

perspectives

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A publication from
Benesch Friedlander
Coplan & Aronoff LLP

MY BENESCH MY TEAM

Trends and topics in not-for-profit management

Not-for-Profit Spotlight



A MAIN STREET COMMUNITY

Making Our Downtown Better Every Day

Downtown Visions (DTV) has a mission: to help in creating, managing and promoting a quality environment for people who live, work and visit downtown Wilmington, DE. Through this mission, DTV has a vision of a safe, clean, thriving downtown open after the workday is through, businesses bustling with activity, and events that invite all sectors to come together to define a strong sense of self and community. DTV is built to support economic growth, urban revitalization and the creation of new jobs. From facade improvement to grand-opening events and empowering business community connections—DTV is investing in the Wilmington downtown business community.

In 1994, Downtown Visions was granted a charter by the State of Delaware and City of Wilmington to manage the “Business Improvement District” of downtown Wilmington. This 70-block area consists of 700 commercial buildings, 355 occupied by street-level independent businesses, and 90 vacant storefronts. DTV’s long-term objective is to achieve full occupancy and a robust downtown environment for Wilmington. DTV has been actively engaged in encouraging significant private investment, working closely with developer-investors and its not-for-profit affiliates.

(continued on page 2)

It’s Good to “B” In Delaware



Jennifer B. Hoover

In August of 2013, Delaware joined the ranks of states that have enacted benefit corporation legislation. Delaware became the 19th state to enact benefit corporation legislation through its amendment to the Delaware General Corporation Law (DGCL) at 8 Del. Code Ann. tit. 8 § 361 *et seq.* Already a renowned leader in corporate law and the home of many of the nation’s largest businesses (50% of all publicly traded companies and 64% of Fortune 500 companies), Delaware’s enactment of this legislation may lead to a significant shift in the development of this area of corporate law. Benefit corporations, generally, are intended to create a corporate

vehicle that allows corporations to create value that extends beyond its shareholders to society and the public as a whole.

Public benefit corporations (PBCs) are for-profit corporations. They are not formed under a states’ not-for-profit corporation statutes. However, PBCs embody some of the same goals of not-for-profits—indeed, they strive to “make the world a better place”—but through a different corporate vehicle. The intent of PBCs is to blend the altruism typically associated with a not-for-profit corporation with certain aspects of a for-profit corporation. “The idea behind benefit corporations is . . . ambitious: to motivate for-profit business corporations to have a positive impact on society and the environment in addition to earning profits.”¹ The enactment of such corporate legislation has been likened to an opting out of the “property” model of corporate law in favor of the “entity” model, which “views the corporation as a vehicle that can simultaneously serve the interests of multiple constituencies, and thus is ‘tinged with a public purpose.’”² Public benefit corporations are required to be managed in a manner that balances shareholders’ financial interests, the best interests of stakeholders materially affected by the corporation’s conduct, and a public benefit. *See* 8 Del. Code Ann. tit. 8 § 362 (2013). This is a shift for a state that dominates U.S. corporate law, as it expands the purpose of a corporation beyond advancing the pecuniary interests of its shareholders. As recently as 2010, the Delaware Chancery Court had stated that “[p]romoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders” . . . and held that directors who failed to establish how their actions would lead to shareholder value “failed to prove . . . that they acted in the good faith pursuit of a proper corporate purpose.”³

Since the legislation’s passage in August 2013, 87 entities have incorporated as PBCs in Delaware. Incorporators of a PBC in Delaware must opt in to this corporate designation. Conversion of an existing corporation to a PBC requires approval of 90% of the outstanding shares of each class of voting and nonvoting stock of the converting corporation.

What is a public benefit corporation?

- A new kind of for-profit corporation that is designed and intended to be operated in a responsible, socially conscious, and sustainable manner.
- Requires directors of a public benefit corporation to balance the needs and interests of stockholders with the best interests of those materially affected by the corporation’s conduct and the specified public benefits identified by the corporation.

(continued on page 2)



Not-for-Profit Spotlight

(continued from page 1)

Over its first 10 years in operation, Downtown Visions...

