

Legal Issues for New Nonprofits

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I. WHAT IT MEANS TO BE A TAX-EXEMPT ORGANIZATION

The purpose of this outline is to provide your organization with general legal information about operating a nonprofit corporation that is tax-exempt under the Internal Revenue Code. It explains the IRS rules for maintaining your tax-exempt status and explains some of the basics about nonprofit governance and employment law. It provides basic information about financial and other record recording; discuss the importance of trademark and copyright law and also covers some of the things an organization needs to know about risk management. Finally, it discusses some of the legal rules around fundraising.¹

- A. A nonprofit must file Form 1023 with the IRS in order to receive approval as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. An organization that is tax-exempt under Section 501(c)(3) is subject to the federal tax as follows:

| Exempt from Real Property Taxes? | Exempt from Federal Income Taxes? | Exempt from Federal Taxes? | Exempt from Excise Taxes? | Exempt from Federal Payroll, Unemployment & Occupational Taxes? |
|--|--|---|---------------------------|---|
| Not Applicable (Property taxes are local not federal.) | Yes. Charitable organizations which qualify for tax exempt status under 501(c)(3) do not pay Federal Income Tax, BUT Revenue from activities unrelated to an exempt purpose are subject to an unrelated business income tax (UBIT), IF The gross income from the unrelated business activities is greater than \$1,000. | Sometimes. Nonprofit educational organizations are eligible for exemption from federal gasoline tax. Nonprofit hospital and educational organizations are exempt from communication-related excise taxes | | No. All institutions have to withhold Federal Income Tax and pay Social Security and Medicare taxes (FICA), BUT Institutions which qualify for 501(c)(3) status are exempt from paying Federal Unemployment Taxes (FUTA). |

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B. In addition, the nonprofit may be exempt from the following state taxes:

1. A nonprofit should ensure that it is exempt from taxes in any state in which the organization is doing business. In order to qualify for an exemption, the nonprofit may have to apply for tax-exempt status under state law, or at least notify the state that it has received exempt status from the IRS.
 - a. Connecticut: Must file Form REG-1, Business Taxes Registration Application, with the Connecticut Department of Revenue Services. This filing should include a letter from the IRS confirming tax-exempt status.
 - b. D.C. Must apply for exempt status by filing form FR-164. Routinely granted once nonprofit receives IRS approval.
 - c. Georgia: For tax years beginning before January 1, 2008, the entity must file form 3605 along with the organizational documents listed on the form. For tax years on beginning on or after January 1, 2008, the entity need only to attach a copy of the IRS determination letter and all formation documents to the applicable, initial exempt organization tax return filed with the State.
 - d. Maryland: Must apply for State tax exemption by submitting a request for exemption, and explanation of the nature, purpose and scope of the organization, a copy of the IRS tax determination letter, a copy of the bylaws, and a copy of the latest financial statement to Maryland’s Comptroller of the Treasury.
 - e. New York: can apply for an exemption from NYC General Corporation Tax by preparing an affidavit that explains the purpose of the nonprofit, its actual activities, the source of its income, and that any extra revenue does not profit a private individual. Attach copies of your certificate of incorporation, bylaws and the IRS letter granting 501c3 status. There is no form application fee
 - f. New Jersey and Virginia: Corporations exempt from federal taxes are automatically exempt from state tax.

| Exempt from Real Property Taxes? | Exempt from State Income Taxes? | Exempt from State Sales Taxes? | Exempt from State Payroll, Unemployment & Occupational Taxes? |
|---|---|---|---|
| Not Applicable (Property taxes are local not at the state level.) | <p>Yes. All charitable organizations that receive Federal 501(c)(3) tax-exempt status are exempt from State taxes to the same extent.</p> <p>In CT, DC, GA, MD and NY must complete filing in order to be exempt from state or district taxes. In NJ and VA, state exempt is automatic once federal exemption is received.</p> | <p>Maybe. Goods that are purchased or sold by the charitable organization may be exempt from sales tax,</p> <p>IF</p> <p>1) the <i>organization</i> or <i>transaction</i> fits one of the state sales tax exception categories,</p> <p>AND</p> <p>2) The <i>organization</i> obtains an exemption determination letter from the state.</p> | <p>Maybe. Nonprofit organizations that have received 501(c)(3) tax exemption are still required to pay unemployment tax unless qualify for exemption, such as a religious exemption,</p> <p>AND</p> <p>The organization employs minimum number of workers for minimum number of weeks during a calendar year. CT, DC, MD, NJ - 1 or more workers. GA, NY, VA-4 or more workers.</p> |

- C. In addition, the nonprofit may be exempt from local taxes. Typically, the nonprofit must apply for a local property tax exemption.

| Exempt from Local Real Property Taxes? | Exempt from Local Income Taxes? | Exempt from Local Sales Taxes? | Exempt from Local Payroll, Unemployment & Occupational Taxes? |
|--|---|--|--|
| <p>Maybe. Depending on local and state law, nonprofit may be exempt from property taxes – usually requires that the building be used in connection with the nonprofit’s exempt purpose.</p> | <p>Probably. Nonprofits that qualify under State tax exemption are usually exempt from local taxes to the same extent. Nonprofit must verify.</p> | <p>Probably. Nonprofits that qualify under State sales tax exemptions are usually exempt from local sales and use taxes to the same extent. Nonprofit must verify.</p> | <p>Maybe. For example, in GA nonprofits that employ salaried practitioners, who would normally be subject to an occupational tax, are exempt, if eighty percent (80%) or more of the organizations applicable income is derived from charitable activities.</p> |

II. MAINTAINING YOUR TAX-EXEMPT STATUS

- A. Once an organization receives tax-exempt status from the IRS, it must follow certain steps to maintain its status. Specifically, the organization:
- a. Must continue to operate in **furtherance of a public purpose**;
 - b. Must not violate **private benefit & private inurement rules**;
 - c. Must not engage in **excessive lobbying**;
 - d. Must not engage in any **political activities**;
 - e. Must limit its **unrelated trade or business** activity to an insubstantial amount;
 - f. Must meet **IRS filing requirements**; and
 - g. Must not engage in activities that **violate public policy**.

➤ ***SERVING A PUBLIC PURPOSE***

1. In order to justify its tax exempt status and the deductibility of contributions made to it, a nonprofit must serve a public purpose. A nonprofit's mission is described in the organization's Form 1023 and must include one or more of the following purposes:

charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals.

2. The term charitable is used in its generally accepted sense and includes relief of the poor, distressed, or underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency.
3. A nonprofit's mission is described in the organization's Form 1023 and must meet a particular public purpose.
4. If nonprofit makes significant changes to its mission, it must disclose it to the IRS on its IRS Form 990 or 990-EZ.
 1. Even if your organization normally files a Form 990-N, if it makes significant changes to its mission, the organization should consider filing the Form 990 or 990-EZ, so that the IRS is on notice as to what the new activities are.
 2. A significant change would include changing from one activity to another, such as moving from a mentoring program to an ESL program, or adding a substantial new activity, such as providing day care services for clients attending job training.
 3. You should also report if your organization discontinues any significant activities.
 4. Some changes are so significant, they may require a new 501(c)(3) filing.

➤ ***PRIVATE INUREMENT RULE***

- B. A tax-exempt nonprofit must comply with the private inurement rule. Under the private inurement rule, a nonprofit may not use its assets for the benefit of insiders.

For example, the organization cannot pay more than fair market value for services provided by an insider. This includes paying senior staff more than reasonable compensation. It also includes hiring the son of a director, even if the son is not qualified for the position, referring business to founder's for-profit business or paying more than fair market value for a piece of property owned by an officer.

1. Insiders include people such as the founder, officers, directors and senior management, such as the Chief Executive Officer or Chief Operating Officer.
2. It also includes an insider's spouse, as well as his or her parents, siblings, children, grandparents, grandchildren and their spouses.
3. It also includes referring the nonprofit's business to an insider's for-profit company.

➤ **PRIVATE BENEFIT RULE**

- C. A tax-exempt nonprofit must not use its assets for the private benefit of others. This is very similar to the private inurement rule, except it is not limited to insiders.

For example, if nonprofit rents out space in a building, it cannot charge below market rent to Board member's friend. It would be using the organization's assets to serve a private individual's interests and not the organization's exempt purposes.

1. The organization may assist individuals who meet its service criteria.

For example, if an organization provides scholarships to academically gifted students, it would not violate the private benefit rule to award a scholarship to the nephew of a donor if the student otherwise met the award criteria.

However, if the student did not meet the requirements for a scholarship, the award may violate the private benefit rule because the individual is receiving the benefit as a favor to the donor.

➤ **LOBBYING AND POLITICAL ACTIVITY**

- D. A tax-exempt nonprofit may engage in attempting to influence legislation (lobbying), as long as it is not a "substantial" part of its activities.

1. There are two tests for determining whether the activity is substantial – one is the "facts and circumstances" test and the other is to file a lobbying election under Section 501(h) of the Internal Revenue Code.
2. A nonprofit may also have to register with the federal, state or local government as a lobbyist if it engages in lobbying. The test for determining if an organization must register can be much stricter than the IRS's.
3. Under the IRS' facts and circumstances test, the IRS looks at all the facts and circumstances to determine if the nonprofit's lobbying is an insubstantial part of its activities. For purposes of this test, legislation includes any action by Congress, a state legislature, a local council or similar governing body, with respect to bills, resolutions or similar items (such as legislative confirmation of appointive office). It also includes any matter voted on by the public in a ballot initiative. It does not include actions taken by an executive, judicial, or administrative body.
4. Under the second test – the 501(h) election, a nonprofits (except for a church or private foundation) can make an election which will allow the organization to spend up to:

1. 20% of the first \$500,000 of its exempt purposes expenditures on direct lobbying.
 2. + 15% of the next \$500,000.
 3. + 10% of the next \$500,000.
 4. + 5% of the remaining, up to a total of \$1 million in lobby expenditures.
5. Direct lobbying is defined as any communication with a legislator, expressing a view about specific legislation.
 6. A nonprofit making the election cannot spend more than 25% of its overall lobbying limit on grassroots lobbying.
 7. Grassroots lobbying is a communication with the public expressing a view about specific legislation, with a call for the public to take action.
 8. The advantage of the election is that the nonprofit knows that if it meets the spending limits in Section 501(h) it is sure it will continue to be exempt.
 9. Check to determine if your organization has made the 501(h) election when it filed Form 1023. If not, the election can be made at any time by filing Form 5768 with the IRS. The election is effective for the year the form is filed and for each subsequent year, until it is withdrawn.
- E. Under the Internal Revenue Code, there is an absolute prohibition on a tax-exempt Section 501(c)(3) nonprofit engaging in political activity on behalf of or against an individual running for federal, state or local elected office.
1. If the nonprofit violates this prohibition, it will be subject to excise taxes and loss of its exempt status.
 2. The IRS has specific guidance about what is political activity. Generally, it is any activity that shows a bias in favor of one candidate or against another. In most instances, contributions of time, money or other things of value, endorsements and lawmaker ratings are not permitted.
 3. A nonprofit may engage in nonpartisan voter education activities that do not show a bias in favor of any one candidate – for example, the nonprofit may:
 - hold a candidate forum if all candidates for office are invited and the questions are asked in an evenhanded way on a variety of issues;
 - publish a voter guide provided it is balanced and deals with a range of topics; and
 - conduct voter registration drives and encourage people to vote.

➤ ***UNRELATED BUSINESS TAXABLE INCOME (UBIT)***

- A. A tax-exempt nonprofit may not use its exempt status to compete unfairly with for-profit businesses.

2. A nonprofit is subject to tax on income earned from a trade or business unrelated to its exempt purpose.
3. A nonprofit cannot devote more than an insubstantial amount of its activities to regularly carrying an unrelated trade or business. If it does, it risks losing its exempt status.
4. Income earned from property that is debt financed is also subject to tax, with many exceptions.
5. Tax-exempt organizations may not engage in certain insurance-type activities.
6. The first question is whether an activity is a trade or business.
 - a. The term *trade or business* generally includes any activity carried on for the production of income from selling goods or performing services.
7. Next, is the activity substantially related to the organization's exempt purpose?
 - a. A business activity is substantially related if there is a relationship between the activity and the organization's mission and the business activity helps achieve the mission. An activity that is primarily for raising funds is not considered a related activity. The activities that generate the income must contribute importantly to accomplishing the organization's mission.

