Gammon & Grange, P.C. October 2001

Nonprofit *Alert*®

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

Inside This Issue:

Charities Respond Immediately to Terror; But Fraud Opportunists Mar Efforts

The philanthropic community jolted into action last month, following the devastation wrought by terrorist attacks in New York, Pennsylvania, and Washington, DC. But charities should take additional steps to distinguish themselves from fraudulent groups taking advantage of Americans' desire to respond.

Overwhelming Donations

Disaster relief organizations reported significant contributions and in-kind donations—so many that the Red Cross and other groups began asking donors for financial contributions only. The Salvation Army literally ran out of storage space for donated supplies.

In an unprecedented show of corporate support, businesses from Amazon.com to McDonald's Restaurants began accepting and relaying financial contributions from their customers to various disaster relief organizations. As of this writing, contributions have reportedly topped $150 million, with that amount rising steadily.

Volunteer Support

Similarly, volunteer support was immediate and enormous. The Salvation Army reported over 600 volunteers plus 150staff on site at the New York disaster and at triage centers in New Jersey alone.

Just one week after the disaster, the Red Cross said more than 7,000 volunteers had already helped with relief efforts. Many thousands more were expected to pitch in during the rescue and cleanup work that will continue for weeks to come.

Scams Reported

Unfortunately, reports surfaced of "fake charities" attempting to capitalize on the outpouring of support. The Michigan Attorney General's office, for instance, issued a press release urging citizens "to deal only with established, recognized charities." One e-mail scam reportedly included a link that directed donors to contribute to what they thought was a charitable organization, but merely collected their credit card numbers for improper use.

Another group sold prepaid telephone cards, claiming 10% would benefit attack victims, but the company's return address turned out to be invalid.

➢ **For donor's seeking confirmation of charitable status, www. guidestar.org lists most charities recognized by the IRS. Charities should also be prepared to provide copies of their annual Form 990's or other documents. For help, refer to Nonprofit Alert® Memo, *"IRS Disclosure Rules."* Contact Gammon & Grange to order.**

Military Leave for Employees: An Employer's Responsibilities

With the U.S. ready for almost certain military action against suspected terrorists and others who may have aided the September 11 attacks, many American employees may soon be called away to assume duty in the armed forces. How must employers respond?

The Uniform Services Employment and Reemployment Rights Act (USERRA) governs an employer's responsibilities in such situations. It covers the period during which employees may be called away for voluntary or involuntary military service in a national emergency, along with the period thereafter during which they would likely return to their regular jobs.

To assert their rights under USERRA, employees must comply with three requirements:

(1) if possible, the employee must give advance notice of the expected military leave;

(2) the employee must not already have had more than

(continued on back page)

Liability & Risk Management

In Name Only: Sponsor of Charity Event Not Liable

Making a grant to another organization does not automatically result in liability for the grantor if something goes wrong, a Massachusetts trial court found. Eastern Bank sponsored a charity health awareness event, but its only connection was a $5,000 contribution made through its charitable foundation. At the event, participants were encouraged to give blood. But a phlebotomist employed by the local hospital, which organized the event, mistakenly drew blood from one participant with the same needle that had already been used on another blood donor. The participant alleged she suffered pain and emotional trauma from numerous subsequent medical tests, and argued the bank was liable because it had a duty as co-sponsor of the event to make sure the phlebotomist was adequately supervised. But the court ruled the bank did not have a duty because it was merely a sponsor that "had no control over the event...[nor] was in a position to prevent the injuries...[since it] played no role in the management or operation of the program." *Lopresti v. City of Malden*, CA 98-01459 (Super.Ct. at Middlesex, 2001).

Sponsors and grantmaking entities may take comfort from this case; however, if grant conditions set procedures or standards, or the grantor plays a more active role in the event, the grantor should review potential liability and/or insurance coverage.

Company's Founder Lacks Knowledge, Avoids Taxes

The founder of a company is not liable for the company's failure to pay withholding taxes after he relinquishes management control to another person who serves as president, the U.S. Bankruptcy Court has ruled. The saga began in 1993 when the company's founder appointed another person as president. Two years later, the founder learned from an IRS agent that the company was delinquent in its tax payments. The founder then loaned $40,000 of his personal funds to the company for payment of the taxes and immediately began the process of auditing the company's books. He also laid off a number of employees and began a search process for a potential buyer for the company. During this period, he also made sure the company paid all its current withholding taxes. However, the company eventually failed and filed for bankruptcy. The IRS then filed a $248,000 claim for unpaid taxes and penalties against the founder.

He defended the claim by arguing that he lacked actual knowledge of the payroll tax delinquency during the two years it occurred. The Bankruptcy Court agreed, noting that he had reasonably relied on representations made to him by other company officials while he was uninvolved with the daily operation of the company. The court observed that he took immediate steps to correct the deficiency as soon as he had actual knowledge. Under the "totality of the circumstances," the founder had acted in good faith and could not be liable for the deficiencies under the "responsible person standard," the court concluded. *In re Nutt*, Bkty.Ct. (FL 2001).

