

Operational Concerns for Nonprofits

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OTHER OPERATIONAL CONCERNS

A. Trademark

Forms of Intellectual Property Protection

IP	Definition	Term
Trademarks	Identifier of source/quality word, logo, sound	As long as used
Copyrights	Original expression, books, art, music, software	Author's life plus 70 years
Utility Patents	Inventions, novel devices, processes or business methods	20 years from filing
Trade Secrets	Information kept secret giving competitive advantage to owner	As long as kept secret

Trademark Basics

Trademark is a word or design (or combination) used to identify the source of goods/services. A trademark may also include distinctive and non-functional “trade dress,” packaging, colors, configurations, sounds and scents. A trademark identifies source and related quality, reputation and goodwill.

Strength of Marks (Strong to Weak)

Coined	Kodak [®]
Arbitrary or fanciful	Amazon [®] Apple [®] for computers Ivory [®] for soap
Suggestive	Wrangler [®] jeans Coppertone [®] suntan lotion
Descriptive	“America’s Best Popping Corn”
Generic	Lite Beer Thermos Escalator

When considering a trademark, there is frequently a conflict between the trademark attorney and the marketing manager.

Trademark Attorney Perspective

- Pick a mark that is distinctive
- Strongest marks
 - Coined (Kodak[®], Exxon[®], Ensco[®])
 - Arbitrary or fanciful (Amazon[®], Apple[®] for computers, Ivory[®] for soap, monster.com)

Marketing Manager Perspective

- Brand must communicate info about product or service
- Make it easy for consumers to remember your brand name
- Examples: eToys, pets.com, America’s Best Popping Corn

Establishing Trademark Rights

- **Use:** First user wins in product field/geographic area
- **Registration:** “Intent to use” or use application
- A domain name may be used as a trademark, but not if it’s merely an address or a tradename

Rights Conveyed by a Federal Trademark Registration on the Principal Register

- Presumption of ownership
- Nationwide rights regardless of geographic scope of use
- Right to bring an action to enforce trademark rights in Federal Court
- Right to receive damages
- After five years of registration, the mark is deemed incontestable

Term for a Federal Registration

- Initial and renewal terms are 10 years
- Between the fifth and sixth years after registration, you must file with the PTO a declaration of use with a sample of the trademark in use
- A third-party person may petition to cancel a trademark if they feel their business will be damaged by its use

Trademark Infringement

- Likelihood of confusion analysis
 - Similarity of the marks
 - Similarity of the goods and services
 - Strength of the mark
 - Channels of trade
 - Type and sophistication of consumers
 - Intent of the defendant
 - Actual confusion
- Senior user of the mark generally wins

Know When to Assert TM Rights

All trademarks are not equal. All infringers are not equal:

- Mom & Pop store defense

— Scorched earth defense

All confusion is not equal

- Assess competitive overlap
- Degree of potential harm, industry

Trademarks and Internet Domain Names

- Many companies operating with similar names but in different markets or fields
- Only one possible registrant for the top level domain “.com”
- Domain names that incorporate the trademarks of major companies are valuable commodities
- Cybersquatting: people registering domain names of companies in the belief that they will be able to resell the domain name to the company at a high profit

B. Privacy

The news is full of reports of data breaches and privacy issues. Nonprofit organizations are not immune from these issues and should consider adopting and implementing certain policies to address these issues.

Website Privacy Policy

If an organization has a website, it should have a privacy policy.¹ Even if the organization doesn't think that it is collecting information from website visitors, the organization may be collecting “cookies” or “web beacons” (tracking technologies). A website privacy policy covers the following and be posted on the organization's website.

- What information is being collected
- How the information is collected
- How the organization uses tracking technologies
- What the organization uses collected information for
- Whether the organization shares the information it collects
- Security measures the organization uses
- Right to correct the information at any time
- Contact information for the organization

¹ Some states (e.g., New York and its financial services law) have industry-specific laws relating to data privacy.

Terms of Use (if needed)

An organization should have a terms of use when the organization has users interacting with the organization's website (i.e., creating user accounts, posting content, downloading content, etc.). The terms of use should describe the relationship between the content on the website and the website users. If limits are set on a user's ability to post content on the website, that should be included as well.

Data Breach Response Plan

All organizations that handle personal information (of customers or employees or members) should have a data breach response plan. The plan should be a coordinated effort to streamline the process of discovering/identifying a breach, responding to the breach, notifying required parties (see below) and learning from the breach so it does not happen again.

An organization should offer regular training to employees who handle personal information on the dangers of cybersecurity and employees should learn how to spot cyber threats and how to respond in the event of a breach.

In today's environment, breaches are a matter of when, not if!

Data Breach Notice Requirements

Forty-nine (49) states have data breach notice laws. An organization generally must comply with a law if the organization has employees/customers that are residents of the state. These laws are why response plans are so important and why there is a need to understand the breach and mitigate damages as quickly as possible.