For example, if a dance school charges its students a small fee in order to attend classes, the income from holding dance classes normally would have a substantial relationship to its mission, and would not result in taxable income. Similarly, if it held a recital, and charged an admission fee, normally this would be considered related to its mission to provide dance training, and exempt from tax. However, if the school operated a store from which it sold CDs and DVDs to the general public that were unrelated to dance education, the income from that activity would likely be unrelated to its exempt purpose.
8. Next, is the activity regularly carried on?
 - a. An exempt organization's business activity is considered regularly carried on if it shows a frequency and continuity, and is pursued in a manner similar to comparable commercial activities of for-profit businesses.

For example, if a youth group conducted a car wash one Saturday in order to raise funds for the organization, this would be a trade or business but it would not be regularly carried on. If, however, an organization operated a commercial car wash every weekend, this could be considered regularly carried on.
9. Finally, certain types of business activities are not subject to tax:
 - a. Passive income (royalties, rents, etc.) is not subject to tax as long as the nonprofit is not actively involved in running the business (i.e., managing the building that is generating the rental income.)

- b. A business, if volunteers carry out substantially all of the work.
- c. A business carried on for the convenience of members, clients or employees.

For example, if the dance school sold refreshments at the recital for the audience's convenience, the income would not be taxable.

- d. A business where substantially all of the items are donated, such as a thrift shop.
 - e. Bingo games that are legal where played and where bingo is not regularly carried on by for-profit businesses.
 - f. Distribution of low cost articles in exchange for a charitable donation.
10. As a rule of thumb, for purposes of UBIT, anything above 85-90% is at significant risk of being considered "substantial." For example, if a nonprofit operates a business and 95% of the work is performed by volunteers, then the income is less likely to be subject to tax because substantially all of the work would be carried out by volunteers. Similarly, if the nonprofit operates a thrift store, and only 75% of the material is donated for sale, then the income from the thrift shop is likely to be taxed, because substantially all of the items (i.e., more than 85-90%) are not donated.

➤ **ANNUAL REPORTING REQUIREMENTS**

- A. Every tax-exempt organization must file an annual informational return with the IRS.
 - 1. There is a limited exception for church and church-related organizations.
 - 2. Whether the nonprofit should file Form 990, 990-EZ or 990-N depends on the amount of the organization's gross revenue.
 - 3. A nonprofit with gross receipts that are normally less than or equal to \$50,000 may file the Form 990-N.
 - 4. A nonprofit may file a Form 990-EZ if its gross receipts are less than \$200,000 and has total assets of less than \$500,000.
 - 5. A nonprofit with gross receipts of \$200,000 or more or total assets of \$500,000 or more must file the Form 990
 - 6. Every public charity has the option of filing the full Form 990, and organizations that are eligible to file the Form 990-N may also elect to file the Form 990-EZ. If it does so, the organization must fill out the entire form and any required schedules.
 - 7. Private foundations must file Form 990-PF, regardless of size.

8. In addition, a nonprofit must file 990-T if it has over \$1,000 in gross revenue from unrelated business activities in any year.
 9. A nonprofit's receipts are normally less than or equal to \$50,000 if the organization is:
 - a. No more than a year old and has received or donors have pledged to give \$75,000 or less during first year;
 - b. Between one and three years and averaged \$60,000 or less in gross receipts during each of its first two years; or
 - c. Three or more years old and averaged \$50,000 or less in gross receipts for the immediately preceding three tax years (including the year for which return would be filed).
- B. Form 990-N is due the 15th day of the 5th month following tax year (i.e. for calendar year filers, the return is due May 15). There are no extensions.
1. The form is filed electronically through the IRS website.
 2. The organization must answer eight questions:
 - a. Name,
 - b. Address,
 - c. Trade name,
 - d. Taxpayer identification number,
 - e. Tax year,
 - f. Name and address of principal officer,
 - g. Website address, if any, and
 - h. A statement affirming that the organization's income is below the dollar threshold for filing.
- C. Form 990-EZ and Form 990 are also due the 5th month following tax year (i.e. for calendar year filers, the return is due May 15), but a nonprofit may file for an extension of up to six months.
- D. There are monetary penalties for an organization's failure to file the Form 990.
- E. In addition, an organization will automatically lose its tax-exempt status if it fails to file some form of the Form 990 (either Form 990, 990-EZ or 990-N) at least once during any three consecutive-year period.
- F. The IRS revoked the tax-exempt status of thousands of nonprofit organizations for failing to file a Form 990 from 2007 (the first year the requirement went into effect) through 2010.

G. May have to file the Form 990 with state governments as well.

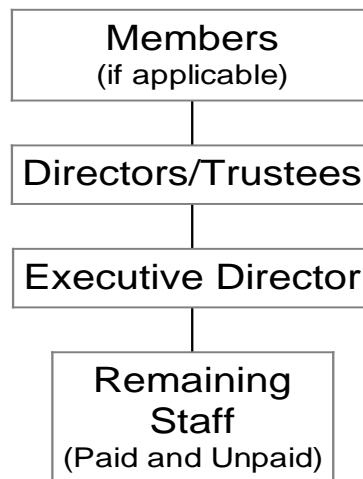
1. Connecticut: required unless filing a Form 990-N.
2. D.C.: Not required
3. Georgia: required unless filing a Form 990-N.
4. Maryland: File MD Form COF-85 if not filing IRS Form 990
5. New York: required; NYC-245
6. New Jersey: required
7. Virginia: required unless filing a Form 990-N.

III. NONPROFIT GOVERNANCE

A. Nonprofit corporations are legal entities authorized to carry out the charitable mission of the organization.

1. Nonprofit corporations are required to have a Board of Directors (known as the Board of Trustees in some states) that is responsible for the overall management of the organization.
2. Nonprofit corporations may also have voting members – who act like for-profit shareholders and have the right to elect Board members and vote on other major corporate transactions.
3. A nonprofit's articles of incorporation (also known as certificate of incorporation) contain the organization's basic governance provisions.
 - a. It sets forth the organization's mission and charitable purposes.
 - b. It provides for the Board of Directors.
 - c. It must specify whether the organization will have members. (Except for membership organizations incorporated in New York.)
 - d. It may contain a provision authorizing the indemnification of officers and directors.
 - e. It will contain provisions regarding the registered agent of the organization. (The person authorized to receive legal papers on behalf of the organization.)
4. Bylaws are the "internal operating manual" for the Board of Directors.
 - a. State law gives organizations great flexibility in how they can construct their bylaws. It is best to keep them streamlined and flexible.
 - b. The Board must make sure they are properly adopted and amended.
 - c. The organization must ensure that the organization has copies of all approved amendments to the bylaws.
 - d. The organization's actual practices must conform to the bylaws.

- e. If they do not, then the organization must either change its practices to comply with the bylaws or amend the bylaws.
5. Bylaws should contain provisions for:
 - a. Voting rights of members, if applicable, and procedures for calling member meetings.
 - b. Directors' election, number, qualifications, term lengths and limits, resignation and removal.
 - c. Board Meetings/Action in lieu of meetings.
 - d. Appointment of Board committees and advisory committees.
 - e. Appointment or election of officers, including Executive Director/CEO, and the duties of the officers.
 - f. Financial matters.
 - g. Indemnification provisions for officers and directors.
 - h. Procedure for amending.
 6. Bylaws should not contain programmatic information, or serve as the personnel policies for the organization's employees.
 7. The follow chart sets forth the organizational structure of a nonprofit corporation:



➤ **MEMBERSHIP VS. NON-MEMBERSHIP ORGANIZATIONS**

- A. Membership organizations are nonprofits that have “legal” members who elect the some or all of the members of the Board and may vote on other “big ticket” items.
- B. Non-membership organizations – directors elect themselves (a “self-perpetuating” Board)
 1. Groups with a self-perpetuating Board may have nominal members, but they have no legal right to participate in the running of the nonprofit. Therefore, they are not “members” for legal purposes.

For example, NPR, PBS and AARP all have members with no legal right to participate in the governance of the organization.

2. Organizations can choose whether to have legal members; this will be noted in the Articles of Incorporation, bylaws, or both.
 - a. In New York State, certain types of nonprofits must have voting members.
3. For legal membership organizations, qualifications for membership are specified in the Articles of Incorporation, bylaws or by resolution of the Board.
 - a. The organization must develop clear criteria for determining who is a member.
 - b. Members have right to:
 - i Notice of membership meeting.
 - ii. Access to information about the operations of the organization.
 - c. Quorum requirements are specified in the article of incorporation or by-laws. If no quorum is specified, check local law.
 - d. Board must report to the membership annually on financial condition of the organization.
4. It is the Board's responsibility to make sure that all the rules are being followed.

➤ ***BOARD OF DIRECTORS***

- A. The Board of Directors is responsible for overseeing the day-to day operations of the organization.
 1. The Board of Directors is accountable to:
 - a. The public,
 - b. The Attorney General,
 - c. The Internal Revenue Service,
 - d. Members (if you have them),
 - e. Donors, clients and beneficiaries, and
 - f. Employees and volunteers.
 2. The Board:
 - a. Sets the tone for the organization. Staff and volunteers take their cue from the ethical climate established by the Board.
 - b. Should adhere to the highest ethical standards.
 - c. Should ensure that the organization complies with all applicable local, state and federal laws.

- d. The “buck” stops with the Board!
3. Number of Directors – The governing documents and state law dictate the minimum number of members of the Board of Directors. Under most state laws, the minimum number of directors is three.
 4. State law and the governing documents also specify any other qualifications for Board service (e.g., age or residency).
 5. Term of office. State law and the governing documents also specify the length of time that an individual will serve once he or she is elected to the Board. This is different from term limits, which may limit the number of times an individual may be elected.

CT – One-year term, unless Board is staggered, in which case a term cannot exceed five years (The maximum number of years in a term equals the number of classes.) For example, if there are three classes of directors, the term is three years.

DC –One year, unless other term is specified. Maximum term is five years.

GA– One year unless other term is specified. No maximum term.

MD - One year unless other term is specified. No maximum term. Terms are established in the bylaws, however, if the Board is staggered, a term cannot exceed five years and the term of at least one class must expire each year.

NY – Terms may be between one and five years. For staggered board, the number of years in a term must equal the number of classes.

NJ – Terms may be between one and six years. Some members of the Board must be elected or re-elected at least every two years.

VA – One year unless other term is specified. No maximum term.

6. The Board must have regular elections as required by the governing documents. A director cannot stay on the Board past his or her term unless re-elected in accordance with the governing documents.
7. In addition to setting forth the length of each Board term, the bylaws may also limit the number of terms a director may serve. It is considered a best practice for larger nonprofits to have term limits because it ensures that fresh perspectives are brought to the Board on a regular basis. However, it may not be practical for smaller organizations, because they find it more difficult to recruit members to serve on the Board.

B. Duty of Care

1. The Board must perform its responsibilities with the same care, as an ordinarily prudent person would use in managing his /her own affairs.
2. The Board must act in good faith, stay informed and attentive, be active, make sound and informed decisions, and exercise independent judgment.

3. The Board may delegate the day-to-day management of the organization to employees, and certain decisions to Board committees – but ultimate responsibility stays with the Board.
4. In fulfilling the Duty of Care, the Board may rely on:
 - a. Information provided by employees.
 - b. Advice from others – attorneys, accountants, insurance professionals, and other experts acting in their field.
 - c. Information provided by Board committees acting within their areas of expertise.
 - d. However, reliance must be in good faith.
5. Ultimately, the Board of Directors bears the responsibility for determining what is best for the organization.

