined by the 10-point checklist that's left on my desk in the morning and I just follow along that checklist, I am a nonexempt employee.

If, on the other hand, I handle phone calls on my own or if the boss is out, I say, "Well, this is a matter that must deal with development, I'm going to call development, I'm going to explain to them what's happening and I'm going to have development call back," then there's an argument that the individual could be an exempt administrative employee.

At this point, on the wage-an-hour piece, I'd like to put it out to the panel and see if the panel has anything to add.

Steve Garrett - *Texas A&M Research Foundation - Associate Vice President Counsel*

This is Steve Garrett. The only thing I have to say about the volunteers is they can't, even in the nonprofit world, that they can't be doing the same kind of services that they're normally hired to do.

The second thing is that you really ought to get a written statement from them that they understand what they're doing is volunteer work. That way if there's an argument later on, you've got their statement saying that they weren't expecting to be paid, this is to be voluntary, and it really helps, because I've run into that problem before.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

And this is Bob. On the Fair Labor Standards Act, we have had visits to our facilities from the Department of Labor doing audits, as I believe it was Rich pointed out, and we are looking at our classifications, and that's what the Department of Labor is interested in. And so we can confirm that what he's saying is true and that we have to be very careful in that area.

And with nonexempt employees, there is some class action activity that was publicized here in California involving, I believe it was Farmer's Insurance, where their insurance adjusters were getting together to file a class action against the insurance company for failure to provide meal breaks and things of that nature, and so the documentation of those meal breaks becomes extremely critical in terms of making sure that the employees are getting the appropriate breaks and you don't have to be subject to an action that would require you to pay them large sums of money for the employer's failure to document.

Richard Greenberg - *Jackson Lewis, LLP - Partner*

Since we're running a little behind, I'd like to move on now to the attendance and leave section of the presentation and just spend a couple of minutes on this. Everything that I will be speaking of now is located on slide 14 and 15.

The main focus here isn't so much attendance, which is due performance management, but really leave of absence issues and just primer on issues to think about. The first major issue to think about whenever an employee needs a leave of absence is whether or not you're FMLA covered, and if you are FMLA covered, to make sure you get the proper notices, give the person up to 12 weeks off, the continued health benefits and reinstate them.

Separate and apart from the FMLA are the accommodation obligations under either the ADA or applicable state disability laws, and those laws can require an employer to provide an accommodation even in excess of the 12 weeks required from FMLA to provide leave and accommodation based on a medical condition to the extent it doesn't impose an undue hardship. It's the same concept of someone with a bad back saying they need a special chair, it's the same accommodation analysis.

The third prong of this is the employer's own leave policies. It is so often that an employer calls us and says, "Well, we don't want to do this, we don't want to do this," and we do a legal analysis of them and we say, "Well, there's a risk. You could get away with this action."

Then we look at their policies and their policies require them to take this action. So it's very important to review and audit your leave policies to make sure that they are very consistent with the corporation's goals. In this context, worker's compensation and short term disability policies should be strongly considered, because in general, both of those policies should be phrased as solely monetary benefits.

Or if they're phrased as leave of absences, should note that they run concurrently with FMLA or any other company leaves, because one of the things that I hate in my job is when an employer calls and says, "Someone's been out on worker's comp for two years. Can we let them go?"

And I say, "What have you ever told them about the status of their employment?" And they say, "Well, we've always told them that we have a job for them and we've never said anything to the contrary." And then I'm forced to give them negative advice.

So the recommendations that we have on this part will be to audit your leave policies to make sure they're as consistent as possible while in compliance with the law and to always engage in a three-step analysis of legal issues. What is, per se, statutorily required like FMLA, what may be a legal requirement, like accommodation issues, and what do our policies require.

I'm now going to turn it over to Phil to move on to the discipline piece.

