

perspectives

MY BENESCH MY TEAM

March 2012

A publication from
Benesch Friedlander
Coplan & Aronoff LLP

Trends and topics in not-for-profit management

Not-for-Profit Spotlight



**CHILDREN'S
MUSEUM**
INDIANAPOLIS

The Children's Museum of Indianapolis is the largest children's museum in the world, welcoming more than 1 million visitors each year. As a 501(c)(3) not-for-profit institution, the museum's mission is to create extraordinary family learning experiences across the arts, sciences and humanities that have the power to transform the lives of children and families.

The Children's Museum is a leader in offering family-learning opportunities represented in the museum's 11 major permanent and traveling exhibit galleries, planetarium and children's theater. Visitors to The Children's Museum can experience history through exhibits such as *National Geographic Treasures of the Earth*, the humanities in *The Power of Children*[®], multiculturalism in *Take Me There: Egypt*[®], the sciences in *Dinosphere*[®] and *ScienceWorks* and the arts in Dale Chihuly's *Fireworks of Glass*. The Children's Museum offers more than 4,000 programs and activities each year and maintains a collection of more than 120,000 artifacts.

The Children's Museum offers temporary and traveling exhibits for the entire family, including

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Lessons from Garth Brooks and Ray Charles (and Not Music Lessons!): Promises, Restrictions and Changing Priorities



Meredith Rosenbeck

Since the start of 2012, the charitable endeavors of Garth Brooks and Ray Charles have made big news in charitable fundraising. As a result, many charities have a renewed focus on shoring up any potential loose ends attributable to large contributions.

In January, a jury sided with Garth Brooks on a fraud claim, awarding him not only the return of his original \$500,000 contribution, but an additional \$500,000 in punitive damages.¹ The premise of Brooks' action against the hospital was that the hospital promised, but failed, to use the funds to name a new women's center after his late mother, Colleen Brooks. While

there was conflicting testimony regarding the content of phone conversations between Brooks and the hospital CEO prior to the donation concerning the naming rights, the fact remained that the parties never reduced any terms of the gift to writing. In awarding the damages to Brooks, the jury found that the hospital acted in "reckless disregard" and "intentionally with malice toward others."

Similarly, it was reported in February that the Ray Charles Foundation is demanding the return of a total of \$3 million in contributions given to Albany State University by Charles more than a decade ago.² While the Foundation is arguing that the money was given solely for the construction of a performing arts center, the University claims that the gift was never restricted. While this controversy has yet to hit the court system, it is another current example of the varying interpretations of donor intent.

What can your organization learn from this?

There are two important takeaways for your organization:

First, get it in writing. Whether a contribution is restricted to a certain purpose or not, get it in writing! All too often a miscommunication can result in problems for your organization—ranging from a breach of trust of a valued donor to a lawsuit and everything in between. These problems can be avoided by reducing your discussions or negotiations to writing signed by both the donor and a representative of your organization. If funds are to be unrestricted, ask that the donor specifically state this in the memo of the check or in the award letter.

Second, don't over-promise or over-sell what your organization can do with the funds. Be realistic about the goals of your organization, especially when it comes to certain projects. If the goals or needs of your organization suddenly or unexpectedly change, and you are unable to use funds for a restricted purpose, you have two options: ask the donor's permission to use the funds elsewhere or return the donation. Again, a written statement of donor intent will help your organization to avoid any confusion in using funds in accordance with the donor's intent.

For more information, please contact **Meredith Rosenbeck** at mrosenbeck@beneschlaw.com or 614.223.9353.

¹ <http://www.kfor.com/news/local/kfor-judge-deliberates-in-garth-brooks-lawsuit-20120124/0,6682356.story>

² <http://news.yahoo.com/ray-charles-foundation-wants-3-million-gift-back-222641663.html>

NLRB Issues Major Decision on Independent Contractors in the Arts Community



Katie Tesner

The National Labor Relations Board (NLRB) began 2012 by taking a marked detour from established Board precedent concerning the way employers, especially employers in the collaborative arts

industry, classify their workforce.

