Newsletter
Summer 2003

Lawyers Alliance for New York

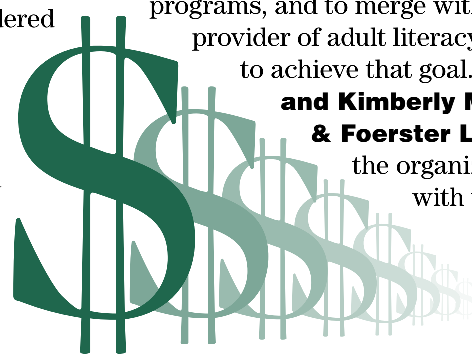
Strategies for Nonprofits Coping with Financial Distress

As nonprofits struggle to do more with less, they should be mindful that there are strategies available to help them preserve programs in times of financial distress.

New York City nonprofit organizations are facing drastic cuts in funding resulting from severe reductions in both government and foundation support. These financial pressures are being felt at a time of unprecedented demand for services from New York City's most vulnerable populations. The squeeze that community-based nonprofits are experiencing will almost certainly get worse before it gets better, because both foundation grant making and government contracting for services inevitably lags behind any economic recovery.

As nonprofits struggle to do more with less, they should be mindful that there are strategies available to help them preserve programs in times of financial distress. One option often considered attractive by nonprofit leaders is partnering with another organization to continue to deliver vital programs. This "partnership" can take the form of a legal merger, but often is structured as some other kind of strategic alliance.

In a merger, the separate legal existence of the strategic alliance partners terminates and the surviving corporation absorbs the assets, rights, debts and obligations of the other corporation. Lawyers Alliance is currently representing nine organizations that are negotiating mergers with other nonprofit groups. For example, we are representing a Brooklyn-based agency that was founded in 1978 as a nonprofit housing and neighborhood development corporation. Its approach is based on the concept of self-help by providing technical assistance and training to increase the capabilities of residents so that they maintain control of their homes and their community's development. The organization has decided to add adult literacy training as a component of its job readiness and training programs, and to merge with an experienced provider of adult literacy services in order to achieve that goal. **Carl F. Berglind and Kimberly Many of Morrison & Foerster LLP** are representing the organization in connection with the merger.



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Nonprofits Facing Lay-Offs Face Legal Concerns As Well

As New York City's nonprofits face funding cuts, they are being forced to consider lay-offs and hiring freezes that would have been unthinkable options only a few years ago. In many cases, lay-offs are more than feared possibilities: they are harsh realities. In recent months, a number of Lawyers Alliance's clients have contacted us to discuss so-called "economically-related lay-offs" of anywhere between one and several employees.

The term "economically-related lay-off" can be a dangerous one for nonprofits to use. Why? Even in times of economic distress, nonprofits must make difficult choices between which staff members to let go and which ones to keep and, when doing so, they must comply with anti-discrimination and other laws pertaining to the employment relationship.

There are some cases where economics force a nonprofit to lay off a particular employee or group of employees. These cases tend to occur when a nonprofit loses all of its private or public funding for a particular program or staff position, and the nonprofit does not have other funding to pay the related staff salaries (from unrestricted funds, for example). A nonprofit may truly be able to call such a lay-off exclusively "economically related."

For staff positions that are linked to particular funding streams, it is best for the nonprofit to state – preferably in writing when the employment relationship begins – that the position is contingent on funding and may be eliminated if the funding is lost. Employers should be careful

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in such cases to stress that a job that is contingent on funding is still subject to the rule of "employment-at-will," meaning that the employer still retains the right to terminate the employee for any lawful reason, at any time, regardless of funding available for the position.

> An employee who is laid off is likely to ask "why me?" Why was I the one (or one of two or three) to lose my job during these hard economic times?

In the case of most lay-offs during hard times, however, nonprofits are forced to lay-off one or more employees – and keep others – to trim staff costs under newly tightened budgets. In these cases, the organization will generally seek to lay off its poorest performers, its "least valuable players." While an organization may be tempted to tell its soon-to-be-terminated employee that he or she is being laid off for purely economic reasons – to avoid a difficult conversation about the employee's past performance or to allow the employee to "save face" – such a route raises liability risks for the nonprofit.

An employee who is laid off is likely to ask "why me?" Why was I the one (or one of two or three) to lose my job during these hard economic times? The employee will next start to look for reasons, and performance problems may not be the ones that come to his or her mind. Instead, the employee is likely to dwell on his or her own individual situation, and this is where allegations of discrimination can and do arise.

The employee whom a nonprofit allegedly terminates for "economic reasons" may come to believe that he or she was really terminated because he or she is over 40, a member of a minority group, disabled, or in another "protected class," all potential grounds for state and federal lawsuits. This is why employment lawyers urge employers to be honest in termination settings, including disclosing the real reasons for job terminations. While there is nothing wrong with telling an employee that general economic conditions facing a nonprofit contributed to the employee being let go, it is also important to communicate that the employee is being terminated for poor performance so that there is no misunderstanding.