C. Duty of Loyalty

1. The Board must act in the best interests of the organization, and not for personal benefit.
2. A Director cannot take advantage of business opportunities that would be of interest to the organization without first offering it to the organization.
3. Boards should adopt a written conflict of interest policy, and make sure it is followed.
4. The conflict of interest policy should include:
 - a. A requirement that conflicts, or appearance of a conflict, be disclosed to other Board members.
 - b. Review and approval of the transaction by disinterested Board members, prior to the transaction taking place, after the Board members were fully informed of the conflict.
 - c. A requirement that the transaction must be fundamentally fair to and in the best interests of the organization.
 - d. A requirement that the interested party abstains from voting.
 - e. Full reporting of the transaction on all appropriate IRS forms.
5. A conflict of interest policy should:
 - a. Define what constitutes a conflict of interest.
 - b. Specify the persons to be covered by the policy.
 - c. Require an annual disclosure of affiliations.

D. Duty of Obedience

1. Directors must make sure that the organization acts in a manner that is consistent with its governing documents, mission and tax-exempt status.
 2. Must ensure that the organization complies with all federal and state laws as they apply to the organization.
 3. Must ensure that all grant requirements are being followed.
- E. The Board is responsible for general administration of nonprofit. To satisfy this requirement, the Board should:
1. Hold regular meetings.
 2. Establish committees as needed.
 3. Elect officers and supervise senior management.
 4. Set policies for all aspects of the program and operations.
 5. Ensure all government filings are made in a timely manner.
 6. Ensure that the organization has adequate insurance.
 7. Caveat - the Board shouldn't micromanage!
- E. The "Corporate Checkup" – On a regular basis the Board members should conduct a corporate checkup. As part of the checkup, the Board should check:
1. Application for Tax Exemption and Certificate of Incorporation - do they accurately reflect the organization's current activities?
 2. For membership organizations: is there a current list of members? Are the members getting notice of meetings?
 3. Bylaws – do they accurately reflect how the organization currently operates?
 4. Ensure that the organization's programs are consistent with its mission and regularly evaluate the program to ensure that it is furthering the mission.
 5. Ensure that the organization has a strategic plan for carrying out its mission.
 6. Fundraising:
 - a. Ensure that the organization has sufficient funds to carry out its mission.
 - b. Participate in the fundraising activities of the organization.
 - c. Ensure that the nonprofit engages in legal and ethical fundraising practices.
 7. Finance:
 - a. Formulate and approve operating budget with assistance of Executive Director.
 - b. Monitor income and expenses on a regular basis.
 - c. Review and approve year-end financial report.
 - d. Retain independent auditor and supervise the audit process.

- e. Establish financial management procedures - e.g., check writing, expenditure controls.
 - f. Ensure required reports are submitted to the organization's funders.
 - g. Review Form 990 before it is filed with IRS.
 - h. Ensure tax payments are made on a timely basis.
8. Personnel Matters:
- a. Determine what kind of employee and other workers the organization needs to accomplish its mission.
 - b. Hire a qualified Executive Director; evaluate his or her performance periodically.
 - c. Set the executive director and other key employees' compensation in accordance with IRS guidelines.
 - d. Develop and implement personnel policies, and make sure they are followed.
 - e. If the organization has volunteers, consider developing and implementing policies for them, too.

➤ **OFFICERS**

A. Which officers are required by state law and in the bylaws?

1. The Board should determine state law requirements with respect to the number and duties of the organization's officers.

CT - The number and officer positions are determined by the corporation's bylaws. The bylaws or the board of directors shall assign to one of the officers responsibility for preparing the minutes of the directors' and members' meetings and for maintaining and authenticating the records of the corporation. The same individual may simultaneously hold more than one office in a corporation.

DC- Organization must have two officers – a chief executive officer and a chief financial officer. In addition, an officer must be given the responsibility to prepare minutes and maintain corporate records - but it can be someone who does not hold the title of secretary.

GA – Must have an officer who has the responsibility to prepare minutes and maintain corporate records - but it can be someone who does not hold the title of secretary.

MD - Each corporation is required to have a president, secretary, and treasurer. A person may hold more than one however such a person may not act in more than one capacity to execute, acknowledge, or verify an instrument required by the law to be executed by more than one officer. Officers shall perform the duties in the management of the assets and affairs provided in the bylaws.

NJ – No provisions

NY does not require an organization to have officers, but it's highly recommended. If the organization has officers, the President and Secretary cannot be the same person.

VA - Must have an officer who has the responsibility to prepare minutes and maintain corporate records - but it can be someone who does not hold the title of secretary

2. Officers may come from the Board, but also could be senior management (such as CEO or CFO). The role of officer is distinct and separate from the role of a director.
3. Term of office and responsibilities of officers are set out in bylaws.

➤ **BOARD MEETINGS**

- A. Board meetings are an integral component of Board service; they allow the Board members to fully discuss important issues affecting the organization.
- B. Quorum – The bylaws set forth the minimum number of directors that must be present in order to take action at a Board meeting. The minimum quorum is usually a majority of the Board, but some jurisdictions, such as DC, allow a nonprofit to set the quorum at 1/3 of the Board (although this is not recommended.)
- C. Conference call for Board meetings. The Board may hold a meeting at which some or all of the members are participating via conference call. This is allowed as long as all the directors are able to speak and to hear all the other directors and participate simultaneously.
 1. CT, DC, NJ, NY, and VA – Conference call meetings are permitted unless the articles of incorporation or bylaws say otherwise.
 2. MD, GA – Conference call meetings are permitted if authorized in the bylaws.
- D. Unanimous written consent. Board members may approve an action by unanimous written consent. In order to be valid, all Board members then serving on the Board must sign the consent, and all must approve of the action being taken by the consent
 1. Email from a director qualifies as signature on a consent, but director must sign full name. (i.e., John Doe, not John D. or John.);

2. CT, DC, MD, NJ, NY, and VA – Unanimous Consent is permitted unless the articles of incorporation or bylaws say otherwise.
3. GA – Unanimous Consent is permitted if authorized in the bylaws

The Board is not allowed to use proxy or ballot voting when conducting its business. Being a director is a fiduciary responsibility that is personal to the director, and cannot be delegated to another person. It is also important for the directors to discuss matters before the Board and consider the opinions of their fellow directors. Ballot or proxy voting does not make that possible in real time. Therefore, the directors cannot consent in writing to an action unless all directors unanimously vote to approve the action.

If a nonprofit has voting members, they are not considered fiduciaries of the organization. Therefore, a member can give someone a proxy to vote at a membership meeting, provided the governing documents permit it.

➤ **COMMITTEES**

- A. The Board of Directors may establish committees. The number of committees and their composition may be set out in bylaws, or established by the Board when and if the Board deems it necessary.
 1. Each committee's authority is determined by the bylaws and the Board. Generally, Board committees are authorized to act on behalf of the Board within a limited area. For example, an audit committee may be authorized to hire an independent auditor; the finance committee may be authorized to approve certain expenditures.
 2. Each state law provides rules that set forth who may serve on the committees and how many members.
 - a. CT – committee must have at least one director appointed by the Board; creation and appointment of committees requires majority vote of all directors then in office or the number of directors required by the articles of incorporation or bylaws.
 - b. DC– must have at least one Board member. Creation and appointment of committees requires majority vote of all directors then in office. All committee members must be directors.
 - c. GA – must have at least one Board member.
 - d. MD - Committees must be composed of one or more directors, only.
 - e. NJ – If the certificate of incorporation or bylaws provide, the Board may appoint committees, but the committee which must be composed of only Board members. A committee must have at least one member.
 - f. NY – must have three or more directors, appointed by a majority of all directors then in office.

- g. VA– must have at least two Board members. Creation and appointment of committees requires majority vote of all directors then in office. Committee members must be directors.
4. The Board has the authority to create advisory committees that do not have authority to act on behalf of the Board. An advisory committee may make recommendations to the Board, but the Board must vote on those recommendations. As a result, the committee may be approved by the majority vote of the directors present at a Board meeting, and may have one or more non-Board members. Advisory committees may be given the authority to act on behalf of the organization to the same extent employees may be authorized to act on behalf of the organization.
 5. Most states do not allow committees to vote on “big ticket” items such as:
 - a. Approving action that must also be approved by members;
 - b. Filling vacancies on Board or any of its committees;
 - c. Adopting, amending or repealing bylaws; and
 - d. Approving a disposition of all or substantially all of the organization’s assets or a plan of merger.

➤ ***FILING REQUIREMENTS***

- A. Each state requires that a corporation incorporated in its state file a corporate report. Typically, the report asks for information such as the list of officers, registered agent and principal place of business.
 1. In addition, an organization must register with every state in which it does business.
 2. For most states, “doing business” means maintaining an office in the state and may include soliciting funds in the state.
 3. CT, GA, MD, NJ , NY and VA – must file an annual corporate report.
 4. DC requires corporate registration every two years.
 5. If the organization fails to file its report in its state of incorporation, its corporate charter will be revoked. (*Please note*, CT does not revoke an organization’s corporate charter if it fails to file its annual report.)
 6. State and local jurisdictions may also require a business license.

IV. CHARITABLE SOLICITATION/FUNDRAISING

➤ ***STATE REGISTRATION OF CHARITABLE SOLICITATIONS***

- A. State governments regulate a nonprofit’s charitable solicitations.
 1. A nonprofit cannot use deceptive or abusive fundraising techniques.

2. On IRS Form 990 and 990-EZ, nonprofits are expected to disclose the percentage of funds raised that are used for program expenses vs. fundraising and administrative expenses. This information must also be supplied to the jurisdictions in which the organization raises funds.
- B. A nonprofit should adopt policy regarding donor privacy and use of donor names.
 1. If nonprofit collects credit card information, the servicing agreement with the credit card company requires strict safeguarding of the donor's information.
 2. Small nonprofits can use Network for Good or other third party processors to avoid the cost of complying with the requirements.
 - C. 39 states and the District of Columbia require nonprofits to register with the state before raising funds, including CT, DC, GA, MD, NJ, NY and VA. Requirements differ by jurisdictions. Generally, the organization must register in order to solicit the general public for charitable contributions.
 - D. In determining where it must register, a nonprofit must ask: "Has my organization purposefully directed a charitable solicitation to a resident of State X?"
 1. If yes, does that state require registration?
 2. If yes, what kind of a solicitation was it? (in person, mail, phone call, email, internet) and does the organization conduct activities or have a presence in that state? Depending on these answers (addressed below), often the organization must register in State X.
 3. A nonprofit must register in every state where it solicits contributions if that state requires registration. Registering only in the jurisdiction where the nonprofit is incorporated is not sufficient. This is especially important in places like NYC and DC metro area, where the nonprofit's donors may be located in several states.
 - E. The organization must disclose financial and other information in its registration.
 - F. The registration fee ranges from \$0 to \$2,400.
 - G. Registration is required prior to soliciting. The nonprofit may be subject to fines for failure to register before soliciting.
 - H. Nonprofit organizations, paid solicitors, fundraising consultants and commercial co-venturers are required to register. It is illegal to use an unregistered fundraising solicitor or consultant in some states.
 - I. The term "soliciting" encompasses a wide range of activities that require the nonprofit to register, including:
 1. Fundraising appeals made to the general public, including appeals made via the mail, email, Facebook, Twitter, telephone, public service announcements or other broadcast advertisements, on-line advertisements or in-person solicitation.
 2. Solicitation of corporations and private foundations.