In three separate decisions issued December 27th and 28th, 2011, the NLRB found that musicians playing for symphony orchestras in Pennsylvania, Massachusetts and Texas are statutory employees, not independent contractors. As statutory employees, the musicians are now covered under the National Labor Relations Act (NLRA) and are therefore eligible to vote on whether they want union representation.

In the only published decision of the three, the Board in *Lancaster Symphony Orchestra* (357 N.L.R.B. No. 152) ruled 2-1 that the musicians were employees after applying a “common-law agency test,” which analyzes a multitude of factors involved in the work relationship. A non-exhaustive list of factors include such things as whether the employer controls the manner and means of the job performance; whether the individual bears entrepreneurial risk or enjoys gain; the method of payment, whether by time or by the job; whether the work is part of the employer’s regular business; and the length of the employment. No individual factor is determinative; however, the central inquiry commonly revolves around how much control an employer actually has over the performance of the work.

Prior to *Lancaster Symphony Orchestra*, the NLRB permitted employers to exercise a measurable degree of control over the performance of a job without finding employee status. Employee status would typically not be found where the individual artist retained discretion to accept or decline work and perform elsewhere. In stark contrast, the Board majority in *Lancaster Symphony Orchestra*

discounted evidence that the musicians were free to turn down work (stating that this was simply a reflection of the part-time nature of the symphony’s performance schedule), and focused instead on the fact that once the musician agreed to accept work, the orchestra controlled the manner and means by which the work was accomplished. The Board was swayed by evidence that the orchestra chose the music, decided how it would be played, when and how it would be rehearsed and how the musicians would appear on stage. Further convincing the Board of employee status was the fact these musicians were subject to discipline, had no entrepreneurial stake in the symphony (because their fees are unilaterally set by the orchestra) and their service was part of the orchestra’s regular business. In contrast to past decisions, the Board was not moved by the fact these musicians supplied their own instruments and tuxedos, practiced on their own outside of rehearsal and even signed a Musician Agreement stating conclusively that they were independent contractors.

The NLRB’s decision should cause all employers in the collaborative arts industry, as well as other non-profit industries, to take a second look at how their employees are classified. Dealing with misclassification has become increasingly expensive. In addition to the potential union liabilities, many states have recently enacted worker misclassification laws that impose severe penalties on employers who misclassify employees as independent contractors. For example, California recently enacted a statute that imposes stiff civil penalties and fines on any entity that “willfully misclassifies” an individual as an independent contractor. Fines start at \$5,000 and range as high as \$15,000 per violation. Further, if the entity is found to have engaged in a “pattern or practice” of misclassification, these fines skyrocket up to a minimum of \$10,000 per violation, and cap at \$25,000 per violation! Oregon allows, and often requires, state agencies to impose back taxes, penalties and interest on employers that are misclassifying

their workers. These are just a few examples.

The bad news is that the difference between an “employee” and an “independent contractor” remains far from crystal clear. There are different legal tests in addition to the NLRB’s “common-law agency test” used by various federal and state agencies and courts. The IRS has its famous 20-Factor Test on Employment Status, but there is no comprehensive checklist covering all state and federal laws.

The good news is that this NLRB decision, while not particularly favorable to employers, gives important guidance on the issue of control. And the right of the employer to control the worker remains central to the analysis under *all* of the tests. The NLRB majority opinion in *Lancaster Symphony Orchestra* suggests that workers’ entrepreneurial opportunities and discretion are construed narrowly and given less weight than in the past. An employer’s complete and final authority over how and when an artist performs at both rehearsals and concert performances will potentially outweigh any incidence of discretion that artist has over where and when s/he chooses to perform.

The decision in *Lancaster Symphony Orchestra* is another significant reminder that an independent contractor agreement, by itself, will not create an independent contractor relationship. However, if there truly is an independent contractor relationship, an employment agreement can be drafted to include sufficient information to support the existence of that relationship.

