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**Disaster Relief and Recovery:  
The Role of Nonprofits Beyond Ground Zero  
and the Legal Implications of Their Work**

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## Table of Contents

Introduction.....	1
Part I: Disaster Relief and Recovery: The Role of Nonprofits.....	3
A. Helping Affected Businesses Recover.....	4
1. In Lower Manhattan.....	4
2. Beyond Lower Manhattan.....	6
B. Combating Unemployment.....	7
1. Short-term Assistance.....	7
2. Ongoing Assistance.....	8
C. Responding to the Housing and Homelessness Crisis.....	10
D. Providing Mental Health Counseling and Support.....	12
E. Helping Children Cope.....	15
F. Looking Forward.....	16
Part II: Disaster Relief and Recovery: Nonprofit Legal Issues.....	18
A. Federal Tax Laws and Charitable Activity.....	18
1. Charitable Class.....	19
2. Charitable Aid and the “Needy or Distressed” Test.....	21
3. Statutory Exception for September 11.....	23
4. Tax Consequences of Charitable Grants to Individuals.....	24
B. Charitable Aid to Business.....	25
1. Aid to Small Businesses.....	25
2. Taxation of Cash Payments to Small Businesses.....	27
C. The “Purposes” of Disaster Relief Nonprofits.....	28
D. Restricted Gifts.....	30
1. Legal Implications of Funding Restrictions.....	30
2. Lifting Funding Restrictions.....	31
E. Commercial Lease Concerns After September 11.....	32
1. Downtown Lease Concerns.....	33
2. Lessons Learned by Nonprofits.....	34
F. Property Damage and Business Interruption Insurance.....	35

G. Human Resources and Personnel Issues.....	37
1. Alternative Workforce Considerations.....	38
2. Working with Volunteers.....	39
H. Confidentiality and Privacy of Client Information.....	40
Conclusion.....	43



## Introduction

In the aftermath of the September 11, 2001 attacks on the World Trade Center, community-based nonprofit organizations engaged in immediate and longer-term disaster relief efforts. They provided food, cash assistance, social services and information, and in many cases created new entities to provide direct aid to victims. They were leaders in massive citywide relief activities and in hard-hit smaller neighborhoods. From the beginning, these nonprofits recognized that the impact went far beyond Ground Zero and the individuals killed or physically injured in the attacks.

Hundreds of thousands of New Yorkers are indirect victims of the September 11 attacks. A June 2002 report by McKinsey & Co. for the United Services Group estimated that \$768 million would be required over the following year to meet the financial, mental health, housing and job training needs of affected victims. Over 90% of this projection involves affected workers who lost or were displaced from their jobs.<sup>1</sup> Such analyses -- coupled with the real pain and turmoil that nonprofits observed and responded to -- show that disaster relief includes, but is more than, the much-needed outpouring of cash for those who lost family members or were physically injured. Disaster relief means addressing the multi-faceted needs of New York's larger community as it recovers from a grave tragedy.

Part I of this paper discusses the broad range of problems and human needs created or intensified by September 11, particularly in New York's low-income and disadvantaged neighborhoods, as well as the role of nonprofits in addressing them. Nonprofits learned many valuable lessons as they organized themselves and mobilized resources for disaster relief and recovery. In doing so, they had to navigate a sea of legal issues. Part II of this paper examines some of the key legal issues that disaster relief organizations faced after September 11 and how the law has evolved in response.

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<sup>1</sup> *A Study of Ongoing Needs of People Affected by the World Trade Center Disaster*, at 3, 18. Survey and analysis by McKinsey & Co., sponsored by the 9/11 United Services Group, June 27, 2002.

As the leading provider of free and low-cost business law services to New York's nonprofit sector, Lawyers Alliance for New York has had the opportunity to assist hundreds of nonprofits affected by and/or responding to the September 11 attacks. These nonprofits have made, and will continue to make, a critical difference to New York and surrounding communities faced with a tragedy of immense dimensions. Their challenges and contributions are ongoing. Lawyers Alliance is pleased to be able share its perspective on the broad impact of the disaster and the business law needs of the nonprofit sector that responded to it.

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## Part I

### Disaster Relief and Recovery: The Role of Nonprofits

Charities raised over \$2 billion for disaster relief in the months following September 11, through efforts ranging from national concerts to local bake sales.<sup>2</sup> Contributions poured in from throughout the city, the country and the world, and the philanthropic sector rallied immediately. While the full impact of the terrorist attacks was not fully known, there was little doubt that it would be significant and long-term. These funds enabled major relief organizations to provide for the immediate and ongoing financial needs of families who lost loved ones and people living near Ground Zero. This outpouring of charitable giving also supported vital services to be provided by nonprofits to affected neighborhoods throughout the New York metropolitan area, including in many low-income and disadvantaged communities beyond Ground Zero.

Over 75% of private funds raised (those donated by individuals and institutions) may be used for families of the deceased and for displaced workers.<sup>3</sup> For families who lost loved ones, private charities and the Federal Victim's Compensation Fund are expected to provide resources to meet their current and ongoing financial needs.<sup>4</sup> These important categories of need will require public and private attention into the future, but equally important will be the significant resources mustered to help the many thousands of indirect victims of the attacks.

Below we examine the broad effects of September 11 on New York City's neighborhoods and the role of nonprofits in addressing them.

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<sup>2</sup> "Families Fret as Charities Hold a Billion Dollars in 9/11 Aid," *The New York Times*, June 23, 2002, section 1, p. 29.

<sup>3</sup> M. Axel-Lute, "Brief Relief," at 26, in *City Limits*, November 2002.

<sup>4</sup> *A Study of Ongoing Needs of People Affected by the World Trade Center Disaster*, at 3, 18. Survey and analysis by McKinsey & Co., sponsored by the 9/11 United Services Group, June 27, 2002 [hereinafter, *A Study of Ongoing Needs*] at 3.



## **A. Helping Affected Businesses Recover**

Approximately two of every five New York City workers, and roughly half of workers statewide, are employed by small businesses.<sup>5</sup> The economic injuries September 11 caused for small businesses throughout the region have wide-ranging consequences.

### **1. In Lower Manhattan**

Before September 11, over 400 businesses and nonprofits operated at the World Trade Center. Hundreds more, including over 500 nonprofit organizations, were located in Manhattan below 14th Street, in the “Frozen Zone,” where certain buildings closed and the government imposed travel restrictions immediately after September 11. Over 50,000 people worked in the World Trade Center, and an average of 140,000 more visited the complex every day, feeding a vibrant network of service and retail businesses.<sup>6</sup> Chinatown and the Lower East Side, and other nearby neighborhoods that serviced downtown business and visitors, suffered in the short term from closed streets and the ongoing loss of tourism and foot traffic in Lower Manhattan. These downtown businesses and nonprofits faced not only lost business, but also commercial lease problems, insurance coverage questions, and employer-employee issues. An estimated 700 small businesses located in Lower Manhattan were forced to close permanently and additional businesses temporarily or permanently relocated.<sup>7</sup>

Government, private and nonprofit organizations have rallied to try to rebuild the vibrant business activity that existed in Lower Manhattan prior to the devastating events of September 11. Most of the September 11-related government funding has been earmarked for Ground Zero recovery and economic development in downtown

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<sup>5</sup> Wyatt, Edward, “Ripples of September 11 Widen in Retailing,” *The New York Times*, December 10, 2001, section A, page 1.

<sup>6</sup> “List of World Trade Center Tenants,” <http://www.cnn.com/SPECIALS/2001/trade.center/tenants1.html>.

<sup>7</sup> “Terrorism: Questions and Answers,” Website maintained by the Council on Foreign Relations, in cooperation with the Marckle Foundation, [www.terrorismanswers.com](http://www.terrorismanswers.com).

Manhattan.<sup>8</sup> In addition, many charitable organizations, including some organizations that had not previously done so, have sought to provide aid to small businesses.

For example, SEEDCO, a community-development nonprofit that has traditionally provided grants and loans to community organizations, implemented a program to provide emergency cash flow loans to small businesses as well as nonprofit organizations located below 14th Street. In addition, a coalition composed of SEEDCO, Alliance for Downtown New York, Consortium for Worker Education, Henry Street Settlement, and the Lower East Side Business Improvement District joined forces to create the Lower Manhattan Small Business and Workforce Retention Project, which provides small businesses below 14th Street with emergency assistance, including grants, loans, free consulting services, wage subsidies, and other services, to help improve their long-term sustainability.<sup>9</sup> Another coalition of businesses, industries and residents came together in the months after the attacks to create a new tax-exempt nonprofit called Wall Street Rising to serve as an advocate for Lower Manhattan business and residential communities, with the goal of promoting the area as a thriving twenty-four-hour, seven-day-a-week destination for businesses, residents and visitors. Wall Street Rising launched a Downtown Retail Attraction Program that provides free information and technical assistance to small retailers and businesses that need help locating retail space in Lower Manhattan and navigating grant programs and tax incentives.<sup>10</sup>

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<sup>8</sup> *A Study of Ongoing Needs*, at 4. See also Fried, Joseph P, “More Aid Seen for Business Downtown,” *The New York Times*, August 23, 2002, p. B4. Various governmental agencies and private organizations, such as New York City Partnership and Chamber of Commerce and the New York City Investment Fund, collaborated on financial assistance programs. “Economic Impact Analysis of the September 11th Attack on New York,” Executive Summary and Overview at 18, New York City Partnership and Chamber of Commerce, November 2001. The NYC Economic Development Corporation, the Empire State Development Corporation, and the New York City Partnership joined forces to create ReSTART Central, a service linking small businesses affected by September 11 with entities providing donated goods and services. See information posted on 9/11 related work at [www.nycp.org](http://www.nycp.org), maintained by New York City Partnership and Chamber of Commerce; see also website of ReSTART Central at [www.restartcentral.org](http://www.restartcentral.org).

<sup>9</sup> “Small Businesses in Lower Manhattan to Receive Financial Help in Wake of September 11th Disaster,” Press Release, October 23, 2001, available at [www.seedco.org](http://www.seedco.org); “Seedco Announces Important New Resources to Rebuild Lower Manhattan Small Businesses,” Press Release, October 17, 2002, available at [www.seedco.org](http://www.seedco.org).

