



# Nonprofit Alert®

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

## 1. Nonprofit Overview

### 1.1 Supreme Court Extends Sexual Harassment Protection.

Sexual harassment in the workplace doesn't necessarily occur only between members of the opposite sex, the Supreme Court ruled last month in a landmark same-sex harassment case brought under Title VII of the Civil Rights Act of 1964. The ruling grew out of a Fifth Circuit case involving the sexual assault, battery and harassment of a male oil rig worker by two of his male supervisors. The Fifth Circuit rejected his harassment claims, saying Title VII didn't apply to same-sex situations. But the Supreme Court unanimously overturned that ruling, finding nothing in Title VII's language that limited it only to male/female harassment. Title VII requires "neither asexuality nor androgyny in the workplace," Justice Scalia wrote for the Court, "it forbids only behavior so objectively offensive as to alter the conditions of the victims' employment." *Oncale v. Sundowner Offshore Services*, No. 96-568 (3/4/98).

★ Although Scalia uses the language of objective assessment, one of three triggers under Title VII is highly subjective: Does the conduct unreasonably interfere with the individual's work performance or create an intimidating, hostile, or offensive work environment? If an employee claims it does, an investigation is probably in order, even if the alleged actionable conduct is same sex.

This case should trigger a fresh look at your organization's sexual harassment policy. Does it need updates for same sex harassment? NP9201-2, *Sexual Harassment Policy for Nonprofit Employers*, can help. See ordering instructions on the back page.

### 1.2 Critic Barred From Using Domain Name of Nonprofit.

The Second Circuit has prohibited a vocal critic of Planned Parenthood from using the nonprofit's name in the Internet address or "domain name" of a web site he operates. Richard Bucci of Syracuse, NY registered "plannedparenthood.com" as the domain name for his site in 1996. The site opened with the title, "Welcome to the Planned Parenthood Home Page!" But it contained only antiabortion information, including references to a book and other literature on antiabortion. The Second Circuit upheld a lower court ruling that said the site "deliberately duped innocent users into believing" Planned Parenthood provided the information. Bucci's lawyer says he will fight the court's order.

★ Because domain names are offered on a first-come, first-served basis, anyone can register any name that isn't already

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taken. Even if your organization doesn't yet have a web site, it may be prudent to register a domain name(s) now to secure your organization's future claims.



Call Gammon & Grange to discuss Internet issues like registering domain names, pros and cons of trademarking distinctive web names and logos, and ordering a copy of Gammon & Grange's do-it-yourself web site audit. Also, see a new section on Internet rights and liabilities in NP9208-2, *Copyright Law: Your Rights and Responsibilities*.

## 2. Liability & Risk Management

2.1 *Charity Wins \$1.5 Million in Damages From Fund Raiser.* An arbitrator has awarded the American Heart Disease Prevention Foundation \$1.5 million in damages against a fund raising firm formerly known as the Watson and Hughey Company, now operating as Direct Response Consulting Services. The award is personally binding against Jerry C. Watson and Byron C. Hughey, owners of the firm. The foundation claimed the firm used the mailing list of foundation donors to financially benefit the firm. The foundation also charged that the firm led the foundation into financial trouble with the U.S. Postal Service and jeopardized its exempt status with the IRS. Originally filed as a federal claim in 1994, the case transferred to an arbitrator for settlement. The outcome only became public when the arbitrator's decision was recently filed in federal court. But the filing did not disclose the arbitrator's rationale for the findings in the case.

★ This same fundraising firm was held liable for private inurement and excessive compensation as an "insider" in the landmark *United Cancer Council* case, released by the

Tax Court last December. (NPA, Jan. 98). In that case, the charity lost its exempt status, retroactive to the time it entered a contract with the firm.

 Although the arbitrator's decision is binding, the firm may appeal. To better understand arbitration, see NP9510-1, *Alternate Dispute Resolution: Arbitrate, Don't Litigate*. A similar process for religious organizations is covered in NP9101-6, *Christian Conciliation: Conciliate, Don't Litigate*.

