

perspectives

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Benesch Friedlander
Coplan & Aronoff LLP

MY BENESCH MY TEAM

Trends and Topics in Not-for-Profit Management

Not-for-Profit Spotlight



GrantStation is dedicated to creating a civil society by assisting the not-for-profit sector in its quest to build healthy and effective communities. It offers not-for-profit organizations, educational institutions and government agencies the opportunity to identify potential funding sources for their programs or projects as well as resources to mentor these organizations through the grantseeking process.

GrantStation provides: access to a searchable database of private grantmakers that accept inquiries and proposals from a variety of organizations; federal deadlines; links to state funding agencies; and a growing database of international grantmakers. In addition, GrantStation publishes two newsletters highlighting upcoming funding opportunities: the weekly *GrantStation Insider*, which focuses on opportunities for U.S. not-for-profit organizations, and the monthly *GrantStation International Insider*, which focuses on international funding opportunities.

Securing grant awards is an essential part of a healthy funding strategy for any organization or agency. Because there are thousands of grants made every year representing billions of grant awards, sorting through all of this information to find the right grantmaker can be a tricky and time-consuming task. GrantStation provides all the tools and resources necessary to become a successful grantseeker—all in one place.

For more information about GrantStation, please visit the website [here](#).

Governor Signs New Law to Allow Asthma Inhalers in School and Camps



Rachel Winder

Asthma is a chronic lung disease that inflames and narrows the airways. It causes recurring periods of wheezing, chest tightness, shortness of breath and coughing. An individual diagnosed with asthma may need quick-relief prescription medication to treat asthmatic symptoms.

According to the Centers for Disease Control and Prevention in 2007, asthma was the underlying cause of death for 10 children in Ohio and contributed to approximately 200 hospitalizations for middle and high school-aged students across the state.

Current law does not allow health care professionals to obtain an inhaler for non-patient-specific use or use a child's inhaler for instances where another child may be suffering from asthma symptoms and gasping for breath.

These limitations in Ohio law are the motivation behind Substitute House Bill 39, which will permit schools and camps across Ohio to procure asthma inhalers, and other devices that attach to inhalers, for use in certain emergency situations.

Substitute House Bill 39 was signed by Governor John Kasich on November 1, 2015. Beginning in February of 2016, a board of education, a governing authority of a chartered or nonchartered nonpublic school, a community school or a STEM school with the approval of its governing authority, a college-preparatory boarding school, a residential camp, and a child day camp each are authorized to procure inhalers for use in emergency situations.

The new law requires that a school or camp that chooses to procure and possess asthma inhalers must adopt an inhaler policy overseeing their maintenance and use. Before adopting a policy, a school or camp must consult with a licensed health professional who is authorized to prescribe drugs, and the policy must include a prescriber-issued protocol that specifies a definitive order for inhalers, including dosage, number of times that each inhaler may be used before disposal and the methods of disposal. The policy also must do all of the following:

- Identify the locations in which an inhaler must be stored.
- Specify the conditions under which an inhaler must be stored, replaced and disposed.
- Specify the employees and contractors (other than a school nurse or athletic trainer) who may access and use an inhaler to provide a dosage.
- Identify the emergency situation, including when an individual exhibits symptoms of asthma, in which an inhaler may be accessed and used.
- Specify that assistance from an emergency medical service provider must be requested immediately after an employee, other than a nurse or athletic trainer, uses an inhaler.
- Specify the individuals, in addition to students, school employees and school visitors, to whom a dosage may be administered.

The law will grant qualified immunity from civil liability for damages allegedly arising from maintenance, access or use of an inhaler under the law.

For more information regarding Sub. H.B. 39 in Ohio, contact [Rachel Winder](#), Government Relations Manager, Benesch Law at (614) 223-9316.

Benesch's Not-for-Profit and Public Law Practice

Members of the Not-for-Profit Team are able to assist not-for-profit clients in structuring government affairs programs designed to address specific state and national issues. We frequently study and evaluate proposed legislation to determine possible effects on clients and confer with legislators and key officials to influence passage, defeat or amendment of legislation or introduction of legislation more favorable to our clients' interests. Should the need arise, we coordinate meetings between clients and members of the General Assembly or state agencies to discuss legislative or administrative matters and to allow officials to respond to concerns. Other activities of the group include direct contact with administrative officials, testifying at public hearings, and consulting on all matters relating to legislative or administrative needs of clients.

