perspectives
MY BENESCH MY TEAM
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Benesch Friedlander
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Trends and topics in not-for-profit management

Not-for-Profit Spotlight

GLADDEN
COMMUNITY HOUSE

The Gladden Community House is a settlement house serving Franklinton and its surrounding neighborhoods. They are a United Way affiliated non-profit agency providing education and recreation programs, emergency assistance, food assistance, and advocacy and support for individuals, families, and groups.

Gladden was founded in 1905 by Reverend Washington Gladden and Mrs. Celia Jeffrey as a neighborhood outreach mission of First Congregational Church. First Church was originally located across from City Hall at Broad and High Streets, just across the Scioto River from Franklinton, although it later moved further east on Broad Street. Gladden's official connection with First Congregational Church ended in 1923 when Gladden was incorporated as an independent non-profit welfare agency but First Congregational Church and its members continue to be strong supporters of our work with the low income residents of Franklinton and the near west side.

In 1923 Gladden became a charter member of the Columbus Community Chest/Associated Charities, today known as United Way of Central Ohio, and United Way remains their primary funder.

For more than 100 years, as an active member of the Columbus Federation of Settlements, Gladden has been an essential support system and engine for change in their near West side service area. Learn more about Gladden Community House by visiting their website.

Supreme Court Skirts Question Of When Public Funds Become Private; Finds a Fiduciary Relationship


Mark D. Tucker

In a decision in which no opinion commanded a majority, the Ohio Supreme Court sided with a private entity—a charter school operator—in a dispute over the ownership of personal property purchased by the operator with funds paid to the operator pursuant to its contracts with several charter schools for the operation of the schools. The funds were originally received by the schools as per-student funding from the State. *Hope Academy Broadway Campus v. White Hat Mgt., L.L.C.*, 2015-Ohio-3716. The contracts between the schools and the operator required the operator to purchase all furniture, computers, books, and other equipment, and further provided that, upon termination of the contract the property would become property of the schools only if they made payments to buy it back from the operator. A majority of the Court failed to agree on a rationale for its decision, but did hold that the buy-back provision was enforceable. 2015-Ohio- 3716 at ¶48.

A different majority of the court held that a charter school operator has a fiduciary relationship with the school that it operates, and that the fiduciary relationship "is implicated" when the operator "uses public funds to purchase personal property for use in the school that it operates." 2015-Ohio- 3716 (syllabus). In her plurality opinion for the Court, **Justice Judith Lanzinger, refused to go as far as the charter schools asked, and instead stated that, "[w]hile we cannot broadly hold that public funds always retain their status as public funds, a private entity… engaged in the business of education is accountable for the manner in which it uses public funds[ ]" because "[f]ree public education, whether provided by public or private actors, is historically an exclusive governmental function**." 2015-Ohio- 3716 at ¶33.

Although Justice Lanzinger questioned the wisdom of the buy-back provision, 2015-Ohio- 3716 at ¶34 ("The notion that the schools would knowingly transfer their funds to White Hat for White Hat to purchase the property for itself (and then later require the schools to buy the property back with additional public funds) does not seem supportable but was an agreed-upon term."), she and four other justices nevertheless agreed that the provision was enforceable. 2015-Ohio-3716 at ¶48. The Court noted that the schools were represented by legal counsel when they agreed to the buy-back provision, and that they could not "rewrite terms simply because they now seem unfair." 2015-Ohio- 3716 at ¶38. As Justice Sharon Kennedy stated in her opinion concurring in part and dissenting in part, "the parties legitimately agreed that [the school operator] would own all property that it purchased with the money that [the charter school] provided as the continuing fee. As the majority concludes, the contract is enforceable." 2015-Ohio- 3716 at ¶64.

Agreeing with the Court's holding that the buy-back provisions were enforceable were Chief Justice Maureen O'Connor, Justices Lanzinger, Kennedy, and Judith French, and Judge John Wise of the Fifth Appellate District, sitting by designation. Dissenting from that holding were Justices Paul Pfeifer and William O'Neill.

For more information on this topic, please contact **Mark D. Tucker** at (614) 223-9358 or mtucker@beneschlaw.com.