**2.2 Nonprofit Liable for "Rescuer's" Muddy Fall.** Whether a property owner is liable for injuries someone sustains while on the property depends on who the "someone" is. Sued by a woman injured while attempting to help a child out of a mud puddle on church property, the church argued she was a trespasser and, therefore, not entitled to damages. But the court said the woman was a rescuer because her injury occurred while in the act of helping the child. The woman initially trespassed to retrieve the child's tricycle from a large unfenced yard on church property. Before she reached the tricycle, she heard the child slip into a large pond of water that had accumulated in a low-lying spot in the churchyard. She tried to rescue the child, but slipped in the mud and fractured her leg. The church argued it had no duty to protect trespassers from natural hazards like the water. The court said the determination is made from the standpoint of the child, to whom a different standard applied. *Blackburn v. Broad Street Baptist Church*, 1997 N.J. Super. LEXIS 459 (NJ Super.Ct.App.Div. 1997).

★ **Property owners generally owe trespassers a lesser duty of care than they owe to invited guests. But property owners shoulder greater liabilities for open hazards that attract children, such as playgrounds, dirt bike trails, swimming pools, etc., regardless of whether the children are invitees or trespassers. This case shows how that liability may extend to an adult acting as a rescuer, although the adult was initially a trespasser.**

**2.3 Nonprofit's Executive Salaries Raise Alarm in Congress.** Sen John McCain (R-AZ) is questioning the \$200,000 a year salary of Ira Fishman, chairman of the Schools and Libraries Corporation (SLC), a nonprofit organization that provides Internet links to educational groups. Formed in 1997 by the Federal Communications Commission (FCC), the SLC operates with substantial government funds collected from fees paid by telecommunications companies and customers. Sen McCain chairs the Senate Commerce Committee, which oversees the FCC. Fishman previously worked for the FCC and helped

establish the SLC during his tenure. Sen. McCain's wants to tie SLC's executive salaries to the federal employee pay schedule.

★ **SLC executives defend their salaries, claiming they work long hours and earn amounts comparable to other senior executives of their status and job responsibilities.**

 SLC's argument represents two of the twelve factors to consider when determining reasonable compensation. NP9102-7, *Establishing Reasonable Compensation for Nonprofit Leaders*, discusses those factors and how to implement a safe harbor for setting executive salaries.

## 3. Employees & Volunteers

### 3.1 One Little Mistake Invalidates Early Retirement Waiver.

Employees of American Airlines who accepted a voluntary early retirement offer in 1994 did not waive their rights to bring claims under the Age Discrimination in Employment Act (ADEA), despite having signed waivers to that effect, the First Circuit has ruled, because the waivers lacked a critical detail. American drafted the waivers in compliance with the ADEA, but failed to include a statement advising employees to consult with an attorney prior to signing the form. The waiver contained language advising employees to consult financial and tax advisors, to obtain advice from personnel counselors, and to attend retirement seminars, but it did not specifically advise them to see an independent attorney. The court said this made the waivers invalid, setting the stage for the employees to bring discrimination claims under the ADEA because they alleged that American hired younger employees to fill their positions after they accepted early retirement. *American Airlines, Inc. v. Cardoza-Rodriguez*, 1998 WL 2590 (1st Cir, 1998).

 **Learn how to avoid ADEA claims and other discrimination charges in your organization with NP9312-1, *Avoiding Employment Discrimination in the Nonprofit Organization*. See back page to order.**

### 3.2 Social Security Benefits Don't Hamper ADA Rights.

Although the Social Security Administration certified Rosanna Talavera as totally disabled due to a back injury, the Eleventh Circuit says she may still qualify for certain jobs with reasonable accommodation under the Americans With Disabilities Act (ADA). Talavera had requested a transfer from her job that required her to stand for long periods, but her employer transferred her to another position that required the same standing periods, then refused to renew her contract when it expired. A lower court ruled that she couldn't claim a total disability for Social Security purposes, then argue she was qualified for work under the ADA. But the appeals court said a social security disability doesn't necessarily mean an individual is unable to perform a job with reasonable accommodations under the ADA. *Talavera v. School Board of Palm Beach County*, 129 F3d 1214 (11th Cir, 1997).