If federal withholding is not collected and paid to the government, the "responsible person" doctrine can make individual executives and even board members personally liable for up to 100% penalties, *in addition* to the obligation to pay the withholding. This applies to both nonprofits and for-profits. This case shows that even executives and board members who valiantly respond to situations in hard times must ensure that all withholding requirements are met—at least on their watch—and that they are not responsible for any failures to comply.

Employees & Volunteers

Fee Splitting Clause Ruins Arbitration Agreement

Once again, courts have closely scrutinized arbitration provisions to be sure they do not undermine rights under non-discrimination statutes. In this case, the Eleventh Court ruled a fee-splitting arrangement in a mandatory arbitration agreement was unenforceable. The case involved a "Pre-dispute Resolution Agreement" between Globe Airport Security Services and a female employee who was required to sign the agreement before she was hired. The agreement said any disputes arising from her employment would be submitted to arbitration, and all fees and costs would be shared equally between the parties. When the employment was later terminated, she filed a Title VII lawsuit, claiming gender discrimination. Globe responded with a motion to compel arbitration. But the employee objected, arguing that the fee-splitting provision created an unreasonable cost for her and prohibited her from asserting her rights. The district court agreed, and the Eleventh Circuit upheld the decision, noting that the fee-splitting provision directly circumscribes an arbitrator's authority to award fees and costs. The court also refused to sever the offending provision and enforce the remainder of the agreement, saying, "if an employer could rely on the courts to sever an unlawful provision and compel the employee to arbitrate, the employer would have an incentive to include unlawful provisions in its arbitration agreements." *Perez v. Globe Airport Sec. Servs., Inc.* 2001 WL 649497 (11th Cir. 2001).

Nonprofit *Alert*®
8280 Greensboro Drive, 7th Floor, McLean, VA 22102-3807
(703) 761-5000 Facsimile: (703) 761-5023
E-mail: npa@gandglaw.com
Editor-in-Chief . . . . . *George R. Grange, II*
Editor . . . . . *Sarah J. Schmidt*
Nonprofit *Alert* is published monthly by the law firm of Gammon & Grange, P.C., which represents nonprofits nationwide. References in **Nonprofit *Alert*** in no way constitute an endorsement by **Nonprofit *Alert*** or by Gammon & Grange, P.C. **Nonprofit *Alert*** is distributed with the understanding that no legal, accounting or other professional services are rendered, and no attorney/client relationship is established. If legal advice or other expert assistance is required, the services of a professional should be obtained.

Courts are especially solicitous of employee rights in discrimination cases. Even so, arbitration/mediation provisions offer potentially expeditious means of resolving disputes. For more details, read more in Nonprofit Alert® Memo, *Arbitrate, Don't Litigate!* Contact Gammon & Grange, (703) 761-5000 to order.

Minister's Housing Isn't Counted in Retirement

The IRS has ruled that a minister's housing allowance cannot be counted as compensation when calculating the minister's limits on excludable retirement plan contributions permitted under §415 (c) of the tax code. The minister worked for a religious organization that employed several individuals who qualified under the tax code definition as "ministers of the gospel." All were paid a regular salary plus a housing allowance, which was excludable from their gross income. The organization also supported a §401(b) retirement plan and allowed the ministers to make salary reduction contributions up to 25% of their excludable compensation. The housing allowances were not counted as compensation when figuring the ministers' contribution limits. The IRS said this was correct because housing allowances are not covered under the standard definition of compensation for purposes of §415(c) retirement plans. They are also not included in either of two "alternative definitions" of compensation found in Treasury regulations that supplement §415(c). Therefore, the minister's housing allowances could not be counted when computing the retirement plan contribution limits.

Unfortunately, this ruling means ministers are significantly limited in the amounts they can contribute to their retirement plans since they cannot count housing allowances as compensation when calculating retirement contributions. The Economic Growth and Tax Relief Reconciliation Act (EGTRRA) will soften the impact of this ruling next year, however, as it increases the percentage of contribution limits under §415(c), effective Jan. 1, 2002. To learn more about

Tax-Exempt Issues

Three Times the Charm: USPS Rates Rise Again

The Postal Service announced last month that it intends to propose another 8.7% rate hike to take effect next year. The increase would boost the price of first class postage from .34 cents to .37 cents, but it was unclear at press time exactly how much nonprofit postal rates would change. The Direct Marketing Association (DMA) criticized the announcement, saying it would be bad for the economy. The DMA also said this is the first time ever that the Postal Service has either raised or requested three rate hikes in one year. Postage for nonprofits increased by an average of 4.8% in January, followed by another 2% increase in July. The Postal Service says the increases are necessary to offset a projected 2001 deficit of $1.65 billion.

