

Establishing a New Unionism Network NGO as a US-Based Non-Profit Organization¹

Eric M. Fink

Introduction

The New Unionism Network (“NUN”) originated as a vehicle for communication and collaboration among union members, activists, scholars and others working to build and energize the labor movement, both within and across national boundaries. At present, NUN has a nominal membership of some ___ individuals from ___ countries. Lacking any organizational structure or process for agenda-setting or action, NUN’s activity has primarily consisted of online communication. Through informal discussion among some NUN participants, the idea has emerged of exploring the possibility of establishing a formal organization alongside the existing informal network, to support more sustained activity. The purpose of this memorandum is to outline the logistics of establishing such an organization as a not-for-profit corporation, with tax exempt status, under U.S. law

Establishing a Not-For-Profit Corporation

In the United States, state law governs the creation and operation of corporations, including not-for-profit corporations. The following discussion is based on North Carolina law.² A not-for profit corporation is one intended to have no income, or the income of which is not distributable to its members, directors, or officers.³

The advantage of establishing an organization as a corporation is that the organization itself will have many of the legal powers and abilities of a person, including (but not limited to) the following:

¹ *The information contained in this memorandum is provided for purposes of facilitating discussion. Nothing contained in this memorandum is intended to constitute, nor should it be construed as constituting, legal advice or counsel, and no attorney-client relationship is created or implied.*

² N.C. Gen. Stat. Chap. 55A. The applicable law varies in some respects from state to state.

³ N.C. Gen. Stat. § 55A-1-40(17).

- ♦ The power to sue and be sued
- ♦ The power to purchase, lease, and otherwise use and dispose of real and personal property
- ♦ The power to make contracts and incur liabilities

Because a corporation is a legal entity separate from its members and directors, the individual members and directors enjoy limited liability for any debts or obligations of the corporation. This means that, in normal circumstances, the individual members or directors will not be personally responsible for any corporate debts or obligations. Exceptions to limited liability may arise where the legal formalities of the corporate form are not respected, or where the corporate form is used to perpetuate a fraud on a third party.

1. Creation of a Not-For-Profit Corporation

The first step in creating a not-for-profit corporation is to file Articles of Incorporation with the Secretary of State's office. There is a filing fee of \$60 for this step.

The Articles of Incorporation must include the following information:

- ♦ Corporate Name
 - The name must be distinct from any other registered corporation, and may not be misleading as to the purpose of the organization.
- ♦ Designation as a Charitable or Religious Corporation
 - This applies only to organizations designated as such under U.S. federal tax law, and would not apply to NUN
- ♦ Identity of the Registered Office and Agent
 - Every corporation must have a registered agent authorized to accept service of notices and legal process on the corporation
 - The registered agent may be an individual or a corporation
 - If the registered agent is an individual, they must reside in the state, and their business address must be identical to the registered office.
 - if the registered agent is a corporation, its business office must be the same as the registered office

- The registered office may be, but need not be, the same as the corporation's place of business.
- ♦ Identity of the Incorporator(s)
 - There must be at least one incorporator, who signs the Articles of Incorporation. Their name and address must be included in the Articles.
- ♦ Identity of the Members
 - North Carolina law does not require that a corporation have members. The Articles of Incorporation must specify whether or not there are to be members.
- ♦ Provisions for Distribution of Assets Upon Dissolution
 - The Articles of Incorporation must include a plan for distributing the corporation's assets upon any eventual dissolution or termination. The plan must provide for payment and settlement of all outstanding corporate liabilities and obligations at dissolution. Any remaining assets should be conveyed to one of the following:
 - The United States
 - a state of the United States
 - a charitable or religious corporation
 - a tax-exempt organization under § 501(c)(3) of the U.S. tax code.
- ♦ Location of the Principal Office

The Articles of Incorporation may also include any of the following option provisions:

- ♦ A statement of the purpose(s) for which the corporation is organized
- ♦ The names and addresses of the initial directors
- ♦ Provisions relating to the management and regulation of the corporation's affairs
- ♦ Provisions defining, limiting, or regulating the powers of the corporation, its directors, and its members
- ♦ Provisions defining the qualifications, rights, and responsibilities of members
- ♦ Provisions limiting or eliminating the personal liability of directors for monetary damages for breach of their duties as directors.

- N.B. This limitation on personal liability applies to acts by which a director breaches their duties to the corporation itself, and is distinct from the limited liability of members and officers with respect to debts or obligations of the corporation to third parties.

The Secretary of State's office will examine the Articles of Incorporation to ascertain that they comply with legal requirements. Once the Articles of Incorporation are filed, the corporation must notify the Secretary of State's office, within 60 days, of,

- ♦ Any changes in the name or address of the registered agent, and
- ♦ Any changes in the corporation's principle office address.

2. Corporate By-Laws

Along with the Articles of Incorporation, the principal governing document for a not-for-profit corporation are its Bylaws. North Carolina law does not require a corporation to adopt or file Bylaws. However, doing so is advantageous for specifying the rules and procedures for organizational affairs.

The Bylaws may contain any provision not inconsistent with law or the Articles of Incorporation. They must be adopted by the incorporators or by the board of directors.

Obtaining Tax-Exempt Status

The U.S. Internal Revenue Code ("IRC"), which governs taxation at the federal government level, grants tax-exempt status to certain qualifying not-for-profit corporations or associations. There are two provision of the IRC under which a New Unionism NGO may potentially qualify for tax-exempt status.