Phil Rosen - *Jackson Lewis, LLP - Managing General Partner*

If you think about, both from a legal perspective and best practices for discipline and termination, the kinds of issues which I've seen come up and we've dealt with, when you're dealing with not-for-profits, are things such as you've got a variety of categories of individuals, and I'd break it down primarily for discipline and termination purposes into employees, volunteers and then you have the upper management - let's call it the CEO level for a foundation or an executive director for some organizations or key administrative person, because you have a number of things that come up.

One might be, for example, that you have a volunteer yet you're looking to end the relationship with that volunteer, and to me, oftentimes many of the same rules are better rules to follow, because you may find after the fact that that volunteer was truly an employee under the law. So again, I find that the best practices tend to apply to both the employees and the volunteers.

In terms of the higher level individuals, what tends to happen oftentimes is that when you're dealing with discipline and termination issues or ongoing workplace conduct issues, that it is oftentimes people focus on the employees or the volunteers, and yet we get calls all the time which might be either from an executive director to say, "I have the following issue which has come up," and it's an issue that deals with an allegation of harassment in the workplace where they say, "I'm involved and how do I handle this?" and the interaction between the board and that executive director.

Or you have board members who are saying, "We don't believe that our top official is doing the kind of job that we need. How do we appropriately handle the either discipline or separation of that relationship?" both from a legal standpoint as well as from, oftentimes, a publicity standpoint, so it's handled appropriately.

So if you go through things like discipline on slide 16, obviously, performance reviews are something which are oftentimes a critical component to ensure that you're giving someone notice if you think that there's a problem. Performance reviews oftentimes aren't the only issue, because if there's a violation of workplace conduct, which is an allegation of harassment in the workplace, then you're not going to wait for a performance review because you want to be able to deal with that immediately, doing the appropriate investigation and taking proper remedial action, if appropriate.

And oftentimes with the higher level individuals, it was a performance review or some annual evaluation done for the higher level individuals as well. Progressive discipline, obviously, while you need caveats in your policies that might deal with - you might have an employee handbook, but you want to ensure that you've given yourself appropriate latitude based on the fact of the circumstances of the case, so that if someone is accused of theft, you know, where they've stolen some money or they've inappropriately handled contributions that have come in, then that does not mean that you've got to warn them on day one and it's only after the second or third situation.

Obviously, that might be appropriate for separation immediately. Timely, consistent, impartial, the biggest issue tends to be - and oftentimes, in charitable organizations, you're trying to maintain and keep employees, so that a lot more flexibility where you begin to say, "What's the right balance that I have when I'm giving leaves to various individuals and being a lot more flexible?"

Then you have somebody who comes in and asks for the same kinds of accommodations and you decide not to give it in that situation, fairness and consistency. Slide 17, which deals with termination, obviously, we're going to talk more about best practices in hiring in a moment.

But ensuring that you've maintained at-will employment with the majority of your employees, and the reason I say majority is because oftentimes you will have an executive director, for example, who might have an employment agreement. That's usually the one exception, is that higher-level individual.

You want to do a thorough investigation, you want to thoroughly document it, no matter what the situation is. The discharge or separation meeting, as I believe it was Bob mentioned, in terms of releases, if in fact you do decide, voluntarily or involuntarily, that there's going to be a separation of an individual at any of these levels, then it's appropriate to ask for releases. And if it covers a person who's over 40, then there are certain requirements under the Older Worker Benefit Protection Act in terms of what should be in that release.

Post-termination procedures as well, remember that in terms of somebody who has now left your employment and is going to another organization, and you get a call from another charitable organization where you've often known this member of the board for years and they're calling to say that, "We're thinking of hiring X, Y or Z, an individual who you have separated from employment."

Under circumstances where you've decided to involuntarily separate that person, it's important that you ensure that with references that are given, the same rules oftentimes apply where you say, "I'd like to get as much information about that candidate if they were thinking of hiring them, yet I only really want to give name, rank or serial number because I'm worried that it might come back that I'm blackballing them in the workplace and I can't truly prove that they were a substance abuser," or "that there was theft that we can actually prove to that individual."

So again, oftentimes these become issues because of the publicity portion of it, in terms of, you know, the worst thing you want oftentimes, because your funding sources may have problems as a result, is to have your organization's name out there in some article based on somebody who has been separated and what the circumstances were, so they need to be handled very carefully.

