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Nonprofit *Alert*®

Alerting nonprofit leaders to key legal developments and responsive risk management steps.

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Supreme Court News

Ruling Tightens ADA Disability Coverage

Correctable disabilities do not qualify for protection under the Americans With Disabilities Act (ADA), says the Supreme Court in three recent decisions being hailed as the most significant ADA rulings to come down from the high court since the law was first passed a decade ago.

Speaking for the majority of the Court in the first case, Justice O'Connor wrote, "determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment," such as eyeglasses or prescription medication.

In the first ruling, the Court denied ADA disability coverage to twin sisters who suffered from myopia so severe they couldn't drive, watch TV, or participate in a number of other daily activities. With corrective lenses, however, both had 20/20 vision.

Both applied for positions as pilots with United Airlines, but were denied job interviews because they did not meet the company's minimum vision requirement. They then filed a charge of disability discrimination under the ADA.

The second case involved a truck driver who was fired for failing basic Department of Department of Transportation standards due to blindness in one eye. In the third case, a mechanic lost his job because he had high blood pressure. In each situation, the individuals' impairments could be corrected or controlled. As such, the Court found none of the individuals were "substantially limited in any major life activity" and thus did not state a valid disability claim within the meaning of the ADA. "If a person is taking measures to correct for or mitigate a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is substantially limited in a major life activity, and thus disabled," said the Court. After significant expansion of the ADA in its first decade, employers welcomed the Court's decision to taper the ADA's wide-reaching coverage. Up to 100 million Americans could have been "disabled," according to some estimates, if the Court had ruled differently. *Sutton v. United Air Lines*, No. 97-1943; *Murphy v. United Parcel Service*, No. 97-1992; *Albertson's, Inc. v. Kirkingburg*, No. 98-591 (S.Ct. 6/22/99).

> **"...determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."** *—Justice Sandra Day O'Connor, writing for the Supreme Court*

Evaluate your organization's ADA compliance with Nonprofit *Alert*® Memo 9109-3, *Basic Requirements*

>>>> Form 990 Disclosure: How Would Your Organization Respond? <<<<

A survey conducted last month among nonprofits in 12 states reveals most aren't sure how to comply with new federal rules requiring disclosure of their Form 990s. Only 37% responded immediately and accurately, according to survey organizers, and only a small portion of those based their responses on awareness of the new regs. Is your organization equipped to comply with the disclosure rules? **Nonprofit *Alert*®** Memo 9904-1, *Nonprofit Disclosure Rules*, can help. See back page to order.

Liability & Risk Management

Internet Posting Makes Couple Liable in Server State

A federal judge in Virginia has ruled that a Texas couple can be sued in Virginia for allegedly libelous messages they posted to an Internet news group using their America Online (AOL) account. Although the message was actually posted from the couple's computer in Texas, it was transmitted and stored on an AOL server physically located in Virginia. From there, it was relayed to other AOL news group users. The court said this was enough to show the statement was "published" in Virginia for purposes of defamation laws. The court focused on the physical location of the server and "the role played by the server or hardware in facilitating the alleged tort." *Bochan v. LaFontaine*, VLW 099-3-111 (1999).

Thanks to the global reach of technology, this means that nonprofits and/or their executives who post data on the Internet may be exposed to liability in states where they otherwise might not have a presence sufficient to warrant jurisdiction. Defamation is always a serious risk, but the Internet makes the risk global. To conduct a defamation review in your organization, order Nonprofit *Alert*® Memo 9206-1, *Developing a Defamation Policy for Nonprofits*. See back page.

Sierra Club Collects $2.7 Million in Donor Dispute

A state appeals court in California has upheld a $2.7 million damage award to the Sierra Club against a donor who claimed a gift he made to the organization in 1970 had been misused. The donor, a wealthy New Mexico developer, donated stock to be used for the purchase of a sheep ranch. The club argued it never promised any specific use, pointing out that the developer never even inquired about his gift until 20 years later, following a disagreement he had with the organization on an unrelated issue. The donor brought suit for breach of contract, but a lower court dismissed his claims in 1993. A year later, the Sierra Club sued the developer for malicious prosecution, claiming his earlier suit had no legal basis and was intended merely to discredit the foundation. The club won a jury verdict in that case, which was upheld last month on appeal.

Careful documentation of donor-designated gifts can protect your organization—even years later, as the Sierra Club demonstrated here. Learn more with Nonprofit *Alert*® Memo 9302-1, *Avoiding the Pitfalls of Donor-Designated Gifts.* See back page to order.