Benesch's Not-for-Profit Team assists not-for-profit and tax-exempt clients in a broad array of matters, ranging from filing for not-for-profit status and preparing federal and state tax exemption applications to training in not-for-profit regulatory compliance. Our not-for-profit attorneys are committed to protecting our clients' assets so that they can continue to drive the missions and goals of their organizations.

For more information regarding this edition or any not-for-profit issues, please contact:

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The Employee Zone of Privacy



Mark R. Waterfill

Employers should recognize an employee's zone of privacy in the workplace. Business owners and managers need to understand that while they have their employees' attention for much of the workday,

there are limits. An employer must recognize how difficult it is to come to work day after day with the same individuals. Employees are often asked to accomplish difficult tasks. Employees are often required to perform these tasks in a very short time period. It only compounds the pressure and stress of everyday work life to have a boss who insists upon knowing every detail of his or her subordinates' lives. That is often a warning sign, a red flag, for trouble.

If an employer is intruding upon the subordinate's life, I often see this as a sign there is going to be some type of workplace complaint. In fact, there are several laws that caution against such behavior.

Laws that Promote Employee Privacy

1. **Sexual Harassment.** Years ago, I was asked to investigate claims of sexual harassment by female subordinates against the company president. I learned that the company president thought it was appropriate to discuss the details of his sex life with his wife with female subordinates, including his own secretary. This misguided company president thought this could not be considered sexual harassment because he was not making an inappropriate approach to these female subordinates, but rather talking about intimate details of his own sex life with his wife. Of course, the female subordinates felt quite the opposite. They were offended and had appropriate claims of sexual harassment in the workplace. The investigation was completed, and appropriate sanctions and education were done.

In 1986, in *Meritor Savings Bank v. Vincent*, the U.S. Supreme Court adopted regulations promulgated by the EEOC in 1980, which laid out a new form of sex discrimination called sexual harassment. 477 U.S. 57 (1986). In *Vincent*, like many cases in this area, the supervisor and subordinate had a

relationship. These types of relationships at the workplace often turn into LGW or "love gone wrong." The relationship in *Vincent* clearly qualified in this category.

There have been numerous other lawsuits in which love gone wrong has led to the court widening the range of sexual harassment. Sexual harassment in the workplace is one area where clearly the employee zone of privacy has been invaded. The results are often catastrophic to the employer.

This is not to say that there are not loving relationships established and marriages created out of workplace romances. However, this is an area fraught with danger. Employers must make sure that their managers are thinking clearly and respecting their employees' zone of privacy.

2. **Other Types of Harassment.** There could be harassment in various other forms such as race, ethnicity, disability, religion or age. Similar to sexual harassment cases, these lawsuits portend a failure of the employer to institute a rigorous standard among its supervisors that there is a limit to the interaction they should have with their subordinate employees. Respecting the employees' zone of privacy means not telling racist, ageist or disability-related jokes. Respecting employees' privacy means that supervisors and managers must be careful expressing political views or commentary on national and international events. These types of communications often result in trouble.
3. **Religious Discrimination.** Protections afforded to employees due to their religion is different from other types of discrimination. Religious discrimination protections are like two rails that an employer must follow: one that requires a de minimis accommodation to employees who hold certain beliefs and one that prohibits discriminating against employees in the terms and conditions of employment.

Employers must be careful not to try to evangelize their employees. Such activity often leads to religious discrimination claims. By the same token, enforcing some dress or appearance standards that are not job-related or are only minimally job-related can lead an employer to run afoul of this protection.

4. **HIPAA.** This statute actually has the word privacy included within it and therefore it is clearly a form of protection for the employees' zone of privacy. For those covered entities, such as employers who provide some type of group health insurance plan, medical privacy is paramount. 42 USC 1320d-6 codifies the disclosure of individually identifiable health information as illegal. Even for those who are not covered by HIPAA, it is always a good idea for employers to refrain from engaging in conduct or communications that invade the privacy of their employees, especially when it comes to medical conditions.