3. Government grants.
 4. Ticket sales and other requests in connection with special events, such as galas, silent auctions, golf tournaments and similar events.
 5. Some states will exempt an organization from registering if it only solicits from the government, corporations or foundations in that state.
- J. A nonprofit must register in every state where it:
1. Is physically “present” in the state - i.e., has offices or regularly conducts business in the state.
 2. Solicits contributions.
- K. Every state has certain exceptions to the registration requirements. The most common exceptions are:
1. Religious organizations
 2. Organizations raising small amounts of money – usually less than a few thousand dollars in total, not just from that state.
 3. Certain types of organizations (schools, firefighters, etc.)
- L. State charity officials have issued advisory guidelines – known as the “Charleston Principles” about internet fundraising and who has to register in a state. In determining whether to register, the nonprofit should ask:
1. Does the nonprofit’s website allow for on-line donations? (The fact that a nonprofit gives visitors to its website the opportunity to make a donation may not, by itself, trigger the registration requirement.)
 2. If yes, does the organization receive contributions on a repeated and ongoing basis or substantial basis through its website from a particular state? If yes – the organization may need to register in that state.
 3. Does an offline solicitation asks a donor to complete the donation on-line or the nonprofit solicits via emails by promoting website giving? If yes, the nonprofit must register in every state where it solicits donors using this method or from which it regularly receive donations.
 4. If the nonprofit’s website doesn’t allow for on-line donations, does the nonprofit:
 - a. Use its website to invite offline donations or send emails or other communications to individuals in the state directing them to the website solicitation, and
 - b. Receive contributions from the state on a repeated and ongoing basis or substantial basis?
 If yes – the organization may need to register in that state.
 5. If a nonprofit re-solicits donors who donate via its website, the return mail would typically trigger the registration requirements, even if the initial donation did not.

6. If a nonprofit fundraises using social media the same rules apply.
- M. Soliciting via email is the same as soliciting via telephone or direct mail. The nonprofit must register in a state IF the nonprofit knows or reasonably should know that the person being solicited is a resident of the state. In such case, the nonprofit must register in that state if it is otherwise required.
- N. The States designed the Unified Registration Statement for nonprofits registering in multiple states. It is the alternative to filing individual forms in each state. www.multistatefiling.org.
 1. Some states require additional information.
 2. Not accepted by every state.
 3. Only for use with initial registration – not for annual updates.

➤ ***CHARITABLE SOLICITOR***

- A. Individuals soliciting contributions on behalf of a nonprofit are also subject to the charitable solicitation laws.
- B. Generally, employees and volunteers are not required to register in order to solicit funds. However, in some jurisdictions, an individual employee or volunteers may have to register if engaging in person-to-person fundraising, such as on the street or in airport.
- C. If a nonprofit hires an independent contractor to solicit contributions on behalf of the nonprofit:
 1. The arrangement must be set forth in writing. In many jurisdictions, the solicitor must file the contract with the state as part of the fundraiser's registration under the charitable solicitations act.
 2. The nonprofit must check to make sure that the fundraiser is properly registered. In some states it is illegal to hire an unregistered fundraiser.
- D. Form 990 requires a nonprofit that hires a third-party fundraiser to report how much was raised by the fundraiser, and how much was actually received by the nonprofit.

➤ ***IRS RULES REGARDING DONATIONS***

- A. The IRS requires nonprofits to properly report and acknowledge cash and in-kind contributions. The nonprofit's failure to do so may result in IRS penalties. Under the IRS rules:
 1. A donation of personal services or facilities –such as the free use of office space - is NOT deductible and should not be receipted. (Although the nonprofit can send a thank you letter acknowledging – but not placing a value on - the gift.)

2. The donor, not the nonprofit, is responsible for determining the value of all non-cash donations. The nonprofit should acknowledge receipt of the donated property, including a description of property, but NOT include estimate of value.
- B. The donor cannot take a deduction for a donation of any amount without a receipt from the nonprofit or bank or credit card record. The evidence of the donation must state the name of the charity and the date and amount of donation.
- C. A donor cannot claim a deduction for any single contribution of \$250 or more unless the donor has a written acknowledgement from the nonprofit. The donor must receive the acknowledgement by the earlier of the time the donor files his or her tax return or the due date, including extensions.
- D. Donations throughout the year may be bundled into one acknowledgement. The acknowledgement must include:
1. Name of the nonprofit.
 2. Amount of cash contribution or description of non-cash contribution.
 3. One of the following:
 - a. Statement that no goods or services were provided (if true),
 - b. Description and good faith estimate of the value of goods the charity provided in return for the donation, or
 - c. Statement that goods or services provided consisted entirely of intangible religious benefits.
- If any of this information is missing from the acknowledgment, the donor is not entitled to claim a deduction.
- E. An organization must provide a statement to donor who makes a payment of more than \$75, partly as contribution and partly as payment for goods or services received from the charity (such as a ticket to a fundraising dinner.)
1. The disclosure must inform the donor that the amount of payment that may be deductible is limited to amount given in excess of fair market value of goods or services (such as the value of the dinner.)
 2. The nonprofit must provide a good-faith estimate of value of goods or services. Fair market value is based on what a third person would willingly pay for the same goods or services, and is not based on cost. (Although cost could be a factor in determining fair market value.)
 3. Under IRS rules, the nonprofit is subject to a penalty of \$10 per donation if the nonprofit does not provide this information.

For example, suppose nonprofit has fundraising dinner at which celebrity chef provides meal at no cost to nonprofit. The value of attendee's donation is reduced by fair market value of the dinner, as determined by what chef would normally charge for the meal.

4. Insubstantial goods or services provided in exchange for contribution do not have to be included in the receipt if:
 - a. The fair market value of the benefits received does not exceed the lesser of 2% of donation or \$104 (as of 2014 – dollar amounts adjusted annually), or
 - b. The donation is at least \$52 (as of 2014) and the only items provided bear the organization’s name or logo (e.g., calendars or mugs), and the cost of these items is within the limit for “low-cost articles” (\$10.40 as of 2014).
 - c. Free, unordered low-cost articles – such as return address labels or greeting cards - are considered insubstantial.

➤ ***CAUSE RELATED MARKETING***

- A. Cause-Related Marketing/Commercial Co-Ventures are arrangements where a for-profit company uses a charity’s name or logo to sell its products or services and makes a charitable donation based on sales.
 1. Marketing approach: Company A does well by doing good for Charity B.
 2. Payments should be structured as royalties for use of the nonprofit’s name and logo in order to avoid tax on unrelated business income.
 3. For example, the Susan G. Koman for the Cure often licenses its pink ribbon logo in exchange for royalty payments from the merchandizer as part of a cause-related marketing venture.
 4. The nonprofit cannot provide additional services to Company A, such as providing assistance in developing marketing materials. If the nonprofit does so, part of income will be allocated as payment for the services and will be taxable as unrelated business income.
- B. State law: the commercial co-venturer may be subject to state registration and reporting under the state’s charitable solicitations act.
 1. The test is whether the products are sold in the state.
 2. Some states require a contract that includes specific provisions.
 3. Some states require the contract be submitted to the Attorney General of the state while some just require the nonprofit to retain the contract.

➤ ***SELLING/LICENSING INTELLECTUAL PROPERTY.***

- A. Nonprofits may rent mailing lists without incurring taxable income, although it may cause problems with donors if a nonprofit does so.
- B. Logo may be rented as well.

C. Qualified Sponsorship v. Advertising

1. Advertising income is unrelated business income and subject to tax.
2. Corporate sponsorship rules- If a for-profit business agrees to sponsor a nonprofit event, sponsorship income is treated as a donation and not unrelated income, provided:
 - a. The acknowledgement of the sponsor includes only the sponsor's name, logo, address, phone number, description of the sponsor's product or services & hyperlink to main website.
 - b. The nonprofit does not include any statement about the quality or price of the goods or services.
 - c. The nonprofit does not endorse or encourage the use or purchase of donor's products or services.
 - d. No other "substantial return benefit" is provided to the donor. (For example, when a university grants Coca-Cola the exclusive right to sell soft drinks on campus.)
 - e. Any goods and services (such as tickets to a recital or sporting event) received by the sponsor from the nonprofit do not exceed 2% of sponsorship payment for year.

➤ ***SPECIAL EVENTS***

- A. Gaming: casino nights, poker, raffles, bingo, door prizes.
- B. Gaming has three elements:
 - a. Chance
 - b. Prize
 - c. Consideration
- C. Gaming is illegal in many jurisdictions. Where it is legal, it is heavily regulated and the nonprofit may need a local license to conduct the activity.
- D. The cost of raffle tickets, bingo cards, are not deductible. It is the purchase of a chance to win not a donation. Any acknowledgement from the nonprofit must reflect this.
- E. Winnings may be subject to income tax and the sponsor may be required to withhold income tax from the proceeds.
- F. There is a UBIT exception for traditional bingo, provided it is legal under state and local law and not ordinarily carried out on a commercial basis in the jurisdiction.
- G. Galas and other events, such as silent auctions, dinners or wine tastings or special performances.

1. A donor's deduction is reduced by the value of anything received in return for the ticket, even if the donor does not attend the function.
2. Silent auction – donation is limited to what the donor pays in excess of value of property.
3. The presence of a celebrity does not increase the fair market value of an event unless there is a commercial value to the celebrity's activities– i.e., having a celebrity chef come to your house and cook a meal for your guests; listening to a famous musician perform. The celebrity cannot deduct the value of the donated services.
4. If the nonprofit gives something of value to the donor in exchange for the payment, there may be sales tax requirements – see if state law provides an exemption for incidental sales.
5. Galas, silent auctions and similar events are considered a charitable solicitation. The nonprofit will have to need to comply with Charitable Solicitation Laws.

V. RECORD RETENTION

- A. State and federal law govern record retention. Sarbanes-Oxley is federal legislation that sets forth rules for companies. Some of Sarbanes-Oxley requirements for record retention apply to nonprofits.
 1. Under Sarbanes-Oxley, a nonprofit cannot destroy any relevant documents if it is under investigation.
 2. The IRS requires a nonprofit to retain certain records, including records that clearly show the organization's income and expenses.
 3. IRS Form 990, Part VI asks a nonprofit to disclose if it:
 - a. Contemporaneously documents Board and committee meetings.
 - b. Maintains a written document retention and destruction policy.
 4. A nonprofit must make certain forms available for inspection by public upon request.
 - a. Forms that must be available for public inspection:
 - i. Form 1023 – If a nonprofit filed a Form 1023 application after July 15, 1987 or possessed a copy of its application materials on that date, it must make a copy of the application permanently available for public inspection.
 - ii. Forms 990/990-EZ/990-N (except donor names and addresses from Schedule B) and, if applicable, 990-T. The Form 990 must be made available for the three-year period from the due date of the return or the liquidation, dissolution, or termination of the organization.
 - b. The nonprofit is subject to a \$20 per day penalty if it fails to comply
 - c. How the request is made determines how the nonprofit must respond:

- i. In-person request at nonprofit's principal office: nonprofit must provide the same day.
 - ii. If the individual wants to pick up the documents in-person and the nonprofit has no principal office: the documents must be made available at a reasonable time and place within 2 weeks.
 - iii. Request to send documents by mail: nonprofit must fulfill requests within 30 days.
 - iv. Nonprofit may charge reasonable copying costs and actual postage.
 - d. The nonprofit can meet these requirements by posting forms on nonprofit's website or Guidestar. However, even if the nonprofit makes its forms available on Guidestar or otherwise on line:
 - i. Nonprofit must still comply with in-person inspection requests.
 - ii. Nonprofit must inform requesters of where documents can be found online.
 - e. Guidestar does not post Form 990s in time to meet all IRS time requirements, so the nonprofit must provide copies if requested before they are available on Guidestar. If a nonprofit is subject to harassment campaign with individuals filing repeated requests for information, the nonprofit does not have to comply with the requests.
 - f. If forms are lost, may request copies from IRS by filing:
 - i. *Form 4506*: includes donor information.
 - ii. *Form 4506-A*: public inspection copy. See <http://www.irs.gov/charities/article/0,,id=135033,00.html>
 - g. Disclosure of some documents is optional disclosure –Form 990 asks if the nonprofit makes the following documents available to the public:
 - i. Governing documents.
 - ii. Conflict of interest policy.
 - iii. Financial statements.

B. Other Record Retention Requirements.

1. Records in connection with litigation or potential legal action must be kept until settlement or the time to file or appeal a claim expires.
2. In the case of tax records required by federal law, the nonprofit should:
 - a. Keep books and records on a tax year basis.
 - b. Keep financial records supporting information on tax return until statute of limitations ends. (Usually the later of the date the return is due or filed plus six years.)