Now is the perfect time to take a cue from the Lancaster Symphony and review your independent contractor relationships with the help of counsel. Proper classification of your workforce can save incredible time and money for the future of your non-profit.

For more information, please contact **Katie Tesner** at ktesner@beneschlaw.com or 614.223.9359.

Events

Benesch and Blue & Co.

are pleased to present...

The Not-for-Profit Executive's Guide to Success



May 30, 2012

1:00 P.M.—6:00 P.M.

One American Square
Main Auditorium (Ground Floor)
Indianapolis, IN 46282

Not-for-profit organizations are faced with an ever-changing array of challenges. We invite you to join us for a complimentary half-day seminar during which we will provide useful tips and ideas to assist not-for-profit executives in successfully leading organizations.

1:00 P.M. — 1:25 P.M. **Registration**

1:25 P.M. — 1:30 P.M. **Welcome**

1:30 P.M. — 2:20 P.M. **Nonprofit Board Governance in an Electronic Age**

This session will provide an outline of the ins and outs of electronic meetings and voting, as well as an overview of the use of social media and items you may want to consider when developing your organization's social media policy. We will also present a review of state charitable solicitation requirements as applied to various online fundraising initiatives.

Presented by: MARTY SWETERLITSCH, *Chair of Benesch's*

Not-for-Profit Team

MEREDITH ROSENBECK, *Associate at Benesch*

2:20 P.M. — 2:30 P.M. **Break**

2:30 P.M. — 3:20 P.M. **Employment Law from Application to Termination**

We will offer a broad review of various employment laws and how they impact a not-for-profit. Special emphasis will be given to volunteers, including issues of enlistment, termination and when, if ever, a volunteer should be paid. We will also discuss, hiring, evaluation and termination of employees, as well as pay under Indiana and federal law.

Presented by: MARK WATERFILL, *Partner at Benesch*

3:20 P.M. — 3:30 P.M. **Break**

3:30 P.M. — 4:20 P.M. **Navigating the Numbers**

This session will focus on understanding the key changes to the 2011 990 reporting requirements and information related to future developments. We will also highlight making the most of the financial reporting function, including identification of performance indicators, examination of industry benchmarks, and implementation of effective controls.

Presented by: ERIC JASKE, CPA, *Tax Manager at Blue & Co.*

MICHAEL SCHULTZ, CPA, *Manager at Blue & Co.*

4:20 P.M. — 6:00 P.M. **Networking and Cocktail Reception**

RSVP

Please RSVP by **May 23, 2012** to Rebecca Walker at
rwalker@beneschlaw.com or 317.685.6162.

BENESCH
Attorneys at Law

CPAS • ADVISORS

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April 4–5, 2012

Hyatt Regency, 350 N. High Street, Columbus, Ohio, 43215

Greater Ohio Policy Center's Ohio Properties Redevelopment Institute: Transforming Problem Properties into Opportunity

This event is a two-day interactive training and policy solutions workshop that will gather local leaders from municipalities, not-for-profit community development organizations and the private sector from across Ohio. It will offer hands-on techniques and strategies for addressing vacant and abandoned property development challenges and generating redevelopment opportunities.

Sessions Include:

- Understanding the Ins and Outs of Property Acquisition
- Land Banks
- On-the-Ground Strategies: The Value of Neighborhood Stabilization
- Rebuilding the Community: Revitalization Strategies
- State Programs and Policy Reforms
- Using Property Information Systems
- Developing Urban Projects in Challenging Times
- Transforming Problem Properties Into Opportunity

Please check out the agenda online for a list of expert panelists and descriptions of each panel.

Registration: Registration for this two-day event is \$89. To pay by credit card, please use [online registration](#). To pay by check, or for more details on the Institute and [lodging information](#), please visit Greater Ohio Policy Center's [website](#).

Wednesday, April 25, 2012, 8:45 A.M.—4:00 P.M.

