

COMMUNITY Risk Management & Insurance

 A publication of the Nonprofit Risk Management Center Volume 14, No. 3, September/October 2005

What Is a Risk Management Plan?

During the past two years the Nonprofit Risk Management Center has been engaged in a process of defining what it means to create a risk management plan. While that exercise could have been both interesting and insightful for its own sake, our motivation was the need to create a software tool that helps nonprofit leaders create a plan (See box).

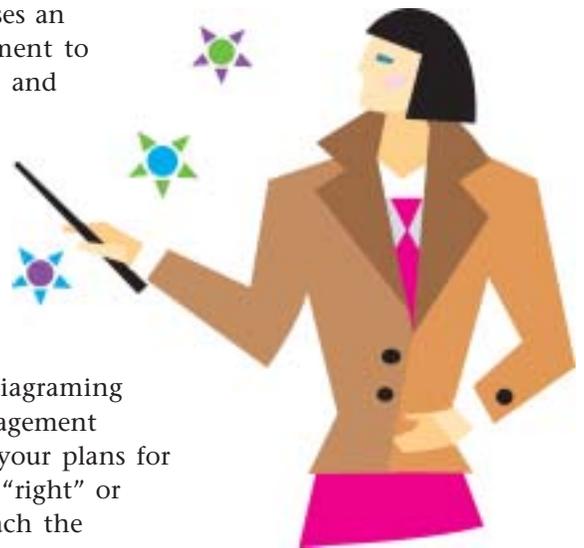
The inspiration for the project began a while back when we began receiving calls and e-mails from nonprofits of various sizes and purposes, asking: “Can you tell me how to prepare a risk management plan?” Many said, “We are required to have a plan, but the national office is unable to provide guidance.”

The answer to “what is a risk management plan” depends on who you ask and even when you ask. A professional risk manager might explain that a risk management plan is a compilation of the organization’s key risk management policies and procedures plus details on the organization’s risk financing and insurance program. A board member might reply that a risk management plan is a definitive analysis of critical risks facing an agency. A harried executive director might describe the plan as something that meets the requirements imposed by a parent organization, funding source or insurer.

What we have concluded, after two years of research and design, is that there is no single approach to creating a risk management plan for your

nonprofit. Instead, an effective plan is one that expresses an organization’s commitment to managing myriad risks, and communicates the strategies in place and the agency’s plans for the future. Perhaps the best way to describe an effective plan is that it acts as both a travel diary and a roadmap—one diagramming your agency’s risk management journey and the other your plans for the future. There is no “right” or “wrong” way to approach the development of a plan.

In our journey we have learned that there are some principles that apply to
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NEW! My Risk Management Plan

Visit www.MyRiskManagementPlan.org to check out a brand-new online program developed by the Nonprofit Risk Management Center. **My Risk Management Plan** walks you through the process of creating a custom risk management plan for your nonprofit. The \$139 cost provides unlimited access to the software and your results. Return whenever you wish to edit entries, fill in new modules or create your own module. For more information on the program, visit www.nonprofitrisk.org and click on the SOFTWARE tab. Call **(202) 785-3891** if you have questions about the program.



Whistleblower Protections in the Nonprofit Sector

by Jason M. Zuckerman

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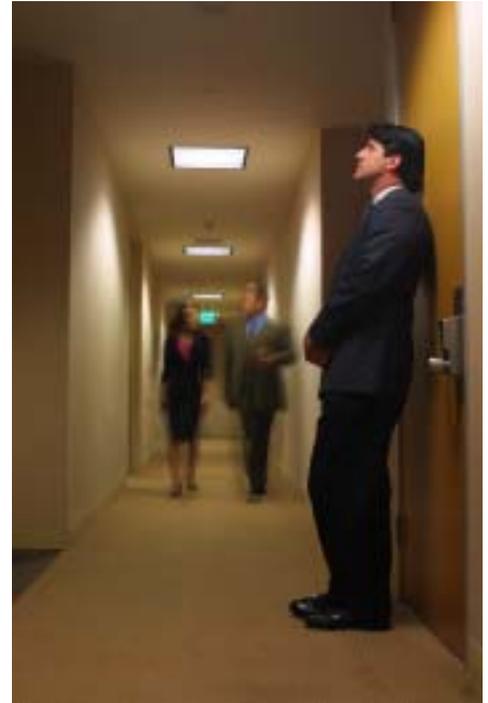
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Since the enactment of the Sarbanes-Oxley Act of 2002 (SOX), publicly traded companies have begun to focus on protecting whistleblowers and providing mechanisms for employees to raise concerns. This results from numerous provisions in SOX that mandate whistleblower protection, a high number of SOX whistleblower-retaliation complaints filed with the U.S. Department of Labor, and the realization that it is better for an organization to learn about unethical or unlawful conduct internally than to find out about the conduct from a news article, a subpoena from law enforcement, or an investigation from a regulatory agency.

