APPENDIX 10

SUMMARY: HUMAN RESOURCES AND EMPLOYMENT-RELATED LAWS

(Adapted with permission from *Guide to Representing Religious Organizations*, published by the American Bar Association in 2009 from material written by Ann T. Stillman, Esq.)

I. Laws Relating to Employment Discrimination

A. Title VII of the Civil Rights Act of 1964 (Title VII)

Title VII makes it illegal to fail or refuse to hire or to discharge any individual, **or otherwise to discriminate** against any individual with respect to his compensation, terms, conditions, or privileges of employment, based on such individual's race, color, religion, sex (including based on pregnancy), or national origin. Title VII applies to employers engaged in any industry affecting interstate commerce, which have fifteen or more employees (including part time employees). Title VII also bans retaliation against any individual for exercising his or her Title VII rights.

Prohibited discrimination includes harassment because of race, color, religion, sex, or national origin. Two types of harassment are prohibited by Title VII: 1) quid pro quo and 2) hostile environment. Quid pro quo may be translated as "this for that," which means that this type of harassment occurs when employment decisions or expectations are based on an employee's submission to or rejection of unwelcome conduct. Hostile environment harassment consists of "comments or conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. The conduct is judged from the perspective of a reasonable person, by judging whether the conduct would substantially affect the work environment of such a person.

Title VII permits hiring on the basis of religion, sex, or national origin if such status is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business or enterprise. A BFOQ is one that affects an employee's ability to do the job and relates to the "essence" or the "central mission" of the employer's business.

Virtually every state has a statute that is similar to Title VII, although some state statutes are more comprehensive, including other categories for which employment discrimination is prohibited, such as sexual orientation. Additionally, many larger localities have civil rights ordinances.

B. Age Discrimination in Employment Act (ADEA)

The ADEA prohibits discrimination in employment of persons forty years of age or older. The ADEA applies to entities with twenty or more employees.

Under the ADEA it is unlawful to: 1) fail or refuse to hire, to discharge or to otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age; 2) limit, segregate, or classify employees in a way that would deprive an individual of employment opportunities or adversely affect his employee status, because of such individual's age; or 3) to reduce the wage rate of any employee in order to comply with the ADEA. The ADEA contains an exception applicable if age is a bona fide occupational qualification reasonably necessary to the operation of the employer's business. However, this exception is interpreted very narrowly.

ADEA prohibition against age discrimination includes a ban on harassment based on age, against employees forty years of age or older. The ADEA also prohibits retaliation for exercising rights protected by the ADEA.

C. Americans with Disabilities Act (ADA)

Title I of the ADA prohibits employment discrimination against a qualified individual with a disability. The ADA generally applies to employers with fifteen or more employees.

The term disability is defined as (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. The definition of disability is construed broadly in the ADA. A "qualified individual with a disability" is defined as a disabled person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

Under the ADA, "major life activities" include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include the operation of a major bodily function, such as the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Other activities may also be deemed major life activities. In addition, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when the impairment is active.

The determination of whether a person has a disability must be made on a case-by-case basis. Even if an individual has a disability, to be protected by the ADA, the individual must be otherwise qualified to perform the **essential functions** of the job. Some of the factors considered in making an "essential function" determination are: 1) the employer's judgment; 2) a written job description; 3) time spent on the job performing

the function; and 4) the consequences of not requiring the employee to perform the function.

Discrimination under the ADA includes the failure to make "reasonable accommodations" (e.g., the failure to allow use of a service dog in the workplace) to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business. The ADA also prohibits retaliation for the exercise of rights protected by the Act.

An undue hardship may not be claimed simply because the cost of an accommodation is high in relation to an employee's salary or because other employees complain. However, if the accommodation requires a heavier workload for other employees, an undue hardship may be found.

D. Equal Pay Act

The Equal Pay Act of 1963 requires employers to provide "equal pay" for men and women who perform equal work unless the difference in pay is based on seniority, a merit system, or some factor other than sex. The Act applies to employees who are: 1) engaged in commerce or in the production of goods for interstate commerce, 2) employed in an enterprise with employees engaged in commerce and that has a gross volume of business (sales or receipts) of at least $500,000, and 3) employed by health and educational institutions, including hospitals, pre-schools, elementary and secondary schools, and nursing homes.

E. Genetic Information Nondiscrimination Act (GINA)

GINA prohibits failing to hire, discharging, or discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because of the employee's genetic information. GINA generally applies to employers with fifteen or more employees. GINA also prohibits limiting, segregating, or classifying employees in any way that would adversely affect the status of an employee because of the employee's genetic information. GINA requires employers to keep confidential any genetic information that they have acquired, and generally prohibits requesting or disclosing such information, except under limited circumstances. The term "genetic information" includes information about an employee's genetic tests, the genetic tests of family members of the individual, and the manifestation of a disease or disorder in family members of the individual, but excludes information about the sex or age of an individual.

