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Wage Theft Statutes and Written Employee Notice Requirements *By Daniel L. Schwartz* When it comes to hiring and retaining employees, all employers, including nonprofit organizations, must remain aware of increasingly stringent written-notice requirements under various state laws. For instance, the New York Wage Theft Prevention Act ("WTPA"), which took effect April 9, 2011, requires that all employers provide each employee with written notice of (i) the employee's rate of pay (including the overtime rate if the employee is eligible for overtime pay); (ii) how the employee's pay is calculated (i.e., hourly, weekly, commission, etc.); (iii) the dates/schedule on which the employee will be paid (e.g., weekly, biweekly, etc.); (iv) the official name of the employer and any "doing business as" (d/b/a) designations; and (v) the address and phone number of the employer's main office or principal location. The WTPA also requires employers to maintain proof that the employee received such written notice, typically through a written acknowledgment of receipt, for six years after the notice is provided to the employee. In addition, the above-described written notice must be provided to all employees on an annual basis between January 1 and February 1 of each calendar year. Failure to comply with the WTPA can have expensive consequences. The New York State Department of Labor has the authority to fine employers between $50 and $100 per week for each employee who has not received the required information, and each such employee can seek individual damages up to $2,500 plus reasonable costs and attorney fees. Although New York's WTPA is one of the strictest statutes regarding employee pay notification, many states, including Connecticut, Massachusetts and New Jersey, have similar laws. To learn about the specific employee notice requirements in your jurisdiction, visit your state's Department of Labor website. We have provided links below to the websites for the state departments of labor in New York, Connecticut, Massachusetts and New Jersey. New York: http://www.labor.ny.gov/home/ Connecticut: http://www.ctdol.state.ct.us/ Massachusetts: http://www.mass.gov/lwd/ New Jersey: http://lwd.dol.state.nj.us/ **Political Activity for Charities -- in 10 Words or Less** *By Peter Chadwick*

The well-publicized U.S. Supreme Court decision in the *Citizens United* case has created a fair amount of confusion among charities. The decision is seen (accurately) as undoing some significant restrictions on political activity by nonprofits, which has led many charities to wonder what the new rules mean for them. The ten-word answer for charities is: The new rules are the same as the old rules. *Citizens United* did not change the rules for Internal Revenue Code section 501(c)(3) charities, though it does have major impacts on other nonprofits, such as section 501(c)(4) social welfare organizations and 501(c)(6) trade groups. Those noncharitable nonprofit organizations have an expanded ability to engage in some types of advocacy in election campaigns. Charities still have to avoid any campaign intervention as a condition of their 501(c)(3) status. Though the details are complex, the most important parts for charities can be summarized with a few bullet points:

- All 501(c)(3) charities still need to steer clear of any participation in election campaigns.
- Private foundations still cannot engage in any lobbying.
- Publicly supported charities still can engage in limited lobbying.

If you have any questions about whether your organization is engaging in political activity, get expert advice. Failure to comply with applicable rules can have significant consequences. **Restructuring Your Lease** *By Colleen R. Donovan* If your organization has an existing lease with more than a year or so remaining on the term, you may want to consider approaching your landlord with an offer to restructure the lease. Nonprofit organizations are looking to reduce costs in the current economic environment, and restructuring an existing lease may be one way to do that. Organizations of all types should periodically review their existing space to determine if it is time to expand, downsize or use their space more efficiently. While most landlords do not want to accept additional space in a down market, there may be some financial benefit to doing so. If, for example, your creditworthy organization has four years left on its lease of 100,000 square feet but you really only need 75,000 square feet, you can approach your landlord about restructuring the lease to reduce the space while extending the term by another few years. Having a guaranteed income stream for an additional five years might be enough incentive for your landlord to accept a small portion of your existing space in exchange. By committing to an extension of your current lease term, your organization can avoid carrying unused or underused space or investing the time and costs involved in subletting the excess space. Even if your existing square footage is adequate, you may want to restructure the lease to obtain a tenant improvement allowance (to refurbish existing space) in exchange for a lease extension or other concessions your landlord may seek. **Delinquent Form 5500: Reducing and Eliminating Reporting and Disclosure Penalties** *By David P. Doyle and Frank A. Rubinetti* Under the reporting and disclosure rules in the Internal Revenue Code and the Employee Retirement Income Security Act ("ERISA"), most employee benefit plans must file an annual report ("Form 5500"), generally within seven months after the end of the plan's year. If the required annual report either is not filed timely or is filed timely in an unsatisfactory manner, both the Internal Revenue Service ("IRS") and the Department of Labor ("DOL") may assess or impose one or more of the following penalties, unless the failure to file properly is for reasonable cause:

- A fine of up to $1,100 a day for each day a plan administrator fails or refuses to file a complete and accurate report.
- A fine of $25 a day (up to $15,000) for not filing returns for certain plans of deferred compensation, trusts and annuities, and bond purchase plans by the due date(s).
- A fine of $1,000 for not filing an actuarial statement (Schedule MB or SB) required by the applicable instructions.
- A fine of $100,000, imprisonment up to 10 years or both for willfully violating any provision of ERISA.
- A fine of $10,000, five years' imprisonment or both for making any false statement or representation of fact or for knowingly concealing or not disclosing any fact required by ERISA.

