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# Hot Topics for Nonprofits

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Wednesday, March 18, 2015



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# Bylaws- What they are

- Internal governance in **greater detail** than the Articles
  - Reiterates purposes
  - Officers & Director's roles and number
  - Indemnification of Officers & Directors
  - Special committees?
  - Notice for Annual and Special Meetings
  - Plan for distribution upon dissolution

# Tax Exempt Organizations – Types that Qualify - Generally

- 501(c)(3) Religious, Educational, Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organizations
- 501(c)(4) Civic Leagues, Social Welfare Organizations, and Local Associations of Employees
- 501(c)(7) Social and Recreational Clubs

# Special bylaw provisions for 501(c)(3) organizations

- PURPOSE CLAUSE - Tax exempt charitable purposes for educational, religious and charitable purposes
- DISTRIBUTION ON DISSOLUTION CLAUSE – In the event the entity dissolves, only other tax exempt organizations (with similar purposes?) may receive distributions.

# PA Nonprofit Law Updates – Electronic Technology

## Key Definitions:

"Execute." When used with respect to authenticating or adopting a filing, document or other record, means "sign."

"Record form" is "inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form."

"Sign." --With present intent to authenticate or adopt information in record form:

- (1) to sign manually or adopt a tangible symbol; or
- (2) to attach to, or logically associate with, information in record form, an electronic sound, symbol or process.

# Meeting Notice

- How typically given  
Note: Fax was OK under prior law
- How meeting notice can be given via new method permitted by PA law  
E-mail or other electronic communications

# Further modifications to the PA Nonprofit Law – Electronic Technology

- Meetings of the members of a nonprofit corporation that is member-based may be held by means of the Internet or other electronic communications technology
- Members of the board of directors may participate in meetings by conference telephone or other "electronic technology"
- Authorizing another to act for a member by proxy



# Further modifications to the PA Nonprofit Law – Electronic Technology

- Unanimous consent of the Directors - Consent in record form
- Unanimous consent of Members (if member-based) - Consent in record form
- If the bylaws so provide, any action to be taken by members may occur without a meeting upon the signed consent of members who would have been entitled to cast the minimum number of votes that would be necessary to authorize the action at a meeting at which all members entitled to vote on such action were present and voting

# Nonprofit Unincorporated Associations (UNA) 15 PaCSA §9111, et seq.

This is the new entity of choice for:

- Churches
- Hunting clubs
- HOAs and Condo unit owner associations
- Charities – 501(c)(3)s and 501(c)(4)s
- PTOs
- Cemetery associations

# Advantages

- Liability protection equal to corporations, LLC's, LP's
- Inexpensive to form and maintain – no advertising, no mandatory filing, easy record keeping, forgiveness for neglecting formalities
- Ultimate flexibility in how the affairs of the UNA are conducted
- Its agents and members have the right to indemnification in the same manner as provided under the nonprofit corporation law; and
- It may take title to, and buy and sell, real estate in the name of the UNA. This advantage includes the right to transfer record title to real estate into the name of the UNA from a trustee or other agent or straw party presently owner of record, without having to pay realty transfer taxes.

# Any public filing?

- Protect the name by filing (state) Form 520, Application for Registration of Unincorporated Association Name
- Don't have to file the annual report like a nonprofit corporation
- If an exempt organization, do have the IRS 990 requirements and – if applicable – the Pa Bureau of Charitable Organizations compliance requirements

# The UNA Lingo

- Member – shareholder, partner or member in other types of entities
- Manager – officer, managing partner or manager in other types of entities. The manager need not be a member of the UNA. Absent a manager, the members, collectively, are managers. Managers have all authority to act for the UNA except for any powers expressly reserved to the members in the UNA statute or in the governing principles.
- Governing principles – articles, bylaws, covenants, shareholder (partnership or operating) agreements in other types of entities. Note that there is no requirement of a writing
- Established practices – any “way things have been done” in the experience of the association, will be sufficient to constitute governing principles.
- PUUNAL. The formal name of the law is Pennsylvania Uniform Unincorporated Nonprofit Association Law.