So with that, that covers the termination section, and maybe I can stop before we go into the next section to get any comments from the panelists on either of these sections, whether it be attendance and leave issues or discipline and termination.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

I will lead off here. This is Bob. I'd like to acknowledge at this point our VP of Human Resources, Nada Battaglia, who is here with me and has helped me with this program. But Nada has developed a pre-termination checklist which goes along with the material that was just discussed, and the key element for us when we do terminations is we don't want any termination to be a surprise to the employee.

It's very important that there be appropriate communication concerning performance, and some of the items on this checklist which anybody who's listening to this, if they want to email me at the email address, robert.amberg@rhf.org, I'll be happy to provide you with it. But it has things like discussed and approved by regional, by HR, has the personnel file been reviewed; what is the employee's disciplinary record during the last 12 months, have you given full consideration to the employee's length in service; past contributions, has there been a recent recommendation submitted on behalf of the employee.

Important things like that to make sure that we have done our due diligence, because as all of you know, this is a very emotional situation for everyone involved and we want to defuse as much of that emotion as possible so that when a meeting takes place to terminate the employee, it is not a big surprise. So I will just leave it there, because I know we're trying to keep on our time frame here.

Steve, do you have anything on that?

Steve Garrett - *Texas A&M Research Foundation - Associate Vice President Counsel*

No. Really, you've pretty much covered a lot of the type of practices that we do here. One of the biggest things that I think everybody kind of gets the gist of this through this whole presentation is we try to focus on education, education, education.

The more you know and the managers know, the less trouble or less work I have in that regard coming into my door and so I always try to take the opportunities to make sure that people are-kind of quiz them a little bit here and there just to make sure everybody's up to speed on the latest status of the law in the cases, so that they can do their job better and not have to take time out of their regular stuff to come down and talk to me about some things that went wrong or something along that line.

Phil Rosen - *Jackson Lewis, LLP - Managing General Partner*

We do, for example, the same concept - this is Phil talking - a tremendous amount of management training. And you, because this is all attorneys on the call, may be able to do that yourself in house, but oftentimes it's not only the legal but it's the practical.

Oftentimes when I do training which covers all of the laws that we're talking about here, I may just start out to say on a topic, let's say it's talking about interviewing, "Okay, everybody, interview me. Ask questions," and all of a sudden it gets quiet in the room among the management team as they try to figure out, you know, what they should or shouldn't ask, and then you can make a list.

Same thing with terminations. You know, oftentimes, here's the following scenario. Somebody complains about harassment in the workplace. It happens to also be a person who was referred to the organization by a board member.

How do you handle that investigation, and if you find that something is inappropriate, how do you handle the termination? So the whole layer of issues that come with it, but the more knowledgeable your management team is to anticipate issues and understand the law, the better off you are.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

And of course that situation you've described that deals with more complex issues, when the general counsel reports to the person involved and you've got the board involved and that sort of thing, but we'll defer that to another webcast. Are we prepared to go to the next section?

Phil Rosen - *Jackson Lewis, LLP - Managing General Partner*

I believe so.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

Okay. Slide 18, please, best practices in hiring. The employment application is a very, very critical document and I think, you know, we have developed one that I think is extremely current and well suited, and the one best practice that I would certainly recommend in the employment application is to require your job applicants to write the entire application in their own writing.

We've learned that the "see attached" when you deal with employment history, many employees are inclined to just throw a resume in there. We like to have our specific questions answered.

Real quickly, we have name, address, prior addresses for a long period of time, education, a thorough description of that; references - three references, employment history, name of employer, type of business, address, exact reason for leaving; job title, name of supervisor, supervisor's job title; description of work and responsibilities, may we contact - yes or no.

We deal with some situations where candidates who don't want, obviously, their current employer contacted until we actually offer them the position and we, of course, respect that. But once we do offer an employee a job with the company, we do want to contact previous employers.