Charity "Cleans House" in Wake of Investigation

On a tip from a local TV station, Tennessee authorities found suspected stolen goods, including clothes, shoes, videos, linens, and food, in the homes of six executives who worked at the Nashville distribution center for Feed the Children, an international charity. The TV station allegedly videotaped employees of the charity moving boxes of donated goods from the warehouse into their personal cars. Among the suspected offenders was the executive director of the warehouse, who later told the Associated Press he saw nothing wrong with employees taking donated items. He was replaced a day later, and the charity launched its own internal investigation, resulting in the firing of all 14 warehouse employees. Charity officials said the warehouse will remain closed while staff members from the headquarters office take inventory to determine what is missing. Feed the Children has also launched an examination of its other operations, including a warehouse in Oklahoma City.

Employees & Volunteers

Limit the possibility for this kind of abuse in your organization by applying the safeguards found in Nonprofit *Alert*® Memos 9106-2, *Accounting & Fiduciary Guidelines for Nonprofits*, and 9109-1, *Converting Your Annual Audit Into Vital Risk Management*. See back page to order both memos.

No Free Lunch? Court Says It Depends on Employer

Because an employer imposed a "stay-on-premises" requirement for its employees, all meals the employer provided to employees were considered "for the convenience of the employer," and therefore were non-taxable de minimis fringe benefits to employees, the Ninth Circuit has ruled. The decision overturned an earlier ruling by the Tax Court and settled a long-debated section of the tax code, which says that more than half an employer's workforce must be provided meals "for the convenience of the employer" in order for all employer-provided meals to be considered de minimis fringe benefits. Since the employer, a casino owner in this case, required all employees to stay on premises during their entire shift in order to maintain tighter control over their performance, the court said more than half then received the employer-provided meals, which made the value of *all* the meals excludable from employees' income. *Boyd Gaming Corp. v. Commr.*, 99-1 USTC, (9th Cir., 5/12/99).

Investigate this and other possible tax-free employee benefits with Nonprofit *Alert*® Memo 9311-2, *Employee Benefits: A Summary for Nonprofit Employers.* See back page to order.

State Court Finds Employee Handbook is Contract

An employer cannot change a stated policy published in an employee handbook unless the employees agree, because such

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policy forms part of the employment contract, the Arizona Supreme Court has decided. The policy at issue concerned employee layoffs, which the handbook stated were based strictly on seniority. Although the employer revised the handbook over the years, every version contained this provision. But the employer informed hourly employees that their layoffs would instead be based on "abilities and documentation of performance." Six employees were then laid off and promptly filed suit for breach of contract. A lower court sided with the employer, but the Ninth Circuit directed the state supreme court to address the contract questions. *Demasse v. ITT Corp.*, No. CV-97-0177-CQ (AZ 5/25/99).

This case sends strong warnings to all employers: (1) beware creating unintended contracts; (2) use disclaimers; (3) have legal counsel review your employee handbook to properly differentiate what is and is not contractual.

Tax Deal Extends Education Aid For Employees

A package of tax incentives containing an extension of employer-provided education assistance for employees has passed the Senate Finance Committee and appears headed toward favorable treatment by the full Senate. The measure would extend the tax exclusion for employer-provided educational assistance for undergraduate and graduate courses until June 30, 2004. The measure met warm support from nonprofits, which have long sought to make the tax benefit permanent. The extension for graduate courses was especially well received, since that provision previously expired in 1996. If the measure fails, the current tax break for undergraduate courses will expire January 1, 2000. The House isn't scheduled to take up the bill until later this month.

Employer-provided educational assistance amounts to a significant tax-free benefit for employees—but only if Congress extends these tax breaks. To implement such a program for your employees, read Nonprofit *Alert*® Memo 9103-2, *Employee Educational Assistance Programs.* See back page to order.

Tax-Exempt Issues

Christian Coalition Looses Exempt Battle With IRS

After a ten-year effort to gain 501(c)(4) exempt status, the Christian Coalition has reportedly withdrawn its application with the IRS and is now focusing efforts on reorganizing into two separate organizations: one nonprofit to continue the Coalition's voter education efforts, and one for-profit that will engage in political campaigning, including campaign fundraising and candidate endorsements. Those partisan activities are what allegedly led the Coalition into trouble with the IRS in the first place. The organization initially filed for exempt status in 1989, but the issue remained unresolved because of IRS concern over the Coalition's political work on behalf of certain candidates and the Republican party. Widely known for its "voter guides" distributed nationwide through churches and other religious groups, the Coalition met stiff opposition through the years from