# Open Questions

- Insurance. How will insurance companies treat UNAs?  
For instance:
  - Will it issue D&O coverage to a UNA?
  - Will premiums be higher given the underwriting uncertainty for insuring a new type of entity?
- Banking. Will banks have a problem opening accounts with a UNA?
- Other states. If a PA UNA has assets, conducts business or has other connections outside Pennsylvania, will PA UNA statutory protections be recognized?

# Applying for Tax Exempt Status - Form 1023

- Application
- Timeframe for approval
- User Fee

# New Form 1023-EZ for 501(3) organizations - Generally

- Purpose - The Form 1023 alternative
- How do I get started?



# 1023-EZ Criteria – Do I qualify?

- Complete the Form 1023-EZ Worksheet – Must answer “NO” to all questions
- Internet address: <http://www.irs.gov/pub/irs-pdf/f1023ez.pdf>
- Common questions that disqualify organizations

# 1023- EZ – Common questions that disqualify organizations

1. Do you project that annual gross receipts will exceed \$50,000 in any of the next 3 years? (Note: Gross receipts are the total amounts the organization received from all sources during its annual accounting period, without subtracting any costs and expenses. You should consider this year and the next 2 years.)
2. Have your annual gross receipts exceeded \$50,000 in any of the past 3 years?
3. Do you have total assets in excess of \$250,000? (Total assets includes cash, accounts receivable, inventories, bonds and notes receivable, corporate stocks, loans receivable, other investments, depreciable and depletable assets, lands, buildings, equipment, and any other assets)
8. Are you a successor to a for-profit entity?
10. Are you a church or convention or association of churches described in section 170(b)(1)(A)(i)?



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# 1023-EZ Application Process

- Representations
- User Fee
- Processing Time
- Submission

# Additional Internet Sources – 1023-EZ Application

- Application: <http://www.irs.gov/pub/irs-pdf/f1023ez.pdf>
- Instructions: <http://www.irs.gov/pub/irs-pdf/i1023ez.pdf>

# Gift Acceptance Policies

- Your Organization’s “Rules” for donors and your fundraising team
- Avoids offending donors
- “Due diligence” for gifts, particularly “in kind” gifts
- Maps procedure for specific types of gifts, such as business interests or real estate
- Reduces your organization’s liability for “bad gifts”

# Endowment Policies

## Types and purposes of EPs

- Temporarily restricted endowment
- Permanent endowment
- Quasi-endowment

# Endowment Policies

Example of why and how to name a fund after a person or family:

Donor, wife, would like to donate \$35,000 to a retirement community to create a philanthropic and charitable endowment fund in the memory of her deceased husband for the exclusive benefit of that retirement community. The retirement community may create an agreement detailing its administration of the fund, and would include terms such as the fund name, purpose, how the retirement community would control and administer the fund (including annual distributions), promotion and privacy policies and variance power.

# Typical topics covered in Endowment Policies

- Purposes
- Role of the Endowment
- Responsibilities
- Investment objectives/strategy
- Disbursement policies
- Monitoring investment performance
- Future amendments



# Who should manage the investment and how will that be managed

- Board would delegate the responsibility for overseeing the investments of the funds
- This would be delegated to an investment manager
- The EP would document how the organization will review the investment manager, when these reviews will be conducted (frequency), the benchmarks, and how the investment manager will report to the Board

# Endowment funds of organizations at the end of its lifecycle

- What happens to endowments that are not used?
- What happens to endowments of defunct organizations?
- *Parens Patriae* power of the PA Attorney General's office

# Employment Law

Both federal and state statutes apply to non-profit entities

- This includes anti-discrimination laws based upon race, gender, religion, national origin, age and disability.
- This includes wage and hour considerations such as minimum wage, overtime and employee classification.

# Religious Exemptions

- A non-profit with a religious purpose may use religion as a bona fide requirement for employment
- A non-profit may also require employees to adhere to certain moral code requirements

# Ministerial Exemption

- Doctrine rooted in the First Amendment of the Constitution separating church and state.
- Prohibits the state from interfering with a religious organization's interactions with its ministers; thus, ministers are exempted from discrimination protections and wage and hour requirements.
  - Note: The exemption is limited to ministers – those actively involved in preaching, teaching or caring for church members.