- Assisted in over 5,000 emergency situations (includes fire, medical, property damage and disabled vehicles).
- Provided over 358,642 merchant contacts and special attentions (including checks on parking lots/garages).
- Assisted police in 2,247 apprehensions.
- Removed 1,521,730 pounds of trash from the Business Improvement District.
- Provided security/assistance at over 3,556 events.
- Assisted in dispersing over 15,000 intoxication/disorderly conduct/nuisance incidents.
- Provided 8,256 escorts to people downtown.

To learn more visit: www.downtownvisions.org.

It's Good to "B" In Delaware

(continued from page 1)

How do you form a public benefit corporation?

- Generally formed in same manner as any other corporation that is formed under the Delaware General Corporation Law.
- A PBC's certificate of incorporation must identify one or more specific public benefits and must have a name that clearly identifies its status as a public benefit corporation.
- Once every two years, a public benefit corporation must send its stockholders a statement with respect to its promotion of the public benefits identified in its charter.

Delaware corporations were eligible to form, convert or merge into a public benefit corporation as of August 1, 2013. The Delaware legislation is more flexible than the model benefit corporation legislation (as well as the legislation of certain other states that have adopted benefit corporation legislation).⁴ Section 361 of the DGCL provides that if a PBC elects to become a PBC, it shall be subject in all respect to the DGCL, except to the extent that the subchapter on PBCs imposes additional or different requirements.

Section 362 of the DGCL goes on to identify what constitutes a Delaware PBC, by stating:

- (a) A "public benefit corporation" is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interest of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation. In the certificate of incorporation, a public benefit shall:
 - (1) Identify within its statement of business or purpose pursuant to § 102(a)(3) of this title 1 or more specific public benefits to be promoted by the corporation; and
 - (2) State within its heading that it is a public benefit corporation.
- (b) "Public benefit" means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literacy, medical, religious, scientific or technological nature. "Public benefit provisions" means the provisions of a certificate of incorporation contemplated by this subchapter.
- (c) The name of the public benefit corporation shall, without exception, contain the words "public benefit corporation," or the abbreviation "P.B.C.," or the designation "PBC," which shall be deemed to satisfy the requirements of § 102(a)(l)(i) of this title.

Delaware is one of the few states that mandate the inclusion of a specific public benefit.

The duties of a board of directors of a Delaware PBC are discussed at Section 365 of the DGCL.

- (a) The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interest of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.
- (b) A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account

(continued on page 3)

It's Good to "B" In Delaware

(continued from page 2)

of any interest materially affected by the corporation's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

(c) The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) of § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.

Section 366 of the DGCL provides for periodic statements to stockholders regarding the status of the PBC's public benefits identified in the certificate of incorporation. A Delaware PBC shall no less than biennially provide a statement to its stockholders regarding the PBC's promotion of the public benefit or public benefits identified in its certificate of incorporation and of the best interests of those materially affected by the corporation's conduct. Section 366(b) of the DGCL sets forth the specific information that the statement is required to include, and Section 366(c) sets forth additional information that a specific PBC's certificate of incorporation or bylaws may require, including the use of a third-party standard or certification to assess the corporation's promotion of the public benefit or public benefits. Except in Delaware, a benefit corporation's adherence to its public benefit goals, as disclosed in the annual benefit report, must be measured against a third-party standard. Section 366(c) provides that Delaware PBCs may, but are not required, to bind themselves to a third-party standard by including it in the certificate of incorporation or bylaws.

Since Delaware's landmark passage of the PBC legislation, New Hampshire has gone on to adopt its own benefit corporation legislation. As of the writing of this article, 20 states have passed benefit corporation legislation and an additional 16 states are working on such legislation.⁵ A spokesperson for B Lab, a not-for-profit organization dedicated to using the power of business to solve social and environmental problems, anticipates that an additional five or six states will have passed benefit corporation legislation by year-end. (See <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> for more information on the not-for-profit B Lab). When questioned as to the not-for-profit world's acceptance of benefit corporations, a representative of B Lab stated that although certain state's not-for-profits initially opposed the adoption of such legislation, in general, the not-for-profit community has welcomed the legislation as it has provided an alternative—a corporate vehicle through which an entity can protect its morals and its mission while providing it with more freedom in how to choose its funding. According to B Lab, many traditional not-for-profits are exploring the mechanisms by which to convert the for-profit arms of their not-for-profits to benefit corporations.

