perspectives
MY BENESCH MY TEAM
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A publication from
Benesch Friedlander
Coplan & Aronoff LLP
Trends and topics in not-for-profit management

Not-for-Profit Spotlight

the YMCA OF CENTRAL OHIO

The YMCA of Central Ohio is an inclusive organization of men, women and children joined together by a shared commitment to nurturing the potential of kids, promoting healthy living, and fostering a sense of social responsibility.

With a mission to serve the whole community through programs expressing Judeo-Christian principles that build a healthy spirit, mind and body, the YMCA's impact is felt when an individual makes a healthy choice, when a mentor inspires a child, and when a community comes together for the common good.

The YMCA of Central Ohio runs a supportive housing program for adult men and women. Its main objective is to offer the assistance and support needed to stabilize and maintain independent housing, while providing access to those supportive services needed in order to achieve the highest possible standard of living.

Along with the supportive housing program, the YMCA of Central Ohio also works with the Community Shelter Board (CSB) of Columbus. The CSB is a collective impact organization leading the community's response to homelessness by creating collaborations, developing innovative solutions, and investing in quality programs in Columbus and Franklin County.

Lasting personal and social change comes about when we all work together. That's why, at the Y, strengthening community is the primary cause. Every day, the Y works side-by-side with its neighbors to make sure that everyone, regardless of age, income or background, has the opportunity to learn, grow and thrive.

Learn more about the YMCA of Central Ohio and its programs by visiting its website.

Department of Labor Finalizes Fiduciary Rule – What Lies Ahead?

Lisa M. Kimmel

In April 2016, the Department of Labor (DOL) released the final version of the fiduciary rule. The final rule was six years in the making, and impacts retirement plans, including 401(k) plans, and the employers who offer 401(k) plans to their employees. The final fiduciary rule raises the requirements that apply to investment advisors who provide advice to retirement plans. The final rule clarifies the type of investment advice that will be subject to the new standards and requirements, and includes examples of investment-related communications that would not be considered advice subject to the new requirements. The final rule is intended to reduce conflicts of interest for advisors who provide investment services to 401(k) plans and other retirement plans.

Under the final rule, a fiduciary includes any person who receives fees or any form of compensation for investment recommendations that are specifically tailored to a particular retirement plan sponsor, participant or beneficiary for consideration in making an investment decision. If an investment advisor is considered a fiduciary under the final rule, he or she is required to disclose conflicts of interest and provide advice in the client's best interest. The investment advisor is precluded from accepting any fees or other compensation for investment advice if the advice creates a conflict of interest, unless the advisor qualifies for an exemption under the rules.

Who Is Impacted By the Fiduciary Rule?

Any party who provides investment advice to retirement plans; fiduciaries of retirement plans; retirement plan participants or beneficiaries; employers who sponsor retirement plans; or IRAs must ensure that any fees or compensation received in connection with such advice does not create a conflict of interest, unless there is an exemption available. In addition, investment advisors will be required to acknowledge their status as fiduciaries by reason of the provision of such advice. Historically, many advisors have shied away from acknowledgment of their fiduciary status in the context of retirement plan investment advice, so this new requirement will be a change for many. Employers who sponsor retirement plans will be affected as well because they will need to monitor compliance by their advisors, and ensure that the proper contracts and acknowledgements are in place. However, the primary burden for compliance with the final fiduciary rule falls upon the investment advisor.

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In This Issue

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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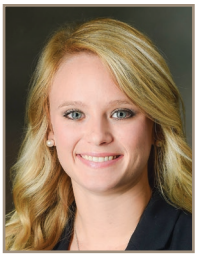
Ohio Supreme Court Opens Door for Property Tax Exemption for Religious Organizations



Victoria L. Stephenson

In Ohio, houses used exclusively for public worship, and not with a view to profit, are exempt from property taxation. The Ohio Supreme Court has long interpreted the word "exclusively" to mean "primarily." In other words, a property must be used primarily for purposes of public worship in order to be exempt from property taxation. Recently, the Ohio Supreme Court expanded its interpretation of what it means for a property to be used, not with a view to profit, and primarily for purposes of public worship, when it determined in *Christian Voice of Central Ohio v. Testa*, 2016-Ohio-1527, that property housing a Christian radio station was exempt from property taxation.

