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### University of Arkansas

The University of Arkansas offers a website designed to be used as a free tool for nonprofit organizations and individuals interested in starting nonprofits. Visit the website at [www.uark.edu/legalsource/index.html](http://www.uark.edu/legalsource/index.html).

### University of Arkansas at Little Rock

The University of Arkansas at Little Rock (UALR) has several programs of special interest to nonprofits, including the Center for Nonprofit Organizations, which seeks to improve the capacity of the nonprofit sector through an interdisciplinary application of community and University resources. UALR also offers a graduate certificate in Nonprofit Management. For more information, visit <http://ualr.edu/iog/nonprofitcenter> or contact Kim Evans at [khevans@ualr.edu](mailto:khevans@ualr.edu) or 501-569-8026.

## Appendix B

### IRS Sample Conflict of Interest Policy

**Note:** Items marked for hospitals that complete Schedule C have not been included in this version. For more information, see the IRS website, [www.irs.gov](http://www.irs.gov).

#### Article I Purpose

The purpose of the conflict of interest policy is to protect this tax-exempt organization's (Organization) interest when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or director of the Organization or might result in a possible excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflict of interest applicable to nonprofit and charitable organizations.

#### Article II Definitions

##### 1. **Interested Person**

Any director, principal officer, or member of a committee with governing board delegated powers, who has a direct or indirect financial interest, as defined below, is an interested person.

##### 2. **Financial Interest**

A person has a financial interest if the person has, directly or indirectly, through business, investment, or family:

- a. An ownership or investment interest in any entity with which the Organization has a transaction or arrangement,

b. A compensation arrangement with the Organization or with any entity or individual with which the Organization has a transaction or arrangement, or

c. A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Organization is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial.

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate governing board or committee decides that a conflict of interest exists.

**Article III  
Procedures**

**1. Duty to Disclose**

In connection with any actual or possible conflict of interest, an interested person must disclose the existence of the financial interest and be given the opportunity to disclose all material facts to the directors and members of committees with governing board delegated powers considering the proposed transaction or arrangement.

**2. Determining Whether a Conflict of Interest Exists**

After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the governing board or committee meeting while the determination of a conflict of interest is discussed

and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.

**3. Procedures for Addressing the Conflict of Interest**

a. An interested person may make a presentation at the governing board or committee meeting, but after the presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.

b. The chairperson of the governing board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.

c. After exercising due diligence, the governing board or committee shall determine whether the Organization can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.

d. If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the governing board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Organization's best interest, for its own benefit, and whether it is fair and reasonable. In conformity with the above determination

it shall make its decision as to whether to enter into the transaction or arrangement.

#### 4. **Violations of the Conflicts of Interest Policy**

- a. If the governing board or committee has reasonable cause to believe a member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.

- b. If, after hearing the member's response and after making further investigation as warranted by the circumstances, the governing board or committee determines the member has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

#### **Article IV** **Records of Proceedings**

The minutes of the governing board and all committees with board delegated powers shall contain:

- a. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the governing board's or committee's decision as to whether a conflict of interest in fact existed.

- b. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings.

#### **Article V** **Compensation**

- a. A voting member of the governing board who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.

- b. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.

- c. No voting member of the governing board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization, either individually or collectively, is prohibited from providing information to any committee regarding compensation.

#### **Article VI** **Annual Statements**

Each director, principal officer and member of a committee

with governing board delegated powers shall annually sign a statement which affirms such person:

- a. Has received a copy of the conflicts of interest policy,
- b. Has read and understands the policy,
- c. Has agreed to comply with the policy, and
- d. Understands the Organization is charitable and in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes

#### **Article VII** **Periodic Reviews**

To ensure the Organization operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

- a. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.
- b. Whether partnerships, joint ventures, and arrangements with management organizations conform to the Organization's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes and do not result in inurement,

impermissible private benefit or in an excess benefit transaction.

#### **Article VIII** **Use of Outside Experts**

When conducting the periodic reviews as provided for in Article VII, the Organization may, but need not, use outside advisors. If outside experts are used, their use shall not relieve the governing board of its responsibility for ensuring periodic reviews are conducted.