Sears Methodist Retirement Systems Bankruptcy: A Cautionary Tale For Directors And Officers

Martha J. Sweterlitsch

Sears Methodist Retirement Systems, Inc. declared bankruptcy in June 2014. Nine nonprofit entities (eight communities and one corporate entity), all located in Texas, were found to be insolvent and the assets were distributed pursuant to an order of the United States Bankruptcy Court for the Northern District of Texas. The facilities were sold to for profit companies but the tale does not end with the bankruptcy. The bankruptcy judge, in the findings of fact and conclusions of law essentially invited the Texas Attorney General to take action and he enumerated the possible claims: breach of fiduciary duty, defalcation, negligence, gross negligence, waste, mismanagement, misallocation of charitable funds, fraud or statutory violations of the laws of the state. The Attorney General responded by filing two actions on June 12, 2015.

In Re Charitable Trust Funds of Sears Methodist Retirement Systems, Inc. This action allows the state to come in and distribute any charitable funds from Sears Methodist to another entity pursuant to the original intent or restriction of the gifts. This petition asks the court to use its *cy pres* power to determine the appropriate distribution and use of certain charitable funds that the bankruptcy court protected from creditors' claims. This is not an unusual request when charitable funds can no longer be administered or put to their intended use.

In the matter Attorney General Ken Paxton, on Behalf of the Public Interest in Charity v. Perry, Williams, et al., the Texas AG is suing the former officers and directors of Sears Methodist for breach of fiduciary duty, negligence, and violations of the Texas Uniform Prudent Management of Institutional Funds Act (TUPMIFA) in an amount of "at least $1.4 million." This case is unusual and arises out of the findings by the bankruptcy court and the Attorney General of overall mismanagement and neglect of duty by those responsible for the oversight and management of this charity.

Some of the key allegations made by the AG against the officers and directors include:

1) Comingling of restricted charitable gifts with general operating funds because no proper cash management system was in place.
2) Taking on more debt and allowing the foundation funds to be pledged on the additional debt.
3) No records from board meetings during 2011 through the first half of 2014 that reflect any discussion of charitable fund oversight.
4) Sears received donations of $832,000 for a specific development project but only expended $49,000 and did not construct the intended additional building wing. There is no indication of what happened to the remaining funds.
5) Insufficient records of the expenditure of funds donated for a specific facility expansion.
6) Insufficient records on the Charitable Assistance Fund and how those monies were spent.
7) The Attorney General alleges that the officers and directors were negligent because the Sears community in Tyler, Texas lost its property tax exemption (resulting in a $200,000 settlement) after it failed to demonstrate to the local taxing authorities that it provided "at least a threshold amount of charity care at its facility. This is a particularly interesting and unusual allegation, asserting that a director breaches his or her fiduciary duty by failing to provide enough charitable care.

Based on a review of the material publicly available if appears that there was a serious failure of oversight by the Board and the corporate officers, compounded by the tanking of the economy during a time when Sears was attempting to expand. It also appears that either no one involved understood the rules and limitations on holding and managing charitable funds, or they simply didn't take them seriously. Either way, the outcome for these directors and officers could be financially and personally devastating.

For more information on this topic, please contact **Martha J. Sweterlitsch** at (614) 223-9367 or msweterlitsch@beneschlaw.com.

Benesch's Not-for-Profit Team assists not-for-profit and tax-exempt clients in a broad array of matters, ranging from filing for nonprofit status and preparing federal and state tax exemption applications to training in not-for-profit regulatory compliance. Our not-for-profit attorneys are committed to protecting our clients' assets so that they can continue to drive the missions and goals of their organizations.

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In *Browning-Ferris*, Businesses Lose As the Board Crafts a Solution in Search of a Problem

Christopher J. Lalak

Marking a sea-change in labor law and a departure from decades of settled precedent, the National Labor Relations Board formulated a new joint employer standard in August 27's *Browning-Ferris Industries of California, Inc.* decision.