Unfortunately, the scandals that prompted Congress to enact SOX have not been limited to the private sector. Nonprofits have also been subject to increasing scrutiny due to allegations of excessive compensation, self-dealing, and ineffective governance. Many of these problems came to light from whistleblower disclosures.

At the encouragement of the U.S. Senate Finance Committee, the Panel on the Nonprofit Sector was formed to prepare recommendations for Congress to improve the oversight and governance of charitable organizations. The Panel's final report, which was released in June 2005 and is available at www.nonprofitpanel.org/final/, provides a comprehensive series of recommendations intended to strengthen nonprofit governance and improve transparency and accountability. Many of these reforms are modeled on SOX. The final report addresses whistleblower protections and recommends that nonprofits voluntarily comply with the whistleblower provisions of SOX.



Protecting whistleblowers is an essential component of an ethical and open work environment. Whistleblower protection should not be viewed only as a prophylactic mechanism designed to avoid employee lawsuits. Instead, protecting whistleblowers from retaliation and encouraging constructive whistleblowing benefits nonprofits by increasing transparency and by giving management the opportunity to learn early on of unethical or unlawful practices directly from their employees rather than from the media, law enforcement, or a regulatory agency. In addition, effective whistleblower protection helps foster a work environment in which all employees are held accountable, thereby improving performance and empowering employees.

This article provides general guidance for the establishment of a comprehensive whistleblower protection program at a nonprofit.

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Whistleblower Protections

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Provide Employees Multiple Avenues to Report Concerns

While employees will hopefully feel comfortable raising concerns directly with their supervisors, many employees are reluctant to raise concerns with line management for fear of retaliation, especially where their concerns pertain to unethical or illegal conduct by their line managers. Therefore, nonprofits should provide several options for employees to raise concerns, including the option of raising a concern anonymously.

Establish an Ombudsperson Program

Establishing a forum in which employees can raise concerns internally and have assurance that their concerns will be investigated and appropriately addressed is an effective means of mitigating the risk of whistleblower-retaliation lawsuits and resolving employee concerns internally before the concerns are exposed in the media or in regulatory enforcement proceedings. In addition, an ombudsperson program can help alert the board of directors or management to alleged violations early on, thereby providing an opportunity to intervene and prevent further damage.

To be successful, such a program must be perceived by employees as credible. Accordingly, the ombudsperson should be independent of line management and conduct objective investigations that are not geared toward reaching a conclusion favored by management. Sham investigations always backfire. Employees who suspect that their concerns are not being taken seriously will go outside the organization and report them to someone who they believe will take them seriously, such as the media, a regulatory agency, or law enforcement. Accordingly, the ombudsperson investigating an employee's concern

should frequently update the employee on the status of the investigation and on corrective actions taken to remedy the problems identified by the concerned employee.

Preferably, the ombudsperson should report directly to the board. This ensures adequate independence and strengthens the credibility of the program, thereby increasing the likelihood that employees will raise their concerns internally.

Adopt a Policy Prohibiting Retaliation

Employees should be put on notice that all forms of retaliation against whistleblowers, including harassment, termination, and blacklisting, will not be tolerated and will result in disciplinary action. In addition, the policy should provide that individuals who blow the whistle will be protected from retaliation. While the policy needs to incorporate relevant legal requirements, including federal and state whistleblower protection statutes and common law claims, the policy should be concise and easy to understand. The policy should unambiguously state that employees have the right to raise concerns without being subjected to reprisal.



Train Managers and Supervisors

Merely adopting a policy is not enough to prevent retaliation against whistleblowers. Instead, managers and supervisors should be educated about whistleblower protections and provided the tools to address employee concerns.

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“Merely adopting a policy is not enough to prevent retaliation against whistleblowers. Instead, managers and supervisors should be educated about whistleblower protections and provided the tools to address employee concerns.”