<sup>10</sup> More information available at [www.wallstretrising.org](http://www.wallstretrising.org).

## 2. Beyond Lower Manhattan

Outside the disaster zones of Lower Manhattan, small businesses throughout the five boroughs suffered from lost business. From transportation and service firms whose downtown clients disappeared, to retail and service businesses dependent on tourism, the economic ramifications rippled throughout the region.

Although much of the initial cash assistance to businesses was limited to businesses located in Lower Manhattan, agencies began to find ways to spread aid money to businesses located outside Ground Zero as the larger scope of the economic damage became clearer. The Federal Small Business Administration's Economic Injury Disaster Loan Fund made emergency loans available to small business owners outside Lower Manhattan.<sup>11</sup> In January 2003, the New York City Department of Small Business Services announced that it would open two satellite service centers over the next two years, starting in the Bronx. These centers will partner with local development corporations to connect small businesses to a variety of assistance programs developed after September 11.<sup>12</sup>

In addition, many nonprofit economic development organizations throughout the five boroughs have added or adjusted programs to respond to the distress experienced by small businesses citywide. Washington Heights and Inwood Development Corporation, a not-for-profit local development corporation founded in upper Manhattan in 1978, provided low-interest loans through its "Business Opportunity Success System" to businesses in Washington Heights, Harlem, or Inwood that were "directly impacted" by the events of September 11.<sup>13</sup> The Brooklyn Economic Development Corporation was able to provide low-interest loans for small businesses in any of the five boroughs of New

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<sup>11</sup> Shelby, Joyce. "Keeping Firms Alive After 9/11." *New York Daily News*, February 1, 2002, p. 4.

<sup>12</sup> Krady, Scott. "Finally Some Help for New York City's Little Guys Tied Up in Red Tape." *US Banker*, January, 2003, p. 55.

<sup>13</sup> More information available at [www.umez.org/whindc.htm](http://www.umez.org/whindc.htm) and <http://members.aol.com/whidc>.

York City who relied on clients below 14th street for at least 10% of their revenues.<sup>14</sup> These loan funds were formed to provide vital bridge loans to small businesses suffering economic hardship related to the World Trade Center attacks, even though they may not have suffered physical damage or been located inside a restricted zone.

## **B. Combating Unemployment**

The economic downturn that was drastically accelerated by the events of September 11 has created some of the most direct and long-lasting challenges for nonprofit service providers in New York City. Thousands of unemployed are indirect victims of September 11. The Community Service Society estimates that 98,800 jobs were lost in New York City between September 2001 and March 2002. Employment levels stabilized for a few months in early 2002, but continued in a slower, but steady, decline the rest of the year.<sup>15</sup> Black and Hispanic New Yorkers bear a disproportionate burden of unemployment, as do those without high school degrees. Even before the attacks, New York had the widest income gap between rich and poor of all fifty states; afterwards, New York's jobless rate continued to surpass the national average.<sup>16</sup>

### **1. Short-term Assistance**

In the initial days after September 11, a combination of disaster relief aid and government assistance, in the form of extended Unemployment Insurance (UI) benefits and Disaster Unemployment Assistance (for those who do not qualify for UI, but qualify for relief in the wake of a presidentially declared disaster), created a safety net for

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<sup>14</sup> This WTC Business Recovery Loan Program was made possible with funding from Seedco. More information available at [www.bcdc.org](http://www.bcdc.org).

<sup>15</sup> Levitan, Mark. *One Year On: Unemployment and Joblessness in Post September 2001 New York City*. CSS Data Brief #7. Community Service Society, December 2002.

<sup>16</sup> "New Study Finds Income Inequality in New York Worst of Any State . . ." Press release from The Fiscal Policy Institute, April 23, 2002, available at [www.fiscalpolicy.org](http://www.fiscalpolicy.org).

immediately displaced workers.<sup>17</sup> Unfortunately, the UI application process can be confusing and frustrating and certain eligibility rules deny benefits to low-wage, part-time, and new workers. In addition, even with the federal extension, the New York Unemployment Project reported that, by August 2002, at least 100,000 New Yorkers had exhausted both regular and extended UI benefits.<sup>18</sup>

Nonprofit organizations assisting displaced workers, from small neighborhood agencies to large job-training networks, have been at the heart of the recovery and rebuilding effort from the beginning. Immediately after September 11, Consortium for Workers Education (CWE) partnered with the New York City Central Labor Council to set up an emergency employment clearinghouse, which screened displaced workers and sought employers to match with job-seekers, even for temporary work.<sup>19</sup>

## **2. Ongoing Assistance**

Nonprofit organizations with roots in the community are well-positioned to provide appropriate services, such as skills training, resume services and job placement, and to take advantage of wage subsidies. The majority of jobs lost as a result of September 11 were low-wage service, retail and hotel-industry jobs,<sup>20</sup> affecting workers already struggling to make ends meet, and reducing the pool of jobs available for the often difficult-to-employ clients of job training programs.<sup>21</sup> In response, nonprofits intensified their efforts at skills training and are trying to become more creative in

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<sup>17</sup> *Beyond Ground Zero: Challenges and Implications in New York City Post September 11*, Report by United Way of New York City, March 2002, at 17-18.

<sup>18</sup> *Organizing and Educating Unemployed New Yorkers for Survival*, briefing by the National Employment Law Project (NELP) for the Fiscal Policy Institute.

<sup>19</sup> Letter to prospective employers from Consortium for Worker Education, dated September 17, 2001, provided by New York City Workforce Investment Board.

<sup>20</sup> *The Employment Impact of the September 11 World Trade Center Attacks: Updated Estimates based on the Benchmarked Employment Data*, Fiscal Policy Institute, March 8, 2002, at 2.

<sup>21</sup> *See id.* at 31, noting that many of the low-wage workers who lost jobs had little or no savings or other resources and were often carrying significant debts.

searching for placement opportunities. In addition to providing job counseling and referrals, organizations like Safe Horizon and Chinatown Manpower Project, Inc. have been using September 11-related funding to provide displaced workers with a range of support services, including new job skills, English classes, and income support, while they seek new employment.

Efforts to address employment as part of an economic redevelopment agenda must embrace a broad strategy, both geographically and across employment sectors, to maximize effectiveness. Unemployed workers are distributed throughout the five boroughs: in February 2002 testimony, the Chief Economist of the Fiscal Policy Institute noted that, of applicants for unemployment benefits who claimed that their job loss resulted from the September 11 attacks, only 20% were Manhattan residents. By contrast, 26% lived in Brooklyn, 24% in Queens, and 11% in the Bronx.<sup>22</sup> The United Way reported in March 2002 that the thousands of employees laid off in the aviation industry or by hotels as a result of the reduction in tourism in New York did not qualify at that time for cash assistance provided through nonprofit agencies like Safe Horizon, the Red Cross and the Salvation Army.<sup>23</sup> Many of them turned instead to local and community-based groups where they resided. In Chinatown, for example, Chinatown Manpower Project became a central source of assistance and referrals for thousands who lost jobs after the attacks. In the Crown Heights section of Brooklyn, Church Avenue Merchants Block Association (CAMBA) received funding from the Robin Hood Relief Fund to provide case management and employment services to affected low-income residents in that neighborhood. Funding from private foundations and some government sources allowed these and other organizations to expand or modify programs to respond to the climbing levels of unemployment. Such organizations have required, and continue

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<sup>22</sup> The Fiscal Policy Institute: Testimony before the City Council of the City of New York Economic Development Committee Jointly with the Select Committee on Lower Manhattan Redevelopment, February 25, 2002. The Fiscal Policy Institute: *The Employment Impact of the September 11 World Trade Center Attacks: Updated Estimates Based on Benchmarked Data*. March 8, 2002.

<sup>23</sup> *Beyond Ground Zero: Challenges and Implications in New York City Post September 11*, Report by United Way of New York City, March 2002, at 20.

to require, information on employment law to help shape their guidance to their individual clients as well as their own personnel decisions during such times.

In addition to their job training and placement efforts, many organizations have increased their advocacy activities, for example by lobbying for extended unemployment benefits, the relaxation of geographic and other requirements for disaster relief aid, and better use of federal job-training funds. Community-based employment organizations have joined together with labor unions and research and advocacy organizations to form the Labor Community Advocacy Network to Rebuild New York (LCAN), a broad-based network advocating for a role in decision-making and distribution of funds for the rebuilding of New York. LCAN proposes using Community Development Block Grant money to create thousands of short- and long-term, public sector and publicly-subsidized jobs throughout the city, as well as jobs in the physical rebuilding process around Ground Zero. In addition, LCAN is working to build support for a public jobs-oriented recovery strategy, including worker training and education and other job development programs.<sup>24</sup>

### **C. Responding to the Housing and Homelessness Crisis**

Housing became a problem immediately. There were approximately 30,000 displaced downtown residents, many unable to return to their homes for many months if at all. Most of this population, however, eventually returned to their original housing or relocated, and occupancy rates below Canal Street have nearly returned to pre-September 11 levels.<sup>25</sup>

The severe, ongoing housing crisis continues among the middle- to low-income workers who lost their jobs after September 11, as the tragedy has precipitated the highest

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<sup>24</sup> Labor Community Advocacy Network to Rebuild New York Policy Statement, April 24, 2002, available at [www.lcan.org](http://www.lcan.org).

<sup>25</sup> "Terrorism: Questions and Answers," Section: Rebuilding New York. Website maintained by the Council on Foreign Relations, in cooperation with the Marckle Foundation, available at [www.terrorismanswers.com/policy/rebuilding.html](http://www.terrorismanswers.com/policy/rebuilding.html).

numbers of homeless New Yorkers in the City's history.<sup>26</sup> It is not uncommon for low-wage workers in New York City to spend 40% of their income on rent; thus, for displaced workers, even unemployment insurance benefits may not be enough to cover housing costs.<sup>27</sup> As these benefits and other income supports ran out and unemployment levels remained high, the already-growing numbers of New Yorkers seeking shelter grew even more steeply in the year following the attacks.<sup>28</sup> By early 2002, the average daily census of homeless people in the New York shelter system had surpassed the previous record high, set in 1987: in January, 2002, just after the attacks, more than 30,000 New Yorkers were sleeping in homeless shelters each night; by September 2002, the average was 37,000 per night.<sup>29</sup> The drastic increase in need pushed shelters, soup kitchens, and other social service providers to the limit.

