



Nonprofit *Alert*®

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

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U.S. Charitable Donations Decline , While Executive Salaries Increase at Large Charities

Contributions to the nation's largest charities fell by 1.2% last year, reports an annual study conducted by *The Chronicle of Philanthropy*. The drop marked the first decline in more than a dozen years. The annual "Philanthropy 400" study ranks the nation's top charities by private contributions they receive from individuals, foundations, and corporations. The figures do not include service fees or government funding sources.

Executive salaries increase

Another *Chronicle* survey found that executive salaries at many of these large charities actually increased last year, despite declining revenues. CEOs at 235 large nonprofits, including 50 of the nation's wealthiest private foundations, received a median salary increase of 4.3% in 2002. That increase is greater than the 4% increase that executives in private industry received on average last year, reports the study.

Donations went down by 1.2%, but executive salaries increased by 4.3%.

Vast majority contributes

On a related note, Boston-based Vertis marketing company reported that 86% of Americans contributed to charity last year, although they may have given smaller sums than in previous years.

That number isn't totally representative because the survey specifically excluded religious donations; respondents were asked to consider only their charitable giving to non-religious causes and organizations. Two thirds of respondents also said they planned to volunteer or donate non-monetary items in the coming year.

➔ **Free copies of the Vertis survey, *Direct Marketing for the Nonprofit Sector*, are available upon request at (800) 577-8371 or info@vertisinc.com.**

Quick Tax Tip: Mileage Rates Increase in 2004

The charitable mileage rate remains unchanged at 14 cents per mile in 2004, but the business mileage rate increases to 37.5 cents per mile (up from 36 cents). Nonprofits often use these rates to reimburse employee travel expenses, eliminating detailed expense documentation.

For helpful tips about expense reimbursement policies and procedures, read Nonprofit Alert® Memo, *Expense Reimbursement for Volunteers and Employees*.

Liability & Risk Management

Charity postage fraud nets \$4.5 million settlement from Boston-based direct marketing firm

The Vantage Group of Boston and its two subsidiaries have entered a \$4.5 million settlement of a claim brought by the federal government alleging the company committed postal fraud during direct mail campaigns for dozens of charities in the 1990s. The government claimed the company improperly used nonprofit bulk mail rates for roughly 78 million solicitations. The company's CEO and CFO were also accused of making false statements to cover up the alleged misconduct.

Vantage allegedly signed agreements with several charities, which permitted additional solicitations after an initial campaign was complete if Vantage hadn't raised enough funds during the initial campaign to cover the company's costs. The agreements reportedly gave Vantage authority to continue soliciting on a charity's behalf until enough money was collected to cover all costs. According to government estimates, Vantage pocketed 76% of all the charitable donations it solicited during this period.

Although the agreements themselves were not illegal, postal regulations at that time prohibited commercial fundraisers like Vantage from using nonprofit bulk mail rates. New postal regulations that took effect last month now allow fundraisers to use nonprofit mail rates for "cooperative mailings" made on behalf of charities, so long as the charities are entitled to a portion of revenue from the mailings. (See *NPA*, July '03).

However, many industry experts point to this case as an example of the abuse that can happen when nonprofit mailings are fueled by commercial interests. At least four congressmen have now questioned the new policy and are calling for the USPS to reconsider the rule change. But the USPS says the rule benefits small nonprofits that can't otherwise afford charitable solicitation mailings.

Because postal rules are currently in flux, charities should consult legal counsel before entering agreements with for-profit fundraisers to make solicitation mailings at nonprofit mail rates.

Even though these fundraising arrangements may be legal, they still pose other potential liabilities, including private benefit, private inurement, and state registration compliance.

"Complete release of liability"

Waiver protects charities from death claim

A properly executed release form, signed before a volunteer took part in a charity event, relieved the event organizers of liability for the volunteer's death during the event, a federal district court has ruled. Eve Jaffe rode a bicycle in a four-day, 330-mile fundraising charity ride for AIDS victims. During the ride, Jaffe became ill and stopped at a medical station. She received intravenous fluids, but did not improve. Charity organizers then transported her to a nearby hospital, where she died the next day of cardiopulmonary arrest. *(continued on p. 3)*

Waiver of liability (continued from p. 2)

Her mother sued the group of AIDS relief charities involved in the event for negligently equipping and organizing the medical station where Jaffe first stopped for care and for negligently diagnosing her condition. The charities contended that Jaffe signed a medical waiver relieving them of liability. After reviewing the waiver form at length, the court agreed.

The waiver was “very clear on its face” and constituted “a complete release of liability for all negligence claims, including claims for medical negligence,” the court wrote. Since Jaffe participated in the ride the previous year, the court said she presumably knew the “nature of the event and the medical arrangements that would generally be provided.” The court noted that Jaffe signed the waiver to participate in a completely voluntary event, then willingly and knowingly engaged in the ride. *Jaffe v. Pallotta Teamworks*, No. 02-1048 (D.C. 8/8/03).

A properly prepared waiver containing an informed assumption of risk clause is one component of good risk management. But don’t stop there! Consult legal counsel to determine if your waiver forms and other risk management policies are legally adequate.



What’s assumption of the risk? [Learn more.](#)



Nonprofit Alert® Memo, *Gifts of Property*, provides more details on obligations to donors.