## Appendix C

### Outline of Subjects Typically Covered in Bylaws

- I. Name of organization
- II. Statement of mission or purpose
- III. Board of directors
  - A. Number of directors
  - B. Length of terms
  - C. Qualifications
  - D. Nominations and elections
  - E. Meetings
  - F. Committees
  - G. Removal
  - H. Procedures for filling vacancies
- IV. Officers
  - A. Titles
  - B. Duties
  - C. Nominations and elections
  - D. Removal
  - E. Procedures for filling vacancies
- V. Membership (if the organization has members)
  - A. Procedure for becoming a member
  - B. Member records
  - C. Meetings
- D. Voting procedures
- VI. Rules of order
- VII. Fiscal year
- VIII. Indemnification of directors, officers, volunteers, staff
- IX. Procedures for amending the bylaws
- X. Procedures for the dissolution of the corporation

## Appendix D

### Arkansas Statutes of Special Interest to Nonprofits

#### Introduction

Like their for-profit counterparts, nonprofit organizations are subject to many rules and regulations, including statutes enacted by state legislatures and Congress. The following summary includes some of the Arkansas statutes that affect nonprofit organizations. In consulting this summary, be aware that it does not attempt to give legal advice on the particular situation of your group and it does not include all of the laws affecting nonprofit organizations. Moreover, the law is constantly changing, so it is essential to consult the latest version of these statutes before relying on them. The Arkansas Code is available free online at [www.arkleg.state.ar.us/datar\\_code.asp](http://www.arkleg.state.ar.us/datar_code.asp).

#### The Arkansas Nonprofit Corporation Act of 1963

If an Arkansas nonprofit organization was incorporated before 1994, it is governed by the Arkansas Nonprofit Corporation Act of 1963,<sup>1</sup> unless it elects to operate under the Arkansas Nonprofit Corporation Act of 1993. For information about the 1993 Act and the election, see the following section.

The 1963 Act offers general legal guidance on the organization, operation, and dissolution of Arkansas nonprofits. Highlights include the following:

- ◆ A nonprofit corporation must have at least three directors;<sup>2</sup>
- ◆ Terms of office for directors may not be more than six years;<sup>3</sup>

- ◆ A nonprofit may have members or may have no members, as provided in the articles of incorporation;<sup>4</sup>
- ◆ A nonprofit corporation may not issue shares of stock or pay dividends;<sup>5</sup>
- ◆ A nonprofit may not loan money to its directors or officers;<sup>6</sup>
- ◆ A nonprofit must keep correct and complete books and records of its accounts, meetings, and members;<sup>7</sup>
- ◆ If a nonprofit corporation shuts down, the board of directors must first pay off debt, then distribute any remaining assets for nonprofit purposes;<sup>8</sup>

See Chapter I for more information about incorporating as a nonprofit. Most aspects of nonprofit life are not covered in the Nonprofit Corporation Act, so an organization's articles of incorporation and bylaws are very important.

#### The Arkansas Nonprofit Corporation Act of 1993

The Arkansas Nonprofit Corporation Act of 1993<sup>9</sup> applies to all Arkansas nonprofits incorporated after 1993. A nonprofit incorporated in 1993 continues to be governed by the 1963 Act unless it elects to operate under the 1993 Act.

#### *Highlights of the 1993 Act*

The 1993 Act is more comprehensive than the older law and was intended to fill in some of the gaps that became apparent as the State's nonprofit sector grew and developed. The Act begins

by describing the process for incorporating as a nonprofit by filing articles of incorporation with the Arkansas Secretary of State.<sup>10</sup> See Chapter 1 for more information about incorporating as a nonprofit. Other provisions cover holding and conducting meetings of members and directors,<sup>11</sup> authority for action without meetings,<sup>12</sup> requirements for voting,<sup>13</sup> and detailed guidance as to what constitutes proper notice of meetings.<sup>14</sup> The 1993 Act also provides for operation of an organization in an emergency, defined as a situation in which the corporation's directors cannot readily be assembled because of a catastrophic event.<sup>15</sup> Many sections of the 1993 Act are intended to fill in the gaps in a nonprofit's articles of incorporation or bylaws and can be superceded by those documents. For example, the section on "officers" reads: "Unless otherwise provided in the articles or bylaws, a corporation shall have a president, a secretary, a treasurer and such other officers as are appointed by the board."<sup>16</sup> Similarly, a quorum of a board of directors consists of a majority of the directors in office immediately before a meeting begins, except as otherwise provided in the statute, the articles of incorporation, or the bylaws.<sup>17</sup>

### **Benefits of election**

The principle benefit of election is that the 1993 Act provides more guidance for nonprofit organizations than did the old law. For a discussion of the advantages of electing to be subject to the 1993 Act, see *The Nonprofit Corporation Act of 1993: Considering the Election to Apply the New Law to Old Corporations*, a 1994 article by James Edward Harris published in the University of Arkansas at Little Rock Law Journal.<sup>18</sup>

### **How to elect**

To make the election, the organization must amend its articles of incorporation to indicate that it will be governed

under the new law.<sup>19</sup> The amendment must also indicate whether the nonprofit is a public benefit, mutual benefit or religious corporation.<sup>20</sup> The amendment must be approved by a majority of the members of the organization or, if there are no members, by a majority of the directors.<sup>21</sup> The amendment must then be filed with the Secretary of State. The current fee for filing an amendment to articles of incorporation is \$50.<sup>22</sup> Once made, the election is irrevocable.<sup>23</sup>

### **Act 569 of 2007**

Act 569 of 2007 requires nonprofit corporations to file an annual report with the Arkansas Secretary of State. The report must include the name of the corporation, its jurisdiction, the name and address of its registered agent, the address of its principal office, the names of its principal officers and the names and addresses of its directors. The report will be due by August 1, starting with the report for the 2007 reporting year, which was due August 1, 2008.