NPA Highlight of the Month

Forecasting Employment Litigation Trends: Lawsuits Abound

The 1990's brought an upsurge in sexual harassment lawsuits, but that trend will likely be replaced by more disability related lawsuits during the next decade, according to practitioners at the Society for Human Resource Management Annual Conference. One reason: the workforce is aging as medical advances extend the average life span. In addition, many older employees have not adequately planned for retirement, relying instead on a Social Security system that by many accounts cannot meet the burgeoning need. Thus, some practitioners fear that older employee discontent may fuel a host of discrimination complaints.

Employers can best prepare for such risks by adopting good, sound employments practices. Of course, employers must not illegally discriminate on the basis of age. If layoffs or downsizing are required, care must be taken to identify the objective, non-discriminatory basis for layoffs. While an employer may not have intended to illegally discriminate in specific terminations or layoffs, arbitrary actions that impact persons of a protected class are more likely to be interpreted as discriminatory. Such actions are much harder to defend.

In individual cases, employers should fairly and carefully engage in progressive discipline, and appropriately document personnel actions. This not only serves to improve performance and encourage clear expectations, but if a lawsuit materializes, then the employer has hard factual evidence to offer, rather than one word against another's.

For more tips on how to avoid age discrimination complaints in your organization, refer to Nonprofit Alert® Memo, *Employment Discrimination: Steering Clear in the Nonprofit Organization*. Contact Gammon & Grange, (703) 761-5000 to order. For information about the Society for Human Resources Management, visit their website at www.shrm.org.

Three Times the Charm: USPS Rates Rise Again

The Postal Service announced last month that it intends to propose another 8.7% rate hike to take effect next year. The increase would boost the price of first class postage from .34 cents to .37 cents, but it was unclear at press time exactly how much nonprofit postal rates would change. The Direct Marketing Association (DMA) criticized the announcement, saying it would be bad for the economy. The DMA also said this is the first time ever that the Postal Service has either raised or requested three rate hikes in one year. Postage for nonprofits increased by an average of 4.8% in January, followed by another 2% increase in July. The Postal Service says the increases are necessary to offset a projected 2001 deficit of $1.65 billion.

IRS Open for Business on the Web; Pay Taxes Here!

The IRS officially opened its Electronic Federal Tax Payment System (EFTPS) to all taxpayers last month, accepting tax payments electronically over the Internet. The system has actually been in use since 1996 but was used primarily by large corporate taxpayers. With the success of that program, the IRS finally opened the site to all taxpayers. The system is free, but to

This policy should help streamline many private foundations' international grant making processes. Even so, private foundations must be careful to exercise expenditure responsibility where grants to foreign entities are concerned.

Ordering Information: Memos referenced in the ***Nonprofit Alert*** are $20 per memo *prepaid* ($10 for firm clients). Five or more copies of the same memo are bulk priced at $5 each.
Subscription Information: Subscriptions to the ***Nonprofit Alert*** are $75/year, $130/two years. Additional subscriptions to the same organization are $25 each/year. Subscriptions for 100 or more may qualify for additional bulk discounts. Send inquiries to: Editor, ***Nonprofit Alert***, 8280 Greensboro Dr., 7th Floor, McLean, VA 22102-3807; (703) 761-5000; npa@gandglaw.com.

When Employees Take Military Leave, Employers Face Legal Duties

five years of total absences from the same employer for all combined periods of prior military leave; and (3) if the military leave is less than 31 days, the employee must report to the employer within a short, specified time period after his/her military service ends; if the leave is greater than 31 days, the employee must submit an application for reemployment.

Benefits Continue

Various employment benefits still continue throughout the entire period of military leave. Employers must treat the employee as if he/she is on furlough or a leave of absence, meaning the employee is still entitled to any rights and benefits that aren't determined by seniority in the organization. Generally, this is the equivalent of granting the employee an unpaid leave of absence. Commencement of military leave is a qualified COBRA event, which entitles the employee to elect continued health care coverage for the entire COBRA period, regardless of whether the employee eventually returns to work or not.

Certain exceptions apply to reemployment rules, including provisions addressing potential disabilities that the returning employee may have due to his/her military service. Some state laws also impose additional requirements, so employers should consult local counsel familiar with USERRA and all pertinent state laws. In certain crisis environments, Congress sometimes enacts special relief measures to cover military members or others affected by the crisis. So employers should also be aware of those measures and what impact they might have on employees as they return to work. Learn more about USERRA at http://www.dol.gov/elaws/userra0.htm.

Nonprofit Alert®

Gammon & Grange, P.C.
7th Floor, 8280 Greensboro Drive, McLean, VA 22102-3807

October 2001

**First Class
U.S. Postage
PAID
Laurel, MD
Permit #1290**