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Whistleblower Protections

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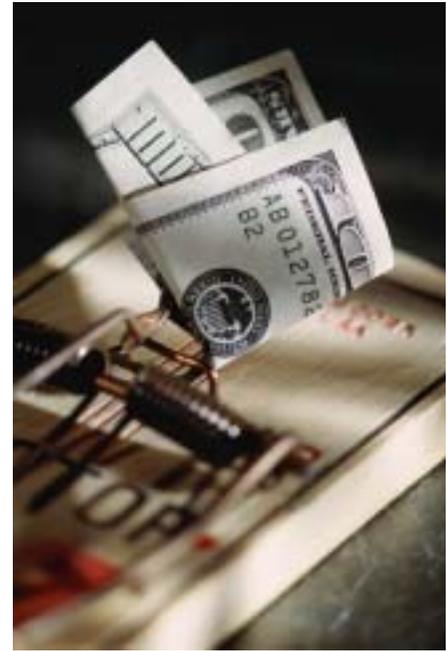
To be effective in sensitizing managers and supervisors to the rights and responsibilities of employees to raise concerns, training should be practical and interactive. A PowerPoint presentation filled with legalese will not have a lasting impact. Instead, the training should be in plain English and should provide case studies that offer participants the opportunity to apply what they learn in the training. Moreover, training should address Section 1107 of SOX, which makes it a criminal offense to “knowingly” retaliate against a whistleblower who has provided to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense.

Take Disciplinary Action Against Those Who Engage in Retaliation

When a manager or supervisor retaliates against an employee who voiced a concern, other employees are dissuaded from raising concerns for fear that they will also suffer retaliation. Failing to hold an employee accountable for violating an anti-retaliation policy signals to other employees that the organization is not truly committed to maintaining an open and ethical work environment. Accordingly, nonprofits should enforce their anti-retaliation policies and monitor compliance with those policies.

Conclusion

By viewing whistleblowers as allies rather than as adversaries and by making a relatively minimal investment in processes and procedures designed to protect whistleblowers, nonprofits can increase transparency, empower employees, learn early on about unethical or unlawful practices, and enhance legal and procedural compliance. ■



Jason Zuckerman is an attorney in private practice in Washington, D.C. His practice focuses on litigating whistleblower retaliation claims, conducting internal investigations, and advising companies on whistleblower protections and other employment law issues. He can be reached at jzuckerman@zuckermanlaw.com.

What Is a Sample?

The next page features a sample whistleblower policy. The Center receives requests for policy “samples” on a regular basis. We are happy to provide samples; however, we do so after explaining that a sample policy should be viewed as the starting point for developing a policy in your nonprofit. It is never a good idea to insert the name of your nonprofit and call it a day. When you read a sample, ask:

- What changes should be made due to our special circumstances?
- What editing is required so that anyone who must comply will easily understand the policy?

Happy customizing!

NONPROFIT RISK MANAGEMENT CENTER

www.nonprofitrisk.org

SAMPLE**Employee Protection (Whistleblower) Policy**

If any employee reasonably believes that some policy, practice, or activity of [Name of Nonprofit] is in violation of law, a written complaint must be filed by that employee with the Executive Director or the Board President.

It is the intent of [Name of Nonprofit] to adhere to all laws and regulations that apply to the organization and the underlying purpose of this policy is to support the organization's goal of legal compliance. The support of all employees is necessary to achieving compliance with various laws and regulations. An employee is protected from retaliation only if the employee brings the alleged unlawful activity, policy, or practice to the attention of [Name of Nonprofit] and provides the [Name of Nonprofit] with a reasonable opportunity to investigate and correct the alleged unlawful activity. The protection described below is only available to employees that comply with this requirement.

[Name of Nonprofit] will not retaliate against an employee who in good faith, has made a protest or raised a complaint against some practice of [Name of Nonprofit], or of another individual or entity with whom [Name of Nonprofit] has a business relationship, on the basis of a reasonable belief that the practice is in violation of law, or a clear mandate of public policy.

[Name of Nonprofit] will not retaliate against employees who disclose or threaten to disclose to a supervisor or a public body, any activity, policy, or practice of [Name of Nonprofit] that the employee reasonably believes is in violation of a law, or a rule, or regulation mandated pursuant to law or is in violation of a clear mandate or public policy concerning the health, safety, welfare, or protection of the environment.