- c. Keep Form 990s for at least seven years – IRS may audit returns for three years, or if a material understatement of revenue, for six years. However, the best practice is to keep the Form 990s permanently.
3. State and local governments may require the nonprofit to keep records longer. The nonprofit should check your state law.
4. In states with a long statute of limitations for breach of charitable trust actions, such as California (10 years), some records may need to be kept longer than the recommended best practices.
5. If a membership organization, may have to maintain records and make them available to members for inspection. For all organization, Board members have a right to inspect records.
6. Charitable solicitation laws in some states require nonprofits to make financial information available upon request.
7. Employment records of former employees should be kept at least until statute of limitations expires under federal and state laws, but at least three years. The best practice is to keep the records for seven years.

➤ ***BEST PRACTICES***

- A. Records should be kept permanently if they have enduring value:
 1. Application for tax-exempt status.
 2. IRS determination letter.
 3. Organizational documents (articles, bylaws) with amendments.
 4. Board and Board committee minutes, policies, resolutions.
 5. Copyright, trademark, patent registrations.
 6. Form 990 tax returns.
 7. Financial audits.
 8. Certain state and local filings.
 9. Insurance policies (auto, general liability & umbrella policies usually cover any claim attributable to actions that took place during policy period, even if claim filed years later.)
- B. Records with limited value should be kept for three years unless required to be kept longer by law.
- C. Records with little or no long-term value should be kept until no longer needed for reference.
- D. Keep copy of acknowledgment of donation and IRS Forms 5253 or 5252 for six years.
- E. Minute books:

1. Prepare contemporaneously with meeting. Keep permanently.
2. “Contemporaneous” for IRS purposes means prepared:
 - a. before next meeting, or
 - b. within 60 days, whichever is later.
3. Minutes should include:
 - a. Name of organization, date, time and place of meeting, who called meeting, who prepared minutes and members present/absent at meeting.
 - b. All motions made and the results of voting. Directors may request that minutes state specifically that they voted no on a motion. It will help shield director from liability if the appropriateness of any action is questioned later.
 - c. Specific discussion and actions relating to the following:
 - i. Conflict of interest policy, whistleblower and record retention policy and any related party transactions.
 - ii. Executive compensation.
 - iii. Financial audits.
 - iv. Disposition of a large portion of the organization’s assets.
 - v. Changes to governing documents.
 - vi. Participation in joint venture arrangements.
4. Otherwise, do not provide a detailed description of the discussion.

➤ ***STATE OR LOCAL FILINGS***

- A. A nonprofit should keep a permanent record of its state and local tax exemption filings. It is also important to keep permanent records of its:
 1. Annual or biennial reports (to secretary of state and/or attorney general).
 2. Basic business license if required.
- B. If a nonprofit is required to file a charitable registration in any state, it should keep initial registration permanently and the annual renewals for 10 years.

➤ ***BUSINESS RECORDS***

- A. It is important for a nonprofit to maintain adequate business records in case it gets into a dispute with another party. Therefore, the nonprofit should maintain the following records:
 1. Contracts - contract term plus seven years.
 2. Financial audit: - permanent.

3. Bank records - seven years.
4. Employment applications - three years.
5. Employment or personnel files - seven years following termination.
6. Payroll records - seven years.
7. Employee insurance records –
 - a. Under the Health Insurance Portability and Accountability Act (HIPAA) the employer must maintain health records separate from personnel files and kept secure.
 - b. Employee health information should only be disclosed on a need-to-know basis.
8. Correspondence
 - a. Hard-copies and internal memoranda
 - i. Routine matters – two years.
 - ii. Important/legal matters - permanent, subject to review.
 - b. Emails – Emails are just a form of document, and not a separate type of document. They should be subject to the nonprofit’s record retention policy. Otherwise, based on the subject matter, keep for the period specified in the policy (i.e., emails about employment matters should be kept for the same period of time as similar employment records.)
 - i. Important/legal matters should be kept permanently, subject to review.
 - ii. Print and keep with hard-copies.
 - iii. Be careful – While emails are a less formal means of communication, in a business context you should not put something in an email you would not put in a memo or letter.

It is important to destroy documents when the time for keeping them expires. If the records are kept longer than necessary, they will have to be produced if the organization is sued, and could cause embarrassment to the organization.

VI. EMPLOYMENT LAW

- A. At-will employment is a fundamental principal of U.S. employment law, and is the law in every state. Most U.S. employees are employed “at-will” meaning that an employee can leave his or her employment at any time without notice, for any reason (or no reason) AND an employer can terminate an employment relationship without notice, for any non-discriminatory reason (or for no reason).
 1. If there is an employment contract, employee can be terminated, but employer may be responsible to pay wages until end of contract term.

2. Employer has no obligation to pay severance unless there is a promise to pay - which typically is set forth in a contract or employment policies.
3. How to Maintain “At-Will” Status:
 - a. Do not enter into employment contracts with employees (or do so only with legal advice).
 - b. Ensure you have an “at-will” statement in your employment policies/handbook making clear that the handbook does not constitute an employment contract.
 - c. Ensure that employment documents such as applications, offer letters, training agreements, confidentiality agreements, etc., clearly state employment is “at-will” and do not create any terms of employment or implied contracts.

➤ ***EMPLOYEE VERSUS INDEPENDENT CONTRACTOR***

- A. The basic element in determining whether a worker is an employee or independent contractor is how much control does the employer exercise over the worker? The more control the employer exercises, the more likely the worker is an employee and not an independent contractor.
 1. Employer must balance the evidence of control vs. evidence of independence.
 2. Must undertake an individual analysis for each position and not the person in the position.
 3. Factors to consider:
 - a. Who controls where the person works and when?
 - b. Who provides office space, tools and equipment to use?
 - c. Who determines if a worker needs additional workers to assist, and who hires the additional workers?
 - d. Who determines where to purchase supplies or services?
 - e. Who determines whether work is performed by a specific individual versus hiring a company which assigns a worker?
 - f. Who provides training and decides on the level of training?
 - g. How is the worker paid? Per job or by the hour or week?
 - h. Who pays the worker’s expenses?
 - i. Does the worker perform services for organizations other than your own?
 - j. Does the worker advertise services to the public?
 - k. Does the worker receive employee benefits from your organization?
 - l. Are there any written contracts outlining the position?

- m. How permanent is the relationship?
 - n. To what extent are the services performed by the worker a key aspect of the organization's business?
 - o. Are other people performing the same services for your organization treated as employees?
4. Why is classification important?
 - a. Employers are required to withhold taxes from employees.
 - b. Responsible officers and directors can be personally liable if taxes are not withheld!
 - c. Employers are not required to pay the employer's share of FICA taxes for independent contractors; they are for employees.
 - d. Independent contractors are not eligible for worker's compensation or unemployment benefits.
 - e. Employers do not provide benefits like health care to independent contractors.
 - f. Independent contractors are not covered by employment discrimination laws.
 - g. Employee's commuting expenses are not deductible; Independent contractor's travel expenses are.
 5. It is tempting to classify someone as an independent contractor because it often costs less than hiring an employee. Moreover, the person may want that classification, because they may be able to deduct personal expenses as business expenses.
 6. However, whether someone is an employee or independent contractor is an objective test. The worker and the organization cannot agree to treat someone as an independent contractor if they actually satisfy criteria for the employment test.
 7. How to mitigate risk of misclassification?
 - a. Draft job descriptions that clearly state the requirements of the position and which reflects the actual duties of the position.
 - b. Talk to an attorney about how to classify a worker.

➤ ***WAGE AND HOUR LAWS***

- A. Fair Labor Standards Act (FLSA) covers a number of wage and hour matters including minimum wages that must be paid to employees and rules regarding overtime pay.
 1. FLSA sets the floor for wages and overtime. State law and collective bargaining agreements may set higher standards.

2. Some employees are exempt from FLSA but most are non-exempt employees. Presumption an employee is non-exempt unless the employer proves otherwise.
3. Federal Minimum wage is \$7.25 per hour. State or local jurisdiction may have a higher minimum wage.
4. Overtime must be paid to a non-exempt employee once the employee is on the job more than 40 hours in a work week.
5. Exempt employees are NOT subject to overtime compensation.
6. Exempt employees may not be paid by the hour. If an employee is paid by the hour, he or she will automatically be considered non-exempt regardless of the employee's salary or job duties. However, salaried employees may be classified as non-exempt, based on their duties, even though they are not paid by the hour.
7. In order to be "exempt," an employee must be paid on a salary basis at a rate of at least \$455 per week AND meet one of these tests.
 - a. Executive - Supervise two or more full-time employees (or equivalent). Hire and fire or have "particular weight" in employee decisions; manage recognized unit within organization; exercise independent judgment and discretion.
 - b. Administrative – Perform office or non-manual work directly related to "management or general business operations". Exercise of independent judgment and discretion on "matters of significance". Decider or influential adviser.
 - c. Professional - Requires knowledge customarily acquired by prolonged course of specialized intellectual instruction.
 - d. Certain computer & sales employees.
8. "Volunteering" to Work
 - a. Non-exempt employees must be paid for hours worked.
 - b. A non-exempt employee cannot "volunteer" to work extra hours (during lunch, stay late, come in early) and not be paid.
9. An employer is liable for wages, including overtime if applicable, anytime it "suffers" an employee to work or the employee is permitted to work.
10. Therefore, an employer must pay all overtime wages, even if the employee did not have permission to work overtime.
11. "Comp Time"
 - a. Giving a non-exempt employee compensatory time off in lieu of overtime pay is not permitted under the FLSA. This rule applies even if the employee wants compensatory time off.

- b. The Federal government believes (with good reason) that some employers would pressure employees to accept “comp time” in lieu of overtime pay, and a blanket rule is the only way to prevent the abuse from happening.
- c. The only exception is if, at the employee’s written request, an employer gives the employee time off equal to 1.5 times the number of hours of overtime worked in the same payroll period – no carry over!

Example: An employee is paid \$10 an hour for 40 hours per week. The employee receives his or her pay on a bi-weekly basis. The employee works 45 hours in week one, and earns \$475 (40 hours x \$10 + 5 hours x \$15). If the employee elects, he or she can take 7.5 hours off in week two. The employee would be paid \$325 (32.5 hours x \$10). Altogether, the employee would receive \$800 over the two-week period for 77.5 hours worked (40 + 32.5) - the same amount as if the employee had worked two 40 hour work weeks,

- 12. Paid time-off for holidays, sickness, vacation is not required under federal law.
 - a. May be required under some state and city laws.
 - b. CT requires sick leave for service workers.
 - c. DC has a safe and sick leave requirement.
 - d. GA, MD, NJ, NY, and VA sick leave is not required, however in 2013, New York City passed the Earned Sick Time Act which requires employers with employees in New York City to provide such employees with sick time.
- 13. If an employee takes paid time off (vacation time, etc.) that time does not count towards overtime calculations. (FLSA is concerned about hours actually worked.)
- 14. An employee may file a wage and hour claim. If employee is not paid for overtime, he or she can go back two years (and in some cases three years) to calculate overtime due. The burden is on the employer to prove what hours the employee actually worked.
- 15. How do you mitigate risks?
 - a. Ask an attorney to help properly classify your workforce.
 - b. Draft clear job descriptions for each position that clearly reflect the work performed.
 - c. Require non-exempt employees to keep an accurate record of time worked, including break time and meal time. Retain records for at least three years.