¹ "Benefit Corporations: A Challenge in Corporate Governance," *The Business Lawyer*, August 2013, 68 Bus. Law. 1007.

² *The Business Lawyer*, August 2013, 68 Bus. Law. 1083.

³ See id. at 2 (citing to *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010)).

⁴ Delaware and Colorado have adopted public benefit corporation laws. The other states have adopted benefit corporation laws based on the model legislation.

⁵ <http://www.bcorporation.net/what-are-b-corps/legislation>

Additional Information

For additional information, please contact **Jennifer B. Hoover** at jhoover@beneschlaw.com or (302) 442-7006.

The Wonderful World of Limited Liability Companies



Jessica N. Angney

The use of limited liability companies has exploded in the for-profit world and the tax-exempt world is catching on. So how can a limited liability company be used in the tax-exempt world?

Let us count the ways:

1. Create A Joint Venture with Other Tax-Exempt Organizations

Multiple tax-exempt organizations can together form a limited liability company to engage in exempt activities. So long as the activity of the limited liability company is within the purview of the exempt purposes of all of the tax-exempt members of the limited liability company, the income generated by the limited liability company and allocated to its members generally will not be considered unrelated business taxable income.

2. Isolate Risky Assets

Single-member limited liability companies are often used to separate and segregate risky assets or activities. A typical example is the transfer of real estate, such as rental property or a property with potential environmental issues, to a single-member limited liability company. The single-member limited liability company provides a level of liability protection between the limited liability company and the assets of its tax-exempt parent. Even though the single-member limited liability company is a separate entity for corporate law purposes, it is, by default, a disregarded entity for federal income tax purposes. This means that the income and activities of the single-member limited liability company are considered the income and activities of its owner.

3. Separate Different Activities

A tax-exempt organization engaged in multiple, often very different, activities can use single-member limited liabilities to separate the activities. This allows the tax-exempt parent to easily account for different activities while keeping a simple overall tax structure.

(continued on page 4)

The Wonderful World of Limited Liability Companies

(continued from page 3)

Although a single-member limited liability company is ignored for federal income tax purposes, a multi-member limited liability company is treated as a partnership by default for federal income tax purposes. As a result, the limited liability company must file its own informational federal income tax return and allocate its income among its members based on their relative interests in the limited liability company. Such income may or may not be unrelated business taxable income depending on the activities and structure of the limited liability company. A not-for-profit limited liability company may also obtain separate tax-exempt status in certain circumstances, but the process is complex and outside of the scope of this article.

The potential use of limited liability companies is endless in the tax-exempt world. However, there are important considerations. Does the state of formation allow for the formation of not-for-profit limited liability companies? If exempt use property is transferred to a single-member limited liability company, does this preclude or otherwise adversely affect real property tax exemption under applicable state law? Are potential donors concerned or confused by the use of single-member limited liability companies? If a tax-exempt organization is becoming a member of a multi-member limited liability company, has the tax-exempt organization addressed potential unrelated business income tax issues? These considerations, among others, should be discussed with your tax advisor prior to utilizing a limited liability company.

Additional Information

For additional information, please contact **Jessica N. Angney** at jangney@beneschlaw.com or (216) 363-4620.

Ohio Bill to Allow Schools and Camps to Procure Epinephrine Autoinjectors



Rachel G. Winder

Substitute House Bill 296

Substitute House Bill 296, introduced by Representatives Terry Johnson (R-McDermott) and Mike Duffey (R-Worthington), would allow schools and camps to have epinephrine autoinjectors on hand in cases of emergency stemming from known or unknown allergic reactions.

The bill would specifically authorize school districts, a chartered or nonchartered nonpublic school, a community school, a STEM school, a college-preparatory boarding school, a residential camp or a child day camp to follow certain protocols that would allow each entity to maintain two epinephrine autoinjectors on-site in cases of emergency.