### **Statutes Regulating Solicitation of Contributions and Registration of Fundraisers**

The Arkansas Attorney General oversees charitable solicitation in Arkansas, including registration of charities that request donations from the public and registration of paid fundraisers. The purpose of registration is to prevent fraudulent fundraising activities and help people make educated choices about giving. The Attorney General maintains a user-friendly website at [www.ag.state.ar.us](http://www.ag.state.ar.us) and can be contacted at 501-682-2007 or 1-800-482-8982. Following is a brief summary of charitable registration requirements.

## **Definitions**

A “charitable organization” is any person who holds himself or herself out to be established for any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or other charitable purpose.<sup>24</sup> A “charitable organization” may also be any person established for the benefit of law enforcement personnel, fire fighters, or other persons protecting public safety.<sup>25</sup> Finally, any person who employs charitable appeal in any way for solicitation or an appeal which tends to suggest a charitable purpose for such solicitation is considered a “charitable organization.”<sup>26</sup>

A “charitable purpose” is any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or general charitable objective.<sup>27</sup>

A “paid solicitor” is a person who: (i) for compensation, performs for a charitable organization any service in which contributions are solicited by the person or by another person he or she employs, procures, or engages to solicit for compensation; or (ii) at any time has custody or control of contributions.<sup>28</sup> A bona fide permanent salaried officer or employee of a charitable organization is not a “paid solicitor” under this statute.<sup>30</sup>

A “solicitation” is each request, either directly or indirectly, for a contribution on the plea or representation that the contribution will be used for a charitable purpose.<sup>31</sup> A “solicitation” occurs when the request is made, at the place the request is received, whether or not the person making the request actually receives any contribution.<sup>32</sup>

A “person” may be an individual, corporation, limited liability corporation, association, partnership, foundation, or other entity.<sup>33</sup>

## **Registration Requirements**

Before a charitable organization may solicit contributions from persons in Arkansas, that organization must: (i) be registered;<sup>34</sup> provide certain information regarding the solicitation on forms provided by the Attorney General of Arkansas;<sup>35</sup> and file the information with the Attorney General. The information on those forms is available to the general public in most instances.<sup>37</sup>

The information in the forms must be sworn to and must at a minimum include: (i) the identity and address of the charitable organization doing the solicitation;<sup>38</sup> (ii) the purpose of the solicitation;<sup>39</sup> (iii) who will have custody of and who will distribute the contributions;<sup>40</sup> (iv) the timeframe of the promotion;<sup>41</sup> (v) a description of the methods of solicitation;<sup>42</sup> (vi) whether voluntary unpaid solicitors, paid solicitors, or both will be conducting the solicitation;<sup>43</sup> (vii) if there are paid solicitors, their name and address, basis of payment, nature of arrangement, and copy of contract for services;<sup>44</sup> and finally (viii) a copy of the IRS tax-exempt status form.<sup>45</sup>

## **Financial Reporting**

On or before May 15 of each year, a charitable organization must file with the Attorney General a copy of all tax or information returns.<sup>46</sup> This filing must include all schedules and amendments submitted to the IRS for the previous reporting year, except any schedules of the organization’s contributors.<sup>47</sup> A charitable organization that maintains its books by fiscal year instead of calendar year, upon application to the Attorney General, may file the returns within six (6) months after the close of its fiscal year.<sup>48</sup>

If a charitable organization has gross revenues greater than \$500,000 (not including grants or fees from government



agencies) in any fiscal year, it must submit in addition to tax records an audit report of a certified public accountant.<sup>49</sup>

If a charity is required to register with the Attorney General but not required to file returns with the IRS, it should submit an annual report in forms provided by the Attorney General.<sup>50</sup>

A charitable organization may receive an extension of six months for the filing of records and other reports upon the Attorney General's approval of a written request and showing of good cause.<sup>51</sup>