The results of a *City Limits* magazine survey of twenty-six major foundations and relief funds that contributed significant funding for September 11-related projects indicates that only 4.8% of private relief grants were earmarked for provision of social services.<sup>30</sup> Nevertheless, nonprofits providing such services stepped up their efforts. An October 30, 2001, article in the *New York Daily News* describes lines of hundreds of people waiting to be fed at the city's soup kitchens.<sup>31</sup> Bowery Residents' Committee, a social service provider based in Lower Manhattan, expanded its street outreach program to homeless individuals throughout the city after September 11 in response to greater demand, steering homeless individuals toward shelter and employment programs.<sup>32</sup>

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<sup>26</sup> Coalition for the Homeless Fact Sheet, January 2002, available at [www.coalitionforthehomeless.org](http://www.coalitionforthehomeless.org).

<sup>27</sup> *Beyond Ground Zero: Challenges and Implications for Human Services in New York City Post September 11*. The United Way of New York City, March 2002, p. 31.

<sup>28</sup> See Charts prepared by Coalition for the Homeless, March 2002, and shelter census reports from New York City Department of Homeless Services and Human Resources Administration, both available at [www.coalitionforthehomeless.org](http://www.coalitionforthehomeless.org).

<sup>29</sup> *Id.*

<sup>30</sup> M. Axel-Lute, "Brief Relief," in *City Limits*, November 2002, at 27.

<sup>31</sup> "Soup Kitchen Lines Longer Since Tragedy," *New York Daily News*, October 30, 2001, p. 23.

<sup>32</sup> End of year letter dated December 4, 2001, from Muzzy Rosenblatt, Executive Director of Bowery Residents' Committee, Inc., re: BRC 2001 organizational accomplishments and goals.



New York City officials have acknowledged that the homelessness problem is real and growing.<sup>33</sup> However, with current and future city and state budget cuts, it appears that organizations caring for the homeless will be facing reduced public funding, regardless of increased need.<sup>34</sup> Mayor Bloomberg announced a new housing plan as an important priority.<sup>35</sup> It is too early to know how the Mayor's plan will be implemented, but nonprofit housing developers will undoubtedly have much to contribute if the plan is successful.

#### **D. Providing Mental Health Counseling and Support**

Several studies have shown that a large number of New Yorkers have suffered, and continue to suffer, some form of post-traumatic stress related to September 11. Six months after the attacks, psychotherapists ministering to individuals and corporations reported that, after an initial lull during the first few months, demand for counseling was rising as the after-effects of the tragedy began to manifest themselves.<sup>36</sup> In March, 2002, a New England Journal of Medicine survey found symptoms of Post-Traumatic Stress Disorder (PTSD) and/or depression in 13.5% of respondents throughout Manhattan; among respondents living below Canal Street, 20% reported symptoms of PTSD and 16.8% reported symptoms of depression.<sup>37</sup>

Lingering fear and stress from living through the attacks will affect many New Yorkers for some time to come. Unfortunately, there is precedent for long-term impact.

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<sup>33</sup> "More Homeless People, Mayor Now Says," *The New York Times*, October 30, 2002.

<sup>34</sup> "Foundation Giving: What Can We Expect," *Nonprofit Quarterly*, Volume 9, Issue 3, Fall 2002.

<sup>35</sup> *Mayor Bloomberg's Housing Plan: Down Payment on the Future*. New York City Independent Budget Office Fiscal Brief, February 2003, p. 1, at <http://www.housingfirst.net/pdfs/mayorshousing.pdf>.

<sup>36</sup> Lagnado, Lucette. "Bracing for Trauma's Second Wave." *The Wall Street Journal*, March 5, 2002, p. B1.

<sup>37</sup> Goode, Erica. "Thousands in Manhattan Needed Therapy After Attack, Study Finds," *The New York Times*, March 28, 2002.

In a post-September 11 interview, Nancy Anthony, director of the Oklahoma City Community Foundation, noted that most requests to the Oklahoma City Foundation for mental health assistance came after the one-year anniversary of the bombing in Oklahoma City, a mass tragedy on a smaller scale than the September 11 attacks. Seven years later, counseling continues to be the single largest disaster-related expense in Oklahoma City, and ten percent of the Foundation's cases were still active in 2002.<sup>38</sup>

The largest provider of counseling and support services related to September 11 is Project Liberty, which is a collaboration between New York State and New York City and is funded by the Federal Emergency Management Administration. Project Liberty contracts with licensed mental health programs in organizations throughout the tri-state area to provide outreach and crisis counseling services; it has also developed a mental health curriculum and provided crisis training for school personnel. In the wider metropolitan area, Project Liberty operates the 1-800-LIFENET hotline, a source of mental health referrals for the major relief agencies. In addition, the September 11 Fund and the Red Cross have both announced that they will continue to direct millions of dollars in September 11 funding toward mental health efforts over the next few years. Meanwhile, The New York Times 9/11 Neediest Fund gave over \$2 million to create the New York Consortium for Effective Trauma Treatment, an alliance of the four major hospital-based trauma treatment centers in New York. The Consortium has trained dozens of clinicians to go beyond their traditional hospital settings, offering trauma counseling and various therapies in schools, firehouses, and other group settings. This initiative is intended to provide an infrastructure for future trauma response efforts.<sup>39</sup>

Individual professionals in the mental health industry also sought to help through nonprofit organizations. In order to connect clinicians with organizations serving victims, a group of mental health professionals created Trauma Response Database, a

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<sup>38</sup> "September 11th Fund Reports Six-month Disbursement of \$205 Million from \$456 Million Donated; Plans \$250 Million for Future Needs," Press Release dated March 6, 2002, issued by The September 11th Fund.

<sup>39</sup> The New York Times 9/11 Neediest Fund Twelve-Month Report, available at [http://www.nytcfo.com/company/foundation/neediest/trauma\\_a.html](http://www.nytcfo.com/company/foundation/neediest/trauma_a.html).

nonprofit organization that operates an online database of mental health professionals interested in offering their services. The New York Disaster Counseling Coalition formed to connect individuals with clinicians in their neighborhood willing to provide free or reduced-fee services to those who lost family members or were otherwise directly impacted by the attacks on the World Trade Center.

To face ongoing challenges, multi-service and youth service agencies throughout the City have expanded mental health programs or added new ones. In the immediate aftermath of September 11, organizations such as Safe Horizon and the Salvation Army made counselors available to individuals in the Family Assistance Centers and through referrals. In addition, multi-service agencies expanded and/or modified their own counseling programs. For example, Barrier Free Living, an organization for the homeless and disabled on the Lower East Side, and Builders for the Family and Youth, an agency of Catholic Charities of Brooklyn and Queens that provides services including childcare, eldercare, and housing assistance, were among dozens of community-based organizations throughout the five boroughs that administered mental health services in their communities as Project Liberty Providers. Similarly, Hamilton-Madison House, a settlement house serving the Asian-American community in New York City, operates mental health and substance abuse clinics in multiple Asian languages and dialects, and provides counseling and referrals through Project Liberty. The organization's clinics experienced a 20% increase in demand after September 11, and it anticipated further increases as other programs run out.<sup>40</sup>

In order to provide needed services, many community-based nonprofits hired additional social workers or therapists with experience in trauma counseling. Nonprofit managers thus had to deal with human resources issues and ensuring compliance with rules regarding the privacy and confidentiality of client information, at the same time as addressing mental health needs. The critical mental health needs that Hamilton-Madison

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<sup>40</sup> Eva DuBuisson conversation with Hamilton-Madison House Director of Development Illyse Kaplan, June 19, 2002.

House and community agencies like it will continue to confront are unlikely to abate even as the city passes the immediate stages of crisis counseling.

### **E. Helping Children Cope**

A Board of Education study conducted in the spring of 2002 revealed that children were experiencing heightened anxiety in large numbers, estimating that roughly 200,000 public school children were in need of mental health intervention after the disaster.<sup>41</sup> With limited mental health services in place aimed specifically at children, helping youth recover remains a special subset of the wider need for mental health services.

Many community-based nonprofit organizations have stepped into schools and neighborhoods to help young people, working in coordination with families, teachers, and childcare providers. In the immediate aftermath, families in Lower Manhattan dealt not only with trauma, but also with the stresses of displacement. Manhattan Youth Recreation and Resources, a nonprofit community center serving the youth of the downtown and Tribeca area, expanded its programs to provide crisis information to families and added childcare hours during the evenings and weekends to assist parents who might have had new, longer commutes and other needs. In order to reach children throughout the area, Project Liberty developed a mental health curriculum for use in schools and provided crisis training for school personnel. This training gave teachers and caregivers better tools with which to help children process the tragedy. Today, Project Liberty continues to provide counseling and referral services to people of all ages affected by September 11.<sup>42</sup>

In addition, several neighborhood-based initiatives have been formed to help children cope with their anxieties and fears, including those who ordinarily may not have

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<sup>41</sup> Board of Education study: Kleinfeld, N.R. "In Nightmares and Anger, Children Pay Hidden Cost of 9/11," The New York Times, May 14, 2002.

<sup>42</sup> <http://www.projectliberty.state.ny.us/services.html>.

sought professional therapy. Lutheran Disaster Relief, a faith-based organization formed after September 11, has helped support a week-long program of day camps at neighborhood churches in the New York/New Jersey metropolitan area during the summers of 2002 and 2003. Called Camp New Ground, this program aims to help put kids on “new ground” in the wake of the frightening world that has evolved since September 11. Working Playground, a nonprofit that offers art education in the public schools, implemented a special program to help public school children express their emotions about the attacks through artistic activities. Many other groups have formed to aid children of victims and uniformed personnel, providing support groups, day trips, summer camp, and other healing experiences. One such organization, Tuesday’s Children, adopted as its mission “an eighteen-year commitment to each of the thousands of children who lost a parent” on September 11, a commitment it plans to keep through broad-based community support and interaction with these children.<sup>43</sup> These programs, in addition to scholarship funds that have been collected to provide for the future education of the children of victims, will be an important part of the long-term recovery effort in New York.