Christian Voice of Central Ohio (now River Radio Ministries) owns property that is used to produce a Christian radio station. The station consists of about 95% Christian music, with the remaining time having been filled with talk segments by Christian Voice's full time pastor. Revenue received by Christian Voice to support its mission of furthering the gospel takes the form of donations, and funds received as a result of advertising. The station is situated on a newly purchased property that is more than two acres, and includes a building that houses the station, offices, a meeting room and a chapel. The chapel is used four days a week to pray for the intentions of listeners, for a weekly Bible study, and for pastoral counseling by an outside pastor, and is open to the public. The meeting room is used by a number of religious organizations, regardless of denomination.

The Tax Commissioner denied Christian Voice's application for exemption, citing a lack of evidence of individuals gathering to worship or profess their faith. The BTA agreed, finding that the above-mentioned activities do not rise to the level of public worship required for property tax exemption.

The Ohio Supreme Court disagreed, however, and granted the property tax exemption. The Court used a holistic approach to determine what constitutes public worship, rather than focusing on the primary purpose for which the property is being used. A distinction was drawn between traditional church services and the fact that modern worship can take many forms. Additionally, that music is a means of expressing religious beliefs was of significant note to the Court, and Christian Voice's selling of advertisements to raise revenue was of little concern.

When receiving property tax exemption as a house of public worship, a religious organization has historically been required to demonstrate that the property is being used primarily for public worship, typically in the form of traditional worship services, and activities supportive of that worship. The Court's holding in *Christian Voice* establishes a precedent that would permit a property used by a religious organization, not necessarily for traditional worship services, but for a myriad of other uses supportive of its religious mission, including the playing of music, bible study, counseling and meetings, to be eligible for property tax exemption as a house used exclusively for public worship. This ruling may open the door for many types of organizations with a religious mission to receive exemption for taxation of properties used to achieve their goals.

To learn more on this topic please contact **Victoria L. Stephenson** at vstephenson@beneschlaw.com or (614) 223-9344.

Overtime Pay for Millions


Steven M. Moss

Millions of American workers will now be eligible for overtime pay after the Department of Labor (DOL) released its long-awaited Final Rule updating the overtime regulations under the Fair Labor Standards Act (FLSA). The Final Rule raises the minimum annual salary requirement to qualify for "white collar" executive, administrative and professional exemptions from $23,660 to $47,476 per year. The Final Rule will take effect on December 1, 2016. This will give employers nearly 200 days to prepare to comply with this 100% increase to the minimum salary necessary to exempt a salaried employee from overtime pay requirements under the FLSA.

The Department of Labor estimates that the Final Rule will extend overtime pay protections to over four million workers within the first year of implementation and boost wages for workers by $12 billion over the next 10 years. The Final Rule is summarized below:

Minimum Salary Threshold Increases By More than 100%

The minimum salary to qualify for a "white collar" exemption will increase from $23,660 to $47,476 annually or from $455 per week to $913 per week. The new salary requirement is more than double the current salary, but lower than the salary originally proposed by the DOL in June 2015. The new minimum salary threshold is set at the 40th percentile for full-time salaried workers in the lowest income Census region (currently the South) based on statistical data from the Bureau of Labor Statistics. The last time the DOL increased the minimum salary requirement for the white collar exemptions in 2004, it set the salary level at the 20th percentile.

Salary Requirement for Highly Compensated Employee Exemption Also Increased

The FLSA contains a special exemption from overtime pay requirements for highly compensated workers who are currently paid a total annual compensation of $100,000 or more, which includes a salary of at least $455 per week and may consist of commissions and other nondiscretionary bonuses and compensation earned. To qualify for the highly compensated employee (HCE) exemption, an employee must perform office or nonmanual work as their primary duty and perform at least one of the exempt duties of a white collar executive, administrative or professional employee. Thus, employees who earns than $100,000 annually may qualify for an exemption even if they do not meet all of the requirements of any single white collar exemption. Under the Final Rule, the salary requirement for HCEs will increase to $134,004 per year and a minimum weekly salary of $913, equivalent to the 90th percentile of earnings for full-time salaried workers nationally.

Automatic Increases to Minimum Salary Requirement

For the first time, the DOL has built in an automatic escalator to increase the exemptions' minimum salary threshold every three years in order to keep pace with inflation. Starting January 1, 2020, increases will be set at the 40th percentile of salaries for full-time workers in the lowest wage census region for the white collar executive, administrative and professional exemptions and at the 90th percentile of salaries for full-time salaried workers nationally for the HCE exemption. The DOL will publish the new salary rates 150 days before the effective date. It is estimated that the minimum salary threshold for the white collar exemptions will increase to $51,168 at the time of the first adjustment in 2020.

