



Nonprofit *Alert*®

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

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IRS Stretches to Expedite 9-11 Giving

Responding to urgent need and to complaints that charitable gifts are not benefitting the intended September 11 victims quickly enough, the IRS has issued an unusual announcement: money can be disbursed without charities first having to demonstrate clear financial distress or need on the part of the recipients, at least to the extent typically required.

Unusual Circumstances

According to IRS Commissioner Charles Rosetti, "Groups who act in a reasonable, good faith manner to get help to victims will not endanger their tax-exempt status." Normally, 501(c)(3) organizations must be able to demonstrate that such assistance goes to those in need, who are appropriate members of a "charitable class."

But unusual circumstances call for unusual measures, and the IRS is signaling that it will likely be more flexible in reviewing how funds are distributed in these cases.

Critics Disagree

Some criticized the IRS for overreacting with a policy decision that may actually cause more inequity in the distribution of September 11 funds.

An estimated \$1.3 billion has been raised so far.

Broad Implications

It remains to be seen whether the IRS's action will have broader implications. However, the IRS is clearly *not* signaling that the normal charitable purpose requirements are suspended.

When giving assistance to individuals, charities must be able to demonstrate that their resources were dedicated to furthering the organizations' legitimate charitable purposes, and that individual

beneficiaries were actually in need.

Charities should, therefore, continue to establish, maintain and document an objective basis for reviewing and distributing charitable gifts.

➤ **To review procedures that help demonstrate whether gifts to individuals serve legitimate charitable ends, order Nonprofit Alert® Memo, *Benevolence Programs for Nonprofits*. See back page to order.**

Anti-Terrorism Law Imposes New Nonprofit Telemarketing Disclosures

The broad anti-terrorism bill that Pres. Bush signed into law shortly after the September attacks contains a little-known section that imposes new disclosure rules on telemarketers, even those who conduct telemarketing for charities.

The law requires solicitors to: 1) "promptly and clearly" say their call is to solicit donations; 2) give the name and address of the charity they're soliciting for; and 3) make any other disclosures required by the Federal Trade Commission (FTC).

In 1995, the FTC implemented sales-call rules for telemarketers but exempted charities. This new law makes charities subject to the

1995 rules, in addition to the disclosures described above. It is effective immediately and extends through 2005, unless Congress acts at that time to continue the law.

Until the FTC issues guidance, some requirements under this law are not exactly clear. For instance, most telemarketers start a call by giving the name of their charity, but seldom do they also state the charity's address.

If the FTC requires the full address, rather than just city/state, then charities will have to re-write telemarketing appeals and re-think their messages to avoid awkward pretexts. Watch *Nonprofit Alert*® for updates on FTC guidance.

Technology Abuse: Guilty as Charged!

In a recent survey, nearly two-thirds of employees admit they take undue advantage of their employer's technology resources in ways their employers would disapprove. The most popular abuses: personal surfing and/or shopping on the web (41%); routine personal use of company email (39%); and playing computer games at work (34%). For more information about the *2001 Technology & Ethics Survey*, contact the Society of Financial Service Professionals at (610) 526-2500 or visit their web site at www.financialpro.org.

Liability & Risk Management

Door-to-Door Solicitations: Supreme Court Will Decide Legality of Town's Local Restrictions

The U.S. Supreme Court has agreed to determine whether local governments may restrict groups who conduct door-to-door solicitations. The case pits a congregation of Jehovah's Witnesses against the village of Stratton, Ohio, which passed an ordinance in 1998 requiring anyone visiting private homes with the intent of "advertising, promoting, selling and/or explaining any product, service, organization, or cause" to first register with the mayor's office. Registrants must provide information about themselves, the purpose of their solicitations, and their organizations. The Jehovah's Witnesses challenged the ordinance on free speech grounds, but a lower court upheld the ordinance as "narrowly tailored to serve significant government interests." Oral arguments are expected in February. *Watchtower Bible & Tract Society v. Village of Stratton*, No. 00-1737.

Courts generally look askance on these restrictions unless they're narrowly tailored to preserve free speech. It will be interesting to watch whether the current Supreme Court, generally favorable to states' rights, continues that trend in the present climate of enhanced security.

Gift Annuity Foundation Folds; Donors Left Empty

Mid-America Foundation of Scottsdale, AZ, closed abruptly in October, leaving an unknown number of donors in the lurch for payments on gift annuities the organization was managing. The foundation sent a brief letter to donors saying it had "recently disbanded" and "inadequate assets" prevented the distribution of any further annuity payments. The foundation reportedly offered commissions to financial planners who marketed its gift annuities. That practice, along with the foundation's aggressive marketing techniques, had been criticized by many in the field of charity annuities. It is not known exactly how much money is at stake, but the foundation's recent marketing publications say it had \$42 million in assets.

