

NEWSLETTER AUGUST 2010

Opening Letter:

Dear Clients and Friends,

We are pleased to share with you our newsletter on matters of interest to nonprofit executives. It is being distributed to you to help keep you abreast of issues of legal concern to the nonprofit community.

This month, please enjoy our feature articles on force majeure provisions, the IRS's recent announcement about how to maintain your exempt status even if having failed to file for the past three consecutive years, and the importance of following proper procedure for employment agreements. Also, consider some events coming up: The Foundation Center's free *Grantseeking Basics* event and The Gannett Foundation's Community Action Grants.

Please feel free to pass this newsletter along to your colleagues. We also invite referrals to others in your organization and elsewhere who might wish to receive future issues directly.

We welcome suggestions about topics of interest to address in future issues. Likewise, we encourage you to get in touch with us with any questions you might have about legal matters, whether or not discussed in this newsletter. All consultations are confidential and are free to prospective new clients. We hope you will enjoy our newsletter.

Sincerely,

Julian H. Spirer

Coming Up:

(1) Every nonprofit organization could benefit from more effective fundraising. Take advantage of The Foundation Center's free event this August or again in September. *Grantseeking Basics* will introduce you to The Foundation Center's resources in order to become a more effective grantseeker. In 90 minutes you will be given a formal presentation on foundation research and identification of potential funders, as well as a tour of their library. The event is being offered on August 10th and September 14th at The Foundation Center, 1627 K Street NW, Third Floor. You can register online [<http://foundationcenter.org/washington/training/gbdc.html>], in person, or by calling 202-331-1400.

(2) The Gannett Foundation is now accepting applications for Community Action Grants. The average grant amount is between \$1,000 and \$5,000. The Foundation favors grass-roots educational programs (e.g., after school tutorial programs), at-risk youth programs, and services for special populations (e.g., homeless children, families in crisis, poor/ill elderly). Applications are due by August 17th, and the application can be found here [<http://www.gannettfoundation.org/>].

Did You Know?

(1) The IRS recently released an update to Publication 4483, 403(b) *Tax Sheltered Annuity Plan for Sponsor*. If you are a 403(b) plan sponsor or employer, click here [<http://www.irs.gov/pub/irs-pdf/p4483.pdf>] to ensure that you are maximizing your employees' retirement benefits, avoiding additional taxes and penalties, and remaining in compliance with the law.

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(2) Do you want to keep your knowledge of exempt organization compliance requirements up to date? Are you interested in ensuring that your organization maintains its tax-exempt status? The IRS provides free online training here [www.stayexempt.irs.gov] for exempt organizations. Benefit from the wide selection of virtual workshops and mini-courses on topics ranging from taxable business income to political campaign involvement. Review also the Resource Library [<http://www.stayexempt.irs.gov/ResourceLibrary.aspx>], where you will find course descriptions and summaries, a glossary of terms, and links to each IRS form and publication discussed.

Main Articles:

(1) **Force Majeure:** How can your organization prepare for the unexpected?

Force majeure provisions may hold the key to protecting an organization from uncontrollable circumstances. By generally excusing a party's performance under a contract to the extent that such performance has become impossible or illegal, these provisions account for circumstances beyond a party's reasonable control (e.g., acts of war, terrorism, government actions, disease, strikes, breakdown of machinery, and acts of God). If one such enumerated event or condition makes a party's performance impossible under the contract, then that party would have the right to postpone performance or even to terminate the contract without liability to the other party.

Understandably, force majeure clauses can prompt intense negotiations. Be aware that courts tend to interpret force majeure clauses very narrowly based on their precise language.

(2) **Maintaining Your Tax-Exempt Status**

Last month we reported that small charities failing to file their returns for three consecutive years are in danger of losing their tax-exempt status, but that the IRS would soon release guidelines on how it will help small charities maintain that status even if they missed this year's May 17th deadline. The remedy, which the IRS announced July 26th, is to file returns for the missing years before October 15, 2010 under a one-time relief program.

The 2006 Pension Protection Act imposed two important changes for tax-exempt organizations. First, it mandated that all exempt organizations other than churches or church-related organizations file an annual return with the IRS.. Second, it prescribed that any exempt organization failing to file for three consecutive years will lose its exempt status. If an

organization loses exemption, it will have to reapply with the IRS to regain that status. Income received between revocation and renewed exemption may be taxable.

Under the IRS's recent relief plan, small organizations required to file Form 990-N need simply to go to the IRS website, supply the eight information items called for on the form, and file electronically before the October deadline. Small organizations eligible to file Form 990-EZ can participate in a voluntary compliance program (VCP), under which an organization must file its delinquent annual information returns by the October deadline and pay a compliance fee.

For more information about this IRS announcement, visit their website here [www.irs.gov].

(3) Employment Agreement: The Importance of Following Procedure

The Old Cowtown Museum in Kansas recently learned a lesson about following procedures for Board approval of an employment agreement for a chief executive. When Jan McKay was hired as the museum's Executive Director in 2001, her employment agreement was signed by the President though never reviewed or approved by the Board of Directors. This neglect was repeated when a new employment agreement was entered into three years later.

In 2006 McKay was fired. She claimed the organization breached her 2004 amended employment contract, under which the Board was required to give McKay notice of its intent to terminate her employment by a date then passed. On the other hand, the Cowtown Board claimed that the 2004 amended contract was not valid, having never been properly authorized.

The Kansas Supreme Court decided in favor of McKay, explaining that given a pattern of allowing the Presidents to act alone in approving the employment agreement, McKay reasonably could have believed the President was authorized to take all required action to approve and administer the contracts with her.

It is not unusual for Boards of Directors to neglect to act on employment matters, even if required by law and contract. This case demonstrates that such conduct can have consequences.