★ **Whether a person earning Social Security for a total disability is unable to work with reasonable accommodations depends on the facts and circumstances of each case, the court said. However, an individual claiming ADA protection can't disavow statements he or she makes**

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on a Social Security benefits application, the court added. Although several lower courts have ruled differently, this is the first federal circuit to reconcile Social Security and ADA. It adds another ADA concern for employers.

## 4. Tax-Exempt News & Issues

**4.1 Fitness Center Sweats Through IRS Workout.** A fitness center, owned and operated by two nonprofit hospitals, maintains its exempt status because a significant amount of its facilities and resources are for rehabilitation services conducted by the hospitals, the IRS has ruled. The IRS noted that at least 70% of the center's operations involved public use for which membership or daily fees were charged in competition with commercial health clubs. However, the center depended on financial support from the two hospitals to stay in business, and certain facilities in the center were used routinely for hospital rehabilitation therapy. The center also rented facilities to charities for special rehabilitation classes. The IRS said this rehabilitation use was enough to "accomplish the exempt purposes" of the center and the hospitals that owned it. IRS TAM 9803001.

★ **Exempt organizations that conduct activities in direct competition with commercial businesses often come under IRS scrutiny. Here, the center cited a number of factors to establish its non-commercial nature: 1) it never increased the size of its facilities; 2) it did not market or solicit new members; 3) it maintained constant levels of charitable usage and access; and 4) it provided public recreation at reasonable cost. Given all these factors, the IRS said the facility could**

**maintain its exempt status and avoid unrelated business income tax.**

### 4.2 Strict Limits Proposed on Charities' Political Activities.

Sen. Joseph Lieberman (D-CT) has introduced a bill to significantly limit all partisan political activity by exempt organizations. The bill would eliminate exempt status for 501(c)(3) and 501(c)(4) organizations that accept contributions from a political party or candidate, make contributions to a party or candidate, or expend funds cooperatively with a party or candidate. The measure would also reign in organizations claiming exempt status under §527 of the tax code (i.e. political advocacy groups) by limiting status only to those regulated under the Federal Election Campaign Act.

★ **The limitations go well beyond current tax code restrictions on political activity and lobbying. Opponents say the bill goes too far and restricts free speech rights.**



**Understand the current limitations and how they affect your organization with NP9101-3, *Nonprofit Lobbying and Political Activity—Know Your Limits.***

## 5. State Rules & Regulations

### 5.1 Colorado Considers Tax Exemption for Donated Goods.

A bill introduced in the Colorado legislature would create a use tax exemption for goods donated by manufacturers to entities that are exempt from federal income tax. The bill is under consideration in the Colorado House. HB 1269.

## NPA Highlight of the Month

### Home Office Injuries: Can an Employer be Liable?

Millions of Americans are taking advantage of technology by working from home offices. Employers generally welcome the shift because it often means greater productivity with substantial savings on overhead. But employers shouldn't overlook the possibility of increased workers compensation liabilities that may be created when employees sustain injuries in a home office. The traditional rule was always that an employer couldn't be responsible for an employee's injuries that occur off the job, even if the employee took work home. But some state courts now recognize two exceptions: 1) when an employer specifically directs the employee to perform the work at home; and 2) when the employer expects an employee to routinely work from home. A Texas court used the first exception to hold an employer liable when an off-duty jailer accidentally shot himself while cleaning his gun at home. The employer required employees to clean their firearms during off-duty hours. *Esis, Inc. v. Johnson*, 908 SW2d 554 (Tex.App. 1995). The second exception was used to hold an employer liable when a sales representative had a heart attack while shoveling snow from his driveway so he could access his car to make sales calls. *Tovish v. Gerber Electronics*, 642 A2d 721 (Conn 1994). A New York court also used the second exception to hold a realtor's employer liable when she fell down the stairs in her home. She was descending the stairs from a business meeting held in her home, while on her way to meet another client. *McRae v. Eagan Real Estate*, 567 NYS2d 183 (1991).