A charitable organization must keep a full and true record, which is open to inspection and copying at all times by the Attorney General. By keeping a full and true record, a charitable organization is able to provide the information required by this statute.<sup>52</sup> Donor lists obtained in accordance with this statute are not subject to disclosure without a court order, but donor lists and other records may be disclosed to other law enforcement agencies.<sup>53</sup> An organization must retain its records for at least three years after the end of the fiscal year to which they relate.<sup>54</sup>

### *Exemptions from Registration and/or Financial Reporting*

A chapter, branch, or affiliate in Arkansas of a registered parent organization is not required to register as long as the parent organization files a consolidated financial report or tax information form for itself *and* the chapter, branch, or affiliate.<sup>55</sup>

The following organizations are exempt from this statute's requirements for registration, financial reporting, and contract reporting, provided that each organization submits any information required by the Attorney General to substantiate its exemption:

- (i) Religious organizations, i.e., any good faith, duly constituted religious entity if it satisfies each of the following criteria:
  - (a) it is tax-exempt under the Internal Revenue Code, and
  - (b) no part of its net income goes to the direct benefit of any individual;<sup>56</sup>
- (ii) Educational institutions, i.e., any parent-teacher association or educational institution whose curricula in whole or in part are registered or approved by any state or the U.S. directly or are accredited by an accrediting body;<sup>57</sup>
- (iii) Political candidates and organizations, i.e., any candidate for national, state, or local office or a political party or committee required to file information with the Federal Election Commission or state election commission or an equivalent agency;<sup>58</sup>
- (iv) Governmental organizations, i.e., any department, branch or other instrument of the federal, state, or local governments;<sup>59</sup>
- (v) Nonprofit hospitals, i.e., any nonprofit hospital licensed by Arkansas or in any other state;<sup>60</sup>
- (vi) Any charitable organization that does not intend to solicit and receive, and does not actually receive, contributions exceeding \$25,000 in a calendar year: (a) if all its functions (including fundraising) are carried on by unpaid persons, and

(b) provided that no part of its assets or income goes to any officer or member,<sup>61</sup> and

(vii) Any person who solicits solely for the benefit of the organizations described above.<sup>62</sup>

### *Prohibited Practices of Paid Solicitors*

A person may not act as a paid solicitor unless he or she first registers with the Attorney General.<sup>63</sup> In order for a paid solicitor to represent that any contributions will be given or donated to any charitable organization, the organization must first consent in writing to the use of its name before the solicitation occurs.<sup>64</sup> A paid solicitor may not represent that tickets to an event are to be donated for someone else's use, unless a charitable organization first states in writing that it will accept donated tickets and specifies the number of tickets it will accept.<sup>65</sup> The solicitor may not solicit more contributions for donated tickets than number of ticket commitments from the organization.<sup>66</sup> Finally, a paid solicitor may not solicit contributions from citizens or entities in Arkansas on behalf of an unregistered charitable organization.<sup>67</sup>

### *Arkansas organizations that solicit in other states*

Most states, like Arkansas, have statutes that require charitable organizations to register before soliciting contributions within their borders and to submit annual reports of fundraising activities. These statutes serve two purposes: to inform people making decisions about charitable giving and to protect the public from charity-related fraud. Since registration statutes tend to define "solicitation" broadly, a charity may be required to register in a particular state even if it does not have a physical presence there.

### *Standardized Registration*

States vary widely in their rules, expectations and enforcement practices, so registration and reporting can be a significant burden for a charity soliciting in more than one state. In response to this problem, the National Association of Attorneys General (NAAG)<sup>68</sup> and the National Association of State Charities Officials (NASCO)<sup>69</sup> developed a standardized registration process for nonprofit organizations. Most states accept the standard registration. The necessary form, the Unified Registration Form, is available at [www.nasconet.org](http://www.nasconet.org). Keep in mind that standardized registration does not avoid the need to submit annual reports on a state-by-state basis.

### *Website Solicitation*

The growing practice of web solicitation of donations has created another problem – determining where internet activity, which obviously reaches citizens of all states, requires a charity to register. Since there is no uniform federal law addressing this issue, charities are faced with a hodgepodge of state statutes and regulations and little cohesive guidance.

In an attempt to establish guidelines for charities that solicit funds via the web, the NAAG and the NASCO issued the "Charleston Principles." The general approach of the Charleston Principles is that an out-of-state charity with a website should not be required to register simply because it maintains a passive web presence. The Charleston Principles are not law and are not binding in any state. Nevertheless, they enjoy broad support from state attorneys general and apparently have not been repudiated by any state.

In summary, the Charleston Principles suggest that a charity should be required to register in each state where:

- it has its principal place of business; or
- its non-internet activities alone would be sufficient to require registration; or
- it solicits contributions through an interactive website and
  - specifically targets people located in that state for solicitation, or
  - receives ongoing or substantial contributions through its website from people located in the state; or
- it solicits contributions through a non-interactive website, but either specifically invites further offline activity to make a contribution or establishes other contacts with the state, such as sending email messages or other communications promoting the website.