- d. Make it clear to the employee whether they are exempt or non-exempt and what that means. (NY law requires that non-exempt employees be told of their hourly wage in writing when they begin employment.)
 - e. Enact policies that state that all overtime must be approved in advance. If someone works overtime, you must pay them. However, make clear that the employee will be subject to discipline for violating the policy.
 - f. Ensure you understand the wage & hours requirements of the state in which you do business.
- B. Federal law prohibits discrimination in job-related activities such as interviewing, recruitment, hiring, termination, promotion, compensation and other terms of employment.
- 1. Federal law prohibits discrimination based on race, color, religion, gender, national origin, disability, pregnancy, genetic background. (Employer must have at least 15 employees to be covered by this law).
 - 2. Federal law also prohibits discrimination based on age. (Employer must have at least 20 employees to be covered by this law.)
 - 3. Disability law requires “reasonable accommodation” and “public accommodation” of individual’s disability.
 - 4. State and local laws may also apply, and many are more expansive than federal law.
 - a. Connecticut (3 or more employees): Prohibits discrimination based on age, ancestry, color, criminal records (state government only), gender identity or expression, genetic information, learning disability, marital status, mental disorder, mental retardation, national origin, physical disability, race, religious creed, sex (including pregnancy), sexual orientation.
 - b. Georgia (15 or more employees): Same as federal law except does not recognize genetic characteristics.
 - c. Maryland (15 or more employees): Same as federal law except it prohibits discrimination based on sexual orientation.
 - d. New Jersey (1 or more employees): Prohibits discrimination based on race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), marital status, domestic partner or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular blood trait, genetic information, liability for military service, mental or physical disability (including AIDS & HIV related illnesses).
 - e. New York State (applies if 4 or more employees): Prohibits discrimination based on age, race, color, creed, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, domestic violence victim status.

- f. New York City (applies if 4 or more workers): Prohibits discrimination based on race, color, creed, age, national origin, alienage and citizenship status, gender (including gender identity), sexual orientation, disability, arrest or conviction record, marital status, partnership status, status as a victim of domestic violence, stalking or a sex offense.
- g. Virginia: (More than five but less than fifteen): Prohibits discrimination based on race, color, religion, national origin, disability, sex, pregnancy, childbirth or related medical conditions, or of age if the employee is forty years or older
- h. Washington, DC (1 or more employee): Prohibits discrimination based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation.

➤ ***SEXUAL AND OTHER FORMS OF HARASSMENT***

A. There are two types of sexual harassment:

- 1. Quid Pro Quo Harassment
 - a. This occurs when an employment decision is based on an employee's submission to or rejection of sexual advances, sexual favors, etc.
- 2. Hostile Work Environment: This involves a work situation where the employee is subject to unwanted attention based on the person's gender. It includes same-sex sexual harassment.
 - a. Actions must be sufficiently severe or pervasive to create a hostile work environment.
 - b. It includes such actions as lewd jokes, pictures, or comments, and unwelcome touching.
 - c. It may also include other gender based comments.
- 3. Harassment can also involve race, color, religion, national origin or other characteristic protected by law.
- 4. Who can be a "harasser" or a "discriminator"?
 - a. Supervisors
 - b. Other Employees
 - c. Contractors/Consultants
 - d. Volunteers/Directors
 - e. Vendors
 - f. Donors

- g. Clients
 - h. Other Third Parties
5. Employer is responsible for maintaining a harassment-free work environment – no matter who is the source of the harassment.
 - B. Retaliation: The law prohibits employers from retaliating against an employee for making a good faith claim of harassment or discrimination or for any other employee who cooperates in the investigation of that claim.
 - C. Retaliation is defined as any action that might dissuade a reasonable worker from making or supporting a charge of discrimination. Specifically, the law forbids retaliation when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.
 - D. In 2011, the Supreme Court held that retaliation need not be directed at the employee. The Court held that it was illegal for an employer to fire an employee’s fiancé. The Court stated that “a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”
 - E. How do you mitigate risks?
 - a. Adopt clearly stated policy that prohibits harassment and discrimination.
 - b. Must have a mechanism by which employees can report allegations of harassment and discrimination AND you must address the allegations in a timely manner.
 - c. Train employees, volunteers and Board members regarding your anti-discrimination and anti-harassment policies.
 - d. Be proactive in preventing retaliation – especially if an employee files a claim against supervisor.
 - e. Make employment decisions based on ability/inability to perform the functions of the job.

➤ ***FMLA LEAVE (FAMILY MEDICAL LEAVE ACT).***

- A. Employers are required to provide unpaid leaves of absence for the birth, adoption or foster placement of a child, an individual’s medical needs or the medical needs of a family member.
 1. Must have 50 employees in the workforce.
 2. Employee must have worked 1250 hours in the 12 months prior to the leave.
 3. Leave can be as long as 12 weeks.
 4. Leave is un-paid, unless the employee otherwise uses paid personal leave or the employer enacts a policy which allows for payment during leave.

5. Employee must be allowed to return to same or similar position after 12 weeks of leave.
6. Leave can be based on calendar year or “rolling” 12 month period.
7. Leave can be intermittent.
8. Some states and cities have their own leave acts, which are often provide more benefits than federal law.
 - a. DC has its own FMLA and Parental Leave Act (Applies if employer has 20 employees. Allows parents time to go to their children’s school events. Leave can be as long as 16 weeks.)
 - b. NJ and CT have leave acts that differ slightly from the federal.
 - c. Employers may also be required to allow leaves for military service as well as family members of active duty service members.

➤ ***VOLUNTEERS***

- A. A nonprofit should have clear policies with respect to its volunteers. The first question to ask is who is a volunteer? Under federal labor law, the answer depends on the facts and circumstances:
 1. Does the individual expect to receive compensation for services.?
 2. Does the organization normally compensate others for the type of service performed by volunteer?
 3. Was a regular employee displaced by the volunteer?
 4. Is there a promise of future employment?
 5. Is there any economic coercion to perform services for the organization?
 6. What about employees who want to volunteer for the nonprofit they work for?
 - a. Could be risky for non-exempt employees.
 - b. Need to make sure that the non-exempt employee is not doing the same or similar duties when volunteering as he or she does in the normal performance of the job. If so, then he or she must be paid for the extra work.
 - c. Need to make sure there is:
 - i. An absence of coercion, such as peer pressure, to volunteer, and
 - ii. No real or perceived reward for volunteering.
 7. How do you mitigate risks?
 - a. Do not pay your volunteers money or a monetary equivalent (like a gift card). This will be treated as payment for services and is subject to withholding and tax reporting if it is greater than the dollar limits.

- b. Have volunteers perform tasks that are not being performed by employees.
- c. Consider drafting written volunteer policies.
- d. Avoid having non-exempt employees volunteer for special event – such as having non-exempt workers “volunteer” to work at the gala dinner. The fact that it is not part of employee’s regular duties may not be enough, since it is not part of anyone’s regular duties, and could be a gray area.
- e. Have non-exempt employees volunteer for the organization’s normal volunteer opportunities that are open to the public (i.e., Saturday Habitat for Humanity build.)

VII. INTELLECTUAL PROPERTY

Trademarks, Copyrights, and Patents are the most common forms of intellectual property (IP). Because most nonprofits are not high tech companies, their first reaction is why should I care about IP? But every nonprofit owns several pieces of intellectual property, even if they do not realize it.

➤ **TRADEMARK**

A. All businesses have a trademark. A trademark is another name for the nonprofit’s name and logo used to identify the organization. It indicates the source of any goods and services; assures a certain standard of quality and creates goodwill and brand awareness. It is what makes the nonprofit identifiably different from other nonprofits. Having a strong identity helps a nonprofit reach its constituents and fulfill its mission.

1. When selecting a trademark, there are several factors to consider:

Brand selection. Your trademark will help “brand” your business. A nonprofit invests a lot of money in developing its trademark – stationary, websites, Facebook pages, signs, brochures, t-shirts and coffee mugs all increase awareness of the organization’s name and mission. If an organization’s brand is tarnished, it can have a detrimental impact on the welfare of the organization. Penn State University and the Susan G. Koman Foundation are only two examples. Given the amount a nonprofit invests in building its brand, and its importance to the welfare of the organization, it is important that the nonprofit protect its investment.

2. Search and Clearance. The nonprofit must not infringe on others marks as well. Before you start using your mark, you should determine that no one else is using a similar or identical trademark
3. Prosecution. Once you determine that you can use this mark, you should register the mark. However, your mark is still protected even if you choose not to register the trademark. Trademark rights arise from the USE of a mark in commerce to identify the source of goods or services.

4. Usage Requirements. To register the trademark, you must either prove that you are currently using the trademark or that you intend to use the trademark. If you intend to use the trademark, you must prove that use after filing an Intent-to-Use application.
5. Enforcement. Once you have a trademark, you should protect the trademark against infringement by third parties.

B. What is a trademark?

1. A trademark is a word, slogan, design, picture or any symbol associated with goods, services, or a business itself
2. A trademark helps potential clients identify the source of a particular good or service. If branding is done correctly and effectively, a trademark will inform the client of the quality of that product. Once a client tries that product, any other product that the client sees with the same trademark will let the client know that it is of equal quality.
3. A trademark is anything that can distinguish the goods or services of one business from another:
 - a. Word Marks: *Calvin Klein*



b. Non-Traditional Marks:

c. Slogans: *I'm lovin' it*



d. Composite Marks:



e. Logos, Design Marks or Stylized Marks:

4. What is *not* a trademark?
 - a. Copyright
 - b. Patent
 - c. Trade Dress
 - d. Trade Secret
 - e. Right of Publicity

C. Brand Selection

- i. Fanciful - has no meaning other than as a trademark for a particular entity (Exxon or Adidas).
- ii. Arbitrary – Has another meaning that is unrelated to the goods or services (Dove or Apple).
- iii. Suggestive – Has a meaning that suggests the work the enterprise engages in (Coppertone or Mr. Clean).
- iv. Selecting a mark that is merely descriptive means you can only register it if you show that there is also *secondary meaning* that is distinct from the meaning of the words. Descriptive trademarks are afforded less protection. (Bread for the World or Water for People)
- v. Generic marks can NEVER be registered or protected – cannot register Action Figures as a trademark for action figures.
- vi. The more fanciful a mark, the easier it is to protect. For example EXXON has no meaning other than oil, and any use of the mark by a third party is likely to be considered an infringement. You should consider choosing a mark that is either fanciful, arbitrary, or suggestive. The trade –off is between having a distinctive mark versus the cost in time and resources of creating an association in the public’s mind between the mark and your organization.

D. Legal Analysis.

1. Infringement. Nonprofits CAN be sued for infringement. Your mark may infringe on another’s trademark if that mark is in use and the marks are “confusingly similar.”
 - a. When registering your trademark, run a search on the mark before using it to make sure no one is already using it.
 - b. If you infringe on someone else’s trademark:
 - i. A court can issue an injunction and order you to stop using your mark.
 - ii. A court can order you to pay damages to the trademark holder.
 - iii. You may have to destroy materials that have the trademark fixed upon it.
 - iv. You will incur expenses of trying to rebrand your business. (finding a new trademark, new filing fee, expense of putting the new trademark on all materials, etc.)
 - v. If you infringe on someone else’s trademark, it is a Public Relations nightmare and is bad publicity.
2. Registrability - If there are confusingly similar marks on the register:
 - a. The strength of your mark will be very weak.
 - b. You will have less exclusivity

- c. The licensing fees you receive when someone uses your mark will be lower.
 - 3. Remember: Avoid similar marks for related goods or services (the term “related” goods is interpreted broadly).
- E. When determining if a mark is confusingly similar the court will look at a number of factors, including:
 - 1. The marks themselves
 - a. Sight
 - b. Sound
 - c. Meaning/Commercial Impression
 - 2. What goods/services are sold under the two marks?
 - 3. The consumers targeted by the two users – are they the same group of customers?

What channels of trade are used to market the goods or services and how are the goods or services marketed?
 - 4. Sophistication of consumer – Are the goods marketed to a targeted, sophisticated group of consumers or to the general public?