Notably, the proposed rule had called for automatic annual increases to the minimum salary threshold, but the final rule abandoned this, thereby giving employers more preparation time between increases.

Bonuses, Commissions and Incentive Pay may Satisfy a Portion of the New Minimum Salary Requirement

Currently under the FLSA, employers are not permitted to use nondiscretionary bonuses, incentive payments or commissions to satisfy the minimum salary requirement to qualify for an overtime exemption. Exempt employees must be paid a minimum salary exclusive of such compensation. Under the Final Rule, the DOL permits employers to use nondiscretionary bonuses, commissions and incentive payments tied to productivity and profitability to satisfy up to 10% the new minimum salary requirement for the white collar exemptions. In addition, the Final Rule requires such compensation to be paid on a quarterly or more frequent basis in order to be counted toward the minimum salary requirement. Employers are also permitted to make a "catch-up" payment and make up the difference if the employee has not earned sufficient commissions to satisfy the minimum salary on a quarterly basis. While nondiscretionary bonuses and incentive payments (including commissions) will continue to count toward the annual total compensation requirement for HCEs, such payments may not be used to satisfy any portion of the minimum weekly salary amount for the HCE exemption.

No Changes to Duties Tests

The new rule contains no changes to the duties tests for any of the white collar exemptions or the HCE exemption. This comes as a relief to many in the business community who feared a stricter duties test to more narrowly define the white collar exemptions.

No Changes to Any Other FLSA Exemptions

The Final Rule imposes no changes to the outside sales or computer professional exemptions or any other statutory exemptions.

Potential Challenges to Final Rule

Congress now has 60 days to review the Final Rule and could potentially issue a resolution of disapproval. Should Congress disapprove the final rule, there is little doubt President Obama will veto any such vote. In March 2016, lawmakers in the House and Senate introduced the *"Protecting Workplace Advancement and Opportunity Act"* that would nullify the Final Rule and prevent the DOL from issuing any future rules with automatic increases to the minimum salary requirement without separate rulemaking. The outcome of this legislation will likely depend on the results of the November election.

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Department of Labor Finalizes Fiduciary Rule – What Lies Ahead?

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What Constitutes Investment Advice?

During the six-year-long rulemaking process, many parties voiced concerns about the impact the rule would have on investment education. Many investment advisors provide certain investment education services as part of their services to 401(k) plans. The concerns centered around the possibility that advisors' distribution of basic and general information regarding potential 401(k) plan investments would be considered a fiduciary act that would invoke application of the rule and all the standards that apply. The DOL has addressed concerns about basic investment advice being considered fiduciary in nature by identifying certain investment education activities as those that will not be considered "fiduciary conduct."

Under the final fiduciary rule, the provision of investment advice will not be considered a fiduciary act if a reasonable person would not view it as an investment recommendation. Although the DOL's intent was to make the carve-out clear, it is still a fairly subjective standard.

The following types of activities will *not* be considered investment advice under the final rule: general communications including widely circulated newsletters, market research and general marketing materials; material that is publicly broadcasted; conference presentations; and other similar materials that no reasonable person would view as investment advice. In addition, if an investment advisor or other retirement plan service provider simply makes available a platform of investment alternatives, without considering or taking into account the specific needs of the retirement plan or its participants, the mere availability of the platform will not be considered a recommendation that would be considered investment advice, provided the advisor also represents in writing that such advice is not investment advice and that it is not being provided in any fiduciary capacity.

What is the Best Interest Standard?

The final rule includes the Best Interest Standard, which will require that investment advisors adhere to the fiduciary requirements under ERISA. The fiduciary requirements under ERISA require advisors to disclose any possible conflicts of interest and to provide advice that is in the best interests of their clients, including plan participants, and not their own. If an investment advisor fails to act in the best interest of a client, the client will have some recourse against the advisor under ERISA.

When Does the Rule Become Effective?

The implementation of the final rule is phased in over a period extending from April 10, 2017 to January 1, 2018.

What Does the New Rule Mean for Plan Sponsors?

The primary compliance obligation of the final fiduciary rule is on investment advisors who provide retirement plan investment advice. However, the final rule will also affect employers who sponsor retirement plans because they will be required to interact with investment advisors who will be tackling compliance with the rule, and, in some cases, employers will need to redefine their relationship with such advisors. In addition, because investment advisors will have increased compliance obligations, there are likely to be increased costs associated with the provision of investment advice and services. It is always prudent to reevaluate a relationship with a retirement plan provider, whether investment or otherwise. In light of the final rule, we recommend that plan sponsors carefully review the relationship they have with their retirement plan advisors to determine the extent of any fiduciary relationship that may exist. We are happy to assist with any questions you may have in this area.

