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This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Staying Legal in Tough Economic Times – COVID-19 Edition

Donations are down; requests for assistance are up. Nonprofits that already operate on a lean budget are tightening the belt another notch or two. Nonprofits have been through it before, but a global pandemic adds even more challenges. Now is not the time to let down your guard when it comes to the legal health of your nonprofit. Here are tips for keeping your organization out of legal trouble while you weather the latest economic downturn.

#1. Don't stop paying your taxes.[1]

With decreased revenue, nonprofits sometimes fall into the trap of not paying employment taxes that are owed to the IRS. Don't do this! The IRS won't be moved by your charitable works; the Service wants its money. Also, board members and executives should know that they can be held *personally* liable for a nonprofit's failure to pay employment taxes. As a related issue, make sure that any one you are treating as an independent contractor is correctly classified as such. Follow the IRS guidelines or seek legal counsel to determine whether a worker is an independent contractor or an employee. Make sure that you are properly withholding and paying employment taxes for anyone who should be treated as an employee.

#2. Be careful when laying off employees.[2]

When laying off employees, you must keep several things in mind to avoid future legal challenges to your decisions. First, prepare a written layoff plan and carefully document layoff decisions. This will help protect you from accusations that your decisions were made improperly. Make sure that the business reason for the layoffs is clear and that the selection criteria for determining who is laid off is clearly defined so that you will have evidence if your decisions are later questioned. Always remember that you cannot make termination decisions based on an employee's race, national origin, sex, age, or any other characteristic protected law. Also, before an employee is laid off, you must check if the employee has an employment agreement

[1] While the Coronavirus, Aid, Relief and Economic Security Act (CARES Act) allows employers to defer the payment of the employer's share of Social Security taxes, the deferred amounts will ultimately have to be paid to the U.S. Treasury by the deadlines or penalties will apply. Further, nonprofits that receive forgiveness for PPP loans under the CARES Act are not eligible for the deferral.

[2] Employers seeking loan forgiveness for PPP loans under the CARES Act should note that the forgiveness amount may be reduced if they fail to retain workers.

and if there is an agreement, check for a certain period of service and for a severance payment. It is important that you consult legal counsel to assist in creating a layoff plan that will be compliant with various applicable laws and to assist you with interpreting any employment agreement that may be in place.

When you implement a layoff, please be aware that non-exempt employees must be paid for all hours they have worked prior to the layoff. For exempt employees, pay is required through the full workweek during which the employee last performed any work. (See #3 below for additional information about these classifications).

Also, be aware that when you lay off an employee, he or she may be eligible for unemployment compensation. How eligibility for benefits is managed in Georgia depends on whether the layoff is temporary or permanent. Please see this information related to partial unemployment claims, which must be filed by the employer, through the Georgia Department of Labor for hour reductions and temporary layoffs or furloughs due to COVID-19. If employees are terminated for lack of work without an expectation that they will be called back to work, the employees may be eligible to collect unemployment benefits. A Georgia Separation Notice must be issued to all employees who leave employment. You can find the Separation Notice by searching the DOL website under Forms and Publications for this notice or clicking this link.

#3. Make sure you pay minimum wage and overtime as required.

As an alternative to layoffs, you might consider retaining your employees but reducing their compensation.[3] Any such compensation reduction program must comply with federal and state wage and hour laws. Bear in mind that reductions in pay may affect the exempt or non-exempt status of a position. In order to be exempt under the Fair Labor Standards Act (FLSA), an employee must satisfy the duties test for the specific exemption, be paid on a salaried basis, and meet the minimum salary requirements. If any of these items change, the employee may no longer be exempt from the minimum wage and overtime requirements of the FLSA. If you decide to lower salaries, make sure that you are still paying at or above minimum wage. Also, don't slack off on paying overtime to all non-exempt employees. If you don't know the difference between exempt and non-exempt employees or haven't carefully considered this classification, seek help. Find more information at the Department of Labor's website.

#4. Keep up to date your insurance premiums.

Insurance is costly but you need it more than ever when times are tough. Be sure to pay all premiums due on general liability, workers' compensation, director's and officer's liability and any other insurance that is vital to your organization.

[3] Employers seeking loan forgiveness for PPP loans under the CARES Act should note that the forgiveness amount may be reduced if they reduce employee pay.

#5. Keep the Board informed and engaged.

Make sure the Board of Directors is well aware of the financial challenges facing the nonprofit and be sure to give them time to respond to those challenges. Board members should meet more frequently, if necessary, and stay on top of any potential problems. For information about board governance in a pandemic, see this article.

#6. Check your contractual obligations.

If a contract (including an independent contractor agreement) becomes too expensive or unnecessary to your business and you want to terminate, be sure to read the termination clause first and understand what risk you face by ending the contract. There may be cancellation fees or other requirements. For more information about Contract Considerations Related to the COVID-19 Outbreak, see this article.

Also, don't use funds from one contract or grant to cover shortfalls in operations or other less-funded programs without properly considering your obligations under the contract and taking any necessary steps.

#7. Renegotiate outstanding debt or upcoming rent.

If you have a mortgage or other type of loan and are having trouble keeping up with the payments, don't avoid your lender. Most lenders would rather renegotiate the debt than foreclose. If your loan is backed by Fannie Mae of Freddie Mac, you may be eligible for mortgage payment or late fee relief. Similarly, if you are unable to make rental payments for your property, don't avoid your landlord. There is a 60-day hold on evictions in the City of Atlanta (but rents for this time must still be paid) and even more grace if your landlord receives certain federal funding. Contact your lender or landlord and see what can be arranged.

#8. Be sure subcontractors are being paid.

If you are in the process of building or renovating, don't get caught between your general contractor and any unpaid subcontractors. Make certain that your general contractor signs a release that he has received payment to pay subcontractors and make sure he pays them. A subcontractor that does not get paid by the contractor can put a mechanic's lien on the property to obtain his payment. Mechanic's liens increase during difficult economic times. Make sure that you have evidence that the owner paid the contractor in order to protect your organization.

#9. Be careful about new fundraising efforts.

Nonprofits look for new and innovative ways to raise money in a bad economy but be aware that there are many laws and regulations for fundraising. For example, Georgia has strict gaming laws governing raffles, door prizes and bingo games. Nonprofits may also consider revenue generating activities but be aware that the IRS regulates unrelated business taxable income (UBTI). The UBTI regulations may require organizations to pay tax on any income (including fundraising income) that is not directly related to their charitable mission. For more information, see this article.

#10. To Merge or Not to Merge?

Combining forces with another organization may be the only way to survive an economic downturn. Although it is important that your organization's mission, programs and culture are sustained, you must consider that merger with another organization may be the key to surviving during a period of fierce competition for scarce resources.

Combined organizations are more likely to attract funding than each organization alone and also experience more efficiency in operations. Attorneys can help with the many legal issues that arise in a merger. PBPA will be hosting a webcast on this topic on May 20, 2020, if you would like more information.

If you have further questions about any of these issues, consult with an attorney.