We have a general information check section. Have you ever been discharged or asked to resign from any job? We have a description of any kinds of criminal activity in the employee's past and we actually ask for misdemeanor or felonies and a conviction, not an arrest, of course.

We state that conviction will not necessarily disqualify you from employment but failure to admit is cause, and that kind of thing does come up on our background checks. We get into issues of criminal activity convictions appearing on that background check not disclosed on the application or denied on the application, and we take a pretty aggressive response to that, particularly because we do healthcare, that we will enforce that provision of the job application, and it gets, you know, pretty difficult at times.

Now, there are issues of expungement and when a criminal conviction has been expunged from the record, that we will certainly allow the employee to deny that, that there's no need to disclose that as is our right and the employee's right.

We have in the job application the Consumer Reports' disclosure and authorization, which deals with another bullet point in the PowerPoint that I'll get to in a few minutes, as well as an authorization and release for references, education record, schools, employers, along with a paragraph at the end releasing schools, past/present employers and all individuals from any and all liability for releasing this information, which is very important.

The at-will statement is very important as well. This confirms the fact that you, the employee or the employer, may terminate the employment at will. The statement that the application is being truthful is very important, that the applicant will abide by the rules and policies or be subject to termination, a statement indicating whether the job requires a post-job offer medical examination, a substance abuse screening, a background check, et cetera, all of which we believe is a best practice here at our company and we have found it to be extremely helpful to us to make the right hiring decisions.

Moving on to the next slide, permissible interview questions. Let me just read a few of these that are questions to avoid at all costs.

What is your maiden name? How old are you? What year did you graduate from high school or college? Where were you born? Are you a U.S. citizen? That's an interesting accent - where is it from? Are you married, single, divorce, separated, engaged or widowed?

In the interest of time, I will not read any more of this. This is available, again feel free to send me an email. This is Nada's PowerPoint presentation, which I will be happy to share with all of you.

Background Check Fair Credit Reporting Act. The law does require a disclosure to the employee about getting this information and obtaining consent, and we must have them complete the appropriate disclosure and authorization form.

If we are to deny employment based on the results of a criminal check or other consumer report in accordance with the Fair Credit Reporting Act, we must send a pre-adverse letter summary of rights under the Fair Credit Reporting Act form, a copy of their criminal report if we have one. And so this is something that is very much a part of our employment process and something that's very important to make sure that we comply with all of the documentation requirements.

Arbitration agreements. We in California have a Supreme Court case that legally authorizes us to require arbitration agreements for all employees, and we do.

Arbitration agreements really take the wind out of plaintiffs' attorneys' sails in any of these dispute cases that arise, and I can't stress enough how important it is that your hiring package includes a mandatory arbitration agreement. And we have used them, we continue to use them. We have had case after case where the arbitration agreement was presented to plaintiff counsel and the interest in litigating obviously wanes after that.

Drug testing. We perform pre-employment drug testing on all of our employees. We have also found that to be an extremely useful tool to screen out employees who cannot pass the requirements of the company, which is a clean drug test.

It's something that we've implemented in the last five years or so, and we've had a couple of cases where employees have failed to show up for their drug test, in which case we terminate the application process at that point.

There's also, obviously, during employment what we call reasonable suspicion drug testing, which is not really a part of this program, but we would certainly encourage you to contact your counsel to make sure that if you do reasonably suspect someone is under the influence of alcohol or drugs, that you handle that in an appropriate fashion.

That being said, that concludes my comments, and we have one email that we've received inquired about CLE credit for attending this seminar. It's something that I'm not very familiar with. I don't know if we have an ACC representative that can answer that, but I will assure the person who sent that email that anybody who's interested in CLE credit please contact me - it's Bob Amberg - and I will be happy to follow up, and if there is credit available, we will get it for you.

Unidentified Speaker

Just a comment for a moment, Bob, that in terms of all of these best practices that you mentioned on hiring, it all starts with the employment application, is the way it's put on the first of the slide and you deal with. I think really it does run the range of employment.