How the program would work

A board of education of each city, local, exempted village or joint vocational school district or the governing authority of each charter school, community school, STEM school, residential camp or day camp, or the board of trustees of a college-preparatory boarding school that chooses to keep epinephrine under this program shall adopt a policy that would govern the maintenance and use of the epinephrine in consultation with a licensed health professional authorized to prescribe drugs. Part of the policy shall include a prescriber-issued protocol that specifies definitive orders for epinephrine autoinjectors and the dosages of epinephrine to be administered through them.

The required policy shall also specify:

- One or more locations in each school or camp in which the epinephrine is stored.
- Conditions under which epinephrine must be stored, replaced and disposed.
- Which individuals may access and use an epinephrine autoinjector.
- Any training that employees or contractors must complete.
- The emergency situations, such as signs of anaphylaxis, under which epinephrine may be administered.
- The individuals, such as students, campers, employees, contractors, counselors and school or camp visitors, to whom a dosage may be administered.

A school or camp must contact emergency services immediately following administering a dose of epinephrine. A school is required to report to the Department of Education each time an epinephrine autoinjector was used. Any camp who administers a dose from its supply shall report to the Ohio Department of Job and Family Services. The bill contains an immunity for schools and camps from civil liability for injury, death or loss to person or property from an act or omission associated with using epinephrine under this proposed law.

Status of Substitute House Bill 296

The bill passed the full Ohio House on November 20, 2013, by a vote of 92-0. The bill is pending in the Senate Medicaid, Health and Human Services Committee and has had a number of hearings.

Additional Information

For additional information, please contact **Rachel G. Winder** at rwinder@beneschlaw.com or (614) 223-9316.

Ohio Bill to Provide Tax Credits for Donations to Community Foundations

Substitute House Bill 408

Substitute House Bill 408, introduced by Representatives Barbara Sears (R-Sylvania) and Ron Amstutz (R-Wooster), would create a nonrefundable tax credit for authorized donations to the permanent endowment fund of an eligible community foundation. The bill defines “eligible community foundation” as a qualified community foundation that has been accredited by the community foundations national standards board.

However, the bill sets limitations on the credits. For donations less than \$1000 made during a year, the credit would be equal to 50% of the donation. Authorized donations over \$1000 would be eligible for a credit of 20% of the donation amount, but may not exceed \$10,000 for individual returns or \$20,000 for joint returns. In addition, the total amount of the credits would be capped by the state at \$20 million per year.

How the program would work

A taxpayer would need approval from the Department of Taxation prior to making a donation in order to be eligible for the tax credit. If the Department of Taxation approves a taxpayer’s application and the total credit limit of \$20 million has not been reached, the taxpayer must make the donation within 60 days of receiving approval. If a community foundation does not receive the actual donation within 60 days, the foundation is required to notify the Department of Taxation so the previously approved donation amount can be placed back in to the pool of funds making them available to other taxpayers.

Each community foundation that received eligible donations would be required to report to the Department of Taxation the total amount of donations the foundation received in the previous year and include a list of the donations by range, including how many were less than \$500, \$500–\$1000, \$1000–\$2500, \$2500–\$5000, \$5000–\$10,000, and more than \$10,000.

The Department of Taxation would report to the Governor and the Legislature, for the previous year, the number of authorized donations for which a tax credit was claimed, the total amount of donations received by foundations, and the total amount of credits that were granted for such donations.

The bill specifies that the credit cannot be used against the Local Government Fund (LGF) or the Public Library Fund (PLF) and requires the Director of Budget and Management to credit those funds back to the level of the previous year before June of each year.

The program would sunset at the end of 2019.

Status of House Bill 208

The bill passed out of the House Finance and Appropriations Committee on February 26, 2014, and passed the full Ohio House on February 12, 2014, by a vote of 81-8. The bill now moves to the Ohio Senate for consideration.

Additional Information

For additional information, please contact [Rachel G. Winder](mailto:rwinder@beneschlaw.com) at rwinder@beneschlaw.com or (614) 223-9316.

Opinions

Federal District Court Allows a Church to Intervene in Electioneering Case

The U.S. District Court for the Western District of Wisconsin has permitted the Holy Cross Anglican Church, which by its Pastor’s admission does not obey the electioneering restrictions on tax-exempt entities, to intervene in a case brought by the Freedom from Religion Foundation alleging that the IRS unlawfully gives preferential treatment to churches and religious organizations. See [*Freedom from Religion Foundation, Inc. v. John Koskinen, Commissioner of the Internal Revenue Service*](#).