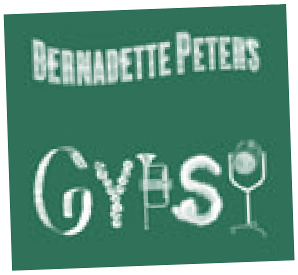
In addition, the employer should record the performance-related reasons for the termination in the employee's personnel file. The employer will then be able to show that the reason the particular employee was laid off during the financial downturn, while others were kept on, was that the employee was a "least valuable player." Even if you have a written personnel policy that makes all employees "at-will," the nonprofit should be prepared to prove with detailed documentation that the termination was not a breach of a commitment or a pretext for unlawful discrimination.

When an employee is terminated for poor performance – even during bad economic times – it is best when the employee had been warned previously about these problems and given measurable opportunities to improve. While employers are not required to give reasons or warnings for firings when employment is "at-will," prudent employers routinely do so, both out of a concern for fairness to their employees and to appear sympathetic and even-handed in any future legal actions brought against them by fired employees.

In addition to maintaining careful personnel records, nonprofits are advised to have a written personnel manual that, among other provisions describing the terms of employment, clearly states that all employees are terminable "at will." Employers should also review their forms, hiring letters and other personnel policies to ensure that no language will unintentionally be construed as a limitation on their right to terminate at-will employees.

While economic downturns often demand unprecedented and difficult personnel practices, nonprofit employers should not lose sight of the employment liabilities that can be the unintended consequences of these actions. Lawyers Alliance's staff and volunteer attorneys are available to guide nonprofits that are developing personnel policies, terminating employees, changing employees' job responsibilities, or facing other key employment law issues. Please contact Senior Staff Attorney **Rebecca Kramnick** at (212) 219-1800 ext. 222 for more information. ■

Lawyers Alliance's Theatre Benefit



If you would like to see the new smash Broadway musical ***Gypsy*** with Bernadette Peters, then please plan to join Lawyers Alliance for New York for our Theatre Benefit on Wednesday, June 18, 2003. There will be a reception at Coco Pazzo Teatro Restaurant at 224 West 49th Street, followed by a performance of *Gypsy*, which won rave reviews at its opening and is already designated as the big hit of the spring season on Broadway. Lawyers Alliance appreciates all those who support this special event. A special thanks to the following sponsors:

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Lawyers Alliance will also be holding a special raffle for our guests. Prizes will include a backstage tour after the show to meet Bernadette Peters, and a membership at Chelsea Piers Gold Club. For questions about tickets for the Theatre Benefit, contact Director of Development **Nan Lee** at (212) 219-1800 ext. 230. ■

2002-2003 Law Firm Appeal

Lawyers Alliance is very pleased to announce that our 2002-2003 Law Firm Appeal has been a tremendous success, surpassing last year's Appeal. Lawyers Alliance sincerely thanks Co-Chairs **Steven H. Davis** and **Peter R. O'Flinn** of Leboeuf, Lamb, Greene & MacRae, L.L.P. for leading this important effort, and we also extend our gratitude to all the law firms who joined the appeal this year for their continued support. ■

Steven H. Davis and Peter R. O'Flinn, both of LeBoeuf, Lamb, Greene & MacRae, L.L.P., led this year's Law Firm Appeal.

Patricia Gopaul Joins Lawyers Alliance As Senior Staff Attorney

Patricia E. GoPaul

Patricia E. GoPaul has been named Senior Staff Attorney at Lawyers Alliance for New York. With her extensive experience in economic development and real estate issues, Ms. GoPaul will lead Lawyers Alliance's practice in support of economic development organizations.

"Economic development is the foundation of New York's efforts to revitalize and improve low-income neighborhoods. Pat GoPaul brings to our economic development clients her extensive experience in economic development, real estate, and work with city agencies that are essential to their success. She will be an invaluable asset in helping these organizations to grow and succeed in the years ahead," said **Elizabeth Guggenheimer,** Legal Director at Lawyers Alliance.

A recipient of Lawyers Alliance's 2002 Cornerstone Award for extraordinary pro bono legal work, Ms. GoPaul was previously of counsel/senior attorney at Winston & Strawn, where she specialized in commercial lending and real estate issues including acquisitions, lease negotiations and transactions involving the New York City Industrial Development Agency. She was also an associate in the Real Estate Group at Orrick, Herrington & Sutcliffe.

From 1987 to 1997, Ms. GoPaul worked with the New York City Economic Development Corporation, where she specialized in transactional work including real estate financing, secured transactions, loan restructurings and related services. She was also previously a staff attorney with MFY Legal Services, specializing in social security and supplemental security income cases. She earned her undergraduate degree at Harvard College and her J.D. at Columbia Law School, and is a member of the American Bar Association and the Association of Black Women Attorneys.