# Discrimination and Harassment

- Clear policy in place and reporting mechanisms
  - An employer cannot address problems it is not aware of, and failure to have a reporting policy may impart liability to the employer.
- All reports should be taken seriously and investigated
- No retaliation

# Disability Accommodation

- An employer is required to provide reasonable accommodations to an employee that will allow an employee to perform the essential functions of the position.
- An employer and an employee must engage in an interactive process to determine if a reasonable accommodation is available.
  - Medical documentation may be required.
  - An employer is not necessarily required to give the employee the accommodation requested.

# Wage and Hour Considerations

- Exempt employees are paid a salary and not entitled to overtime pay
- Salary must be equal to \$455 per week
- Limited to certain executive, administrative, professional, computer and outside sales positions
- Non-exempt employees are generally paid by the hour and are entitled to time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek



# Handbooks

Every non-profit should have a handbook

- Serves to communicate expectations
- Alerts employees to discrimination/harassment policies and reporting policies
- Documents the at-will nature of the employment relationship
- Gives employees notice of paid time off policy, holidays, and bereavement leave; how to address workplace injuries; call-off procedures

# Job Descriptions

Serve to communicate to the employee the essential functions of the position

- What are the duties?
- What are the requirements: physical requirements, proficiencies and skills necessary?

# Documentation

- Employee Reviews: should accurately and honestly assess the employee's performance
- Disciplinary write ups: should state the rule and the infraction and alert employee to possible further action

If it is not documented, it is as if it did not happen.

- Positive feedback

# Repurposing Your Nonprofit

## Modification of your purpose(s)

- Is the organization contemplating a change in the organization's purpose?
- What is the current purpose as set forth in the organization's Articles of Incorporation and Bylaws, which were presented to the IRS in the Form 1023 application?

# Repurposing Your Nonprofit

Transfer of all or substantially all of the organization's charitable assets

- Is the organization contemplating a transfer of all or substantially all of the organization's charitable assets?
- Section 5547(b) of the PA Nonprofit Corporation Law: (b) Nondiversion of certain property. – Property committed to charitable purposes shall not...be diverted from the objects to which it was donated, granted or devised, unless and until the board of directors or other body obtains from the court an order under 20 Pa. C.S. Ch. 77 Subch. D (relating to creation, validity, modification and termination of trust) specifying the disposition of the property. 15 Pa. C.S. § 5547(b).

# Repurposing Your Nonprofit

Who cares??

- The IRS
- The PA Attorney General's Office (in its role as *parens patriae*)
- The Orphans Court – pursuant to Section 5547(b) of the PA Nonprofit Corporation Law

# Repurposing Your Nonprofit

## Process generally

With the IRS

Several notification avenues, including:

- New 1023 for new PA Nonprofit
- PLR for existing organization
- Re-do 1023 for existing organization

# Repurposing Your Nonprofit

## Process generally, cont.

With the PA Attorney General's office

- Make a request for a Letter of Non-Objection

With the Orphans Court

- Obtain pre-approval by the Orphans Court
- Petition



# D & O Insurance

- Sit on a board of a nonprofit? If you are sued for actions as an officer or board member, do the nonprofit's bylaws require it to provide you a defense and indemnification? How about advancements for litigation costs?
- Indemnification and advancement are statutory, so if you are on a board with bylaws that have no such provision, you need not be nervous, because you have that protection by statute.

# D & O Coverage

- What you might not have is a deep pocket – the nonprofit may not have significant liquid assets to meet its statutory obligation to indemnify and advance So, you should confirm the nonprofit has D & O coverage.

# D & O Insurance

- Coverage for third party claims
  - The organization and the directors and officers are all party defendants
- Coverage for action by members or by the organization
  - Derivative lawsuits
  - Self-dealing
- Typical defense is business judgment rule
- Not all acts of director or officer are covered

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QUESTIONS & ANSWERS

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