"Protected Health Information" is safeguarded by HIPAA. This does not mean that any type of health-related information must be safeguarded. On the contrary, what HIPAA really protects is divulging protected health information that is used in insurance claims. However, the standards of HIPAA are being used to broaden privacy rights of individuals, which can clearly apply to the workplace as well.

Recently, HIPAA has been used in state court jury trials for claims under the common law tort of invasion of privacy. Plaintiffs have recovered over seven figures where their medical information has been divulged.

Those cases are warnings to employers not to violate their employees' medical privacy.

How might this occur in the workplace?

Perhaps a company president learns that a particular individual is pregnant and decides to take it upon himself to send an email to all of the employees. Maybe that employee did not wish for that information to be spread throughout the workplace. Perhaps there are particular reasons why she wanted the information to remain private. Such a claim might include a claim of invasion of privacy as well as a sex discrimination claim.

The employees' zone of privacy is amplified by HIPAA. Employers are wise to be careful when dealing with employees' medical issues.

5. **The Family Medical Leave Act (FMLA) and Genetic Non-Discrimination Act (GINA).** Provisions in the FMLA (29 C.F.R. 825.500 g) and GINA (29 C.F.R. 1635.9) require employers to keep medical information confidential. Employers are to keep medical information in a separate locked file apart from the regular personnel

files. Such a provision also exists under the Americans With Disabilities Act (ADA), discussed below. A novice mistake an employer can make is to produce personnel files to the EEOC that include medical information protected by the FMLA, GINA and the ADA.

Not only do employers learn protected health information regarding their employees but also regarding their immediate family members. Extra caution should be given to protect that information. An invasion of privacy lawsuit by a spouse of an employee would not be subject to a workers' compensation protection, and there could be large liability to an employer for exposing that information.

The only exceptions to these restrictions are the following:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment.
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. 825.500 f.

6. **The Americans with Disabilities Act.** As discussed above, under the ADA, health information is to be kept in a separate medical file, not included within the personnel files. in a separate locked cabinet and only provided to those with the need to know. Individuals with the need to know might include the company nurse and the HR director. However, the owner of the company or the president of the company would not necessarily have the need to know and therefore should not gain access.

There is a major caveat regarding the employee zone of privacy as it relates to the ADA. This law requires that once an employee has established that he or she is a qualified individual with a disability, the employer is required to enter into the "interactive process" in order to determine what reasonable accommodations might be required. This interactive process

may require some additional knowledge regarding the employee's health condition.

For example, if an employee with cerebral palsy asks the boss for a reasonable accommodation related to that disease, certainly the employer may be in a position where it must learn more about the limitations caused by disease. However, word of warning: the employer needs to be focused on the essential functions of the job and physical limitations of the employee, not the details of particular illness or disease. For example, questions such as "How long have you suffered from cerebral palsy?" or "Was this a hereditary condition?" are really irrelevant to whether the employee can perform the essential functions of the job with or without reasonable accommodations and what those reasonable accommodations might be. The focus needs to be upon the physical tasks the employee can and cannot perform.

Let's take another example. Suppose an employee says to his supervisor that he is an alcoholic or drug addict and that he needs to attend classes to help with that problem. An in-depth discussion regarding the drugs taken or the reasons for the alcoholism are really irrelevant, and more significantly, intrusive upon that employee's privacy. What is relevant to the employer is that the employee can perform the essential functions and then, alternatively, what reasonable accommodation (in this case, perhaps treatment through an employee assistance program) the employee is seeking—that is the interactive process and nothing more. This is not an excuse to invade the employee's health privacy.

Conclusion

Work is very difficult. We are often confined with the same individuals day after day and many times performing monotonous tasks in a difficult environment. Smart employers do not make that situation worse by taking it upon themselves to learn every intimate detail of their employees' lives. A word of warning: employees will often try to divulge these details to an employer. All supervisors and managers should avoid these types of conversations. This can only lead to trouble, and trouble often leads to lawsuits.

For more information on this topic, please contact **Mark R. Waterfill** at (317) 685-6119 or mwaterfill@beneschlaw.com.