In the interest of public disclosure, the Charleston Principles also contain a statement encouraging charities to post their current Unified Registration Statement, their last three IRS Forms 990, and their complete IRS Form 1023 or 1024 application and resulting determination letter on their websites.

### **The State and Local Government Volunteers Act**

The State and Local Government Volunteers Act (the “SLGVA”) is designed to make sure that the people of Arkansas derive the greatest possible benefit from volunteers in state and local agencies.<sup>70</sup> The SLGVA authorizes all agencies, departments, institutions, and divisions of state government to develop volunteer programs to accept the services of volunteers and donors.<sup>71</sup> The SLGVA also exempts volunteers in state and

local agencies from all state employment laws.<sup>72</sup> The SLGVA sets forth the rules covering reimbursement of volunteers for meals, lodging, and transportation expenses, and it provides the circumstances under which meals and lodging may be furnished to volunteers at no charge.

### **The Arkansas Civil Rights Act of 1993<sup>73</sup>**

The Arkansas Civil Rights Act prohibits any employer with nine or more employees in Arkansas from discriminating against any person on the basis of race, religion, national origin, gender, or disability. A victim of discrimination may sue for reinstatement, back pay, compensatory and punitive damages, attorney fees and court costs.

### **The Fair Labor Standards Act and Arkansas Wage and Hour Law**

The Fair Labor Standards Act (FLSA) of 1938 establishes requirements for employers that aim to ensure employees’ minimum standard of living and general health and well-being.<sup>74</sup> Those requirements regulate the minimum wage, overtime pay, equal pay, and child labor for employees covered by the act.<sup>75</sup> Whether an employer or an organization is covered by the FLSA’s scope will depend largely on whether the employer deals with commerce or is a public agency.<sup>76</sup> Most employers and employees are covered.

### **Persons Protected by the FLSA**

If an individual is an employee, generally he will be protected by the FLSA if he is engaged in commerce or in the production of goods for commerce or is employed by an enterprise so engaged.<sup>77</sup> Commerce includes trade, commerce, transportation, transmission, or communication among or between the states.<sup>78</sup> This definition covers many activities, but

volunteered; and (2) such services are not the same type of services which the individual is employed to perform for such public agency.”<sup>88</sup> The definition of employee also does not include individuals who volunteer “solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.”<sup>89</sup>

A volunteer has been defined as “[a]n individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.”<sup>90</sup> An individual will only be a volunteer if his services are given freely without pressure or coercion from an employer.<sup>91</sup> While a person’s motivation to volunteer will be a factor in determining whether one intended to be a volunteer, that motivation does not have to always be altruistic.<sup>92</sup>

When looking at whether someone falls under the definition of a volunteer, the court will apply that definition in a common-sense manner, taking into account the “totality of the circumstances surrounding the relationship between the person providing services and the entity for which the services are provided, in light of the goals of the FLISA.”<sup>93</sup> The main factor will be whether both parties, using common-sense, understand that the person performing services is doing so on a voluntary basis.<sup>94</sup> When analyzing whether the parties understood the services to be, a court will look at the parties’ “statements, attitudes, and outward manifestations of their motivations, as well as any other available objective indicia that indicate[s] whether a volunteer or employment relationship was contemplated by the parties.”<sup>95</sup> The person seeking compensation under the FLISA bears the initial burden of proving an employer-employee relationship existed.<sup>96</sup> Once the burden is met, the employer must prove an exemption or exception under the act.<sup>97</sup>

it is not all-inclusive.”<sup>79</sup> An enterprise is engaged in commerce or in the production of goods for commerce if the enterprise has employees engaged in such activities, or has employees handling, selling, or working on goods or materials that have been moved in or produced for commerce by any person and whose annual gross volume of sales made or business done is not less than \$500,000.<sup>80</sup> An enterprise is also engaged in commerce if it is engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit) . . . or is an activity of a public agency.<sup>81</sup> If an organization is determined to be an enterprise engaged in commerce, the enterprise will have to comply with the wage standards of the FLISA.<sup>82</sup>

#### ***Persons Exempt from FLISA Coverage***

Ordinarily the FLISA will not cover someone who claims to be a volunteer. “An individual who, ‘without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit,’ is outside the sweep of the [FLISA].”<sup>83</sup> This is usually the case with volunteers, students, or trainees.<sup>84</sup> However, in determining whether someone is an employee, courts also use the economic reality test.<sup>85</sup> The focal point of the test is whether the individual is economically dependent on the business to which the individual renders services.<sup>86</sup>