Events

Nonprofit Legislative Day

The Ohio chapters of Association of Fundraising Professionals and the Ohio Association of Nonprofit Organizations invite you to participate in our Nonprofit Legislative Day

- State Legislative Briefing
- Advocacy 101 Presentation
- Keynote Luncheon
- Legislative Visits

Date: April 9, 2014

Time: 8:30 A.M.—4:30 P.M.

Location: Ohio Statehouse Atrium
1 Capitol Square, Columbus, Ohio 43215

(Legislative visits will occur at the Ohio Statehouse and the Riffe State Office Tower)

Register: Click [here](#) to register.

Questions? Contact 614-280-0233, 888-480-6266 or info@oano.org.

The OANO Member Service: *Ask the Expert: Legal Issues* (CURRENT OANO MEMBERS ONLY)

Date: April 21, 2014

What is Ask the Expert?

It's a free service for current members to talk with an expert, and get advice on specific topics such as accounting, legal, human resources, fundraising, marketing...

How does the program work?

Ask the Expert allows current OANO members to make an appointment to discuss issues pertaining to their organization.

Appointments:

- Must be scheduled in advance
- Last a maximum of 25 minutes
- Are conducted over the phone

How do I make an appointment?

- You must contact OANO in advance to schedule an appointment: (614) 280-0233, (888) 480-6266, info@oano.org
- At the time of your call, you will be assigned an appointment time between 12:00 p.m. and 4:00 p.m.
- Appointments will be made on a first-come, first-served basis.

AFP Delaware Events

Fundraising in a Crisis

Date: April 16, 2014

With So Many Options, How Do You Decide to Leverage Technology for Your Event

Date: May 21, 2014

Visit the AFP Delaware [website](#) for more information on these events.

Benesch
Attorneys at Law

LABOR & EMPLOYMENT

28th Annual Labor & Employment Conference

Tuesday, May 6, 2014 | 8:00 A.M. to 1:15 P.M.
The City Club of Cleveland | 850 Euclid Avenue, Cleveland, OH 44114

Managing labor and employment issues is persistently a challenge for all employers. Implementation of the Affordable Care Act continues to be plagued with uncertainty and confusion. Meanwhile, federal agencies are continuing to expand their reach into the workplace. The NLRB is aggressively regulating employer policies in an unprecedented fashion, the EEOC is escalating its enforcement activities and the Department of Labor is embarking on an overhaul of the overtime regulations. Please join us as we discuss the recent developments currently in effect and what the future is likely to bring.

8:00 A.M. – 8:30 A.M. Registration and Continental Breakfast
8:35 A.M. – 9:25 A.M. General Session
The Affordable Care Act
Presented by *Lisa M. Kimmel*

Breakout Session Topics
Please choose the three breakout sessions that appeal to you the most.

9:30 A.M. – 10:15 A.M. Breakout Session 1
Select one topic.
LGBT Issues in the Workplace
Presented by *Christopher J. Lalak* and *Patrick O. Peters*

10:15 A.M. – 10:30 A.M. Break
Traps for Unwary Ohio Employees
Presented by *Joseph N. Gross* and *Rick Hepp*

10:30 A.M. – 11:15 A.M. Breakout Session 2
Select one topic.
The EEOC: Recent Developments & Future Plans
Presented by *Peter N. Kirsanow*

11:20 A.M. – 12:05 P.M. Breakout Session 3
Select one topic.
Employee Privacy: Monitoring & Regulating Social Media & Other Electronic Activity
Presented by *Maynard A. Buck*

Misclassification/Contingent Workforce Issues
Presented by *Katie Tesner*

Trends & New Developments Under the Americans with Disabilities Act
Presented by *Steven M. Moss*

12:10 P.M. – 1:15 P.M. Networking Lunch with Q&A

RSVP by May 1, 2014 to Megan Pajakowski at mpajakowski@beneschlaw.com or 216.363.4639.
There is no charge for this conference.

This program has been submitted to the HR Certification Institute for review. Pending 3.0 hours of CLE



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