Florida and Arizona (the two states where Mid-America handled most of its accounts), plus a number of other states do not require charities to keep adequate reserves on hand for annuity payoffs to donors. No doubt this debacle will generate more scrutiny by state regulators. Nonprofit Alert®

Memo, *Guidelines for Charitable Gift Annuities*, covers the basics of annuities and how they can work for your organization. See back page to order.

Court Invalidates Camp's Parental Release Form

A parent's signed release form isn't enough to waive a camp's liability to a child who is injured by the camp's negligence, the Utah Supreme Court has ruled. The case involved an 11-year old girl who suffered severe facial injuries when she was thrown from a horse at the Navajo Trails Adventure Camp in the Utah canyons. The girl's mother had signed a standard release and indemnification form, relieving the camp of liability for anything except gross negligence or willful misconduct. A lower court ruled the release form was a valid contract between the parent and camp, leaving the girl with no recourse for damages against the camp. However, the Utah Supreme Court reversed, ruling that a parent cannot waive the rights of a minor child.

Organizations that operate youth programs should take careful note of this case. Parental release forms may be ineffective, which calls into question whether any waiver is effective since minors do not have legal "capacity" to waive their rights (at least in Utah, anyway). Consider whether your waiver and release forms are legally adequate in light of recent changes in precedent.

Employees & Volunteers

ADA Doesn't Require Creation of "Light Duty" Job

An employer can't be forced to create a permanent position requiring an employee to perform only "light duty" under the Americans With Disabilities Act, the Tenth Circuit has ruled. The Denver Post Co. argued in defense to a discrimination lawsuit that the ADA protected the company's decision to terminate an employee because he could not perform essential functions of his job. The employee worked as a journey-level mailer, requiring operation of heavy machinery. He suffered seizures on the job, was diagnosed with epilepsy, and his doctor informed the company that he could not drive or operate heavy equipment for three months. The company then fired the employee. When the employee's doctor lifted the restrictions, the company rehired the employee in his previous position. However, the employee filed suit claiming the company failed to reasonably accommodate him during his disability. The court decided otherwise, finding the company was justified in terminating him for failure to perform essential job functions. His job description included five essential functions, three of which involved the use of heavy machinery, the court noted. The employee's request to perform "light duty," which did not involve heavy machines, would essentially require the company to create a new position specifically for him, the court said. Accommodation under the ADA does not require an employer to create a new job, the court concluded. *Mathews v. The Denver Post*, 2001 WL 967797 (10th Cir. 2001).

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 **How far must an employer go to “reasonably accommodate” an employee’s disability? Review the basic standards in Nonprofit Alert®Memo, ADA: Basic Requirements for Nonprofits. Refer to ordering instructions box on back page.**

 **In establishing a basis for reasonable compensation, comparability data should align as closely as possible with the facts under review. This report, from Abbott, Langer & Associates at (708) 672-4200, www.abbot-langer.com provides national data but regional data is also available from sources such as the Christian Management Association (www.cmaonline.org) and National Association of Church Business Administrators (www.nacba.net). To understand the standards of review, see Nonprofit Alert® Memo, *Compensation Policies for Nonprofit Leaders*. See back page to order.**

Earning What You’re Worth? Survey Compares Data

The median salary for nonprofit CEO’s working in the U.S. is \$73,000, according to the annual compensation survey by Abbott, Langer & Associates. Since federal law limits nonprofits’ compensation packages to “reasonable” amounts, data like this can be helpful in justifying and regulating the salaries and benefits of hard-to-quantify executive manpower. The study surveyed over 62,000 nonprofit employees, finding the most highly paid executives in health & welfare organizations (median annual salary: \$124,982), business-related trade associations (\$118,000), and foundations (\$95,000). Not surprisingly, organizations located in large metropolitan areas paid higher salaries, particularly New York City (median annual salary: \$139,525), Los Angeles (\$96,250), and Chicago (\$89,796). The survey also included data on 123 other nonprofit professionals, among them: chief legal officers (median annual salary: \$120,750); directors of government relations (\$76,975); chief financial officers (\$64,000); marketing directors (\$55,703); and human resource managers (\$50,000).

Per Diem & Mileage Rates Increase Only Slightly

Federal per diem rates are set to increase by only a few dollars next year, as the rates for “high-cost” areas rise from \$201 to \$204 per day. Rates for all other areas will increase from \$124 to \$125 per day. Several areas were added to the “high-cost” list, including Palm Beach, FL, Kennebunk, ME, and Salt Lake City, UT. However, Philadelphia was removed from the “high-cost” list of cities this year. The standard mileage rate for business use of an automobile also increases in 2002 from 34.5 cents to 36.5 cents. The rate for charitable use of an auto remains unchanged at 14 cents per mile. Nonprofits often use these rates to reimburse employee travel, reducing detailed expense documentation.