My signature below indicates my receipt and understanding of this policy. I also verify that I have been provided with an opportunity to ask questions about the policy.

Employee Signature

Date

For more information or assistance on any risk management topic, visit **www.nonprofitrisk.org** or call (202) 785-3891.

2005 Risk Management and Finance Summit for Nonprofits

Thanks to our Hosts!

With a record number of preregistered attendees, the 2005 *Risk Management and Finance Summit for Nonprofits* (formerly the *Nonprofit Risk Management Institutes*) promises to be a high point in the Nonprofit Risk Management Center's education calendar for the year. The tremendous turnout and solid program would not have been possible without the extraordinary effort and contributions of the Summit hosts. The Center is grateful to the following nonprofit organizations for their service and commitment as hosts of this year's event:

- Nonprofits' Insurance Alliance of California (www.niac.org);
- CompassPoint Nonprofit Services (www.compasspoint.org);
- San Francisco Chapter of the California Society of CPAs; and
- California Association of Nonprofits (www.canonprofits.org).

With Gratitude to our 2005 Corporate Sponsors

This year a record number of companies and organizations signed on as Corporate Sponsors of the Summit. This tremendous response has allowed the Center to offer a content-packed program at a minimal registration fee. The Center is grateful to the following organizations for their generous sponsorship of the Summit:

- Arthur J. Gallagher & Co.
- CAN Insurance Services
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- The Chubb Group of Insurance Companies
- David Szerlip and Associates



- The Hartford Steam Boiler Inspection and Insurance Company
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The Center is also grateful to the *Public Entity Risk Institute* for once again sponsoring the conference scholarships program. For more information on PERI, visit www.riskinstitute.org.



What Is a Risk Management Plan?

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the most useful, most effective plans. While not a template per se, they are universal.

Best Practices—Your Risk Management Plan

An effective risk management plan:

- reflects a wide range of views and perspectives in an organization;
- expresses the nonprofit's belief in and support of risk management;
- states that personnel at all levels of the organization play a vital role in protecting the nonprofit's mission, reputation and assets;
- incorporates the existing risk management policies of the organization;
- reflects the nonprofit's goals and aspirations for its risk management efforts;
- focuses on priority risks and considers secondary risks.

How to Get Started

Every nonprofit has some risk management policies/procedures in place, yet leaders find it difficult to make time to organize these materials into a broad plan. There are two ways to begin using *My Risk Management Plan*: 1) Gather your existing risk management policies and procedures. If you know what you have and know where each file (electronic or paper) is stored, working with the software will move along more quickly than if you have to hunt for paper or electronic information and consult other staff as you go. 2) Or dive right into the software's modules, beginning with the *Introduction*, and consult with colleagues or locate appropriate policies as needed to insert policies into a module. Neither way is the "right" way, it is a matter of working style. Either approach will get you to the end result. ■

www.MyRiskManagementPlan.org

My Risk Management Plan is a Web-based software program that helps nonprofit leaders develop customized risk management plans for their organizations. Generous funding to support the development of this program was provided by the Public Entity Risk Institute and the St. Paul Companies, Inc. Foundation. The program was developed by the Nonprofit Risk Management Center (www.nonprofitrisk.org).

How Does it Work? The program walks the user through a suggested Table of Contents for a *Risk Management Plan*. Each section of the plan is presented as a program module. The current modules are:

- | | |
|------------------------------------|---|
| ■ Introduction | ■ Facility/Site Safety and Security |
| ■ Risk Management Program | ■ Technology and Information Management |
| ■ Governance | ■ Transportation |
| ■ Human Resources | ■ Crisis Management |
| ■ Programs and Services | ■ Volunteer Management |
| ■ Client Safety | ■ Insurance Program |
| ■ Financial Management | ■ Your Custom Module |
| ■ Fundraising and Public Relations | |

Once you select a module, you will review introductory material followed by a list of submodules. The program then asks about the existence of current policies covering the topic area. For example, under "Risk Management Program," you will be asked whether your nonprofit has established specific risk management goals. If you answer "yes" you will have the opportunity to incorporate this existing material into your *Risk Management Plan*. If you answer "no" you will be able to view sample policy statements. Each section of the program affords the user an opportunity to select from sample language, draft original language or paste in existing policies or procedures.

Any time after you have completed at least one module, you can generate a draft *Risk Management Plan*. The program provides simple instructions for saving the draft plan on your computer hard drive or network.