NPA Highlight of the Month

Employee Hardship Funds Hit Hard Times

Historically, both nonprofit and for-profit employers had a significant tax incentive to provide so-called "hardship" funds for their employees, since these funds were tax-free and generally didn't invoke too much IRS attention. That may be changing now in light of a recent IRS ruling that imposed taxes and penalties on a hardship fund that previously had passed IRS muster. The IRS first approved the fund in 1995 (IRS LTR 9516047), but later reconsidered, finding that the fund did not serve a charitable purpose and created private benefit, private inurement, and taxable expenditures. The fund was controlled by a foundation, which was established and funded by a commercial corporation for the benefit of its employees, retirees, and members of their immediate families. The fund provided disaster assistance in cash or in-kind goods to employees who were victims of natural disasters such as floods or tornadoes. The fund also administered hardship grants and loans to employees who had severe financial problems caused by uninsured losses from natural disasters or other circumstances beyond their control. A review committee assessed each request for assistance and made determinations based on comprehensive criteria. In addition, strict rules applied to employee eligibility and use of the funds, including re-payment rules and record-keeping procedures for all expended funds. The company's foundation publicized the fund to employees on an annual basis and routinely distributed application instructions. Although the IRS found that the program actually provided relief to individuals in distress, the fund had another substantial purpose: providing significant benefits to the company. The IRS viewed the fund as comparable to other kinds of employee benefits, such as health insurance or severance packages. Because it fit into this category of employee benefits, the fund gave the company certain advantages in recruiting and retaining employees. This resulted in self-dealing and private inurement to the company, since the company was an "insider" with respect to the foundation that operated the fund. IRS LTR 199914040.

Ever since the concept of donor-advised funds (DAFs) was approved by the U.S. Claims Court in 1987, the prevalence of DAFs has burgeoned. DAFs offer significant fundraising opportunities but equally significant pitfalls for nonprofit s. For guidance read Nonprofit *Alert*® Memo NP9302-1, *Avoiding the Pitfalls of Donor-Designated Gifts,* and then consult with counsel. See back page to order.

critics who claimed the guides were partisan publications containing thinly disguised candidate endorsements. Critics contended that the Coalition's work crossed the line from a social welfare organization, which could qualify for exempt status, to a political operation, which would not qualify. The IRS reportedly ruled against the organization last year, denying exempt status in a private letter ruling that has not been made public. Rather than appeal the ruling, the organization decided earlier this spring to withdraw its application and reorganize, according to various news accounts.

Nonprofit *Alert*® Memo 9101-3, *Nonprofit Lobbying and Political Activity—Know Your Limits,* explores this case and other recent IRS rulings that denied exempt status to nonprofits whose political activities "crossed the line." Make sure your organization doesn't fall into the same trap. See back page to order.

Gift Value Depends on Market—Wherever It May Be

Two California orthodontists donated animal trophy mounts to a nonprofit and claimed generous charitable deductions based on what they asserted was the fair market value of the unique items. The IRS disallowed the deductions and valued them instead at lower rates based on comparable sales prices. The orthodontists claimed the comparable sales method wasn't fair because animal trophies were legally prohibited from sale in California. The Tax Court upheld the assessment, however, and the Ninth Circuit confirmed, finding that the test for fair market value does not require taxpayers *themselves* to be able to sell the donated goods. It is sufficient if comparable sales elsewhere can evidence fair market value. *Robson, et us. et. al. v. Commissioner,* No. 97-71087 & 97-71096 (9th Cir., 3/9/99).

Valuing gifts is actually a donor's responsibility, but organizations can help by offering properly prepared receipts. Review your procedures with 9505-1, *Demistifying the Receipting of Charitable Gifts.*

State Rules & Regs

Maine Grants Time Off to Victims of Violent Crime

Both houses of the state legislature have overwhelmingly passed a measure requiring employers to grant "reasonable and necessary leave from work, with or without pay," to victims of violent crime or abuse in order to seek medical treatment, counseling, or prepare for legal proceedings. The bill is intended to help those who fear their jobs may be jeopardized if they take time off to seek help. The governor is expected to sign the measure into law, making Maine the first state to address this issue with legislation.

Employers may order a free kit that describes measures to effectively deal with domestic violence, available from the National Workplace Resource Center on Domestic Violence, (415) 252-8089.

New Hampshire Taxes Camp's Lodging Facility

The state Superior Court has ruled that the lodging and recreational facilities of a family retreat center, operated by a religious organization, are not exempt from property taxes, although land and recreational facilities that are part of an **adjoining youth camp, operated by the same organization,** *are* exempt. The difference in the two was that the retreat center's mission, to "provide a unique Christian environment for...families," did not state a sufficiently charitable purpose, the court said. Because the center was primarily reserved for members of the religious organization, the court also ruled that it was not sufficiently "public" to meet the state's requirement of "open access." *East Coast Conference v. Town of Swanzey,* No. 97-E-0081 (N.H. Sup.Ct. Apr. 30, 1999).

The ruling is being appealed and is generating national attention since an adverse outcome could have significant implications for nonprofits nationwide if other states follow this precedent.

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