The largest exemption to the definition of employee under the FLISA is for volunteers for public agencies.<sup>87</sup> Someone is a volunteer for a public agency if (1) “the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual

“Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.”<sup>98</sup> A short list of some of the things allowed include uniforms, out of pocket costs incurred incidental to providing volunteer services, cost of meals, cost of transportation, tuition, books, supplies, materials, group insurance, and pension plans.<sup>99</sup> Whether compensation for expenses, benefits, or fees would result in an individual losing her volunteer status will be determined by “examining the total amount of payments made in the context of the economic realities of the particular situation.”<sup>100</sup>

An employee cannot be considered a volunteer for a public agency if his volunteer services are the same type of services which the individual is employed to perform for the same public agency he works for.<sup>101</sup> A determination on whether two agencies of the same state or local government constitute the same public agency will be determined on a case-by-case basis.<sup>102</sup> The phrase, “the same type of services” means “similar or identical services.”<sup>103</sup> Some examples of services that are not considered the same type of services for volunteer purposes include a city police officer volunteering as a referee in a basketball game sponsored by the city and an office employee of a city hospital spending off duty hours with disabled persons as an act of charity.<sup>104</sup> If two or more agencies of a state or local government work together for mutual aid, volunteer status will not be taken away.<sup>105</sup>

### *Arkansas Wage and Hour Law*

If an individual or an enterprise does not fall under the jurisdiction of the FLSA, state wage and hour regulations come into play. The Arkansas definition of employer does not include employers covered by the FLSA and those who employ less than four employees in a workweek.<sup>106</sup> An employee generally includes any individual employed, but there are many exceptions, including “[a]ny individual engaged in the

activities of any educational charitable, religious, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to the organizations gratuitously.”<sup>107</sup> There is little case law interpreting Arkansas wage and hour statutes because most employees fall under the coverage of the FLSA. Because the state and federal requirements are similar, the case law interpreting the FLSA provides some guidance in interpreting the Arkansas statutes.<sup>108</sup>

### Endnotes

- <sup>1</sup> 1963 Ark. Acts 176, codified at Ark. Code Ann. § 4-28-201-224 (West 2004).
- <sup>2</sup> Ark. Code Ann. § 4-28-211(b) (West 2004).
- <sup>3</sup> Ark. Code Ann. § 4-28-211(c) (West 2004).
- <sup>4</sup> Ark. Code Ann. § 4-28-210 (West 2004).
- <sup>5</sup> Ark. Code Ann. § 4-28-219 (West 2004).
- <sup>6</sup> Ark. Code Ann. § 4-28-220 (West 2004).
- <sup>7</sup> Ark. Code Ann. § 4-28-218 (West 2004).
- <sup>8</sup> Ark. Code Ann. § 4-28-207 (West 2004).
- <sup>9</sup> 1993 Ark. Acts 1147, codified at Ark. Code Ann. § 4-33-101-1707 (West 2004).
- <sup>10</sup> Ark. Code Ann. § 4-33-203.
- <sup>11</sup> Ark. Code Ann. §§ 4-33-701, 820.
- <sup>12</sup> Ark. Code Ann. §§ 4-33-160, 704, 821.
- <sup>13</sup> Ark. Code Ann. §§ 4-33-721-30.
- <sup>14</sup> Ark. Code Ann. §§ 4-33-141, 705, 706, 822, 823.
- <sup>15</sup> Ark. Code Ann. §§ 4-33-207, 303.
- <sup>16</sup> Ark. Code Ann. § 4-33-840(a).
- <sup>17</sup> Ark. Code Ann. § 4-33-824(a).
- <sup>18</sup> 16 U. Ark. Little Rock L. J. 1 (1994).
- <sup>19</sup> Ark. Code Ann. § 4-33-1701.
- <sup>20</sup> Ark. Code Ann. § 4-33-1707.
- <sup>21</sup> Ark. Code Ann. § 4-33-1701.
- <sup>22</sup> Ark. Code Ann. § 4-33-122.
- <sup>23</sup> Ark. Code Ann. § 4-33-1701.
- <sup>24</sup> Ark. Code Ann. § 4-28-401(1)(A)(i).
- <sup>25</sup> Ark. Code Ann. § 4-28-401(1)(A)(ii).
- <sup>26</sup> Ark. Code Ann. § 4-28-401(1)(B).
- <sup>27</sup> Ark. Code Ann. § 4-28-401(2).
- <sup>28</sup> Ark. Code Ann. § 4-28-401(9)(A)(i).
- <sup>29</sup> Ark. Code Ann. § 4-28-401(9)(A)(ii).
- <sup>30</sup> Ark. Code Ann. § 4-28-401(9)(C).
- <sup>31</sup> Ark. Code Ann. § 4-28-401(13)(A).