Under GINA, an employer may not request, require, or purchase genetic information with respect to employees or their family members, except in limited circumstances such as when an employee's family medical history is being requested or required by the employer to comply with certification provisions of the Family and Medical Leave Act or similar laws. Since "genetic information" includes the manifestation of a disease in

family members, employers generally should avoid even casually requesting information about a disease afflicting an employee's family member.

Employers must maintain an employee's genetic information on separate forms and in separate medical files, to be treated as a confidential medical record. Disclosure of such information by an employer may be done only in limited situations, such as: at the employee's written request; in response to certain court orders, or government investigations; and in connection with the employee's compliance under the Family and Medical Leave Act or similar laws. The requirements applicable to those limited situations are specific and employers should carefully follow the requirements before disclosing employee genetic information.

An employee who has suffered retaliation, been discriminated against or been subject to another "unlawful employment practice" in violation of GINA may be entitled to compensatory and punitive damages.

II. Other Federal Employment Laws

A. Family and Medical Leave Act (FMLA)

The FMLA requires employers to provide twelve work weeks of unpaid leave within a twelve-month period to an eligible employee for one or more of the following reasons: 1) the birth of a son or daughter or in order to care for such a newborn child, 2) the placement of a son or daughter with the employee for adoption or foster care, 3) a serious health condition of the employee, 4) to care for the employee's son, daughter, parent, or spouse who has a serious health condition, or 5) due to a "qualifying exigency" arising out of an employee's spouse, son, daughter, or parent being on active duty (or having been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation. A serious health condition is an illness, injury, impairment, or physical or mental condition that involves one of two conditions: 1) inpatient care at a hospital, hospice, or residential medical care facility, or 2) continuing treatment by a health care provider.

The FMLA also provides that an eligible employee who is a spouse, son, daughter, parent, or next of kin of a "covered service member" is entitled to a total of twenty-six work weeks of leave within a twelve-month period to care for the service member. The covered service member must be a member of the Armed Forces who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or otherwise on the temporary disability retired list for a serious illness or injury.

The FMLA applies to employers of fifty or more employees in twenty or more calendar work weeks, in an industry affecting commerce. In addition, elementary and secondary schools, without regard to the number of persons employed, also generally are covered by the FMLA.

An employee is eligible to take FMLA leave if the employee: 1) has been employed by the employer for at least twelve months, 2) has worked at least 1,250 hours during the twelve-month period immediately preceding the commencement of the leave, and 3) is employed at a worksite where fifty or more employees are employed by the employer within seventy-five miles of that worksite. Special rules apply to the instructional employees of elementary and secondary schools that have employees who are eligible for FMLA leave. Instructional employees are "those whose principal function is to teach and instruct students in a class, a small group, or an individual setting."

The critical aspect to FMLA leave is not the unpaid leave—it is the right of the employee to be reinstated to his or her position (or an equivalent position) upon return from leave. If an employee was receiving group health benefits at the commencement of the leave, the organization must maintain those benefits at the same level as if the employee had continued to work. An employer may deny job restoration to certain key employees, if necessary, to prevent "substantial and grievous economic injury" to the employer's operations. According to the FMLA, a "key employee" is a "salaried FMLA-eligible employee who is among the highest paid ten percent of all the employees employed by the employer within seventy-five miles of the employee's work site."

Employees may take FMLA leave intermittently or on a reduced leave schedule when medically necessary or for leave due to a "qualifying exigency." However, leave taken intermittently or on a reduced leave schedule for the placement, adoption, or foster care of a healthy child or for the birth and care of a healthy child is subject to the organization's approval, except for pregnancy-related leave that qualifies as leave for a serious health condition. Employees must provide thirty days' or other advance notice of FMLA-eligible leave events, when such leave is foreseeable.

Information about FMLA coverage must be placed in the employee handbook, if there is one, or in other written materials on employee leave and benefits. Employers must also provide individualized notices containing certain information to employees under circumstances specified by regulation, including when the employee informs the employer of the need or intent to take FMLA leave, or when the employer acquires knowledge that an employee's leave may qualify as FMLA leave. Prototype notices are available from local offices of the Department of Labor's Wage and Hour Division or at http://www.dol.gov. If an employer fails to provide adequate and timely notice, the employer may be liable for actual monetary losses sustained by the employee as a direct result of the failure, and/or for other appropriate relief, including reinstatement.

An organization may require the employee to provide a medical certification of a serious health condition from his or her health care provider or the health care provider of the relative for whom the employee is caring. The Department of Labor provides optional forms (Form WH-380-E, WH-380F and WH-385) that may be used for the certification. In addition, the organization may require periodic reports as to the employee's status and intent to return to work, as well as a fitness-for-duty certification upon return to work (unless such a fitness-for-duty certification is disallowed pursuant to regulation, collective bargaining agreement, or state or local law). An organization may require that

leave for a "qualifying exigency" be supported by a certification meeting regulatory requirements (Form WH-384).