Sheraton Columbus at Capitol Square, 75 East State St., Columbus, OH 43215 (Legislative visits will occur at the Ohio Statehouse and Riffe State Office Tower)

Nonprofit Legislative Day

The Ohio Association of Nonprofit Organizations (OANO) and the Ohio chapters of Association of Fundraising Professionals will host a Nonprofit Legislative Day on April 25, 2012.

Visiting your legislator is one of the most effective ways to introduce yourself and your organization. By getting to know your legislator personally, you can make your organization visible and be an effective advocate for issues that impact your organization and the communities you serve.

Topics will include:

- State Legislative Briefing
- Advocacy 101 Presentation
- Impacts of Grassroots Advocacy Presentation
- Keynote Luncheon
- Legislative Visits

Registration: To register, click [here](#) or visit www.oano.org.

Cost: OANO / AFP Members - \$45

(AFP members who are not OANO members, please enter coupon code AFP-AFP during checkout to qualify for member pricing)

Nonmembers - \$50

Not-for-Profit Spotlight: The Children's Museum of Indianapolis

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the preschool-friendly *The Adventures of MR. POTATO HEAD*® (now–May 6) and the kid-pleaser *LEGO®: Travel Adventure* (now–July 22), which the museum's exhibits department created in conjunction with LEGO Systems, Inc. On May 26, the newest exhibit created by The Children's Museum will open—*Hot Wheels For Real*. This exhibit will provide children and their families the opportunity to learn the art of car and track design and test their skills at creating cars of their own.

The Children's Museum was founded in 1925 and is now a major cultural destination for visitors from around the world. More than 146,000 visitors are welcomed at reduced or free admission through the Access Pass and Foster Family Membership Programs, Neighborhood Nights, The Children's Museum Neighborhood Club and Target Free Family Nights.

More information about The Children's Museum can be found online at childrensmuseum.org, facebook.com/childrensmuseum, [@TCMIndy](https://twitter.com/TCMIndy), YouTube.com/IndyTCM and pinterest.com/childrensmuseum.

Instructions for Form 990: Significant Changes from 2011

A number of significant changes were made in 2011 to Form 990. Please click [here](#) for a helpful overview of these changes on the IRS website.

Is Your Not-for-Profit Board Steering or Rowing?

Organizations vary as to how much of which work—rowing or steering—their boards routinely do. Learn to distinguish the difference between a board doing its governance work versus helping with the organization's activities by checking out [this article](#) in *Nonprofit Quarterly*.

Events

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May 24, 1:00–4:00 P.M. Session 1: Introduction, Mission and Program & Public Accountability

May 31, 1:00–4:00 P.M. Session 2: Governing Board & Conflict of Interest

June 7, 1:00–4:00 P.M. Session 3: Human Resources & Financial and Legal

June 14, 1:00–4:00 P.M. Session 4: Fundraising, Public Affairs and Public Policy & Conclusion

100 E. Broad St. (Chase Bank Building), 6th Floor Conference Center, Columbus, OH 43215

OANO's Standards for Excellence Clinic Series

OANO is committed to bolstering public confidence in and support for the not-for-profit sector through the Standards for Excellence, which promote ethical practices and accountability in non-profit organizations across the state. More than 30 Ohio not-for-profit organizations are certified under OANO's Standards for Excellence and hundreds of organizations have participated in the clinic series to help improve their organizations.

Course Description: Each clinic will address in detail two of the eight major topic areas in the OANO Standards for Excellence ethics and accountability code. Special guest speakers will also present. A facilitated peer-to-peer exchange follows each topic overview. Participants will be asked to share copies of agency materials appropriate to specific Standards. At the conclusion of the series, participants who are interested in achieving certification should have assembled all portions of their application.

At least one representative from each participating organization MUST attend each session; clinics are most helpful if the people responsible for specific areas attend relevant sessions (e.g., a human resources director should attend Session 3, a board member should attend Session 2). Up to three individuals from a single organization may attend each session.

RSVP: Click [here](#).

Cost: \$500 OANO Members / \$1000 Nonmembers

Register before April 30 and save \$50. Price includes all four clinics and up to three people per organization can attend each clinic.



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