- <sup>32</sup> Ark. Code Ann. § 4-28-401(13)(B).  
<sup>33</sup> Ark. Code Ann. § 4-28-401(11).  
<sup>34</sup> Ark. Code Ann. § 4-28-402(a)(1)(A).  
<sup>35</sup> Ark. Code Ann. § 4-28-402(a)(1)(B).  
<sup>36</sup> *Id.*  
<sup>37</sup> Ark. Code Ann. § 4-28-402(a)(2).  
<sup>38</sup> Ark. Code Ann. § 4-28-402(b)(1)-(2).  
<sup>39</sup> Ark. Code Ann. § 4-28-402(b)(3).  
<sup>40</sup> Ark. Code Ann. § 4-28-402(b)(4)-(5).  
<sup>41</sup> Ark. Code Ann. § 4-28-402(b)(6).  
<sup>42</sup> Ark. Code Ann. § 4-28-402(b)(7).  
<sup>43</sup> Ark. Code Ann. § 4-28-402(b)(8).  
<sup>44</sup> Ark. Code Ann. § 4-28-402(b)(9).  
<sup>45</sup> Ark. Code Ann. § 4-28-402(b)(10).  
<sup>46</sup> Ark. Code Ann. § 4-28-403(a)(1).  
<sup>47</sup> *Id.*  
<sup>48</sup> Ark. Code Ann. § 4-28-403(a)(2).  
<sup>49</sup> Ark. Code Ann. § 4-28-403(b)(1)-(2).  
<sup>50</sup> Ark. Code Ann. § 4-28-403(c).  
<sup>51</sup> Ark. Code Ann. § 4-28-403(d).  
<sup>52</sup> Ark. Code Ann. § 4-28-403(e)(1)-(2).  
<sup>53</sup> Ark. Code Ann. § 4-28-403(e)(4)(A)-(B).  
<sup>54</sup> Ark. Code Ann. § 4-28-403(e)(3).  
<sup>55</sup> Ark. Code Ann. § 4-28-402(e).  
<sup>56</sup> Ark. Code Ann. § 4-28-404(1).  
<sup>57</sup> Ark. Code Ann. § 4-28-404(2).  
<sup>58</sup> Ark. Code Ann. § 4-28-404(3).  
<sup>59</sup> Ark. Code Ann. § 4-28-404(4).  
<sup>60</sup> Ark. Code Ann. § 4-28-404(5).  
<sup>61</sup> Ark. Code Ann. § 4-28-404(6).  
<sup>62</sup> Ark. Code Ann. § 4-28-404(7).  
<sup>63</sup> Ark. Code Ann. § 4-28-407(a).  
<sup>64</sup> Ark. Code Ann. § 4-28-407(e)(1).  
<sup>65</sup> Ark. Code Ann. § 4-28-407(e)(1).  
<sup>66</sup> Ark. Code Ann. § 4-28-407(f)(1).  
<sup>67</sup> Ark. Code Ann. § 4-28-412(11).  
<sup>68</sup> [www.nraag.org](http://www.nraag.org)  
<sup>69</sup> [www.nraaconnet.org](http://www.nraaconnet.org)  
<sup>70</sup> Ark. Code Ann. § 21-13-102.  
<sup>71</sup> Ark. Code Ann. § 21-13-105.  
<sup>72</sup> Ark. Code Ann. § 21-13-106.  
<sup>73</sup> Ark. Code Ann. §§ 16-123-101 *et seq.*  
<sup>74</sup> 29 U.S.C. § 202.  
<sup>75</sup> 29 U.S.C. § 206.  
<sup>76</sup> *Id.*  
<sup>77</sup> *Id.*; *Zorich v Long Beach Fire Dept & Ambulance Service, Inc.*, 118 F.3d 682, 686 (9th Cir. 1997) (finding that an individual is covered by the FLSA if they are an employee who is engaged in commerce or works for an enterprise who is engaged in commerce).