B. Fair Labor Standards Act (FLSA)

The FLSA requires that all employees, except those who are exempt, be paid at least the federal minimum wage for all hours worked, and be paid overtime pay at time and one-half the regular rate of pay for all hours worked in excess of forty hours in a work week. The FLSA also requires that a record be kept of each employee's wages and hours. The FLSA restricts work for youths less than sixteen years of age and prohibits workers under eighteen from performing jobs declared hazardous by the Secretary of Labor. Finally, the FLSA prohibits retaliation for exercising rights protected by the FLSA.

The Act applies to employees: (1) who are engaged in commerce or the production of goods for interstate commerce; 2) who are employed in an enterprise with employees engaged in commerce and that has a gross volume of business (sales or receipts) of at least $500,000; and 3) employees of health and educational institutions, including hospitals, pre-schools, elementary and secondary schools, and nursing homes.

There is an exemption from the FLSA for bona fide executive, administrative, professional, and outside sales employees. For this exemption to apply, an employee generally must be paid on a salaried basis of no less than $455 per week, and perform a type of work that: 1) is directly related to the management of his or her employer's business, 2) is directly related to the general business operations of his or her employer or the employer's clients, 3) requires specialized academic training for entry into a professional field, 4) is in the computer field, 5) is making sales away from his or her employer's place of business, or 6) is in a recognized field of artistic or creative endeavor. Teachers are exempt as learned professionals, regardless of their salary.

The minimum wage and overtime requirements are inapplicable to certain religious workers, including nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order. This exemption has been narrowly construed by courts.

C. Worker Adjustment and Retraining Notification Act (WARN)

WARN applies to employers with 100 or more full-time employees. Such employers must provide their employees with at least sixty calendar days' notice before closing a facility or conducting a "mass layoff." A facility is considered closed when its shutdown results in an employment loss for fifty or more employees during a thirty-day period. A mass layoff is a reduction in force (other than a plant closing) resulting in an employment loss for at least one-third of the employer's workforce, numbering at least fifty employees, or at least 500 employees. An "employment loss" generally means (A) an employment termination, other than a discharge for cause, voluntary departure, or

retirement; (B) a layoff exceeding six months; or (C) a reduction in hours of work of more than 50 percent during each month of any six-month period."

D. Sarbanes-Oxley of 2002 (SOX): Application to Nonprofit Organizations

SOX is a law that was adopted in 2002 in response to a number of corporate and accounting scandals affecting public companies. SOX generally imposes requirements only on for-profit public companies. However, two provisions of SOX apply to nonprofits.

One of the provisions, the "whistleblower protection provision," can limit employment actions taken by a nonprofit organization against an employee. This provision prohibits retaliation, in the form of any harmful action, including interference with a person's employment or livelihood, "for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense."

The second SOX provision applicable to nonprofits prohibits actual or attempted: 1) record alteration, destruction, or concealment with the intent to impair the object's integrity or availability for use in a federal proceeding; and 2) any other obstruction, influencing, or impeding of a federal proceeding.

E. Uniformed Services Employment and Reemployment Rights Act (USERRA)

USERRA protects the job rights of individuals who leave their jobs for military service or certain types of service in the national disaster medical system. USERRA also prohibits employment discrimination against past and present members of the uniformed services, including veterans and members of the Reserve and National Guard and applicants to the uniformed services. Regulations under USERRA require employers to post a notice of the above rights for their employees. The Act applies to employees of any type of private sector employer, regardless of size.

USERRA requires reemployment if the employee: 1) leaves his or her job to perform service in the uniformed service; 2) ensures that his or her employer receives advance written or verbal notice of the service; 3) had five years or less of cumulative service in the uniformed services while with the employer; 4) returns to work or applies for reemployment in a timely manner after conclusion of service; and 5) has not received a less than honorable discharge. Employees must generally be restored to their job and to the benefits they would have attained if they had not been absent due to military service.

USERRA prohibits discrimination in initial employment, reemployment, retention in employment, promotion, or any benefit of employment because of an employee's application for membership in the uniformed service, membership or prior membership in the uniformed service, or obligation to serve in the uniformed service. Employers may not retaliate against anyone assisting in the enforcement of rights under USERRA, even if that person has no service connection.

While employees are on leave for military service, they have the right to continue their existing employer-based health plan coverage both for themselves and for their dependents for up to twenty-four months. Even if such coverage is not elected, the employees have the right to reinstatement in the employer's health plan when reemployed, generally without any waiting period or exclusions, except for service-connected illnesses or injuries.