

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.

Contracts Basics for Nonprofit Organizations

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When you are tirelessly focusing on your nonprofit's mission, the importance of legal contracts may not be one of the first things to cross your mind. Nevertheless, contracts are crucial for any nonprofit organization, both for enforcing your rights, as well as to protect you from liability. This article provides a brief, basic overview of common contracts topics, as well as best practices when entering into contracts. The following information is for informational purposes only, and you are encouraged to seek legal counsel for specific, tailored advice.

What is a contract?

A contract is an agreement between two or more parties to do something, or to refrain from doing something. Examples are purchase agreements and sponsorship agreements. Specific requirements must be met for a contract to be formed. There must be an offer and an unambiguous acceptance of that offer, the parties must mutually assent to the contract having understood the terms (known as a "meeting of the minds"), and the parties must exchange bargained-for legal value (known as "consideration"). Courts generally do not question whether the consideration given by a party is adequate, hence it is common to see legal contracts with a nominal consideration of One Dollar or a similar concept.

When do you need a contract?

While there is no hard and fast rule of when a contract is needed, an important consideration is the protection a formal written contract would provide you. A contract memorializes an agreement between you and another party, preventing or at least mitigating surprises down the road. Regardless of your counterparty's reputation or your history of dealings, circumstances can always change, and having a signed contract would often afford you greater protection in the future by memorializing what happened in the past. Therefore, while contracts are not mandatory, it is good practice to put your agreements in writing rather than relying on verbal promises. This is particularly true when money is being exchanged.

Importantly, certain types of contracts must always be in writing to be legally enforceable. These types of contracts are governed by something called the Statute of Frauds.² The most common categories you are likely to encounter are contracts involving the sale or transfer of real property or goods over five hundred dollars in value; contracts involving the assumption of another party's debt; or contracts that cannot be completed

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² See Uniform Commercial Code, UCC § 2-201.

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within one year. When dealing with these types of contracts, always ensure that the contract is memorialized in writing and signed by all parties to prevent future issues.

Are there situations where a contract is formed unintentionally?

In some cases, courts do not need a written contract to determine that a contract exists, and that a party has certain obligations due to the circumstances. When a contract does not violate the Statute of Frauds discussed above, and the parties have demonstrated mutual agreement to an arrangement, a court may determine that there is an “implied” contract. Such a contract may arise if the conduct of the parties and the surrounding circumstances indicate that an enforceable agreement exists, or to remedy a situation where one party has benefitted unreasonably at the expense of the other party. Because a court may determine that a contract exists without a written agreement, it is vital that your organization enters into written contracts clearly delineating what is expected of each party when you anticipate potential legal issues in the future, or to preempt liability issues. Maintaining documentation of dealings with other parties, especially when there is no written contract, may also reduce risk.

Contracts Best Practices

When entering negotiations with a counterparty, it is important to maintain records of your communications, and have all agreements made in writing. A contract may go through multiple rounds of negotiations and drafts, and standard practice is to redline changes so each party can see what has been changed. Maintaining good document version control makes the negotiation process smoother.

While different types of contracts will have different provisions, there are some important provisions that should be included in most contracts. The items described here are a non-exhaustive list of provisions to include in your contract in addition to clear and accurate language that reflects the arrangement and the obligations of each of the parties, as described above.

First, ensure that each important term has a definition. This can be done either in a designated “Definitions” section of the contract, or included throughout the contract when such a term appears. These important terms should be capitalized, and the definition must be drafted very precisely to avoid any confusion. Once a definition is assigned, the definition should be used consistently throughout the contract.

Second, the contract should include a merger or integration clause, stating that the written contract represents the complete agreement between the parties. This ensures that any terms previously agreed to by the parties, but not included within the contract, become null and void upon executing the contract. This is important because precisely what is agreed upon between parties often changes in the course of negotiations, and may not always be communicated clearly. By including a merger clause, any prior agreements will be superseded by the written contract, reducing your risk. Conversely, if your counterparty gave you a verbal agreement on something, be sure to include what was agreed upon within the written contract. This protects your rights as to what was agreed upon.

Contract Issues and Disputes

Unfortunately, no contract can fully account for the complexity of operating your nonprofit, and contractual issues can occur regardless of prior planning. As such, you should be prepared for unanticipated problems to arise that cannot be solved just by referring to the content of your contracts. When embroiled in a contract dispute, it is imperative to seek legal advice. If you discover that a counterparty has breached a contract, you should assert your legal rights as soon as practicable. Statutes of limitations differ by state, but if you wait too long to assert a breach of contract claim, you could lose the ability to recover damages.

A well-drafted contract that anticipates future issues and proactively addresses such issues is the best way to reduce the likelihood of costly legal problems. Be sure to also consider issues that have become increasingly prominent in recent years. Potentially overlooked areas for nonprofits are intellectual property and data privacy. Your logo or branding; proprietary information; industry know-how; and any literature or writings are all important assets to your organization, and there should be careful consideration of how to protect and govern the use of such assets by others. For example, when partnering with other organizations, clauses on how proprietary information is shared between you and your partner, or when your partner is allowed to use your name or logo, will contribute to easier collaboration by letting each party know their rights and obligations.

Conclusion

Contracts are an important tool for nonprofits, and entering into formal contracts rather than ad-hoc verbal arrangements is an important risk management practice. Finding a trusted legal advisor to help you navigate contractual issues can provide you with greater clarity and confidence as your nonprofit works to accomplish its objectives. If you have questions about contracts or entering into a contract, please contact your PBPA attorney.