Flexible. Affordable. Accessible. *My Risk Management Plan* offers tremendous flexibility. You can add a custom module covering special areas of interest in your nonprofit and draft original statements of policy as you progress through the program. With a one-time cost of \$139, the program is an affordable, time-saving tool for busy leaders who have struggled to organize existing risk management policies into a document that can be presented to the board of directors, funders, accrediting agencies, or national groups that are increasingly demanding the development of a plan. The software is accessible and easy-to-use. If you can access the Internet, you can access *My Risk Management Plan* and begin honing your risk management program without delay.

For information about developing a special edition of *My Risk Management Plan* for your national association or umbrella group, contact Melanie Herman at (202) 785-3891 or at Melanie@nonprofitrisk.org.

The “Additional Insured”

By George L. Head, PhD, CPCU, ARM, CSP,
CLU, Special Advisor, Nonprofit Risk
Management Center

A nonprofit’s commercial general liability (CGL) policy goes to great length to specify whom (organizations or individuals) that policy protects. To grasp this, take a look at the Declarations page (dec page) and the section titled “Who Is an Insured” in your nonprofit’s current CGL policy.

Some Confusing Language

The Insurance Services Office’s (ISO) CGL policy wording explains that “You” means the “Named Insured” shown on the Declarations page and any other person or organization qualifying as a Named Insured under the policy. An Insured, in contrast, means any person or organization qualifying as an Insured under “Who Is an Insured.” For example, executive officers, directors, employees, or volunteers of the Named Insured are Insureds while acting within the proper scope of their official duties or powers with the organization.

ISO’s CGL policy distinguishes between a Named Insured (or You) and an Insured, as respects the protection the policy provides. Often the exclusions are broader—and, consequently, the liability coverage narrower—for an Insured than for a Named Insured. Every Named Insured is an Insured; however, not every Insured is a Named Insured.

For example, a policy may contain an exclusion that applies only to employees but not the corporate entity (the nonprofit). Keep in mind that it is more advantageous to be a Named Insured than just an Insured.

And then there is an “Additional Insured.” Additional Insured status is always added by endorsement, which amends the Who Is an Insured section to add another person or organization

as an Insured. Therefore, an Additional Insured will only have the extent of coverage offered to other Insureds or as defined by the endorsement. It may seem complex, but it really is not. An endorsement must be requested by the agent or broker, and issued by the insurance company to add the person or organization to the policy as an Additional Insured.

Additional Insured coverage can be very limited. The Named Insured is more fully protected than Insureds, and Additional Insureds may enjoy even less coverage than the Insureds. However, you cannot determine the extent of coverage without reading the language in both the Additional Insured Endorsement and the policy itself.

The request for Additional Insured status should result in the issuance of an endorsement and a “Certificate of Insurance” indicating that the coverage has been provided. A Certificate of Insurance without an Additional Insured Endorsement *does not provide additional insured status* to the requestor—the policy must be endorsed or contain a blanket additional insured endorsement. When requesting additional insured status always ask for a copy of the additional insured endorsement.

The explosive growth in the requests for Additional Insured status can in some ways be attributed to the nature of our litigious society. When someone seeks compensation for harm, it is common to look widely for a source of financial recovery. The range of people or organizations who may be sued, and the amounts for which they may be sued, are theoretically unlimited. Therefore, those who feel threatened by potential lawsuits have been seeking liability coverage wherever possible. Additional Insured status under another organization’s liability insurance becomes an inviting, but often confusing, option.

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“Additional Insured coverage can be very limited. The Named Insured is more fully protected than Insureds, and Additional Insureds may enjoy even less coverage than the Insureds. However, you cannot determine the extent of coverage without reading the language in both the Additional Insured Endorsement and the policy itself.”

The “Additional Insured”

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A Resulting Problem

In negotiating a business contract with another person or organization, one entity often seeks to become an Additional Insured under the policies of the other party. For example, if your nonprofit is contracting with a company to sponsor an event, any sponsor may require that it become an Additional Insured under your CGL policy. Otherwise, the sponsor may refuse to deal with you. Conversely, if an organization that serves one of your nonprofit’s core constituencies wishes to obtain from you something that your nonprofit is uniquely able to provide—perhaps the use of your trademark or your sponsorship of an activity—you may seek to become an Additional Insured under that organization’s CGL policy with respect to any aspect of that trademark use or activity.