Depending on the size of the breach, some states require notice to the attorney general, affected individual notice and/or offering credit monitoring services to affected individuals.

While there is no federal data breach statute, there are federal laws based on industry (i.e., banking, health, etc.). However, Section 5 of the FTC Act provides a basis for the federal government to investigate companies who have large breaches (think Uber).

C. Basic Employment Matters

There are three (3) critical labor law challenges when starting and running any business—including nonprofits. These challenges include: unpaid internships, independent contractor vs. employee classification and exempt status under state and federal law.

Internships: Wage-Hour Pitfalls for the Unwary

In 2015, the Second Circuit weighed in on interns and rejected the test endorsed by the U.S. Department of Labor and adopted a “primary beneficiary” test that focuses on what the intern receives in exchange for his work and allows courts the flexibility to examine the economic reality as it exists between the intern and the employer. *Glatt v. Fox Searchlight Pictures*, 791 F.3d 376 (2d Cir. 2015)

“Primary beneficiary” test includes seven (7) non-exhaustive factors that courts must balance in assessing whether an intern is an employee for the purposes of the Fair Labor Standards Act (FLSA). These factors include:

- The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
- The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
- The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

State law may also impact unpaid internship classification. For example, the New York Department of Labor uses the following criteria to review an unpaid internship relationship:

- Similar to that offered in an educational setting
- For the intern's benefit
- Interns do not displace regular employees and work under close supervision
- Employer derives no immediate advantage from interns
- Interns not necessarily entitled to jobs at the end of the program
- Employer and interns understand that the interns are not entitled to wages
- Clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities
- Interns do not receive employee benefits
- Training is general, permitting the intern to work in any similar business
- Screening process for the internship is not the same as for employment
- Advertisements for the program are couched as training or educational

New York State Dep't of Labor Opinion Letter, RO-09-0189, Dec. 21, 2010

Independent Contractors vs. Employees

Employees and independent contractors are treated differently under federal and state laws with respect to:

- Taxes (including state and federal income taxes, as well as Social Security and Medicare taxes under "FICA" and unemployment taxes under FUTA)
- Unemployment insurance
- Workers' compensation and workplace safety
- Employee benefit plans
- Payment of wages (i.e., minimum wage and overtime)
- Protection from discrimination
- Unionization

Events that can trigger an audit:

- Unemployment/disability/worker's compensation claim
- Wage and hour complaint
- Worker filing Form SS-8 or 8919 with the IRS
- 1099 and W-2 issued to same individual in the same year

U.S. DOL Administrator's Interpretation No. 2015-1

- Is the work an integral part of the employer's business?
- Does the worker's managerial skill affect the worker's opportunity for profit or loss?
- How does the worker's relative investment compare to the employer's investment?
- Does the work performed require special skill and initiative?
- Is the relationship between the worker and the employer permanent or indefinite?
- What is the nature and degree of the employer's control?

Eleven Factors Now Considered by the IRS under Publication 15-A

With the issuance of IRS Publication 15-A, the IRS has distilled the 20-factor test down to the following set of eleven (11) factors relevant to the degree of control by the employer and independence of the worker:

- (1) Instructions that the business gives to the worker
- (2) Training that the business gives to the worker
- (3) The extent to which the worker has unreimbursed business expenses
- (4) The extent of the worker's investment
- (5) The extent to which the worker makes his or her services available to the relevant market
- (6) How the business pays the worker
- (7) The extent to which the worker can realize a profit or loss
- (8) Written contracts describing the relationship of the parties
- (9) Whether or not the worker receives employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay
- (10) The permanency of the relationship
- (11) The extent to which services performed by the worker are a key aspect of the regular business of the company

States may have different standards. For example, California recently determined that an Uber driver is an employee based on the following factors:

- Uber obtains the clients
- Work integral to business
- Uber selects and regulates drivers (does background checks)
- Drivers must register cars with Uber
- Vehicles must meet certain standards
- Fee determined by Uber
- Drivers must maintain a minimum customer rating

Best Practices for Minimizing the Risks

- Review and reassess all IC relationships now
- Have ICs sign agreements acknowledging IC status (include factors derived from the IRS test)
- Explain to ICs that they will not be eligible for employment benefits
- Provide ICs with 1099s
- Do not provide IC's with close supervision, tools and equipment, uniforms or expense reimbursements
- Do not require mandatory attendance at meetings and submission of reports
- Do not require exclusivity of services
- Worker can incur monetary loss
- Unreimbursed expenses
- Nonpayment for services if job is terminated
- Significant financial investment by worker
- Worker can hire assistants (without pre-approval)
- Use ICs who are incorporated and who market services to the public (and retain documentation concerning their public availability)
- Keep EEs and ICs separate (also have separate files)
- ICs should not be required to attend "training," and should not receive "new hire" paperwork/manuals
- Make sure that all pension, health, and welfare policies; plan documents; and "spds" are carefully reviewed and revised when appropriate to exclude independent contractors from coverage
- Know the law and, when in doubt, obtain qualified counsel for assistance (especially when preparing for an audit, investigation, hearing or wage and hour lawsuit!)