★ **Workers comp liability should not deter employers or employees from seeking the best possible work arrangements for productivity and convenience, but employers should enter such arrangements with an accurate understanding of their potential risks. Employers should be clear as to what work can and cannot be performed at home. They should insist that home office employees document their time showing specific periods during which work is performed, so that if an injury is claimed, it must be shown to have occurred during an actual work period in order for the employer to be liable. Employers should consider liability for home offices the same way as they think of liability for their regular offices.**



**For a more thorough discussion of the issues that arise for employers and employees working from home offices, refer to NP9412-1, *The Home Office Deduction for Nonprofit Employees.* See back page to order.**

**5.2 Missouri Exempts Nonprofit Construction.** The state's highest court has ruled that a commercial construction company, which purchased materials for use in building projects for tax-exempt organizations, does not have to pay use taxes on the purchases. *Sports Unlimited, Inc. v. Director of Revenue*, No. 79946 (2/24/98).

★ **Contrast this case with the growing number of state regulators who are denying similar tax breaks to contractors on construction projects for nonprofits, despite the availability of the exemptions to the nonprofits themselves.** (See "Highlight of the Month," *NPA* Dec. 97).

## 6. Gifts & Fundraising

**6.1 Universities Roundup Gift of \$9-Million Ranch.** The Courtenay C. Davis Foundation just donated a working ranch worth about \$9 million to the University of Wyoming and Colorado State University. Davis owned the ranch and worked it until his death in 1995, when the property transferred to the foundation. His daughter, who now serves as president of the foundation, said the trustees decided to donate the ranch to preserve the land intact. They feared a developer would divide the property if it were ever sold. The ranch continues operating, with its annual profits split to both universities for agricultural and veterinary scholarships. The universities also plan student internship programs at the ranch.

★ **Nonprofit Alert has noted a significant increase and variety of gifts-in-kind, from animal trophies (*NPA*, Mar. 97) to ghost towns (*NPA*, Mar. 98). Gifts of real estate can be especially troublesome if the property has any outstanding liens or environmental hazards.**

 **Is your organization equipped to handle unusual gifts? Review NP9109-6, *Gifts of Property* for ten steps to implement before accepting such gifts, then perform your own self-audit based on the risk management tips contained in the memo.**

## 7. Executive Items of Interest

**7.1 Quote From History.** "THIS LAW OF NATURE...DICTATED BY GOD HIMSELF, IS OF COURSE SUPERIOR IN OBLIGATION TO ANY OTHER. IT IS BINDING OVER ALL THE GLOBE, IN ALL COUNTRIES, AND AT ALL TIMES; NO HUMAN LAWS ARE OF ANY VALIDITY, IF CONTRARY TO THIS; AND SUCH OF THEM AS ARE VALID DERIVE ALL THEIR FORCE AND ALL THEIR AUTHORITY, MEDIATELY OR IMMEDIATELY, FROM THIS ORIGINAL."— William Blackstone, writing in his legendary commentaries on the laws of England, written while he was Solicitor General to the Queen, 1765.

**7.2 The "Stamp" of Approval for Philanthropy.** The U.S. Postal Service and the nonprofit community haven't always seen eye-to-eye on postage rates, but a new stamp due out soon is receiving wide approval from both camps. The Postal Service announced it will issue a commemorative stamp honoring philanthropy. The stamp features a sketch of a bee pollinating a flower with the slogan, "Giving and Sharing: An American Tradition." The stamp is due out in October, but only limited quantities will be produced.

 **Move quickly if you want enough stamps for your organization's mailings. They'll only be available for about three months, then USPS's stamp collecting centers will take orders.**

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