Steve mentioned before, no surprises. I think overall if you try to think of yourself as an employer that wants to ensure you will create the best practices in employment, then oftentimes the reason people sue is more because they don't feel they were treated fairly in the workplace than it is that they necessarily feel that there's some particular law which was violated.

It's more of this feeling that, "I don't think I was treated right and it must be because of my so-and-so," fill-in-the-blank protected classification. So if you are handling this where, from day one, for example, with an employment application, you're laying out the ground rules that it's an at-will statement, that you expect them to live up to the policies and procedures; that if there's a post-job-offer medical examination that you're having to fill out the correct forms, that if there's a background check, they understand that and they fill out the Fair Credit Reporting Act forms.

That if it's during employment, that the FMLA form that you mentioned is appropriately filled out and the policy followed. If it turns out that you make a decision as an employer that you are going to allow broader leaves, because what oftentimes in the not-for-profit situation attracts people is not the money but the things they do and the work that they do, and the foundations they work for and the causes and also the flexibility in terms of employment, they know that up front.

And maybe your employee handbook is not going to have a significant section that deals with leaves because you're going to give more latitude than you otherwise would give. So there's a certain amount of value which goes into the discussions that lead to practicably what makes sense from an employer's perspective and how do I apply that so the employee feels that they're being treated right.

Just an aside, before I stop talking, we also, if somebody wants it, background checks. Particularly in, I think, not-for-profits it comes up more often, you may even have people who are going door to door, for example, soliciting funds. You may have people who are dealing much more with individuals in substance abuse cases, for example, who are clients of a particular organization or program where they have a more fragile state and therefore, it's important that the social workers or others who are brought on board are carefully screened.

We'd be happy if someone wanted, as you've offered, to provide - if you just email to us, either to Phil or to Rich - some background on the Fair Credit Reporting Act so that you understand what the legal requirements are in a more detailed way. So with that, I'll turn it back to the others.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

Okay. This is Bob. It is about 11:05, I guess, 11:06. I'm told we have about 5 or 10 more minutes. I just received the word from ACC that we do not have the ability to give CLE credits, so that was the answer to that email.

I have one email I wanted to read here that asks us, "If we are recruiting a key management employee who refuses to sign the arbitration agreement, does this serve as a precedent for other employees in terms of requiring them to sign arbitration agreements?"

Richard Greenberg - *Jackson Lewis, LLP - Partner*

This is Rich and I'll take that. I mean, it poses some major concerns, especially in those situations where employment is a consideration for the arbitration agreement, because if there's a situation where you're trying to enforce an arbitration agreement against one employee and that individual says, "Wait, you've said the consideration for this agreement was employment but my boss was hired and he never signed this thing," there are certain courts that have held that in that situation, the agreement is not enforceable as there was not sufficient consideration.

There are arguments that could be made, however, that due to the different levels of the employee and the fact that this was an executive director, that the situation is distinguishable, but it is a concern. One way to potentially ameliorate that concern is to provide some other consideration other than employment or continued employment as a consideration for the agreement.

Phil Rosen - *Jackson Lewis, LLP - Managing General Partner*

For me - this is Phil talking - it breaks down into when you're dealing with arbitration agreements, you've got several levels. One is current employees, and if this is a key management employee who you've now decided to for the first time institute an arbitration agreement among your employees where you've never had it previously, that is a careful judgment you've got to make as to A, what's the consideration; and B, if somebody refuses to sign, am I going to change the terms where I say you have to sign it or you're going to be let go.

That's different to me also than a future employee where you're saying, "Anybody who we hire in the future, we're going to require as a condition of employment that they agree to arbitration agreements." Because I do believe that it does set some precedent and a lot more of it is the practical issue of why is this person not agreeing to sign and what impact might that have if other people know that that employee or applicant has refused to sign.

Is it because there's something in their past that I didn't know about? Is it something that they're more likely to be litigious that I ought to be thinking about? If you're setting up a program where you believe arbitration is the appropriate way to go for all employees, then if it's a current candidate, even though it's a key management person who you'd love to have on board, I would stick to your guns. That's just my overall philosophy.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

And this is Bob. I would certainly agree with you. I think you're raising a red flag by refusing to sign that arbitration agreement.