F. Trademark Clearance

- 1. Once you have selected your mark, you must check to see if it is available. Just because you can form a corporation in your location, does not mean that the mark is available. You need to check the U.S. Patent and Trade Office’s data base and the internet to see if the mark is being used by someone else. (You can go to www.uspto.gov.) For example, if you are in Georgia, you may be able to form a nonprofit corporation called Nike, Inc., if no one else has formed a corporation in Georgia using that name. However, the trademark is not available since Nike is already doing business under that name in the state.
- 2. You should also use other resources to make sure that no one has a common law trademark on the mark. In addition to the U.S. Patent and Trademark Office, your search should include:
 - a.. Some international registries (e.g., Australia, Canada)
 - b. Search engines (e.g., Google, Bing, Yahoo!
 - c. Domain name availability (e.g., GoDaddy, whois.net)
 - d. State business name records.
- 3. If the mark is unavailable, you can either select an alternate mark or modify the mark (e.g. Wackville rather than Wackamo).
 - a. More costly alternatives to changing your mark are:


1. Conduct an investigation of the existing use
2. Enter into a co-existence agreement
3. Buy the mark from the current trademark owner

International searches – The cost varies by country and can be expensive.

4. If the mark is available, the next step is to register it. If you are doing business in more than one state, federal registration is available. If you are doing business in only one state, consider state registration.

G. Types of U.S. Registration:

1. Word mark versus logo

ADIDAS versus 

- a. Intent to Use Application– Protects the mark from registration by another. You have up to three years after application to prove use.
 - b. Use Based Applications – Use must be in “interstate commerce.”
2. Goods and Services are divided into 45 classes.
 - a. Class 25 – clothing, footwear, headgear
 - b. Class 41 – Education; providing of training; entertainment; sporting and cultural activities
 - c. Class 43 – services for providing food and drink; temporary accommodation
 - d. Class 45 – Personal and social services rendered by others to meet the needs of individuals; security services for the protection of property and individuals.
 - e. Class 35-36 – Business services for nonprofits; fundraising for charitable organizations.

If you register in one class, others may be able to use the same mark in other classes, so it may be advisable to register in all classes for which you qualify. For example, if you are an educational organization that serves low income individuals, you may be eligible to register in Classes 35-36, 42 and 45. If you sell t-shirts to your program participants, you may be able to register in class 25.

3. U.S. Trademark application process:

- a. First, the application is filed. Then the application is reviewed by the examining attorney. If the applicant has complied with requirements and there is no conflict with prior applications or registrations, then the application is approved. Once the application is approved, the application is published for opposition. If there is no opposition, the trademark is registered. Once registration is complete, declarations of use are filed years after registration. Registration will need to be renewed 10 years after registration.
- b. Once the application is published for opposition, if someone opposes, TTAB will issue a decision. If the applicant wins, then the application will be registered. If the applicant loses, then the application will be abandoned.
- c. If the Application was not approved, there will be an office action. Once there is an office action response, the application can either be published for opposition, or if the applicant does not comply with the requirements, then the application will be abandoned.

H. Trademark Prosecution

1. Filing fee is \$325. There can also be additional fees of \$150 every 6 months, for up to 3 years.
2. Attorneys' fees are generally non-existent for pro bono clients.
3. Attorney's fees for oppositions can reach \$40,000 or more
4. Proof of use will cost approximately \$300. You must prove use after filing an Intent-to-Use application.
5. Renewal fees are approximately \$400. Renewal fees will be paid every 10 years.

I. Ancillary Costs - Domain Names Trademarks, Domain Names, and the Internet. Developing a web presence can bring people to a nonprofit organization. Therefore, a nonprofit should carefully select a domain name for its organization.

1. A nonprofit should select a domain name people will easily remember. Examples include an entity's name or nickname followed by .org or .edu, if applicable. To protect its trademark, the nonprofit should also consider registering its domain name with com, .net, and other relevant extensions. This will prevent others from registering the name. The nonprofit should also consider registering common misspellings of its name, and have it automatically directed to its website.
 - a. Recommended Global Top Level Domains
 - b. Limited variations in .com, .net
 - c. Cost varies from \$10 - \$200 / year, depending on the number of domain names purchase and the number of years renewed.

2. Country Code Top Level Domains

- a. E.g., .TV, .CO, .MX, .CA
 - b. Not all companies are eligible to purchase country code top level domains.
 - c. Cost ranges from \$50 - \$600/year
3. There are over 1,000 global top level domains, some of which may be applicable to your industry (e.g., .art, .charity, .community)

J. Notice of Trademark Registration

1. Registered Trademark – ®
2. Trademark Rights - TM
3. Service Mark Rights - SM

K. Consistent Use of Logo

1. Do not alter or distort your logo. Use the organization's trademark consistently to increase its recognition and value. Use the same font, color, and placement on page from use to use. Do not dilute your mark by changing or altering it for a specific occasion.
2. Distinguish marks from surround text (CAPITAL LETTERS, Initial Capitalization and/or using a SM, TM or ® symbol). Trademarks can also be distinguished from surrounding text using bold or italics fonts or in a stylized form or logo type that has become associated with the mark.
 - a. APPLE computers
 - b. Law & Order television series
 - c. MARLBORO cigarettes
 - d. Target ® department stores
 - e. *Steve Madden* shoes
3. Always use Trademarks properly and in their entirety
 - a. *HARLEY-DAVIDSON MOTORCYCLES*, not HARLEYS
4. Never make a trademark possessive or modify a trademark from its possessive form.
 - a. Show on *The Food Network*, NOT The Food Network's show.
5. Never use a trademark as a noun. Always use a trademark as an adjective modifying a noun.
 - a. *Maggiano's* restaurant
6. Never modify a trademark to the plural form. Instead, change the generic word from singular to plural.
 - a. *tic tac* mints, NOT tic tacs

7. Never use a trademark as a verb. Trademarks are products or services, never actions.
 - a. You are NOT xeroxing, but photocopying on a Xerox copier
 - b. You are NOT rollerblading, but in-line skating with Rollerblade in-line skates
 8. Others may do this in informal conversation, but as the owner of the mark, you should not .
- L. Legal Lines. Put the public on notice of our rights. Federal law allows you to place the ® symbol after your mark once you register it with the US Patent and Trademark Office. If there is no federal registration, use SM, TM. These symbols put everyone on notice that the nonprofit claims ownership of the mark and may increase the amount of damages an organization collects if someone infringes on its mark.

➤ ***COPYRIGHT***

- A. A Copyright is the exclusive right to reproduce, license, and otherwise exploit an original work. A Copyright is the expression of an idea fixed in a tangible medium. Copyright protection is available to any original work of authorship. A copyright interest can be created in: Art, Photography, Music, Literature, Film, Software Code, Sculptures, and Written Materials.
1. Original means that the work contains a *minimum* level of creativity. It does not mean that everything must be new, only the expression. For example, you can copyright a story about how a boy meets girl, boy losses girl, boy gets girl back, as long the way you tell the story is original.
 2. Authorship means independent creation. The person who owns the copyright is responsible for creating the work (or who obtained ownership of the copyright from someone who did.)
 3. Fixed means that the work is put into permanent form in a tangible medium of expression. This means it is put in writing, on video or audio recording, stored electronically in a database, impressed on a solid object, etc.
 4. Tangible Medium: this means the paper of a book or letter, a painting's canvas, a computer, the stone of a sculpture.
- B. A Copyright interest arises automatically when a work is fixed in a tangible medium. Copyright owners are not required to register their copyright, but it is recommended. Once you register, originality and ownership of the copyright will be presumed.
- C. Copyrights include the following rights:
1. To reproduce the copyrighted work;
 2. To prepare derivative works (such as making a movie from a book);
 3. To distribute copies of the work to the public;

4. To perform the work publicly; and
5. To display the work publicly.

Owning a physical object is not the same as owning the copyright. If you own a painting you own the physical object, but not the right to reproduce the painting in a book or calendar. The artist still owns the copyright and the right to reproduce the painting, unless the artist assigns that right to you.

D. Registration process

1. \$65 per paper application (\$35 if filed online)
2. A copyright lasts for the life of the author, plus 70 years after death. After the copyright ends, the work will be in the public domain. Once the work is in the public domain, anyone may freely use the work.
3. Fees and information can be found at: www.copyright.gov

E. Benefits of Registration.

1. Required to sue for infringement of the copyright.
2. Required for certain types of infringement damages. Allows the copyright owner to recover statutory damages and attorney's fees.
3. The ownership and originality are presumed from registration, so you don't have to prove that in court. Burden shifts to the infringer to try to prove that originality and ownership do not lie with the person claiming copyright.

F. Copyrightable Materials

1. Materials for which Nonprofits may claim copyright protection:
 - a. Promotional materials (e.g., brochures).
 - b. Educational materials (e.g., seminar hand-outs).
 - c. Training materials
 - d. Event photos if taken by your employees (be sure to get a release for individuals appearing in photos).
 - e. Website.

G. If an Employee creates an original work (such as a written manual) while performing his or her duties, the employer owns the copyright for the materials. If an independent consultant creates the work, the consultant owns the copyright unless he or she assigns ownership of the copyright to the organization employing the consultant.

➤ **BOARD'S RESPONSIBILITY FOR FINANCIAL OVERSIGHT**

A. The Board has ultimate responsibility for ensuring that an organization's funds are properly utilized.

- B. The Board should establish clear policies and procedures to protect an organization's financial assets and ensure that the organization is following best practices. The Board has to set the proper tone at the top of the organization.
- C. The Board is responsible for ensuring that the organization has sufficient funds to carry out its mission.
- D. The key financial responsibilities of the Board are:
 - 1. Ensure proper financial systems and controls are in place and that staff are complying with these policies, including ensuring that funds are used for carrying out the organization's mission and that donor-restricted funds are used in accordance with the donor's restrictions. The Board should:
 - a. Ensure that there is a financial control environment.
 - b. Develop, implement, and monitor proper policies and procedures.
 - c. Ensure compliance with applicable laws and regulations.
 - 2. Review and approve annual budget.
 - 3. Receive regular financial reports showing budgeted and actual revenue and expenses and how performance compares with previous years.
 - 4. Ensure that the organization has sufficient reserves (At least 3-6 months of overhead expenses.)
- E. The Board should also develop:
 - 1. Conflict of Interest Policy and a procedure for enforcing the policy.
 - 2. Whistleblower policy.
 - 3. Procedure for determining compensation and benefits.
 - 4. Document retention and destruction policy.

➤ ***INTERNAL CONTROLS***

- A. There several factors that can cause an employee or volunteer to commit fraud. The Board's duty is to protect against these factors:
 - 1. Incentive / Pressure – i.e. - pressure to meet the board expectations or personal pressure such as individual credit card debt.
 - 2. Opportunity – Poor controls leave opportunity for fraud.
 - 3. Attitude/Rationalization – Board and management's attitude from the top (disregard for need to monitor controls or reduce risk of misappropriation of assets). Employee's rationalization that it is acceptable to take funds from the organization.

- H. Internal Controls are a process implemented by those charged with governance that is designed to prevent fraud and promote reasonable assurance that the following objectives are met. They ensure:
1. Effectiveness and efficiency of the nonprofit's operations.
 2. Reliability of financial reporting.
 3. Compliance with applicable laws and regulations.
- I. It is the Board and management's responsibility to establish effective internal controls that ensure that someone is not using his or her position to defraud the organization.
- J. One of the most important facets of a strong internal control system is segregation of duties. Organization should divide the responsibilities among different individuals within the organization so one individual does not control all aspects of a financial transaction.
- K. Types of Functions that should be divided among several people:
1. Authorization of payments.
 2. Custody of funds.
 3. Record keeping of revenue and expenses.
 4. Reconciliation of financial records, such as bank statements.
- L. Avoid having one employee who has control over all aspects of the check disbursement process. One employee should not have access to checks (custody), check signing ability (authorization), and ability to post transactions to the general ledger (recordkeeping).
- M. Bank reconciliation should be completed by an individual who does not do the bookkeeping. Bank reconciliations should also be reviewed.
- N. Payroll – same individual should not be responsible for hiring personnel and placing them into the payroll system.
- O. Income and expenses must be entered promptly. Best practice is once a week for small organizations – daily for larger ones.
- P. Bank Statement Review – Open and review of monthly bank statements. Must be done within time specified by the bank (typically 60 days) or the Bank is not liable for errors, including forged checks and similar malfeasance.
- Q. Two signatures should be required for disbursements over specified amount – typically \$250 or \$500 (never have a signer sign blank checks or use a signature stamp.)
- R. Cash Disbursements – must have the same controls over wire disbursements and electronic transfers as with checks.