## **F. Looking Forward**

Alongside long-term plans for recovery and rebuilding from the September 11 attacks, nonprofit organizations throughout the New York City region are taking stock of lessons learned and creating plans for future crises. They are recognizing the need for contingency plans to ensure that relief efforts are better coordinated and more effective in the event of a future large-scale disaster.

Nonprofits are taking steps to protect themselves and the communities they serve. For example, many agencies lost important business documents that were stored in World Trade Center offices. To prevent similar problems in the future, NPower NY, a nonprofit organization providing technology assistance to nonprofits, offered free document scanning so that nonprofits could make multiple copies of important documents in CD

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<sup>43</sup> See Tuesday’s Children Mission Statement, <http://www.tuesdayschildren.org>.

format that could be stored in various locations.<sup>44</sup> In addition, given the significant property and financial losses caused by the tragedy, nonprofits are more likely to obtain, and/or check to see whether they have, insurance policies that provide protection against property losses and interruption of business.

In order to prevent problems of confusion and overlap in victim services in the future, many agencies have formed or strengthened coordinating umbrella organizations. In planning their future response efforts, such groups can learn from the coordination efforts that ensued immediately after September 11, during which time nonprofits and agencies struggled to find a way to share amongst themselves information about aid recipients without violating individuals' rights to confidentiality and privacy.<sup>45</sup> Coalition groups, including several organizations central to the emergency response such as the American Red Cross, the Salvation Army, and New York Cares, have formed a New York City chapter of Volunteer Organizations Active in Disaster in order to form a joint emergency response plan and create a forum for service coordination.<sup>46</sup> Disaster relief coordination has taken root in a wide range of communities. Several faith-based social service organizations have joined under the umbrella of the New York Disaster Response Interfaith Task Force, which seeks to provide support for clergy and other caretakers in addition to coordinating disaster relief efforts.

Through efforts like these, New York City's nonprofit community is devoting time and energy to being well prepared to respond to any future disasters.

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<sup>44</sup> <http://www.npower.org/tools/index.htm>

<sup>45</sup> V. Bjorklund, "Personal Reflections on 9/11 Legal Developments," in *September 11: Perspectives from the Field of Philanthropy*, The Foundation Center, 2002, at 29-31 (hereinafter, Bjorklund).

<sup>46</sup> <http://www.nycvoad.org>

## Part II

### Disaster Relief and Recovery: Nonprofit Legal Issues

In the immediate aftermath of September 11, hundreds of nonprofits engaged in new and different disaster relief activities. This raised threshold nonprofit law issues. First, nonprofits had to be mindful of the federal tax laws, which require tax-exempt organizations to behave in certain ways. A second issue was whether their September 11-related activities were duly authorized under their certificates of incorporation and state law. A third, ongoing area involves fundraising law and regulations relating to the collection and use of charitable gifts.

Nonprofits themselves suffered immediate adverse economic effects as a result of the World Trade Center tragedy. For these entities, legal issues included terminating or renegotiating leases for office space located in the vicinity of Ground Zero, determining if they could recover losses through insurance coverage for casualty and/or business interruption, or responding to staff reticence to return to Lower Manhattan.

Organizations soon turned to programmatic concerns, such as negotiating or renewing office leases to continue to provide services, employment law issues relating to new, temporary or part-time staff, and confidentiality and privacy issues raised by providing direct services to individuals.

#### A. Federal Tax Laws and Charitable Activity

Nonprofits must structure their disaster relief services consistently with Section 501(c)(3) of the Internal Revenue Code (the “Code”) in order to obtain or maintain 501(c)(3) tax-exempt status. They must be engaged in “charitable” or “educational activities”<sup>47</sup> -- this is key if organizations expect to receive tax-deductible charitable

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<sup>47</sup> 26 U.S.C. § 501(c)(3) (2003).

contributions, a valuable inducement to potential donors.<sup>48</sup> However, pre-September 11 interpretations of the federal tax laws were not sufficient to address all of the September 11-related issues. The law and articulations of the law evolved in response to the disaster.

## 1. Charitable Class

One of the initial issues charities encountered after the attacks was how to define the “charitable class” that will benefit from their activities. It is well settled that a 501(c)(3) organizations must be organized and operated to serve public, not private, interests.<sup>49</sup> A charitable class must be sufficiently “large” or “indefinite” that providing assistance to members of the class benefits the community as a whole.<sup>50</sup> For newly forming organizations, this class definition directly affects their ability to obtain 501(c)(3) status; for established organizations, it affects their distribution of aid.

Traditionally, the more widespread a disaster, geographically and/or in terms of numbers affected, the more likely the IRS will agree that the class is large enough. For example, when a county-wide flood or hurricane affects an entire community, the charitable class would be sufficiently broad. In contrast, when the event and impact is more limited, such as a flood on one block, and an organization seeks to help specific individuals on the block, there is greater chance of private benefit and that the “charitable class” requirement will not be met.

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<sup>48</sup> See 26 U.S.C. § 170 (a) (2003).

<sup>49</sup> Treas. Reg. 1.501(c)(3)-1(d)(1)(ii). The Treasury Regulations are explicit that an organization must “establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by private interests.” *Id.*

<sup>50</sup> W. L. (Wendy) Parker Rehabilitation Foundation, 52 T.C.M. 51, T.C. Memo 1986-348; see also J. Gitterman and M. Friedlander, *Disaster Relief – Current Developments, Exempt Organizations – Technical Instruction Program for FY 2003*, M-11 (hereinafter *Disaster Relief Current Developments*).



Nonprofits and their attorneys had a general framework from which to work, but the unusual circumstances of September 11 presented new scenarios. An unprecedented outpouring of philanthropy and the disasters' widespread impact put the traditional law to the test. Some of the charitable giving came from those desiring to help certain categories of individuals, such as uniformed officers and their families, survivors of deceased employees of particular corporations, affected children, residents of particular hard-pressed communities, or those in certain lines of work. How can charities help survivors of known victims? How can they assist people who lost or are struggling in jobs? Other charitable giving was more open-ended, such as for economic development or for other broader purposes. How can charities help New York neighborhoods rebuild? How can they ensure there was funding available to address long-term needs?

A newly forming disaster relief charity is well advised to draft missions with a broad charitable class, one that is both open and indefinite. The mission may include, but should not be limited to, aid to specific categories of victims of a particular disaster (*e.g.*, survivors of firefighters from a particular firehouse, traumatized residents of a particular community). The mission also should encompass a larger and more open group, such as families of firefighters killed or hurt in *any* disaster, people dislocated from their homes because of *any* disaster, or *anyone* suffering as a result of any natural or civil disaster. This issue arises when drafting a nonprofit's incorporation papers and other organizational documents.<sup>51</sup>

A related issue is earmarking of donations for particular victims. No matter how well intentioned a charity or donor may be, such earmarking is problematic. Personal donations to benefit pre-selected individuals are not "charitable" gifts because they

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<sup>51</sup> In response to the September 11 tragedy, the IRS confirmed that an organization established to aid victims of September 11 is analogous to an organization to aid flood or hurricane victims and therefore permissibly benefits an entire community. However, at the same time the IRS reiterated the importance of having a large or indefinite class. IRS staff have taken the position that a nonprofit whose activities benefited current and future firefighters or employees or residents of a town affected by disaster has a sufficiently broad charitable class. J. Gitterman and M. Friedlander, *Disaster Relief – Current Developments, Exempt Organizations – Technical Instruction Program for FY 2003*, M-11, M-12 (hereinafter, *Disaster Relief Current Developments*).

benefit private individuals. Similarly, it is improper for a 501(c)(3) organization to engage in such earmarking. Charities are well advised to decline or redirect such donations.<sup>52</sup> Instead, they may encourage donations to support programs to help disaster victims more generally.

It is not necessarily the case, however, that a charity is prohibited from distributing all of its funds to certain categories of victims. It is a longstanding principle that a 501(c)(3) organization must have meaningful control and discretion over the use of the contributions received.<sup>53</sup> In general, organizations may exercise this discretion to use all available funds to help identified victims, as beneficiaries of a large or indefinite class, or set aside part of the funds to benefit victims of future disasters.<sup>54</sup> In the aftermath of September 11, anecdotal evidence suggests that the IRS might have looked the other way on the question of charitable class and earmarking. The IRS granted 501(c)(3) status to some groups that were formed to benefit a broadly defined charitable class, but that noted in their applications for exemption that they would first distribute aid to a relatively narrow class of beneficiaries (*e.g.*, survivors of firefighters killed on September 11). The IRS has not, however, endorsed this concept in any official capacity. This leaves charities to wonder how the IRS will react to similar applications in the future.

## **2. Charitable Aid and the “Needy or Distressed” Test**

Since at least 1959, the Treasury Regulations have defined charitable aid as, among other things, the “relief of the poor and distressed or the underprivileged.”<sup>55</sup> The Internal Revenue Service (IRS) ruled long before September 11 that charities could assist

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<sup>52</sup> See *S.E. Thomason v. Commissioner of Internal Revenue*, 2 T.C. 441 (1943), in which the court ruled that a donor could not take a charitable deduction for a gift to a children’s home that was earmarked for tuition and other education for a child specified by the donor.

<sup>53</sup> *Mozelle v. Kluss*, 46 T.C. 572 (1966); *Davenport v. Commissioner of Internal Revenue*, T.C. Memo 1975-369 (1975).

<sup>54</sup> Disaster Relief Current Developments at M-12.