For the past three decades, whether a joint employer relationship existed turned on the "single employer" test, that is, whether "two nominally separate entities are part of a single integrated enterprise so that, for all purposes, there is in fact a 'single employer.'" *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1112-23 (3d Cir. 1982); adopted by the Board in *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984). Under the settled framework, an entity could only be found to be a joint employer if it exercised *actual* control over the terms and conditions of employment of another entity's employees.

Last week's decision injects a great deal of uncertainty into an area of labor law which was, up until now, quite predictable. Under the new rule, an entity that maintains *any degree* of *indirect* or *reserved* control over *any* of the terms or conditions of employment (such as wages, hours, hiring, firing, discipline, or direction of work) of another entity's employees may suffice to trigger joint employer status.

This change is not to be understated, and will have immediate impacts in some industries:

- **Franchisors.** Although the Board has traditionally *not* held franchisors to be joint employers with franchisees, many (if not all) franchisors may be found to be joint employers with franchisees under the new rule.
- **Staffing Agencies and Contractors.** Although staffing agencies and contractors did not have the indicia of control over employees placed with their customers to be considered joint employers, many staffing agencies and contractors may now be considered joint employers under the new standard.

This is, however, by no means the full extent of the new rule. As the Board's dissenting members pointed out, the Board's new standard "appears to be virtually unlimited" and may also apply to a host of other scenarios, such as **insurance companies** that require employers to maintain safety or security standards, **banks or other lenders** who require performance measurements in their financing terms, **consumers or small businesses** who dictate the time, manner, or some method of performance of contractors, or indeed, "**[a]ny company** that is concerned about the quality of the contracted services."

In their newfound capacity as joint employer, affected companies may now be held responsible for unfair labor practices committed by a contractor. In the collective bargaining context, the joint employers' employees may be included in the bargaining units of employees of a contractor. Furthermore, litigation unfolding around the uncertainty created by the amorphous newly crafted test will prove costly.

An appeal of the Board's decision is likely forthcoming, and it is still possible congress may weigh in. If the decision stands, maintaining economic viability in the wake of *Browning Ferris* for some companies may require nothing short of a fundamental change to their business models. For others, changes to certain terms in contracts between putative joint employers may be necessary to limit this new area of potential liability. For now, all businesses should carefully examine their contractual relationships with customers and contractors to stay informed of how this change in the law may apply to their operations.

Christopher J. Lalak focuses his practice on representing employers in employment litigation and counseling, as well as representing employers in traditional labor law matters. He has experience litigating discrimination claims, covenants not to compete, trade secrets, worker's compensation cases, and matters before the National Labor Relations Board.

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Internal Revenue Service

Exempt organization audits: GAO report

A report from the Government Accountability Office (GAO), that examined how the IRS decides to audit tax-exempt organizations, found that control deficiencies increase the risk that the Exempt Organizations (EO) unit could select organizations for examination in what could be viewed as an "unfair manner," including selecting organizations for audits based on an organization's religious, educational, political, or other views. Click here for full report.

D.C. Circuit Court Sides With the DOL's Decision to Make Home Health Care Workers Eligible for Minimum Wage and Overtime

Katie Tesner

The D.C. Circuit Court of Appeals issued its decision in *Home Care Ass'n of Am. v. Weil* and handed the U.S. Department of Labor (DOL) a major victory when it validated the DOL's new rules rendering employees of home health care agencies eligible for overtime compensation. Since 1974, the FLSA has covered workers who provide "domestic services" of a household nature such as housekeepers, babysitters and home health care workers, among others. However, the FLSA also provided for a "companionship services" exemption, exempting from minimum wage and overtime requirements certain domestic service workers employed to provide "companionship services" for an elderly person or a person with an illness, injury or disability.

On September 17, 2013, the DOL announced a revised rule narrowing significantly the "companionship services" definition and classes of workers eligible for the FLSA exemptions. The exemption would apply only to those caregivers employed by the individuals (or their families) for whom the caregivers provide their services. As a result, home health care agencies were no longer able to claim an exemption from minimum wage and overtime requirements for their workers. The D.C. District Court subsequently invalidated the regulations and the DOL appealed.