- S. Checks received should be deposited promptly and a log of all checks that come in should be maintained.
- T. Make sure that people take vacations – make it mandatory so that someone else takes over responsibilities from time to time.
- U. Common limitations that impact the ability to maintain internal controls:
 - 1. Limited staff to perform several tasks. (Nonprofit should rely on development personnel to assist with reconciliation and review process regarding contributions; the Chief Executive Officer or Executive Director to perform certain review or reconciliation processes; and members of the Board, such as the treasurer, to perform review of certain financial information.)
 - 2. Financial software available to nonprofit does not have many functions which assist in maintaining controls.
 - 3. Human judgment – some things rely on human judgment. Proper training assists in making good judgments, but small nonprofits have a limited training budget.
 - 4. Control breakdowns – people fail to follow controls because of time, resources, and the failure is tolerated.
 - 5. Management override – common source of control breakdown – “Its ok if the Chair of the Board does it.”
 - 6. Collusion between two individuals and no other oversight.
 - 7. Conflict of Interest –when two related parties, such as a husband and wife, are the signatures on an account.

➤ ***ANNUAL BUDGET***

- A. Board of Directors approves annual budget. Thereafter, the Board ensures:
 - 1. Expenditures are made in accordance with budget.
 - 2. Material variations are approved by Board.
 - 3. Organization must have an accounting system that regularly tracks revenue and expenses. Quick Books or similar software should be sufficient for small organizations.
 - 4. Board should receive monthly reports of revenue and expenses as compared to annual approved budget. For very small organizations, such as organizations that file the Form 990-N, quarterly may be sufficient.
 - 5. The reports must show donor restricted funds and expenses attributable to those funds separately from unrestricted funds.
 - 6. Report should also show material variations in revenue and expenses, and explain the reason for the variations (Is it only variation in timing of when the income will be received versus an expected grant has been denied.)

7. Board makes adjustments to budget depending on interim reports.
8. Board is responsible for ensuring that organization maintains adequate reserves.
9. Expenses are reimbursed in accordance with expense reimbursement policy and only with proper receipts. (IRS requirement – otherwise reimbursement is treated as taxable income.)
10. Board ensures that proper receipting of contributions occurs.

➤ ***INDEPENDENT AUDIT***

- A. At some point an organization must decide to have its financial statements reviewed or audited by an independent auditor.
- B. A review is a less rigorous process and is less expensive, but it does not provide the same level of assurance.
- C. The IRS does not require an independent audit, but funders may require an audit – especially if the organization receives government grants.
- D. In many states, charitable solicitation statutes require organizations with annual contributions over a dollar amount (which can be as low as \$100,000) to a financial review performed by an independent CPA. Other states require an independent audit.
- E. It is important for the Board to be involved with the audit. The Board should include members that are competent and financially literate in nonprofit accounting.
- F. There should also be regular communication between the auditor and the Board. It's not just recommended, it's **REQUIRED**.
- G. The Board is responsible for selecting the auditor and overseeing the audit process (These tasks may be delegated to an audit or finance committee.)
- H. It is recommended that the Board meet with the auditor (in person or via phone) for both the planning of the audit and after the audit is completed, if not more often.
- I. It is also important for management not to discourage communication between the auditors and the Board (but don't keep management out of the loop).

VIII. RISK MANAGEMENT

- A. Tax-exempt organizations have various missions. These missions result in both significant and innocuous risks to the organization. The degree of risk depends on many factors:
 1. Scale of operation: size of revenue, assets and staff.

2. Where the nonprofit is located and where it operates: Town, City, State, Multi-state, International.
 3. An organization's particular mission, size and location = its risk = its insurance need.
- B. Risk management is the process of:
1. Identifying risk – a constantly moving target – and how that risk can cause liability or other problems;
 2. Taking steps to mitigate that risk so that it is less likely for a bad event to happen; and
 3. Then transferring the risk that remains as much as possible to insurance companies.
 4. There is a profession of “Risk Managers” employed by larger companies. Smaller companies and nonprofits risk manage for themselves.
- C. You can be sued in a civil action for basically one of three things:
1. Contract: breaching an agreement, written or verbal, causing financial damage.
 2. Tort: breaching a duty you owe to someone else, causing personal injury, property damage, or certain business injuries.
 3. Administrative: violating a statute or regulation, resulting in a fine or penalty.
- D. A nonprofit can be sued by a number of different classes of people:
1. Your program participants
 2. Your guests and invitees
 3. Your employees and volunteers
 4. Anyone with whom you contract or agree
 5. Your funders and banks
 6. Anyone to whom you owe a duty of any kind
 7. Your government.
 8. Your friends!
 9. Almost anyone.

➤ ***RISK MITIGATION***

- A. Step one is to identify the risks your organization faces.
- B. Once you identify risks, you can take steps to mitigate them. Some steps your organization can take include:

1. Create a safe workplace.
2. Attend to any other safety issues.
3. Put fiscal controls in place.
4. Put policies in place that reduce risk, such as how to protect confidential information, and provide regular training for the Board and the employees.
5. Conduct background checks of employees and volunteers who have access to vulnerable populations, such as the elderly and children.
6. Address risk issues promptly.
7. Have volunteers sign liability waivers/releases. Work with an attorney to develop one. Waivers are usually enforceable, sometimes not:
 - a. NY, NJ, GA, DC CT and MD enforceable.
 - b. VA not enforceable.
8. Ask third parties, such as vendors, to indemnify the organization for the third party's actions.
9. If necessary, develop an employee manual. This helps the organization build-in permanent controls & policies, such as a strict policy against discrimination & harassment. Also develop policies for volunteers.
10. Attend trainings about how to protect against risk (i.e., first aid, disaster preparedness, etc.)
11. Consider each policy (conflict of interest, whistleblower, financial oversight) -
- think of these as risk mitigation tools for nonprofit.

➤ ***INSURANCE***

- A. Some risk will remain no matter what, such as accidents, fires, carelessness of others. Insurance is the transfer of risk from you to an insurer. For a price, an insurer will take your risk. Leaving you nearly (but never entirely) risk-free. There are several types of insurance policies:
1. Property policies – “first-party” insurance. Policies may cover both building and contents.
 2. Liability policies – “third-party” insurance. This includes Commercial General Liability or “CGL” insurance
 3. Auto policies – a mixture of both liability and property insurance.
 4. Workers Compensation – MANDATORY coverage. Protect workers in case of injury.

➤ ***PROPERTY INSURANCE***

- A. Property insurance covers “physical loss or damage” to the nonprofit’s real or personal property. It may also cover losses resulting interruption to your business because of damage to your property, as well as third-party theft. Property policies generally exclude:
1. Water damage commonly excluded – flooding, burst pipes, etc.
 2. Damage as a result of mold, asbestos, lead paint, terrorism, pollution, boats, more.
 3. Nonprofit should read a policy in light of your own risk.
 4. May include coverage for employee dishonesty and theft.

➤ ***WORKERS COMPENSATION INSURANCE***

- A. Each state sets number of employees that trigger requirement to buy workers comp.
1. In CT, DC, MD, NJ and NY one employee triggers need for workers comp.
 2. GA and VA – three employees.
- B. A nonprofit wants to have this insurance because it limits liability to nonprofit. If an employee is injured on the job, he or she must file a workers compensation claim, and cannot sue the nonprofit for damages. Worker’s Comp is an exclusive remedy.
- C. It covers any injury to an employee in the “course of employment” – this term is broadly construed.
- D. A nonprofit must promptly notify worker’s compensation board and/or carrier if there is an injury.
- E. Beware of wrongly calling an employee an “independent contractor” – if the worker is an employee, he or she must be covered. The nonprofit could face fines and charges for past premiums if a worker is improperly excluded from coverage.

➤ ***COMMERCIAL GENERAL LIABILITY INSURANCE (CGL)***

A CGL policy covers claims for bodily injury or property damage suffered by a third party. Bodily injury includes physical injury, sickness or disease caused by the nonprofit’s actions or failure to act, including accompanying emotional distress. CGL policy also covers other personal injury, including:

1. false arrest, false imprisonment;
2. malicious prosecution;
3. wrongful entry or eviction, invasion of right of private occupancy; and

4. invasion of privacy; and slander, libel, and disparagement.
- C. Consider a “Non-Owned & Hire Auto” endorsement to cover the nonprofit in case the nonprofit is sued because someone working or volunteering for nonprofit is in accident while on nonprofit business and driving a personal vehicle. If your nonprofit has confidential data, you should consider obtaining a cyber-liability policy.
- D. Check to see that the policy has a duty to defend your organization in case it is sued.
- E. Also see whether defense costs are included when determining whether you have reached the limits of your policy. If so, defense costs could eat into a substantial part of your coverage.

➤ ***DIRECTORS AND OFFICERS INSURANCE***

- A. Directors & Officers coverage (D & O) insures against claims of negligence when carry out fiduciary duties as officers and directors.
- B. Also may cover claims of discrimination in providing benefits to the nonprofit clients.
- C. Typically covers nonprofit, employees, and volunteers as well as officers and directors.

➤ ***OTHER COMMON TYPES OF INSURANCE***

- A. There are several other types of insurance that a nonprofit should consider getting depending on the types of work in which the nonprofit engages and what risks the nonprofit runs in doing so.
 1. Business automobile.
 2. Errors & Omissions – covers mistakes made when professionals provide services. (a.k.a. malpractice coverage.)
 3. Employment Practices Liability or EPL coverage. (Covers claims of employment discrimination – often included in D & O policy.)
 4. Sexual Molestation. (May need separate policy if not be covered by CGL.)
 5. Employee Dishonesty. Sometimes an endorsement to property insurance. This is called a fidelity bond, and is increasingly common.
 6. Accidental Medical Insurance – pays uninsured medical expenses, up to policy limits to:
 - a. Volunteers and clients.
 - b. Claims paid on no-fault basis.

➤ **GENERAL INFORMATION ABOUT INSURANCE**

- A. Many insurance policies have endorsements. An endorsement amends the terms of the policy. Therefore, it is important to read them closely.
- B. See if your policy has a duty to defend – With a duty to defend the insurance carrier must provide lawyers to defend the nonprofit. With this provision a nonprofit has to pay up-front legal costs and be reimbursed at the end. Duty to defend applies if:
 - 1. There is any possibility of coverage, or
 - 2. There are both covered and uncovered claims.
 - 3. Generally, defense costs are outside of policy limits, but need to check your policy.
- C. Duty to indemnify – duty to pay any valid claims in accordance with provisions of the policy.
- D. Definition of a claim. Make sure the definition of what is a claim is as broad as possible so that, because once a claim is made, it triggers the insurance company's duty to defend. For example, you want the duty to defend to kick in once you receive a letter from an attorney threatening a lawsuit, rather than having to wait until a lawsuit is filed.

➤ **FILING A CLAIM**

- A. Despite all the steps your nonprofit takes, it is likely that at some point your organization will experience a loss of property, or someone will be injured. In such case, you should contact the organization's insurance broker immediately. You should discuss with the broker whether it is appropriate to file a claim immediately, or wait to see if the person who suffers a loss asserts a legal claim against the organization. It is important to report claims in a timely manner. If your organization does not do so, it is at risk of losing its coverage because of a failure to report the claim. In addition, your organization should:
 - 1. Not admit liability or commit to make any payments. The insurance company makes that determination.
 - 2. Offer medical attention as warranted and if possible, have the injured party complete an "incident report."
 - 3. Inspect the area or condition where the loss occurred and note any defects or contributing factors.
 - 4. Take photos or video of the area/condition as soon as possible, document the date, time, name of person taking photos and retain for them for your records.
 - 5. Retain any evidence relevant to the incident. Immediately tag and store in a protected place until you make contact with your insurance adjuster.
 - 6. Identify witnesses and if possible have them complete a witness form – even if they did not see the incident occur.
 - 7. Keep copies of your insurance policies permanently.