As this example shows, your organization can be both a “provider” of additional insurance protection (such as to the sponsor) and a “user” of additional insured protection (such as from the organization that wants your public endorsement).

Many nonprofit leaders mistakenly believe that they can obtain appropriate liability insurance at no cost (free!) by becoming an Additional Insured under the liability policies of other organizations with which they contract. This is rarely true. As discussed, Additional Insured status *does not extend the same coverage and protection* afforded to the Named Insured. The nature of the coverage as an Additional Insured depends upon the endorsement used to provide the coverage.

Most Additional Insured endorsements limit coverage for the other entity (Additional Insured) with respect to their liability for your activities or activities they perform on your behalf. For example, ISO Form “Additional Insured – Manager or Lessors of Premises” (CG 20 11 01 96) adds the lessor or manager as an insured

“but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you.” It is inappropriate to believe that additional insured status is as effective as the insurance that the organization purchases directly.

Elements of a Solution

The four key parts of solving this problem—making sure your nonprofit has appropriate insurance, or receives suitable insurance from business partners, whenever it enters into any joint effort with another organization—are:

1. Don’t assume that the other organization has appropriate insurance; require the other business to have the appropriate liability coverage and obtain a certificate of insurance to verify their insurance coverage.
2. Request a copy of the additional insured endorsement and review it with your insurance professional. Remember that your coverage as an Additional Insured is limited to your activities or operations that are related to the Named Insured’s operations;
3. Read very carefully both your policies and the Additional Insured Endorsements of others’ policies.
4. Seek guidance and clarification from your insurance agent, broker, or insurance consultant.

The Center is grateful for the generous assistance provided by David Szerlip (David Szerlip & Associates) and Leslie T. White (Croydon Consulting), whose insights and expertise were instrumental in developing this article.

Is This Nonprofit Covered?

A small nonprofit leases one location for its operations and also uses donated space at a nearby church. The executive director believes that his nonprofit does not need general liability coverage for the nonprofit’s church location because “the church already has insurance.”

Setting the Record Straight

The church’s insurance does not good for the nonprofit because the nonprofit isn’t a Named Insured, Insured or Additional Insured under the church’s policy. Adding the nonprofit as an Additional Insured to the policy isn’t a viable solution because the nonprofit has operations totally independent of the church. Assuming that an insurance company was willing to add the nonprofit as Additional Insured, coverage would only apply *as respects the nonprofit’s activities arising from the Named Insured’s operations*. The church should request the nonprofit to add the church as an additional insured to its policy.

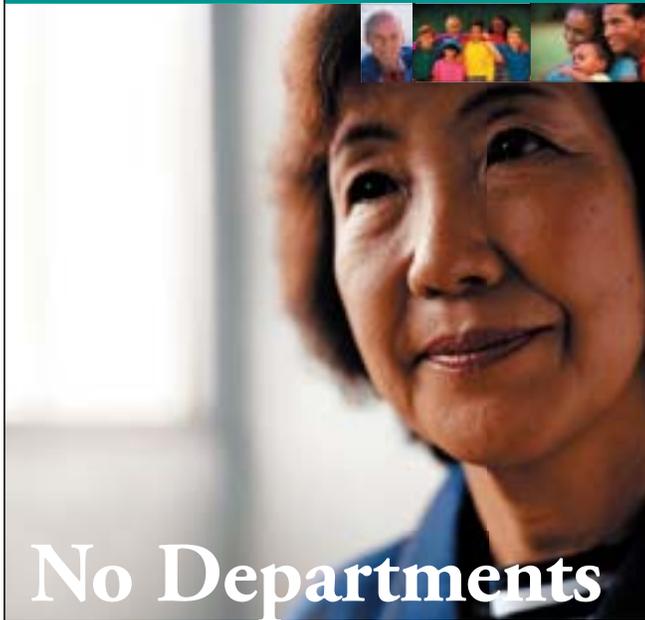
In the end, the executive director of the nonprofit is persuaded to obtain a policy that provides commercial general liability coverage for both of his locations, the building he leases and the space donated by the church.

Risk Management MARKETPLACE

Welcome to the **Risk Management Marketplace**, a regular feature in *Community Risk Management & Insurance*. Inclusion in the Marketplace does not constitute an endorsement by the Nonprofit Risk Management Center. To inquire about space availability for future editions of the Risk Management Marketplace, contact Suzanne@nonprofitrisk.org.

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