- 78 29 U.S.C. § 203. The term produced "means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." *Id.*  
<sup>79</sup> See *Stevens v. Welcome Wagon Int'l, Inc.*, 261 F.Supp. 227, 229 (E.D. Pa. 1966) (finding that an employee who contacted local families to publicize local sponsors' businesses was not engaged in commerce nor in the production of goods for commerce); see also *Johnson v. Spacelane Corp.*, 706 F.2d 1178, 1182 (11th Cir. 1983) (stating that because congress did not include employees "who merely 'affect' commerce . . ." Congress did not extend the FLSA's coverage to the constitutional maximum and left local business regulation to the states).  
<sup>80</sup> 29 U.S.C. § 203.  
<sup>81</sup> *Id.*  
<sup>82</sup> 29 U.S.C. § 206.  
<sup>83</sup> *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 295 (1985).  
<sup>84</sup> *Id.* at 299-300.  
<sup>85</sup> *Id.* at 301.  
<sup>86</sup> *Id.* at 301. In this case individuals were mainly rehabilitated drug addicts and criminals claiming to volunteer their services to a religious organization. Many testified that they did not want compensation for their work. However, because the FLSA defines wages to include board, food, lodging, and similar benefits (29 U.S.C. § 203(m)), the fact that the individuals were dependent on the organization for long periods of time for food and shelter, the individuals were considered employees under the FLSA. *Id.*  
<sup>87</sup> 29 U.S.C. § 203.  
<sup>88</sup> 29 U.S.C. § 203(4)(A).  
<sup>89</sup> 29 U.S.C. § 203(5) (Supp. 2006).  
<sup>90</sup> 29 C.F.R. § 553.101. See also 29 C.F.R. § 553.104. Some examples of services that might be performed on a volunteer basis when motivated by such intentions include "helping out in a sheltered workshop or providing personal services to the sick or the elderly in hospitals or nursing homes; assisting in a school library or cafeteria; or driving a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer as firefighters or auxiliary police, or volunteer to perform such tasks as working with retarded or handicapped children or disadvantaged youth, helping in youth programs as camp counselors, soliciting contributions or participating in civic or charitable benefit programs and volunteering other services needed to carry out charitable or educational programs." *Id.*  
<sup>91</sup> 29 C.F.R. § 553.101.  
<sup>92</sup> *Todaro v. Twp. of Union*, 40 F.Supp.2d 226, 230 (D.C. N.J. 1999).  
<sup>93</sup> *Id.*  
<sup>94</sup> *Id.*  
<sup>95</sup> *Id.*  
<sup>96</sup> *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 140 (4th Cir. 1999).  
<sup>97</sup> *Id.*  
<sup>98</sup> 29 C.F.R. § 553.106.  
<sup>99</sup> *Id.*  
<sup>100</sup> 29 C.F.R. § 553.106. See *Evers v. Tarr*, 48 F.3d 319, 320 (8th Cir. 1995) (finding that \$35/day for service election clerks and \$50/day and \$.25/mile for travel reimbursement for service as election judges did not take individuals out of their volunteer classification); cf. *Krause v. Cherry Hill*

*Fire Dist.*, 969 F.Supp. 270, 273 (D. C. N.J. 1997) (finding that firefighters were employees not volunteers when they were paid eight dollars an hour and then their pay was reduced to twenty dollars per shift).

101 29 U.S.C. § 203(4)(A)(ii).

102 29 C.F.R. § 553.102. One of the factors used to determine whether the two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census. U.S. Department of Commerce. *Id.*

103 29 C.F.R. § 553.103. When making a determination of whether the individual is performing the same type of services, the Administrator will consider, among other things, the duties and factors contained in the definitions of the three digit categories of occupations in the *Dictionary of Occupational Titles*. *Id.* Some examples that would constitute the same type of services is a nurse working for a state hospital and claims to volunteer to perform nursing services at a state health clinic which does not qualify as a separate public agency, or a firefighter claiming to volunteer as a firefighter for the same public agency. *Id.*

104 29 C.F.R. § 553.102.

105 *Id.* For example, if town A and town B agreed to mutually aid each other in fire protection services, a firefighter from town A could still continue to volunteer service as a firefighter for town B. *Id.*

106 Ark. Code Ann. § 11-4-203(4) (Supp. 2009).

107 Ark. Code Ann. § 11-4-203(3) (Supp. 2009). Nonprofit recreational or educational camps that do not operate for more than seven months in a year are also one of the many occupations that are not included in the definition of employee. § 11-4-203(3)(L). Also not included in the definition is “[a] nonprofit child welfare agency employee who serves as a houseparent who is: (i) directly involved in caring for children who reside in residential facilities of the nonprofit child welfare agency and who are orphans, in foster care, abused, neglected, abandoned, homeless, in need of supervision, or otherwise in crisis situations that lead to out-of-home placements; and (ii) compensated at an annual rate of not less than thirteen thousand dollars (\$13,000) or at an annual rate of not less than ten thousand dollars (\$10,000) if the employee resides in the residential facility and receives board and lodging at no cost.”

108 There could be a different interpretation as to a volunteer who refuses to take compensation as in *Alamo*, because the definition for wage in Arkansas is not as expansive as the FLSA definition. However, the Arkansas statute does deal with issues of board, lodging, apparel, and other extra items in a separate statute. Ark. Code Ann. § 11-4-213.