<sup>55</sup> Treas. Reg. § 1.501(c)(3)-1(d)(2).

individuals who are not poor or financially destitute, but nevertheless “distressed,” in the aftermath of a natural disaster or other emergency.<sup>56</sup> Disaster relief is intended to help those suffering from the disaster, irrespective of their economic circumstances.<sup>57</sup>

At the time of the September 11 attacks, the Internal Revenue Service (IRS) had not directly addressed whether recipients of charitable aid must demonstrate financial need before receiving cash assistance. This became a significant issue for charities assisting victims of September 11. In responding to floods, hurricanes and other natural disasters, charities historically provided non-cash services rather than substantial amounts of monetary aid directly to individual victims.<sup>58</sup> The outpouring of funds in the immediate aftermath of September 11 raised new questions of how charities should apply the “needy or distressed” test in distributing charitable funds. To what extent must charitable assistance be tied to financial need? Could the IRS’s “needy or distressed” test be relaxed in the context of September 11?

The IRS, with input from the nonprofit sector and others, reaffirmed and clarified post-September 11 that charitable aid related to a disaster can be based on an assessment of either financial need *or* distress. IRS Publication 3833, issued shortly after the

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<sup>56</sup> Rev. Rul. 78-99, 1978-1 C.B. 152 (providing that an organization that provides counseling to widows during periods of grief and assists them in overcoming legal, financial and emotional problems caused by the death of a spouse qualifies as charitable); Rev. Rul. 69-174, 1969-1 C.B. 149 (providing that an organization that provides free emergency rescue services to stranded, injured or lost persons and to persons suffering because of fire, flood, accident or other disaster is serving a charitable purpose).

<sup>57</sup> Attorney Victoria Bjorklund, who played a significant role in influencing the evolution of tax laws in the wake of September 11, provides the following illustration of the traditional analysis for determining need in administering aid:

“If Ted Turner is racing his yacht in the Bermuda Triangle and becomes endangered, he is ‘distressed’ at that moment and is thus worthy of charitable rescue assistance, despite his neither being ‘poor’ nor ‘underprivileged.’

“Once safely back on shore after his rescue, Mr. Turner remains eligible for mental-health charitable services (*e.g.*, counseling services) if his ordeal has left him ‘distressed.’ But he is not eligible to receive cash from charities because he is not poor or underprivileged.”

Bjorklund at 16.

<sup>58</sup> *Id.* Also, prior to September 11, charities delivering aid often had inadequate funds to respond fully to a crisis in its early stages and had to examine the needs of disaster victims to prioritize the distribution of aid. *Id.* at 15.

September 11 attacks, notes that a charity may provide “crisis counseling, rescue services, or emergency aid such as blankets or hot meals without a showing of financial need,” because individuals requiring such aid are “distressed” regardless of financial condition.<sup>59</sup> IRS Publication 3833 confirms that individuals do not have to be totally destitute to be financially needy, but rather merely lack the resources to obtain basic necessities; it also includes specific examples of permissible aid. Many of these examples are analogous to the type of aid required by victims of the September 11 attacks.<sup>60</sup> In contrast, financial assistance to victims of a disaster to pay for ongoing basic housing would require a “financial need assessment” of the recipient at the time the grant is made.<sup>61</sup>

### **3. Statutory Exception for September 11**

By passing the Victims of Terrorism Tax Relief Act of 2001 (the “Relief Act”), Congress adopted a more relaxed standard for aid to September 11 victims than to victims of other disasters.<sup>62</sup> Nonprofits may still choose to use the “needy or distressed” analysis, but this statutory test is an alternative. The Relief Act permits organizations serving populations affected by September 11, and the anthrax attacks that followed, to make disaster relief payments consistent with their charitable purposes without having to undertake individual, need-based analyses.<sup>63</sup> The Relief Act authorizes such payments

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<sup>59</sup> Disaster Relief: Providing Assistance Through Charitable Organizations, The Internal Revenue Service, Exempt and Government Entities, Exempt Organizations, <http://www.irs.gov/pub/irs-pdf/p3833.pdf>, 7 (hereinafter Publication 3833).

<sup>60</sup> The IRS describes the permissible scope of assistance that, if based on “individual need” is consistent with charitable purposes: “assistance to allow a surviving spouse with young children to remain at home to maintain the psychological well-being of the entire family; assistance with elementary and secondary school tuition and higher education costs to permit a child to attend school; assistance with rent, mortgage payments or car loans to prevent loss of a primary home or transportation that would cause additional trauma to families already suffering; and travel costs for family members to attend funerals and to provide comfort to survivors.” *Id.* at 8.

<sup>61</sup> *Id.* at 7.

<sup>62</sup> Victims of Terrorism Relief Act of 2001, H.R. 2884, 107th Congress, § 104 (2001) (hereinafter the Act)

<sup>63</sup> *Id.*

provided the “*payments are made in good faith using a reasonable and objective formula which is consistently applied*” [emphasis added].<sup>64</sup>

The IRS views compliance with this statutory rule to mean that the charity applies its best efforts to accomplish its charitable purpose and uses objective distribution criteria; the criteria should take into account all pertinent circumstances, including the size of the amounts distributed, to avoid impermissible private benefit.<sup>65</sup> In a memorandum announcing the passage of the Relief Act, Steven Miller, the Director of the Exempt Organizations Division, noted that that the Relief Act permits charities to make proportionate distributions to recipients within a charitable class using pro-rata distributions, so long as the payments are made in good faith and using a reasonable and objective formula that is consistently applied.<sup>66</sup> For example, formulae based on number of survivors and family size have been deemed acceptable. Through this rule, organizations such as the American Red Cross have been able to distribute cash grants very quickly to families who lost loved ones in the September 11 attacks.<sup>67</sup>

#### **4. Tax Consequences of Charitable Grants to Individuals**

It is important for nonprofits to understand the tax consequences of their financial aid to individuals so they can use their grant-making dollars most effectively. This information is also useful for social service agencies whose clients are recipients of September 11 benefits and grants, and may ask their caseworker for guidance. The Relief Act excludes from income “qualified disaster relief payments” made to individuals, including payments made as reimbursement for reasonable and necessary personal,

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<sup>64</sup> *Id.*

<sup>65</sup> Publication 3833 at 10-11.

<sup>66</sup> “Recent Developments Affecting September 11 Disaster Relief Charities,” Steven T. Miller, Director, Exempt Organizations Division, February 2002, available online at <http://www.irs.gov/pub/irs-tege/0202drc.pdf>.

<sup>67</sup> “Victims: Red Cross Provides Family Grants,” CNN.com, September 25, 2001, <http://us.cnn.com/2001/US/09/25/vic.victims.facts/>, noting that the Red Cross distributed some September 11 aid based on the number of dependents in the family.

family, living, or funeral expenses incurred as a result of a qualified disaster.<sup>68</sup> The September 11 attacks are such a disaster.<sup>69</sup> Nonprofits should be aware that the IRS clarified in a recent Revenue Ruling that Section 139 of the Relief Act applies to payments made by a state government or program or by an employer's program. Payments made by *nonprofits* are excludable from the recipient's income as a gift under Section 102 of the Internal Code.<sup>70</sup> The IRS has also set limits on what constitutes qualified disaster relief payments. In a Notice issued in late 2002, the IRS emphasized that payments made to individuals in excess of the recipient's "reasonable and necessary" expenses will be treated as taxable income.<sup>71</sup>

## **B. Charitable Aid to Businesses**

Nonprofits have also encountered federal tax questions as they seek to help businesses damaged by September 11. The first such question is whether and when a charity can provide financial and other aid to small businesses in furtherance of that charity's tax-exempt purposes. The second such question is whether and when disaster relief cash payments to individuals or small businesses will constitute taxable income to the recipient. Here, too, there have been legal developments -- or at least clarifications.

### **1. Aid to Small Businesses**

A tax-exempt charity, in furtherance of its charitable purposes, may provide disaster assistance to a *business* if: (1) the assistance is a reasonable means of accomplishing a charitable purpose and (2) any benefit to a private interest is incidental

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<sup>68</sup> §139 of the Act. Section 139 of the Relief Act intends to exclude qualified disaster relief payments from income only to the extent any expense compensated by such payment is not otherwise compensated for by insurance or otherwise. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Rev. Rul. 2003-12.

<sup>71</sup> Notice 2002-76, available online at <http://www.irs.ustreas.gov/pub/irs-drop/n-02-76.pdf>, 4.

to the accomplishment of a charitable purpose.<sup>72</sup> Private benefit is incidental if the benefit received by the business is “necessary or unavoidable in achieving the charitable purpose and the private benefit is not excessive.”<sup>73</sup>

IRS Publication 3833 provides that nonprofits may provide charitable assistance to *businesses* “to achieve . . . charitable purposes,” including three listed purposes: “to aid individual business owners who are financially needy or otherwise distressed,” “to combat community deterioration” or “to lessen the burdens of government.”<sup>74</sup> Community development organizations and other nonprofits are well advised to include such language in their formative documents, if it applies, especially when crafting a description of the purposes and activities of their organizations when incorporating and when applying to the IRS for tax-exempt status. This is important for establishing that an organization’s activities are “charitable” in the eyes of the IRS.

The IRS has provided examples to illustrate charitable assistance to businesses in the wake of a disaster. An example of aiding a needy or distressed business owner would be assisting a small business that has been so severely impaired by a disaster that the individual who owns the business is deprived of earning a livelihood.<sup>75</sup> Combating community deterioration in the context of disaster relief may include providing funds to rebuild the infrastructure of a central business district severely damaged by a disaster or providing funds in the form of grants, low-cost loans, or equity investments in such business districts to ensure that businesses remain in the area.<sup>76</sup> With respect to lessening the burdens of government, the IRS may consider whether a governmental unit considers the charity’s activities actually lessen the burden of the governmental unit or, in fact, add

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<sup>72</sup> Disaster Relief Current Developments at M-17.

<sup>73</sup> *Id.*

<sup>74</sup> Publication 3833 at 2.

<sup>75</sup> Disaster Relief Current Developments at M-17.

<sup>76</sup> *Id.* at M-18.

to that burden.<sup>77</sup> The clarifications in this area have been significant for the many nonprofits that provide funding and direct services to small businesses negatively impacted by September 11.