NPA Highlight of the Month

Downsizing & Layoffs: Hidden Risks for Managers

News of layoffs and downsizing resonated steadily among America’s workforce during the months following the economic slowdown and terrorist attacks of September. Nearly half the companies surveyed recently by the Center for Workforce Effectiveness reported layoffs in the past 12 months, and almost a third more said they expected layoffs in the next six months. Both professional and clerical staff will be affected by these layoffs, according to the survey. Charities face just as much pressure and hidden risks in downsizing and layoffs as their for-profit counterparts.

Charity managers will likely consider all possible alternatives for downsizing, such as hiring freezes, temporary leave, salary reductions, shorter work weeks, or voluntary severance/retirements. These “interim” measures may better preserve an organization’s long-term stability by offering ready flexibility to bring back experienced employees. Whatever method is chosen, beware of the legal implications. Layoffs, just like any other hiring/firing decision, should be demonstrably objective. Of course, decisions may not be made on the basis of a protected status, like age or disability. But employers should demonstrate and adequately document the objective, fair, and legal reasons for their decisions.

Communication is key to maintaining good employer-employee relations throughout this difficult time. As soon as practical, discuss with all employees the situation prompting the layoffs and how your organization plans to proceed (i.e. how your mission is affected, how you will transition through the period, etc.). Then meet individually with the affected employees to deliver the news with sensitivity and care. Be prepared to offer affected employees information about unemployment benefits, insurance, health care coverage, etc.

If there’s a chance of rehiring laid off employees, then feel free to discuss that possibility, but be realistic in your projections. Giving employees false hope will only make matters worse (and possibly lead to additional legal problems later if things don’t work out as hoped). Remember that rehiring decisions must also avoid illegal discrimination.

 **News of layoffs and downsizing understandably generate much workplace anxiety. Help keep your managerial stress in check with tips from Nonprofit Alert® Memo, *Terminations: Wisely Managing Troublesome Employees* and *Employment Discrimination: Steering Clear in the Nonprofit Workplace*. See back page to order both memos. Before your organization considers downsizing or layoffs, seek experienced advice from legal professionals.**

 **Find tips about how to use these rates in Nonprofit Alert® Memo 9103-3, *Expense Reimbursement for Volunteers and Employees*. To order, see back page.**

Tax-Exempt Issues

Handwritten Card Won't Substantiate Donations

The Sixth Circuit has refused more than \$6,000 of a taxpayer's charitable deductions because the only evidence he offered as proof was a small card on which he'd written "Tithes, \$6,074, 1989 Tabernacle of God." Among his claims: cash tithes and an organ speaker donated to the Tabernacle, plus inspirational articles donated to a religious publication. The taxpayer had no receipts or canceled checks for any of his claimed donations. Furthermore, the religious publication to which the taxpayer claimed he'd contributed articles wasn't even a charitable organization. *Jennings v. Commissioner*, No. 01-1336 (6th Cir., 9/19/01).

 **Substantiation questions surface frequently at year's end when donors ask charities for receipts or other acknowledgments of contributions for tax purposes. IRS officials recently said plans are underway to allow electronic acknowledgment of charitable gifts, so receipting may soon become much easier for nonprofits. For now, however, review your obligations with Nonprofit Alert® Memo, *Charitable Gifts: Receiving & Receipting*. Ordering instructions appear in the box at right.**

'Tis the Shopping Season: Deductions for Rebates

An online shopper may claim a charitable deduction for donating rebates on merchandise that she purchases through a commercial vendor's web site. The vendor operates a site offering a variety of products from several different companies. With each purchase, the vendor awards rebates to the shopper,

who may elect to receive the rebate in cash or donate the amount to a charity of his/her choice. Rebates designated for charities are held by the vendor in a non-interest bearing account until they're transferred directly to the charity. All rebate donations are irrevocable. The IRS ruled that this arrangement satisfied the tax code rules for charitable contributions because it was made voluntarily and with donative intent. The deduction would be allowed in the year during which the rebate is paid to the charity, since the vendor is actually serving as an agent of the shopper, the IRS said. The shopper could not be taxed on the rebate amounts since the rebate is a reduction in the purchase price of an item, not a payment of income to the shopper, the IRS concluded. IRS PLR 200142019.



Enjoy a Blessed Holiday Season!
from the
Staff of the Nonprofit Alert®



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