Hospital agrees to repay donor’s \$6 million gift

St. Luke’s-Roosevelt Hospital Center has agreed to repay \$6 million of a \$10 million endowment that R. Brinkley Smithers, a wealthy businessman, gave to the hospital to fund an endowment for an alcohol research and treatment center. Smithers died in 1994, but his wife brought suit in 1998, charging that the hospital misappropriated money from the endowment. She also claimed the hospital sold the facility where the treatment center was originally housed and was attempting to disburse \$15 million in sale proceeds into the hospital’s general fund.

The hospital argued she didn’t have standing to bring the lawsuit, but an appeals court disagreed, sending the case back to trial for a ruling on the merits. Legal experts hailed that ruling because it was one of the first New York cases to recognize a donor’s right to enforce the terms of a gift. Until that case, New York (like many states) only permitted such lawsuits to be brought by the attorney general on behalf of the state.

Now, after years of legal wrangling, the parties have reached a settlement directing the hospital to pay \$6 million to another nonprofit that plans to manage the treatment center. The parties have agreed that the \$15 million in sales proceeds will be directed to the original endowment and used exclusively for the hospital’s substance abuse programs. The hospital also agreed to rename its treatment facilities that carried the Smithers’ name.

Generally, donors lack legal standing to enforce any gift conditions they impose. But charities may be legally obligated to comply with such conditions, depending on their written and oral communications during their relationship with the donor.

Charities may be legally obligated to honor gift conditions, depending on what is communicated to donors.

Nonprofit Alert®

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Nonprofit & Tax Exempt Issues

National registry for charities may aid state & federal enforcement

Guidestar, a national database of nonprofits, announced plans last month to create a repository of state charity registration information. Guidestar already compiles and makes available on its web site (www.guidestar.org) federal tax filings and other organizational information about charities that submit Form 990s to the IRS.

This latest addition will expand the Guidestar database to include charities' state registrations, reporting information, and possibly even data on state enforcement actions against charities. Known as NASCONet, the new repository is a joint effort between Guidestar and the National Association of State Charities Officials (NASCO), an association of 40 state offices that regulate charities. A \$1.3 million federal technology grant will fund the project.

NASCONet is intended to help both charities and state regulators by providing a central foundation from which states may develop a standardized registration process for charities, thereby eliminating some of the redundancies involved in multi-state registration.

NASCONet's initial implementation is planned for sometime in 2004.

What's that cost in today's dollars? Value changes for planned gifts

The National Committee on Planned Giving (NCPG) proposed new gift valuation standards last month that should help charities better account for planned gifts. Most charities now follow the IRS gift valuation method, which is used to determine a donor's tax deduction for the gift.

But the IRS gift valuation method may not accurately reflect the value of deferred contributions to a charity (such as those from charitable gift annuities or charitable remainder trusts) because a charity may not receive the full value of the gift for many years to come.

NCPG's new standards are designed to help charities estimate the value of a planned gift in today's dollars. The standards also take into consideration the administrative expenses and other fundraising costs of securing planned gifts. That's a significant factor the IRS method doesn't provide.

NCPG plans to finalize the standards sometime next year. The organization would only *recommend* that charities use the new standards. They are not legal requirements, so charities would not be required to adopt them.

The standards are only recommendations, not legal requirements; therefore, charities would not be required to adopt the proposed standards.

Questions or comments about the project should be directed to nasconet@guidestar.com.

For more information, contact NCPG at (317) 269-6274 or visit their web site at www.ncpg.org.

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Highlight of the Month

DOL proposes changes to overtime rules; nonprofit employers may feel pinch

Regulatory changes the Department of Labor (DOL) has proposed for 2004 may entitle many previously exempt nonprofit employees to overtime pay. The DOL plans revisions to several regulatory provisions of the Fair Labor Standards Act (FLSA) regarding overtime pay requirements that have created confusion and complications for years. Because of the complex rules, employers routinely misclassify employees resulting in liabilities for back overtime pay and penalties. DOL thinks the regulatory changes would ease the burden for employers and reduce the number of lawsuits that have resulted.

DOL proposes streamlining the test employers must use to classify employees as exempt from overtime pay requirements. The current test requires employers to apply a three-part analysis to each employees' salary basis, salary level, and duties. The new proposal would shorten and simplify this test.

For example, the new test to determine whether an administrative employee is exempt from overtime would ask whether the employee holds a position of responsibility and primarily performs office or non-manual work directly related to the management or general operations. If this test is met, the employee would not qualify for overtime pay.

The last substantive revisions to the regulations covering executive, administrative, and professional exemptions from overtime pay were made nearly 50 years ago. Even more surprising is the fact that the salary levels used to determine when employee overtime exemptions apply have not changed since 1975. Since then, wages have more than tripled.

 **If these proposed FLSA regulations are approved, nonprofits need to review their wage and overtime pay structures and reconsider employee classifications. Some employees who previously didn't qualify for overtime may no longer be exempt. Some who were considered exempt in the past may now qualify for overtime under the new rules. Your organization should consult legal counsel to make appropriate changes in employee classifications and overtime pay structures if these proposed rules become law. Visit the Gammon & Grange web site, www.gg-law.com for more information about the changes.**

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