3. Educational Organization: IRC § 501(c)(3)

Qualification

IRC § 501(c)(3) grants tax-exempt status to qualifying organizations operated for certain designated purposes, including education. Qualification as a § 501(c)(3) organization requires that "no part of the net earnings ... inures to the benefit of any private shareholder or individual."

The Internal Revenue Service (“IRS”) defines an educational purpose to include “[t]he instruction of the public on subjects useful to individuals and beneficial to the community.”⁴ Qualifying activity may include “panels, discussions, lectures, forums, radio and television programs.”⁵ An educational organization under § 501(c)(3) may engage in “[a]dvocacy of a particular position or viewpoint,” provided that “there is a sufficiently full and fair exposition of pertinent facts to permit an individual or the public to form an independent opinion or conclusion.” In assessing qualification for tax-exempt status as an educational organization, the IRS will consider “[t]he method used by an organization to develop and present its views.”⁶

Restrictions on Political Activity

Electoral Campaigns: Organizations with tax-exempt status under § 501(c)(3) are prohibited from direct or indirect participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office. This restriction extends to the publication or distribution of statements concerning such a campaign. However, certain types of non-partisan voter education activities or public forums may be permitted. An organization that engages in any prohibited political activity will lose its tax-exempt status under § 501(c)(3).

Lobbying: A tax-exempt organization under § 501(c)(3) may not engage in “carrying on propaganda or otherwise attempting to influence legislation” as “a substantial part” of its activity. This restriction applies both to direct lobbying of legislative bodies and to “grass roots lobbying” aimed at affecting public opinion. It does not include activity such as “nonpartisan analysis, study, or research”; “examining and discussion broad social, economic, and similar problems.”⁷ A tax-exempt organization may engage in “communication between the organization and its bona fide members about legislation or proposed legislation of direct interest to the organization and its members,”

⁴ Internal Revenue Service, Tax-Exempt Status for Your Organization, Pub. No. 557 (Rev. Oct. 2010), p. 24.

⁵ Id.

⁶ Id.

⁷ Id., p. 44.

except for the purpose of directly encouraging members to attempt to influence legislation or urge nonmembers to do so.⁸

4. Labor Organization: IRC § 501(c)5

IRC § 501(c)5 grants tax-exempt status to qualifying labor organizations. The IRS⁹ defines a “labor organization” under § 501(c)5 as ones that,

(1) Have no net earnings inuring to the benefit of any member, and

(2) Have as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.

“Labor organizations” under § 501(c)5 include, but are not limited to, labor unions.¹⁰ An organization may qualify for tax-exempt status under § 501(c)5 even though it does not pursue traditional labor union functions such as collective bargaining, so long as its purpose is “to protect and promote the interests of labor.”¹¹ Thus, organizations have qualified for tax-exempt status as labor organizations under § 501(c)5 based on the following types of activities:

- ♦ Publishing a newspaper devoted to matters concerning labor unions;¹²
- ♦ Engaging in legislative, legal, and public relations aimed at improving working conditions for public employees;¹³
- ♦ Operating a “labor temple” with offices, meeting and recreational facilities, a barber shop and other amenities, for the use of labor unions and their members;¹⁴
- ♦ Providing financial assistance to union members during strikes and lockouts;¹⁵

⁸ Id. An alternative limit on lobbying expenditures applies to “public charities”; however, it is unlikely that a NUN organization would qualify for that status.

⁹ 26 C.F.R. § 1.501(c)5-1(a)

¹⁰ Tupper v. U.S. 1996 WL 741565 (D. Mass. 1996), citing Gen. Couns. Mem. 38981 (Jan. 26, 1983).

¹¹ See Portland Coop. Labor Temple Ass’n v. Comm’r, 39 B.T.A. 450, 454-55 (1939).

¹² Rev. Rul. 68-534.

¹³ Rev. Rul. 74-596

¹⁴ Portland Cooperative Labor Temple Ass’n v. Comm’r, 39 B.T.A. 450 (1939)

- ♦ Operating a vacation resort primarily for union members.¹⁶

In each of these cases, the organizations were created and controlled by one or more labor unions. Tax-exempt status under § 501(c)(5) does not require direct union control of the organization, but there must be some connection to a labor union or other traditional labor organization.¹⁷

Restrictions on Political Activity

Electoral Campaigns: Unlike a § 501(c)(3) organization, a § 501(c)(5) organization may engage in some political activity on behalf of, or in opposition to, candidates for public office, provided that this is not the organization's primary activity. However, such activity does not qualify as an exempt purpose, and expenditures for political activity are subject to tax.¹⁸

Lobbying: A § 501(c)(5) organization may engage in activity aimed at influencing legislation that is related to the organization's exempt purpose.¹⁹ Thus, a labor organization under § 501(c)(3) could engage in lobbying in support of legislation aimed at protecting and promoting the rights of workers, and expenditures for such activity would be exempt from tax.

¹⁵ Rev. Rul. 67-7. However, a private strike fund, not controlled by or connected with the labor union's representing the fund's members, was determined not to qualify as a labor organization under § 501(c)(5). Rev. Rul. 76-420.

¹⁶ Gen. Couns. Mem. 34634 (Oct. 8, 1971).

¹⁷ See *Tupper v. U.S.* 1996 WL 74165 (D. Mass. 1996)

¹⁸ John Francis Reilly & Barbara A. Braig Allen, Political Campaign & Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations, Exempt Organizations—Technical Instruction Program for FY 2003, <http://www.irs.gov/pub/irs-tege/eotopicl03.pdf>

¹⁹ Rev. Rul. 61-177.