Year-End Giving



Adam Lenter

It's New Year's Eve and everybody is celebrating—that is, everybody except for development professionals. They are stuck in the office making sure every last check is deposited before

the clock strikes midnight. It is an annual ritual that caps the final push to receive donations and ensure donors earn their last-minute tax deductions. While year-end is a naturally busy time for development teams, it does not have to be a chaotic one. If your November and December feel like a disorganized scramble, it may be time to develop a better strategy based on the following suggestions.

1. **Have a Plan** – Development is cyclical. While year-end is busy, the summer may be slow. For many organizations, August is the perfect month to assess where the organization's fundraising initiatives stand and develop a strategy for the next four months.
2. **Segment Your Donors** – Determine the categories of donors you will need to reach out to at the end of the year and develop a strategy for each. Start with simple groupings (institutions vs. individual or major donors vs. small donors). Then add layers of

complexity (donors who moved from small to large in the current year, donors who gave on multiple occasions, first-time donors, donors whose giving has significantly increased or decreased since the prior year, etc.) A good donor management system will enable you to easily generate such lists.

3. **Develop Your Communication Strategy Early** – How are you going to target each segment of donors? Who should receive a form letter? Who should receive a personal phone call? What should those communications look like? You may be able to create the letters and emails early and simply hit "send" on the scheduled date. This may also be a good time to check your contact records to make sure you're able to reach your donors when the time comes.
4. **Think Like a Donor** – While you are eager to collect every last cent in the calendar year, many of your donors may be counting their pennies as their gift-giving season comes to a close. At the same time, every charitable organization with their mailing address is making the same final push to them. Separate your organization from the others. That may mean making the final push in October or reaching them in different ways. Maybe your donors would appreciate a holiday/thank-you card that does not come with a pledge card to return.

5. **The Relationship Is Everything** – Successful development is all about building relationships. While the scale of your organization may prevent you from having a one-on-one relationship with all of your funders, you can make them feel like you do. The role of development professionals is to bring in revenue, which leads many to focus on what the organization needs from donors. But when you think in terms of relationships, you can consider what your donors need from you—a sense of appreciation that their contributions have had a real impact. The feeling that you are fulfilling some need for your donors can be satisfying and motivating one and engage them more deeply in your cause.

It is easy to fall into the routine of treating fund development as a short-term proposition. But with the right kind of planning, you can develop long-term relationships that will pay big dividends down the road.

About the Author:

Adam Lenter is the Founder and Executive Director of Nonprofit Data Solutions and the developer of the donor management system DonorHub. He has held leadership positions at and consulted to several not-for-profit organizations. Adam can be contacted at alenter@nonprofitdatasolutions.com.

IRS Proposes New Substantiation Rules for Donors



Martha J. Sweterlitsch

As year-end approaches, it is prudent to review the IRS requirements for substantiating donations to charities. For a contribution in excess of \$250 to be deductible to the donor, the charity must provide

the donor with substantiation in the form of a contemporaneous written acknowledgment. It is good practice for charities to substantiate all contributions. In addition, for contributions in excess of \$75 for which the donor received something in return, the value of the goods or services received must be provided to the

donor. Please click [here](#) to access the IRS guidance on substantiation.

In September 2015, the IRS issued proposed regulations under which the donor's obligation to substantiate the deduction can be satisfied if the recipient charity elects to file a return with the IRS reporting the contribution. The charity's return must provide the charity's name and address, the donor's name and address, the donor's taxpayer identification number, the amount of cash, and a description (but not necessarily the value) of any property other than cash contributed, whether the charity provided any goods or services in consideration for the contribution, and a description and good faith estimate of the value of any goods or

services provided by the charity. Practitioners speculate that the motivation for this proposal is related to tax enforcement. It is unlikely that most charities will choose to file such returns. However, some taxpayers have used an obscure exception to the substantiation rules to claim that the filing of a 990 that disclosed contributions fulfilled the substantiation condition. If the rules are adopted, the IRS will presumably develop a form that charities can use to report donations to the IRS as a method of substantiation if they so choose.

For more information on this topic, please contact **Martha J. Sweterlitsch** at (614) 223-9367 or msweterlitsch@beneschlaw.com.

Events

A Special Evening with Kim Klein, Author & Fundraiser

The Center For Nonprofit Resources

Date: December 9, 2015

Time: 4:00 P.M.–6:00 P.M.