## 2. Taxation of Cash Payments to Small Businesses

The IRS takes a different approach with respect to disaster relief payments to businesses that are made by government than it does with those made by charities. This was a serious concern for nonprofits that had made grants to small businesses or advised small business clients on how to obtain recovery grants. In a letter to the Chair of the Section of Taxation of the American Bar Association, the IRS declared that grants given to *businesses* by *governmental agencies* would be treated as income and, therefore, be taxable.<sup>78</sup> The letter clarified that, in contrast, grants made by *nonprofits* to small to medium-sized businesses located in Lower Manhattan will be treated as gifts and therefore will not be taxable as income to such businesses.<sup>79</sup> The theory is that while nonprofits make the gifts pursuant to a “detached and disinterested generosity,” the government acts based upon its duty to relieve hardship caused by disaster.<sup>80</sup> The IRS has advised that a charity aiding a small business must require the business to use grant money solely in accordance with the intended uses and afford the charity access to its financial records.<sup>81, 82</sup>

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<sup>77</sup> See Rev. Rul. 85-1, 1985-1 C.B. 177; Rev. Rul. 85-2, 1985-2 C.B. 178.

<sup>78</sup> Letter to The Honorable Carolyn B. Maloney, Representative, U.S. House of Representatives, from Charles Rossotti, Commissioner of the IRS, dated November 6, 2002.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Letter to Richard M. Lipton, Chair, Section of Taxation, American Bar Association, from Lewis J. Fernandez, Deputy Associate Chief Counsel of the IRS, dated April 15, 2002, p. 2.

<sup>82</sup> Notwithstanding the IRS’s stated position, the question whether businesses that received aid from government sources after September 11 will ultimately be taxed on such funds remains unresolved. As of the date of this publication, there is federal legislation pending that, if passed, will exclude such government grants from the taxable income of recipient businesses. See September 11th Assistance Tax Clarification Act (Introduced in House), 108th Congress, 1st Session, H.R. 1620 (2003), available online, <http://www.theorator.com/bills108/hr1620.html>; See also Press Release of Congresswoman Carolyn Maloney, “Responding to IRS Move to Tax 9/11 Grants, Maloney Introduces Bill to Reverse Decision,”



### C. The “Purposes” of Disaster Relief Nonprofits

Shortly after September 11, some groups wishing to provide disaster relief services formed new not-for-profit corporations, while others expanded the mission of existing not-for-profit corporations. In either case, such organizations needed to examine the purposes clause in the corporation’s certificate of incorporation to determine whether the clause permitted the organization to engage in the proposed disaster relief activities. If not, the certificate had to be amended for the activities to be duly authorized under the law.

For newly forming corporations, it was advisable to draft the purposes clause of their certificate of incorporation in terms broad enough to permit the organization to encompass both foreseeable and hypothetical program expansions. This enables the organizations to change or expand programming without having to amend their purposes clauses.

For New York Type B and Type C not-for-profit corporations that need to amend the purposes clause of their certificate of incorporation, a process is mandated by statute. This process can be somewhat time-consuming. The corporation’s board of directors must approve the change. The corporation must obtain the consent of any state agency that had originally consented to the inclusion of the purpose being amended.<sup>83</sup> Depending on the added purposes, the organization may need to obtain the consent of other agencies.<sup>84</sup> Then, the not-for-profit corporation must obtain the approval of the New York State Attorney General’s office (through the Charities Bureau) and the supreme court of the judicial district in which the corporation’s principal place of

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April 3, 2003; Press Release, “Tax on 9/11 Threatens Recovery: Maloney, Nadler & Lower-Manhattan Biz Leaders Urge Help,” April 7, 2003. To date, no legislation has been passed.

<sup>83</sup> See § 804 of New York Not-for-Profit Corporation Law (hereinafter, N-PCL).

<sup>84</sup> See N-PCL § 404, which describes activities of corporations that require consent or approval of New York state agencies. For example, the state Department of Education signs off on purposes involving education or teaching.

business is located. The Charities Bureau reviews such changes carefully, and will require a commitment that funds raised for “old” purposes are not improperly diverted to “new” purposes.<sup>85</sup> After court approval, the not-for-profit corporation can file the amendment with the New York Secretary of State’s Office.<sup>86</sup>

Nonprofits that amend the purposes clause of their certificate of incorporation should notify the IRS promptly by mailing any amendments to the IRS address listed at the top of the organization’s determination letter.<sup>87</sup> The IRS is concerned with amendments that constitute significant changes in activities or purposes, as well as changes in the corporation’s name and other significant matters.<sup>88</sup> Nonprofits are also asked in their annual reports to the IRS in the Form 990 whether changes were made “in the organizing or governing documents but not reported to the IRS” and are asked to attach a confirmed copy of any such changes with the Form 990 if the organization answers “Yes.”<sup>89</sup> The IRS may review changes to the corporate purposes of an organization that is exempt under Section 501(c)(3) of the Code to ensure that the changes do not affect the corporation’s tax-exempt status and may revoke 501(c)(3) status if it deems the new purposes to be impermissible.<sup>90</sup>

The importance of drafting a sufficiently broad purposes clause and understanding how to amend such a clause continues to be relevant today. Some disaster relief nonprofits whose missions relate specifically to disaster response are now having difficulty getting funding for their disaster relief operations. September 11-related funds

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<sup>85</sup> Bromberger, Hobish and Schatz, *Getting Organized* at 67, Lawyers Alliance for New York Fifth Edition, 1999 (hereinafter, *Getting Organized*).

<sup>86</sup> *Id.*

<sup>87</sup> The determination letter pursuant to which the IRS notifies an organization of its 501(c)(3) status requires such notification; *see also*, *Getting Organized* at 67.

<sup>88</sup> Informal conversations with IRS specialists.

<sup>89</sup> *See* Form 990.

<sup>90</sup> *Getting Organized* at 67-68.

have been largely disbursed and are not likely to be available in the future.<sup>91</sup> Other nonprofits have decided that there are other types of charitable activities that they should pursue, instead of or in addition to September 11-related disaster relief. Consequently, these nonprofits are considering expanding their programming and purposes. For example, an organization that provides scholarship assistance to disadvantaged children who lost a parent or guardian in September 11 or another disaster might consider expanding its mission to assist disadvantaged children who lost a parent or guardian due to other causes. Such an organization might need to amend its purposes clause before pursuing that expanded mission.

#### **D. Restricted Gifts**

September 11 inspired an unprecedented outpouring of donations and support from private and public funding sources. Many charities expanded their programming in response to the tragedy. The funding in many instances was restricted by donors for use in September 11-related disaster relief programming or for the benefit of families who lost loved ones in the tragedy. Organizations faced the legal question of how to apply September 11-related funds consistent with legal principles and the explicit terms of the grants. Some organizations sought to offer disaster relief services outside the scope of the charity's stated purposes and had to amend their certificate of incorporation to reflect the new programming. This raised the legal question of how the organization could apply its new assets consistent with its purposes prior to the amendment.

##### **1. Legal Implications of Funding Restrictions**

The most significant legal doctrine on this issue is the legal doctrine of *cy pres*. *Cy pres* requires that donations be used in furtherance of the charitable purpose for which the funds were given or "as near as possible."<sup>92</sup> It is a violation of New York statutory

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<sup>91</sup> See M. Axel-Lute, "Brief Relief," in *City Limits*, November 2002, 26.

<sup>92</sup> Bjorklund, Fishman and Kurtz, *Nonprofit Law and Practice*, § 8-1(a).

law “to fail to apply [charitable] contributions in a manner substantially consistent with the solicitation for charitable purposes.”<sup>93</sup> New York law also provides that any gift to a not-for-profit corporation, whether restricted or unrestricted, must be used for the purposes of the corporation.<sup>94</sup> Therefore, nonprofits that received funding restricted to September 11 programming have to apply such funds consistent with such restrictions, but may want to consider to what extent such funds may be applied towards their pre-September 11 programming. This is important for those organizations that have now expanded their mission beyond disaster relief. Those organizations will have to apply their disaster relief funding consistently with the terms of the grants which they received.

## **2. Lifting Funding Restrictions**

Nonprofits left with funds that they cannot use in compliance with gift restrictions may, under certain circumstances, get the restrictions lifted or modified. However, the law allows this to be done in only two ways.<sup>95</sup>

One option is to obtain the donor’s written consent. Therefore, organizations will often be able to save time and expense if they can work out an amicable modification with the donor. Given the broad impact of September 11, there remain many useful charitable purposes for donated funds that may satisfy donors.

However, it may not be practical to obtain donor consent if the organization has received hundreds or even thousands of small contributions from individual donors. Under those circumstances, the only option is to seek a court order relieving the restrictions. If consent cannot be obtained by reason of death, disability, unavailability, or impossibility of identification of the donor, the New York Supreme Court may issue a court order to modify or remove the restrictions. The application to the court must be on

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<sup>93</sup> § 172-d(4) of the New York Executive Law.

<sup>94</sup> NPCL § 522(c).

<sup>95</sup> NPCL § 522.

notice to the New York State Attorney General Charities Bureau, and it must include a showing that the restriction is “obsolete, inappropriate, or impracticable.”<sup>96</sup> If the gift instrument is a will, the not-for-profit corporation would have to petition the Surrogate’s Court, rather than the Supreme Court, to lift the restriction. Notice to the Attorney General is required here as well.<sup>97</sup> In that proceeding, the applicant must demonstrate that “circumstances have so changed since the execution of the gift instrument that it is impracticable or impossible” to comply with the gift’s literal terms and the modification will “most effectively accomplish” the gift’s original general purposes.<sup>98</sup>

Nonprofits should keep in mind that, even if any such restrictions are removed, the funds may not be used for purposes other than the existing purposes of the corporation.<sup>99</sup>

#### **E. Commercial Lease Concerns After September 11**

Commercial lease issues quickly emerged in the wake of September 11 for nonprofits located in Lower Manhattan and elsewhere in the City. The collapse of the Twin Towers resulted in physical damage, caused by structural collapse, and dust and/or debris, to buildings located near Ground Zero. For nonprofits located below 14th Street, legal issues were created by damage and debris resulting from the collapse of the towers or lack of access to offices that were located in the Frozen Zone. Many of these nonprofits sought legal assistance with negotiating with their landlords to clean up their offices or terminate their leases. Leasing issues such as these alerted nonprofits throughout the city to review their leases carefully and to consult legal counsel before entering into a lease. Nonprofits moving to larger space to accommodate their growing

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<sup>96</sup> NPCL § 522(b).