Can an employer require a physical exam? I think the answer is yes, from the Powerpoint presentation. What if a major health problem surfaces? Can you rescind the job offer?

Richard Greenberg - *Jackson Lewis, LLP - Partner*

I'll take that. I mean, first, let me just step back on one point. There was actually a recent case in the 9th Circuit which pointed out that while an employer, subject to state law, can require a physical examination, that can only be required after a conditional offer of employment is made.

And then building on that is after the conditional offer of employment is made, someone does not pass a physical and the physical shows that they cannot perform the essential functions of the job, with or without accommodation, then it could be the basis for not hiring the individual.

Phil Rosen - *Jackson Lewis, LLP - Managing General Partner*

But oftentimes that analysis becomes exactly as Rich described. You have to break it down into what are the essential functions of the job, can the person perform those functions with or without a reasonable accommodation.

So it is not an easy analysis. It's something which that's when you pick up the phone and you talk internally or externally with the best people within your organization or outside of your organization, both from a legal standpoint and from a medical standpoint, because it's not just a legal issue at that point.

Richard Greenberg - *Jackson Lewis, LLP - Partner*

I mean, one thing that we see all the time, and we counsel employers on, is employers spend a lot of money on physicals and items such as that, when all they really want to test is, for example, let's say it's a maintenance employee, their ability to operate a certain machine.

There is nothing unlawful whatsoever from during the pre-hire process, asking that person to demonstrate that they can operate the machine. If they can do that, then the employer does not need to incur the cost of the physical or run into any of the potential legal issues that can emanate from the physical.

Phil Rosen - *Jackson Lewis, LLP - Managing General Partner*

The issue here would be that with not-for-profits, it's more likely that you are in a relatively standard office setting other than potentially research-related issues where there's labs and lab work that needs to be done.

So I think oftentimes other than that I think it could be, you know, the in-house counsel - Bob or Steve may have other opinions - it's really only in, it's primarily in the lab-type setting where it might apply to not-for-profits more so than in some of the others.

Steve Garrett - *Texas A&M Research Foundation - Associate Vice President Counsel*

Excuse me, this is Steve. In lab situations or environment is important, from time to time, also fieldwork, when you have some of the projects you're going out in the field to do some work, you have some health issues can come up.

My experience is that we also too, we have someone go aboard vessels for extended expeditions, we don't really see those as being that big of a deal. A lot of times those are, once again, to point out, the offer of employment is made and where it's really important, at that point you ask people to take an exam which focuses on those particular health issues.

It's generally, although there are some exceptions, it's generally not an entire scan of everything they've got. You want to know, as it's important to the position, what are their health issues, if any, that are there.

And a lot of times in my shop here, we really do try to work with people who may be borderline about raising some real concerns. If they're the right candidate to be able to do that, really try to educate the managers and others that the health examinations are just that and they are not employment screens for other issues.

These are just the last validation of the person's qualification to perform that job, and that's really where we come from on those and that's how we treat those, and for the most part, that has been a non-issue for us. The worst we've had has been where somebody actually had about 2 or 3 characteristics that were very important to that position that couldn't pass the test, and that was more of an ego thing, I think, than anything else, but there's ways of dealing with that as well.

Robert Amberg - *Senior Retirement Housing Foundation - Vice President General Counsel*

Thank you, Steve, and thanks to Richard Greenberg and Phil Rosen. We're going to wrap up here. I just wanted to again let everybody know that this webcast will be available for one hour following the conclusion of the webcast and will be archived on the ACC website for a period of one year.

Going to slide 20, please take a look at the email addresses for both Phil and Rich, where you can ask them any follow-up questions you may have and my email address is also on the website. It's robert.amberg@rhf.org.

Any of the forms you've heard us discuss or me discuss, I'll be happy to make them available to you. I want to thank ACC and I want to thank our wonderful panel. It's been a great experience and I hope all of you found this webcast to be enlightening.