"I am very excited to be joining Lawyers Alliance. I am looking forward to the chance to put my experience in economic development, nonprofit issues and critical business areas such as real estate and contracts to work for the economic development organizations that are critical to New York's future," Ms. GoPaul said. ■

Lawyers Alliance Becomes Accredited Pro Bono CLE Provider

The New York State Continuing Legal Education (CLE) Board has approved Lawyers Alliance's application to be a Pro Bono CLE Provider. CLE credit is available for approved pro bono activities performed after October 7, 2002, for nonprofit clients of Lawyers Alliance serving the poor.

If you have any questions about Lawyers Alliance's CLE for pro bono program, or seek to earn CLE credits for your pro bono work through Lawyers Alliance, please contact Pro Bono Coordinator **Carrie Marker** at (212) 219-1800 ext. 228 or cmarker@lany.org. ■

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Lawyers Alliance is also working with a consortium of New York City nonprofit organizations whose mission is to improve the quality of services available to the City's homeless families. The coalition is merging with another consortium of New York City nonprofit organizations whose mission is to improve the quality of services available to the City's single homeless population. Both organizations support the combination based on the programmatic synergies that are possible in providing services to two separate populations of homeless New Yorkers. **Lance Myers and Andrea Marshall of Holland & Knight LLP** are assisting the coalition with its merger with the consortium.

The legal process required for traditional mergers can often be lengthy, and many corporations are burdened with too much debt to make them attractive merger partners. Under those circumstances, the parties may decide to create a parent subsidiary type of relationship by having the parent agency's membership or board control the subsidiary. For example, the Board of Directors and senior staff of one Brooklyn-based substance abuse treatment organization decided that a stand-alone outpatient drug treatment center could not survive without an affiliation with a larger health care provider. It initially began negotiating a possible affiliation agreement with a major nonprofit hospital, but later abandoned that approach because of changes in the financial condition of the hospital. Ultimately, the Board agreed to enter into an affiliation agreement with a citywide drug treatment agency in 2002. Lawyers Alliance, along with pro bono counsel **Donnell Suares,** represented the organization in connection with this strategic alliance.

Other successful strategic alliances are structured to enable one corporation to acquire the assets of another not-for-profit. The transferring organization may use the proceeds of the transfer to continue to operate programs or it may choose to dissolve following the transfer. Lawyers Alliance is currently representing one of the city's oldest and most innovative peer-based HIV prevention and harm reduction outreach programs for street-oriented adolescents and young adults, whose board recognized that it would be very hard to maintain an organization of its size due to reductions in grants and contributions. The Board considered several strategic alliance partners and ultimately selected one of the city's largest and most established social service providers as its partner because it already offered comprehensive services to similar populations. **Sarah Fels of Allen & Overy** is assisting the organization with its asset transfer and dissolution.

In making the most of opportunities to form strategic alliances of any type, timing is key – and many more alliances are abandoned than are successfully completed. The most common reasons why mergers and other strategic alliances fail are (1) the inability of a nonprofit leader and board to foresee the severity of their organization's financial problems in time to pursue these options and (2) the unwillingness of a board or executive director to relinquish control in the best interests of the nonprofit, its programs, and its mission. Ignoring indications of financial distress jeopardizes the ability of an organization to continue to meet the needs of its community effectively and places the organization's future in peril.

We urge you to confront these issues quickly and to seek technical assistance in developing and implementing a strategy. For assistance with a merger or strategic alliance, please contact Senior Staff Attorney **Linda S. Manley** at (212) 219-1800 ext. 239. ■

New Publication Deals with Nonprofit Mergers

Lawyers Alliance is pleased to announce the publication of *Mergers and Strategic Alliances for New York Not-for-Profit Corporations.* This publication is an essential guide for nonprofit managers and their lawyers considering joining forces with another entity.

For more information or to order a copy, please call (212) 219-1800 ext. 221.

Legal Technical Assistance Available To DYCD Grantees

Thanks to the generous support of **New York City Department of Youth and Community Development** (DYCD), under its Technical Assistance Program, Lawyers Alliance is now offering certain educational workshops and legal consultations to DYCD-funded community based organizations at no cost.

This includes the following half-day workshops:

May 29, 2003	**Employment Issues for Nonprofits Working with Volunteers and Interns**
June 6, 2003	**Fundraising Law and Regulation**
June 10, 2003	**Incorporation and Tax Exemption**

We will post the Autumn 2003 workshop schedule on www.lany.org and mail copies to DYCD grantees and other Lawyers Alliance clients by early August.

In addition, this includes legal consultations for nonprofits referred by DYCD to Lawyers Alliance. Lawyers Alliance staff and volunteer attorneys are available to help such groups on a range of business law topics, such as tax-exemption, lease negotiations, and corporate reorganization. This program is part of Lawyers Alliance's and DYCD's efforts to help nonprofit and community-based organizations to build their capacity, both organizationally and programmatically.

For further information, contact the following people at Lawyers Alliance: Acting Director of Finance and Administration **Antonio Larrinaga** (212) 219-1800 ext. 237 (workshops); and Program Assistant for Client Relations **Lori Moses** (212) 219-1800 ext. 223 (consultations, requests for legal assistance). ■

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