<sup>97</sup> § 8-1.1(C)(1) of the New York Estates, Powers and Trusts Law.

<sup>98</sup> *Id.*

<sup>99</sup> NPCL § 522(c).

disaster relief staff or moving downtown in response to financial incentives can learn from the problems faced by nonprofits after September 11.

## **1. Downtown Lease Concerns**

Immediate questions arose for organizations whose offices were located near the World Trade Center. Many groups wondered whether they could collect money from their landlords for physical damage to office space, terminate their leases, seek rent abatement, or find other remedies for the financial harm they suffered as a result of the collapsed towers.<sup>100</sup> Answers to such questions could be surmised from general legal principles, but in all instances the answers depended on a careful reading of the leases in question. Landlords in New York City frequently use the form office lease (Form Lease) prepared by the Real Estate Board of New York, Inc. for their small business and nonprofit tenants. The first lesson learned by nonprofits that did not negotiate riders to protect their rights was that the Form Lease (and other commercial leases like it) favors the landlord on many of the issues that became significant after September 11.

Tenants whose offices suffered significant property damage sought to terminate their leases. Often, the first question was whether the tenant had the right to do so in the event of a casualty to the property subject to the lease. The Form Lease, similar to many commercial leases, expressly provides that the lease continues in full force and effect in the event of a casualty.<sup>101</sup> Although New York law affords tenants the legal right to surrender untenable premises, a tenant under the Form Lease expressly waived such

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<sup>100</sup> Countless individuals also sought legal advice regarding residential landlord-tenant matters. People sought to collect for damage to or clean up of their apartments, to terminate leases for apartments located in Lower Manhattan because of emotional distress or inhabitability (*e.g.*, no electricity, no water, no access to the apartment, excessive dust) and to gain access to apartments belonging to a loved one killed in the tragedy. In response, the Civil Court of the City of New York (Honorable Fern Fisher-Brandveen, Administrative Judge) compiled the “Legal Information and Resource Guide For Owners and Tenants Affected by The World Trade Center Disaster (October 2001),” which was distributed by the court and the Bar Association of the City of New York.

<sup>101</sup> Form office lease, Real Estate Board of New York, Inc., Section 9(a).

rights.<sup>102</sup> Thus, many nonprofits were unable to terminate their leases despite significant damage to office premises.

This left tenants with such questions as whether the landlord was required to repair damaged premises and whether rent abatement was a viable remedy. The casualty provision of the Form Lease provides that the landlord must repair the premises at its expense if the premises are partially damaged or unusable as a result of a casualty.<sup>103</sup> Casualty provisions of commercial leases, like the Form Lease, may also require the landlord to abate rent for the portion of the premises rendered unusable by the casualty during the period such portion is unusable.<sup>104</sup> Nonprofits learned that it was important to negotiate the right to rent abatement for specific events, such as inability to access the leased property. The Form lease does not give tenants a right to rent abatement for inability to access the premises.<sup>105</sup> This was a tough lesson for tenants who could not access offices in the Frozen Zone and one that is important for nonprofits located throughout the city.

## **2. Lessons Learned by Nonprofits**

Nonprofits providing disaster relief services may have sought, or may now seek, larger office space to house additional staff members, may be renegotiating their current office leases or may choose to relocate downtown to take advantage of the remaining

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<sup>102</sup> See NY CLS Real P § 227 (2002) (permitting tenants, unless the terms of the lease provide otherwise, to surrender possession of a leasehold and stop paying rent from the time of such surrender in the event the premises become untenable and unfit for occupancy by virtue of destruction or injury by the elements or any other cause not due to the fault of neglect of tenant); Form office lease, Real Estate Board of New York, Inc., Section 9.

<sup>103</sup> Form office lease, Real Estate Board of New York, Inc., Section 9.

<sup>104</sup> *Id.*

<sup>105</sup> Form office lease, Real Estate Board of New York, Inc., Section 27 (providing that the landlord's inability to perform under a lease does not affect or excuse the tenant's rent or other obligations where the landlord is not the cause of the inability).

state and city financial incentives.<sup>106</sup> Prior to September 11, tenants might not have been concerned with the lease provisions discussed above. The events of September 11 changed that. For example, nonprofits may want to clarify the parties' respective obligations to obtain insurance. They may want to ensure their right as a tenant to sublease their office space. Given the complex legal issues, nonprofits would be well served by getting legal assistance prior to entering into a lease rather than seeking legal representation after problems arise.

#### **F. Property Damage and Business Interruption Insurance**

Many nonprofits that suffered financially due to damage or lack of access to their offices attempted to recover all or part of their losses through insurance. They therefore had to understand their rights under their insurance policies very quickly. Moreover, the tragic events of September 11 led insurance companies and the government to revisit whether and when insurance companies would provide property and casualty insurance that covers losses resulting from "acts of terrorism."

Standard liability insurance generally covers the organization, its employees and its volunteers for liability to third parties, damage to personal property, or defamation claims. It does not necessarily cover damage to leased offices or business interruption. Usually an organization must specifically request and pay for such coverage, in the form of property and casualty insurance. Nonprofit organizations and others that lacked explicit coverage for property damage or business interruption found it difficult if not impossible to recover such losses through insurance after September 11.

After September 11, many organizations found that, even if they had property damage and/or business interruption insurance, their insurance carriers were refusing to pay part or all of their claims on the grounds that their policies specifically excluded

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<sup>106</sup> A description of the some of these benefits and contact information for Empire State Development is available online at [http://www.nylovesbiz.com/Tax\\_and\\_Financial\\_Incentives/liberty\\_zone.asp](http://www.nylovesbiz.com/Tax_and_Financial_Incentives/liberty_zone.asp).



coverage for losses resulting from “acts of terrorism.” While some insurance carriers may have been open to negotiation, the terrorism exclusion limited insurance for many.

Now, as before September 11, organizations will have the option to purchase coverage for losses for acts of terrorism as part of property and casualty insurance. In the weeks following September 11, nonprofit organizations and others found it difficult if not impossible to purchase affordable insurance to cover acts of terrorism because -- in light of uncertainties about future terrorist attacks -- a number of insurers opted to terminate coverage for all terrorism-related losses or dramatically increase premiums for such coverage.

Congress stepped in to mitigate this problem. The Terrorism Risk Insurance Act of 2002 (Terrorism Insurance Act), a federal law signed and effective on November 26, 2002, addresses the lack of insurance coverage for terrorism-related losses in two ways. First, the Terrorism Insurance Act offers federal assistance to insurance companies that make payments to cover losses resulting from acts of terrorism, under certain circumstances.<sup>107</sup> Second, and importantly, it nullifies all existing provisions in property and casualty insurance policies (including excess insurance, workers compensation insurance and surety insurance) that exclude losses resulting from terrorism.<sup>108</sup> Going forward, coverage for acts of terrorism may not “differ materially from the terms, amounts, and other coverage limitations applicable to losses from events other than acts of terrorism.”<sup>109</sup>

Under the Terrorism Insurance Act, insurers are permitted to charge a premium for the insured losses covered by the Act. They may reinstate terrorism exclusions with

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<sup>107</sup> The Terrorism Insurance Act defines “acts of terrorism” to include an act that was (i) perpetrated on behalf of any foreign person or interest, (ii) caused damage in excess of \$5,000,000, (iii) occurred within the United States and (iv) has been certified as an act of terrorism by the Secretary of Treasury, in concurrence with the Secretary of State and the Attorney General. § 102 of the Terrorism Insurance Act.

<sup>108</sup> Terrorism Risk Insurance Act of 2002, H.R. 3210 (2002) (hereinafter Terrorism Insurance Act).

<sup>109</sup> § 103(c)(1)(B) of the Terrorism Insurance Act.

the policyholder's consent or if, after thirty days notice, the policyholder fails to pay the premium for the coverage.<sup>110</sup> The Terrorism Insurance Act will continue in effect until December 31, 2004, but Congress may extend its effectiveness beyond that date.<sup>111</sup>

In evaluating their insurance needs, nonprofit organizations should keep in mind that, even if the Act nullifies a terrorism exclusion or their policy covers acts of terrorism, this does not constitute affirmative coverage. Rather, the absence of the terrorism exclusion enables the organization to be covered for losses caused by certain acts of terrorism only to the extent that the policy covers the underlying loss (*e.g.*, property damage). For example, if an organization does not have business interruption insurance, it would not be covered for any losses from a business interruption resulting from a terrorist act. During the period that the Terrorism Insurance Act is effective, nonprofit organizations are encouraged to make sure that they receive proper notices with respect to any outstanding insurance policies, and that the terms of terrorism coverage offered by their insurance company or any prospective insurance company are substantially the same as the terms for non-terrorism acts.

## **G. Human Resources and Personnel Issues**

The tremendous philanthropic response to September 11 helped to support the extraordinary efforts of nonprofit staff and volunteers. At first, nonprofit organizations tapped their limited resources and expanded their programs to ensure they had sufficient personnel to deal with the urgent demand for services, often raising thorny staffing issues. The subsequent surge in funding, to support those efforts was significant, but not permanent. In response to this instability, organizations met the new and constantly changing demands for disaster relief services through a combination of workforce arrangements, such as reassigning existing staff, hiring new staff, recruiting volunteers,

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<sup>110</sup> If, however, an insurance policy excludes from coverage damage caused by specified occurrences, such as nuclear, biohazard or chemical events, such occurrences will be excluded from the policy even under the Terrorism Insurance Act. §§ 103(b), 105(c) of the Terrorism Insurance Act.

<sup>111</sup> § 103(c)(2) of the Terrorism Insurance Act.

and/or using independent contractors or other alternative staffing arrangements. As the events of September 11 continue to shape employment decisions of nonprofit organizations, it was, and remains, important for such groups to understand pertinent employment law considerations.