- Worker determines tools or equipment, order to follow, where to purchase supplies, etc.
- Worker has other clients or sources of income
- Worker can refuse assignment(s)/project(s)
- Legal entity vs. individual (with some exceptions)
- Worker files Schedule C with Federal Form 1040

Exempt Status under Federal Law

There are three requirements for employees to be “exempt” under the FLSA:

- Employee must perform primarily exempt work (the “duties test”) **and**
- Employee must be paid a minimum salary (the “salary level test”) **and**
- Employee must be paid a fixed salary regardless of quality or quantity of work (the “salary basis test”).

Salary Basis Test

There was a proposal to change the salary basis threshold, but due to legal challenges the new thresholds did not go into effect. So, the current salary basis test is as follows:

- FLSA—Executive, Administrative or Professionals
\$455/week

Note that states may have different thresholds. For example, New York requires the employee to be an executive or administrative earning at least \$675 per week.

The employee must regularly receive each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation. Such amount must not be subject to reduction because of variations in the quality or quantity of the work performed. Subject to certain exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. 29 C.F.R. § 541.602(a).

The employee’s duties must be included in the following categories:

- Professional
- Computer
- Administrative

- Executive
- Outside Sales

Learned Professional Exemption

There is also a “Learned Professional Exemption,” which covers the following:

- Primary duty: performance of work requiring advanced knowledge (29 C.F.R. § 541.300(a)(2))
- In a field of science or learning (Id.)
- Customarily acquired by a prolonged course of specialized intellectual instruction, resulting in a specialized academic degree (Id.)
- Best evidence of this element is a four-year college degree in the specific field of work (29 C.F.R. § 541.301(d))
- Advanced Knowledge
 - Predominantly intellectual
 - Includes work requiring consistent exercise of discretion, judgment
 - Knowledge generally used to analyze, interpret, make deductions from varying facts or circumstances
 - **Not** routine mental, manual, mechanical or physical work
 - **Cannot** be attained at high school level
 - Must utilize principles, theories or methodologies typically learned in an academic environment when performing the primary job duties 29 C.F.R. § 541.301(b)
- Field of Science or Learning
 - Occupations with recognized professional status, as distinguished from mechanical arts or skilled trades

Law	Accounting	Actuarial Computation
Theology	Teaching	Physical Sciences
Medicine	Architecture	Chemical Sciences
Pharmacy	Engineering	Biological Sciences

29 C.F.R. § 541.301(c)

In 2014, the Second Circuit held that a junior accountant meets the professional exemptions based on the “advanced knowledge” required to comply with the job’s requirements. Specifically, the court found that “what matters is whether [employees] exercise intellectual judgment within the domain of their particular expertise” finding the “critical question” to be whether “workers act in a manner

that reflects knowledge and requires judgments characteristic of a worker practicing that particular profession.” The court also observed that employees may “exercise professional judgment when their discretion in performing core duties is constrained by formal guidelines or when ultimate judgment is deferred to higher authorities.”

The court rejected plaintiffs’ argument that they did not meet the education requirement because they learned all necessary skills while on-the-job, finding that KPMG’s “training” materials would not be understandable to “the average classics or biochemistry major” nor could non-accountants “develop the requisite understanding of the audit function, on the basis of the brief training period.” *Pippins v. KPMG LLP*, 759 F.3d 235 (2d Cir. 2014)

Exemption may also apply to certain computer employees if the employee is employed as a computer systems analyst, computer programmer, software engineer or other similarly-situated worker in the computer field performing the duties described above. Note that job titles are not determinative. 29 C.F.R. § 541.400(a) When applying this exemption, one needs to consider the employee’s primary duty:

- The application of system analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications (29 C.F.R. §541.400(b)(1)); **or**
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications (29 C.F.R. § 541.400(b)(2)); **or**
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems (29 C.F.R. § 541.400(b)(3)); **or**
- A combination of the aforementioned duties, the performance of which requires the same level of skills 29 C.F.R. § 541.400(b)(4)).

“Keep it Running” activities (i.e., maintenance, repair, upkeep, first and second-level technical support, routine troubleshooting) are typically non-exempt duties. Design, creation, programming and analysis of systems, networks or software are typically exempt duties.

See, Wage and Hour Opinion Letter, FLSA 2006-42, October 26, 2006 (holding that Help Desk Support Specialist did not meet exemption where primary duties consisted of installing, configuring, testing and troubleshooting computer applications, networks and hardware).