The Court of Appeals determined that Congress intended for the FLSA's protections to extend to workers employed by third parties as professional caregivers, and further that a change in the exemption was warranted due to a shift away from institutionalized care to in-home care—a shift that was not envisioned when the companionship-services regulations exempting these workers were previously promulgated nearly 40 years ago.

Barring further appeal, home health care agencies and other home health care employers who do not fit within the regulations' narrowed exemptions now will now be required to comply with the minimum wage and overtime requirements of the FLSA. Review by the U.S. Supreme Court—if sought—is discretionary. Consequently, the DOL's final rules could possibly become effective in mid-September.

One result of this ruling is that it may significantly increase the cost of companionship services and potentially drive families and individuals to hire workers independently rather than through a third party provider. This has implications for both the caregivers and patients. Agencies may meet patient needs using multiple workers in a day or over a week to avoid overtime at the expense of continuity.

Katie Tesner's practice includes advising employers on all matters arising under the state and federal wage and hour laws. Ms. Tesner may be reached at (614) 223-9359 or ktesner@beneschlaw.com.

House Approves Bill Exempting Certain Religious Groups from PPACA Requirement for Coverage

House lawmakers on September 28 approved, by unanimous consent, the Equitable Access to Care and Health (EACH) Bill (HR 2061), which would exempt certain religious groups, such as Christian Scientists, from the individual mandate under the Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148). Specifically, the measure would extend current religious exemptions to individuals who rely solely on a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs.

Events

Nonprofit Voter Engagement Training–How Can YOU Increase Civic & Voter Engagement at Your Nonprofit?

Ohio Association of Nonprofit Organizations (OANO)

Date: October 7, 2015

Time: 12:00 P.M.–1:00 P.M.

Location: Webinar

Learn the basics of civic engagement for 501(c)(3) nonprofits with Cleveland VOTES co-director Erika Anthony. What are the strategies and tactics best suited to nonprofits? What are nonprofits permitted to do? How do I start doing voter registration at my organization? These topics and more will be discussed.

Register here.

Nonprofit Board Governance Webinars

Ohio Attorney General, Charitable Law Section

Date: October 7, 2015 and November 4, 2015

Time: 11:30 A.M.–1:30 P.M.

Location: Webinar

Webinars will be held on the first Wednesday of each month from 11:30 a.m. to 1:30 p.m. The trainings will address board issues while participants watch the presentation online and listen by phone. Participants will also be able to ask or e-mail questions during the training.

In order to participate, you will need:

- Access to the Internet
- A telephone connection

Once registered you will receive an email confirming your registration with information you need to join the Webinar.

Please click here for registration information.

73rd Annual Human Services Institute

Spotlight on Public Policy: The Opiate Epidemic

Date: October 13, 2015

Time: 12:00 P.M.–1:15 P.M.

Location: The Athletic Club 136 E. Broad Street Columbus, OH 43215

This event features speaker Sam Quinones, award-winning reporter and author of Dreamland: The True Tale of America's Opiate Epidemic. Dreamland details the convergence of the increasing reliance on prescription opiates for pain and the influx of heroin and how this has led to an addiction and overdose epidemic. Mr. Quinones will discuss the origins of Ohio's heroin and pain-pill addiction crisis and how communities have responded to the challenge.

Quinones' remarks will be followed by a moderated discussion. Paul Coleman, President & Chief Executive Officer of Maryhaven, will join Mr. Quinones as a panelist. Ann Fisher, host of WOSU-Radio's "All Sides with Ann Fisher," will serve as moderator.

Please click here to learn more and register for this event.

Wills that Won't and Words that Work

Association of Fundraising Professionals (AFP) Indiana Chapter and the Planned Giving Group of Indiana

Date: November 5, 2015

Time: 8:00 A.M. Registration and Breakfast;
8:30 A.M.–11:30 A.M. Program

Location: The Willows on Westfield, 6729 Westfield Blvd., Indianapolis, IN

AFP Indiana Chapter and the Planned Giving Group of Indiana will join together as Russell James shares information on how Wills that Won't—results from a 20+ year national study on when people add and remove charitable estate beneficiaries and who ultimately makes actual gifts at death; and Words that Work—what surveys from 10,000 people tell us about the words and phrases that encourage planned giving.

Learn more and register here.