## **1. “Alternative” Workforce Considerations**

Nonprofits that seek to expand their staff to provide disaster relief services have a range of options. First, they can hire temporary workers, who are employed by a temporary agency, rather than by the organization. Many groups choose to do this because they are not required to pay withholding taxes or provide healthcare benefits to such workers. Also, this means that the group does not need to lay off an employee once a short-term project is phased out. Unfortunately, however, the rapid turnover in staff may provide little continuity or employee loyalty. Plus, temporary agencies often charge a premium for their placement services.

As a second alternative, some groups have hired part-time employees. Part-time employees generally have the same employment law rights as full-time employees, except with respect to health insurance. Some health plans do not cover them. In addition, employers often offer less vacation time to part-timers. Part-time employees must be counted for purposes of determining whether the organization is subject to the Family and Medical Leave Act,<sup>112</sup> which generally is applicable to employers with fifty or more employees.<sup>113</sup>

A third option is to hire independent contractors rather than employees. The financial benefits of hiring independent contractors include the fact that employers are not required to withhold income tax, social security and Medicare taxes from their

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<sup>112</sup> The Family and Medical Leave Act of 1993, 29 U.S.C . § 203(g) (2003) (the “Family and Medical Leave Act”).

<sup>113</sup> § 2611(4)(A)(i) of the Family and Medical Leave Act.

income,<sup>114</sup> and that they are customarily not paid health insurance, vacation pay and other similar benefits enjoyed by employees. Nonprofits are well advised, however, to avoid misclassifying as independent contractors individuals who are defined by the law as employees. This includes employees who may work only a few hours a day or according to a varying or even an erratic schedule. The consequences of misclassification may include paying back the employment taxes that should have been paid with respect to the misclassified individual.<sup>115</sup> The IRS applies a multi-factor analysis to distinguish an independent contractor from an employee.<sup>116</sup> The factors boil down to whether the employer has supervisory control and financial control over the individual and the nature of the relationship between the employer and the individual.<sup>117</sup> Because of the potentially severe consequences of misclassification, this is an area in which nonprofits should seek legal guidance.

## **2. Working with Volunteers**

The nonprofit sector relied on the services of an extraordinary number of people who volunteered after September 11. One natural instinct is to seek to compensate those who donated countless (and often grueling) hours to help organizations serve victims of the tragedy, for example by offering stipends or other benefits. Many nonprofits are unaware that it is generally impermissible to compensate volunteers without transforming them into employees.

Providing benefits to volunteers, whether cash, goods or services, may turn the volunteer into an employee for purposes of the Fair Labor Standards Act of 1938 (FLSA). The FLSA requires employers to meet minimum wage and other standards with

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<sup>114</sup> Bromberger, Hobish and Yarvis, *Advising Nonprofits*, at 171, Lawyers Alliance for New York, Fourth Edition (1995).

<sup>115</sup> 26 U.S.C. § 3509; *See also* Publication 15-A, Employer's Supplemental Tax Guide (Supplement to Circular E, Employer's Tax Guide) at 5, (Rev. Jan. 2003) (hereinafter Publication 15-A).

<sup>116</sup> Publication 15-A at 5-6; *see also* Rev. Rul. 87-41, 1987-1 C.B. 296 (June 8, 1987).

<sup>117</sup> *Id.*

respect to their employees.<sup>118</sup> Individuals who regularly received food, clothing and shelter in exchange for their “volunteer” services have been deemed employees receiving wages in a non-cash form.<sup>119</sup> In such a case, the employer is not compensating the volunteers/employees in compliance with the wage and hour requirements of the FLSA.<sup>120</sup> A nonprofit demonstrating its gratitude by giving volunteers ten dollars or a meal every time they volunteer for an afternoon, for example, may create an employer-employee relationship. This is distinguishable from reasonable out-of-pocket expenses such as subway fare, which may be allowable under certain circumstances.

Similarly, nonprofits often consider paying stipends to volunteers or summer interns. This is generally ill-advised because the volunteer would easily be deemed an employee, triggering the FLSA. There is a narrow exception: an organization may pay a stipend of less than \$600 to a volunteer who is a trainee in a *bona fide* job-training program that meets certain criteria.<sup>121</sup>

## **H. Confidentiality and Privacy of Client Information**

Many nonprofits providing disaster relief services after September 11 were deluged with requests for information about the individuals and families whom they assisted. Many have received requests for information regarding the identity of their

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<sup>118</sup> See the Fair Labor Standards Act of 1938, 26 U.S.C. § 206 (2003) (hereinafter, the FLSA).

<sup>119</sup> *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 at 306 (1985). To distinguish between a volunteer and an employee, a court or government agency would examine (1) the benefits received by the individual from the organization for whom the services are being performed, (2) whether the activity is less than a full-time occupation and (3) whether the services are the kind typically associated with volunteer work. *Id.* at 303.

<sup>120</sup> *Id.* at 306. See also *Archie v. Grand Central Partnership*, 997 F. Supp. 504 (S.D.N.Y. 1988).

<sup>121</sup> Department of Labor Wage Hour Administration Opinion Letter, dated May 8, 1996. The Department of Labor has indicated that such a program must meet the following criteria: (1) the training must be similar to that given in vocational schools; (2) the training must be for the benefit of the students and not the employer; (3) no employees of the employer can have been displaced by trainees; (4) the employer may not benefit from the trainees’ presence and may in fact be disadvantaged by the presence of the trainees; (5) the trainees are not necessarily entitled to a job at the end of the training period; and (6) the trainee and his or her guardian, if applicable, understand that the trainee is not entitled to wages. *Id.*

individual clients and the nature of the services provided. Reporters, funders, “watchdog groups,” researchers, historians, students and others interested in the impact of September 11 all sought details. Funders also requested information for reports on how grant money has been spent. Nonprofits themselves often sought to disclose certain information, even if not requested, in order to highlight their accomplishments.

State and federal regulators became involved in the privacy issues raised by September 11 relief activities. Shortly after the tragedy, New York Attorney General Eliot Spitzer requested that charities share with each other the names of victims, names of survivors and their financial information, to compile a centralized database. Charities, concerned about their constituents’ privacy rights, were initially reluctant to disclose this information.<sup>122</sup> With pressure from the public and from within the nonprofit community, many of the larger charities joined in the efforts to compile the database. The process took time. It was not until March 2002 that the 9/11 United Services Group launched the database as fully operational.<sup>123</sup> Meanwhile, the IRS has requested that charities that received disaster relief funding relating to September 11 maintain written records to show who received assistance, in what amount and for what purpose, and to coordinate with other organizations. The regulators’ announced goal is to help ensure that individuals and families receive the assistance they need and to help prevent duplication.<sup>124</sup>

Thus, nonprofits providing September 11 relief services must address what measures to take to protect the privacy of client information. Unless a specific statute or common law principle governing confidentiality is applicable to an organization, private organizations -- including nonprofits -- are generally governed by their own privacy policies, cultural norms and business practices.<sup>125</sup> Because there is little case law in New

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<sup>122</sup> Bjorklund at 27.

<sup>123</sup> *Id.* at 29.

<sup>124</sup> “Recent Developments Affecting September 11 Disaster Relief Charities,” Steven T. Miller, Director, Exempt Organizations Division, February 2002.

<sup>125</sup> Bjorklund at 26.

York addressing the use of personal information by the private sector, nonprofits should turn to New York statutes for guidance.<sup>126</sup>

Not-for-profit corporations providing certain social services should remember that New York statutes may impose obligations on such organizations to protect the confidentiality of client information. For example, New York law affords a privilege to communications with certain trained professionals, such as rape crisis counselors and social workers, and the privilege may be asserted by the organization by which the rape crisis counselor or social worker is employed.<sup>127</sup> Organizations may not share such confidential information with third parties without the individual client's consent, which may be given in limited circumstances without jeopardizing the privilege.<sup>128</sup> Nonprofit organizations licensed by the New York State Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities are required to maintain as confidential both the records and the identity of their individual clients and may only disclose such information under limited circumstances.<sup>129</sup> Organizations that provide health or social services to HIV-positive individuals face similar obligations with respect to confidentiality of client information.<sup>130</sup>

These legal considerations affect the collection, storage and dissemination of September 11-related information. They are everyday functions of organizations providing disaster relief and integral to their operations. Given that the activities of disaster relief organizations vary from organization to organization, they will each need to assess for themselves what practices are legal and prudent.

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<sup>126</sup> *Id.*

<sup>127</sup> NY CLS CPLR § 4510 (2002); NY CLS CPLR § 4508 (2002).

<sup>128</sup> NY CLS CPLR § 4510 (2002); NY CLS CPLR § 4508 (2002).

<sup>129</sup> NY CLS Men Hyg § 33.13 (2002).

<sup>130</sup> NY CLS Pub Health §§ 2780-2787 (2002).

## **Conclusion**

The role of nonprofits in disaster relief and recovery in the weeks, months and years following September 11 cannot be understated. These groups rapidly learned that the effects of the tragedy were felt far beyond Lower Manhattan. In response, organizations, located throughout the five boroughs and beyond, ramped up their services and offered even more extensive financial support and direct services to affected individuals and groups. In a remarkably short time, nonprofit groups addressed short-term needs and implemented programs to meet long-term needs. Many groups are now looking to the future and are working to be better prepared for a future disaster.

Lawyers Alliance, too, responded to the needs of the community after September 11. We implemented our Disaster Relief Initiative immediately to address what we anticipated would be the business legal needs of nonprofits in the New York City metropolitan area. We provided legal guidance at a time when disaster relief law was still evolving and many questions were unanswered. In this process, we have had the privilege of working with nonprofits located in and serving all five boroughs. As the issues and laws affecting disaster relief organizations developed, we broadened the scope of our own legal and practical knowledge. We have learned a great deal about offering legal assistance after a tragedy of mass proportions. As we continue to serve the disaster relief community now and in the future, we will keep in mind the lessons learned -- even as we hope that such a horrific disaster does not reoccur.