Location: Findlay Wine Merchant, 540 South Main St., Findlay, OH 45840

Special opportunity for northwest Ohio not-for-profit managers—Kim Klein, internationally known trainer, speaker and author is coming to Findlay, Ohio, for an evening of Fundraising Questions & Answers on December 9, 2015, from 4–6 p.m. Kim is well-known for her ability to deliver information in a practical, down-to-earth and humorous way. She has a wide range of not-for-profit experience, having worked as staff and as a volunteer and a board member. Kim is the author of five books including *Reliable Fundraising in Unreliable Times*, which won the McAdam Book Award, and the classic text, *Fundraising for Social Change*.

Click [here](#) for more information and to register.

What's on the Horizon? Spotlight on Transparency in Health Care

Health Policy Institute of Ohio

Date: December 10, 2015

Time: 9:30 A.M.–1:30 P.M.

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

Transparency is a common buzzword these days, particularly when it comes to health care. There is significant momentum at the local, state and federal levels—in both the public and private sectors—in support of greater health data transparency. What is the rationale for greater transparency? What are the challenges and potential policy approaches for increasing transparency?

Speakers:

- Dr. Chapin White, Senior Policy Researcher, RAND Corporation
- Denise Love, Executive Director, National Association of Health Data Organizations and Co-Chair, APCD Council

A panel discussion with key Ohio stakeholders will follow.

CLE credit: This course is PENDING approval by the Supreme Court of Ohio Commission on Continuing Legal Education for 2.75 total CLE hours of instruction. In the event that approval is denied, HPIO will credit CLE registrants the \$25 add-on fee.

Boxed lunches will be served. (Vegetarian options available.)

Registration begins at 9:00 a.m., with program to follow at 9:30 a.m.

Click [here](#) to learn more and register.

How to Captivate and Engage Constituents with Your Website

Ohio Association of Nonprofit Organizations

Date: December 17, 2015

Time: 2:30 P.M.

Location: Webinar

In this era of technological change, having an effective website is the single most crucial component of a communications plan. In this session, learn from more than 10 years of focus group research with not-for-profit constituents and donors how to captivate and engage your audience. Join Jay to discover:

- The five required elements of an engaging website.
- The three biggest mistakes not-for-profits make with their websites.
- Five proven methods for promoting your organization online.
- The No. 1 factor to consider regarding SEO.
- Real-world examples of not-for-profits that have mastered their online presence.

You won't want to miss this opportunity to learn how to take your organization's web presence to the next level from one of America's top-rated experts on websites and marketing for not-for-profits.

Click [here](#) to register.

First Steps: Getting Ready for Grants

The Center for Nonprofit Resources

Date: January 13, 2016

Time: 9:30 A.M.–11:30 A.M.

Location: McMaster Center at Main Library, 325 Michigan St., Toledo, Ohio 43604

Presented by: Linda Koss, Toledo-Lucas County Public Library, and Michelle Klinger, Center for Nonprofit Resources

In this specially updated workshop for 2016, we will examine what grants are and how they work. We will also help you decide whether or not grants will help your organization and if they will help, how to find grant opportunities and be competitive grantseekers. This is an introductory course. It is geared toward individuals who have little or no grant-writing experience and individuals who are seeking ways to make their not-for-profit organization more sustainable.

Learn more and register [here](#).

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Events

The Executive's Guide to Nonprofit Success

Cleveland, OH

Date: January 21, 2016

Time: 8:45 A.M.–3:45 P.M.

Location: Benjamin Rose Institute on Aging, 11890 Fairhill Rd.
Cleveland, Ohio 44120

Columbus, OH

Date: January 28, 2016

Time: 8:45 A.M.–3:45 P.M.

Location: Quest Business Center, 8405 Pulsar Place
Columbus, Ohio 43240

HW&Co. and Benesch proudly present The Executive's Guide to Nonprofit Success

We understand that the challenges for not-for-profits are continually shifting. With government budget cuts and limited resources, not-for-profits must work even harder to navigate and survive this reality.

Join us in Cleveland or Columbus as we explore practical tips and strategies necessary for the success of your not-for-profit organization.

Fees range from \$50 to \$150.

Register for the **Cleveland** seminar [here](#).

Register for the **Columbus** seminar [here](#).



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