If the plan administrator does not or cannot timely correct the deficiency and penalties are assessed, the DOL and IRS may waive or reduce Form 5500 filing penalties if the plan administrator either demonstrates "reasonable cause" for the filing failure or files a delinquent Form 5500 under the Delinquent Filer Voluntary Compliance Program ("DFVCP"). The DFVCP allows employers to file past-due employee benefit plan annual returns and thus become current and compliant, with greatly reduced filing penalties. **Addressing Conflicts of Interest** *By Warren J. Casey* Every nonprofit organization needs to have a clear and workable conflict-of-interest policy. What is a conflict of interest? Essentially, a conflict of interest exists with respect to a proposed decision or transaction if a trustee or staff member (i) is in a position to make or influence the organization's decision about how to proceed and (ii) has a personal or financial interest in or other affiliation with the potential beneficiary of or other third party to a decision or transaction. Often, conflicts of interest are not black-and-white, so conflicts policies also need to cover situations that may create the appearance of a conflict of interest. The appearance of a conflict of interest exists if a reasonable person would believe that participation by a trustee or staff member in a particular decision or transaction may be impacted by that person's duality of interests. Are conflicts of interest wrong? The simple answer is no. In fact, boards of trustees and staffs of nonprofit organizations are most often made up of richly experienced individuals who have long been active in the community, which results in their having a wealth of experience, knowledge and relationships, any of which may give rise to conflicts of interest. The approach, therefore, is not prohibiting conflicts of interest but, rather, adequately and appropriately addressing situations in which an actual or potential conflict of interest arises. Here are the basics:

- Conflict-of-interest policies should not be tucked away in a drawer but should be regularly distributed and discussed at both the board and staff levels.
- Conflict situations need to be fully aired so that the decision-makers are aware of the circumstances giving rise to the actual or potential conflict.
- The organization should have very clear procedures to ensure that a trustee or staff member who has a conflict or potential conflict has adequately disclosed that conflict prior to action being taken on the matter at hand.
- The organization needs to follow a regular, defined decision-making process that both substantively and procedurally produces independent judgment and action on the particular matter under review.
- The individual who has a potential conflict of interest should not participate in the decision-making, other than to respond to questions, so that the integrity of both the process and the organization is protected.

- There is no absolute mandate that a trustee or staff member who has a potential conflict "leave the room" whenever a particular grant or transaction in which he or she may have an interest is being acted upon. For example, if the board of trustees is acting by motion to approve an entire docket of grants, without discussion of any individual grant in which a trustee or staff member has a conflict, that trustee or staff member need not exit the meeting room. However, if the particular grant or decision involving a conflicted trustee or staff member is to be substantively discussed, the trustee or staff member should not be present.
- Finally, it is important to review the policy frequently to ensure that it reflects changing circumstances within your organization and that the constituents who are subject to the policy understand it.

Tax-Exempt Bonds: IRS Expands Written Post-Issuance Tax Compliance with New Schedule K Question *By Linda L. D'Onofrio* The IRS recently expanded the areas in which written post-issuance tax compliance procedures are being recommended and sought from 501(c)(3) organizations. In the new Schedule K to Form 990 for fiscal year 2011, the IRS added a Part V, which provides this text: "Check the box if the organization established written procedures to ensure that violations of federal tax requirements are timely identified and corrected through the voluntary closing agreement program if self-remediation is not available under applicable regulations." A similar request for written post-issuance procedures by the Tax-Exempt Bond (TEB) group is contained in Form 8038 - the information return filed in connection with the issuance of tax-exempt bonds by 501(c)(3) organizations. Issuers of 501(c)(3) bonds have typically passed on to their nonprofit borrowers the requirement for written procedures as requested by Form 8038. The creation of the Voluntary Closing Agreement Program (VCAP) group within TEB brought about increased enforcement of violations of the arbitrage and private-use restrictions through emphasis on self-correction by issuers and borrowers. Rather than waiting for bonds to be audited, the IRS recommends that issuers and borrowers, through VCAP, voluntarily notify the IRS of their noncompliance, typically pay a negotiated penalty and enter into a closing agreement to maintain the tax-exempt status of their bonds. Although VCAP traditionally has been viewed as a voluntary avenue by which issuers and borrowers can correct problems with their tax-exempt bonds, this new item on Schedule K suggests that violations of federal tax requirements that are not correctable through self-remediation under applicable regulations must be corrected through VCAP. The advisability of a 501(c)(3) borrower adopting such written procedures depends on the facts and circumstances of each borrower, the nature of the violation and business considerations. We recommend that you analyze and discuss this issue thoroughly with knowledgeable advisers. **NJ Environmental Regs Waiver Targets Economic Growth** *By Thomas J. Malman and Christopher James Quinn* In response to Governor Christie's direction to state agencies to implement common sense principles, the New Jersey Department of Environmental Protection ("DEP") has adopted a rule to allow the agency to waive its own environmental regulations on a case-by-case basis. The Waiver Rule, which was published April 2, 2012, and becomes effective August 1, 2012, intends to remove unintended impediments to economic growth without diminishing the value of environmental protection laws. To obtain a waiver, an applicant must establish at least one of the following criteria:

- A public emergency has been formally declared.
- Conflicting rules (between federal and state agencies or between state agencies) are adversely impacting a project or preventing an activity from proceeding.
- A net environmental benefit would be achieved.
- The rule imposes an undue hardship.

Additional factors impact whether a waiver may be granted. For example, a waiver cannot violate any state or federal statutes or federal regulations. Additionally, requests must be supported by science, facts, data and common sense. The waiver rule is designed to implement a more flexible solution that fosters predictability and decreases the compliance burden on businesses. However, its impact remains to be seen. The way in which the DEP implements the rule will define its impact. The rule currently provides no automatic right to a waiver; a waiver is subject to the agency's discretion. Additionally, several environmental and labor groups have already filed suit against the DEP challenging this new rule as a violation of the New Jersey Constitution's separation-of-powers doctrine. Thus, the jury is still out on whether this rule will have the intended impact of encouraging economic growth in New Jersey.