To learn more about this topic, please contact **Lisa M. Kimmel** at lkimmel@beneschlaw.com or (216) 363-4459.

Overtime Pay for Millions

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How Can Employers Prepare?

The time has never been better for employers to conduct an audit of their workforce to ensure that employees are currently properly classified under the FLSA and will remain so after December 1, 2016. In auditing the workforce, employers should focus on job duties performed, not duties listed on a job description or an employment agreement, to meet the duties test of an exemption. Consider updating outdated job descriptions to reflect the actual duties performed by employees. At minimum, employers should identify all salaried exempt employees with a current annual base salary less than the new minimum threshold of $47,476. Employers should recognize that discussions, notes and documents used in self-audits might be subject to discovery in the event of litigation. Involving outside counsel in the audit process may bring much of the audit process within the protection of the attorney client and work product privileges.

Should you have any questions related to this matter, please contact any of the following members of Benesch's Labor & Employment Practice Group:

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All these years and still GROWING PLACES.

We're expanding our reach with a new office in Chicago. Building our bench with 48 attorney hires in the last 18 months. Attracting great clients doing interesting work—and great attorneys eager to practice in an entrepreneurial and collegial environment.

We're thrilled to welcome our four newest partners, who bring with them thriving practices that complement our existing strengths.

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Featured (left to right) H. ALAN ROTHENBUECHER, W. ERIC BAISDEN, JOSEPH P. YONADI, JR., ROBERT A. ROSS

Events

Benesch is a Proud Sponsor of Giving USA 2016

Not-for-profit organizations work to change lives, but they cannot do it without funding.

Giving USA analyzes changes in funding patterns over time as well as current trends that reflect the priorities and values of Americans who support not-for-profits. The report covers four types of donors including individuals, foundations, estates (bequests) and corporations, as well as the estimated contributions to 10 different types of charities.

You will want to join us for a presentation of the results if… your work involves fundraising for not-for-profits, advising donors, or charitable giving research. Giving USA is useful for trustees, philanthropists, financial advisors, giving officers, not-for-profit leaders, executive directors and fundraising professionals who want to benchmark expectations against national trends.

Presented by Melissa Brown

Melissa is a consultant for Giving USA, a leading researcher in philanthropic studies and a nationally recognized speaker.

Click here to learn more and register.

Dates and Locations

Cincinnati
Tuesday, June 14
8:00–10:00 a.m.
The Cincinnati Zoo

Dayton
Wednesday, June 15
8:00–10:00 a.m.
Dayton Art Institute

Cleveland
Thursday, June 16
8:00–10:00 a.m.
Corporate College East

Toledo
Friday, June 17
9:00–11:30 a.m.
The Toledo Lucas County Public Library

The Anatomy of a Medical Record (Webinar)

Ohio Assisted Living Association (OALA)

Presenters: Heather Baird & **Janet Feldkamp** of Benesch

Listen as Janet and Heather detail what constitutes a medical record in Assisted Living. Hear who is permitted to access it, and who you are required to share it with. Discuss what should be included in your facility policy regarding releasing medical records.

Approved: 2 CEUs for AL staff, NHA and Nurses.

Date: June 21, 2016

Time: 1:00–3:00 p.m.

Learn more and register here.

Learn How to Access Impact Investment Funding

The Wells Foundation's cutting-edge leadership development program is designed to help not-for-profit leaders and social entrepreneurs overcome barriers and obtain mission-aligned funding as they work to solve social problems.

The program focuses on several topics, including social enterprise, impact investing (a multi-billion dollar funding opportunity), strategic collaboration, sustainability and creative problem solving to help you expand your impact.

What You Will Learn:

- What is a social enterprise, what it can do for your organization. and what structures should be considered (emphasis on legal, tax and funding options)
- How you can use impact investing to expand your mission and increase your total access to funding
- What foundations are looking for in a social enterprise compared to a traditional grant- funded program
- What is the impact investing ecosystem and what industry trends are creating billion-dollar funding opportunities
- How you can access the extensive network, knowledge and other resources of foundations through true partnerships

Upcoming 2016 Program Dates, Columbus, OH

June 14–16

August 23–25

October 18–20

December 6–8

Contact Patrick Westerlund at pwesterlund@trwellsfoundation.org or (614) 335-5009 ext 703 with any questions.

Click here to learn more.