Employee met exemption where duties included:

- designing and maintaining the proper operation of the trading platform used by Streamingedge’s investment brokers
- systems analysis, software research and development, support, maintenance and testing, networking and assistance with site installations

Olorode v. Streamingedge, Inc., 2014 U.S. Dist. LEXIS 59421 (S.D.N.Y. Apr. 29, 2014)

Administrative Exemption

- Primary duty: office work directly related to the management or general business operations of employer or employer’s customers (29 C.F.R. § 541.201); and
- Must include the exercise of discretion and independent judgment with respect to “matters of significance” (29 C.F.R. § 541.202)
- Production Work Does Not Qualify
 - Production work refers to work directly related to the product or service that employer offers to the marketplace
 - The administrative exemption likely does not apply to the following production activities/jobs:
 - Product Commercialization Teams
 - Field Technicians
 - Manufacturing Engineers and Technicians
 - Technical Writers
 - Customer Support
 - Loan Underwriters
- Management or General Business Operations
 - The regulations outline work areas that will typically satisfy this element:
 - tax, finance or accounting
 - budgeting, auditing or quality control
 - insurance
 - purchasing or procurement

- advertising, marketing or research
- safety and health
- legal and regulatory compliance
- human resources
- employee benefits
- labor relations
- public or government relations
- computer network, Internet and database administration

29 C.F.R. § 541.201(b))

- Discretion and Independent Judgment
 - Comparison and evaluation of possible courses of conduct, and acting or making a decision after considering various possibilities (29 C.F.R. § 541.202(a))
 - Must be on “matters of significance” (Id.)
 - OK if decisions/recommendations are reviewed at higher level and occasionally revised or reversed (29 C.F.R. § 541.202(c))
 - Factors include:
 - Authority to formulate, affect, interpret or implement policies or operating practices
 - Carries out major assignments in business operations
 - Performs work that affects business operations to a substantial degree
 - Authority to commit employer in matters with significant financial impact
 - Authority to waive, deviate from established policies and procedures without prior approval. 29 C.F.R. § 541.202(b)
 - Factors include:
 - Authority to negotiate, bind company on significant matters
 - Provides consultation, expert advice to management
 - Planning long- or short-term business objectives
 - Investigates and resolves matters of significance on behalf of management
 - Represents the company in handling complaints, arbitrating disputes or resolving grievances
 - 29 C.F.R. § 541.202(b)

- Does **not** include:
 - Applying well-established techniques, procedures or specific standards described in manuals or other sources
 - Clerical or secretarial work
 - Recording or tabulating data
 - Performing mechanical, repetitive, recurrent or routine work
 - 29 C.F.R. § 541.202(e)

Executive Exemption

- Primary duty: management of the enterprise or of a department or subdivision (29 C.F.R. § 541.100(2))
- Directs the work of two or more full-time employees or equivalent (29 C.F.R. § 541.100(3))
- Authority to hire, fire, promote or make similar “changes of status” of other employees, or recommendations regarding such changes are given “particular weight” (29 C.F.R. § 541.100(4))
- Management Duties
 - Interview, select, train
 - Set, adjust pay, work hours
 - Maintain production, sales records
 - Conduct job performance appraisals
 - Handle employee complaints and grievances
 - Discipline employees
 - Plan and apportion work among employees
 - Determine techniques to be used; type of materials, supplies, machinery, equipment or tools; merchandise to be bought, stocked, sold
 - Provide for the safety, security of employees or property
 - Plan and control the budget
 - Monitor or implement legal compliance measures
 - 29 C.F.R. § 541.102
- Department or Subdivision
 - “Customarily recognized department or subdivision” must have permanent status and continuing function
 - Does not include a mere collection of employees assigned from time to time to a specific job

Examples of customarily recognized departments or subdivisions include:

- Human Resources (Compensation, Benefits, Recruitment, Training, EEO, Labor Relations)
- Sales (Western Region—Pacific District/Mid-West District) (Eastern Region—Northeast District/Southern District)

Outside Sales Exemption

Exemption covers employees with the primary duty of making sales, obtaining orders or contracts for services or use of facilities. (29 C.F.R. § 541.500(a)). Employee must customarily and regularly be engaged away from the employer's place(s) of business (including away from employee's home office) (29 C.F.R. § 541.500(b)). There is no percentage limit on non-exempt work. In the highly regulated environment of pharmaceutical sales, the sales reps were engaged in sales even though physicians do not actually purchase prescription drugs from them.

The FLSA broadly defines "sale" to include "... any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." The catchall phrase "other disposition" is most reasonably interpreted to include the sales reps' efforts to persuade physicians to prescribe their company's drugs. *Christopher v. SmithKline Beecham Corp.*, DBA *GlaxoSmithKline* (No. 11-204, June 18, 2012)

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