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Nonprofit Board Summit

Risks and Opportunities Through the Legal Lens

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Question #1

How would you grade your board's understanding of your organization's mission?

- A
- B
- C
- D

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Question #2

Over the course of the past year, many traditional avenues for non-profits to raise money (such as annual galas and other public events) have shrunk significantly, and as a result, many non-profits have seen their donations and other funding sources decline. When considering ways to "close the gap" on funding requirements by changing focus or activities of the non-profit, the most fundamental question to ask is:

- A) Will the organization be undertaking activity or a focus that would otherwise qualify it for tax-exempt status?
- B) Can funds raised in support of this new activity or focus be utilized for both this "new" activity and for the "old" activity conducted by the organization?
- C) Will the new activity or focus of the organization be consistent with the organization's mission?
- D) Can the organization "join forces" with other organizations, including for profit entities, to increase visibility and access to additional funding sources?

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Scenario 1

- **“The work we do was conceived and fashioned in a different world. Given the realities of today’s world, we need to change our focus, redirect our efforts so that we are addressing today’s problems as opposed to yesterday’s, and/or do things very differently.”**

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Scenario 1: Duty of Obedience

- **For a nonprofit, the duty of obedience requires that the organization always act within its purposes to further its mission**
  - The source of the mission of the organization is the organization’s Charter (or Certificate of Incorporation); this mission is the organization’s “polestar,” serving as the central focus and the goal which the organization is obligated to pursue.
    - The statutory duty – a fiduciary obligation – to “obey” the mission must not be confused by other articulations of the organizational goals, such as those that may be found in:
      - Mission Statement (external & internal)
      - Employee / Director Handbook
      - Agreements with grantors, donors, and fundraising materials
      - Board-developed mission statements

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Scenario 1: Duty of Obedience

- **The Duty of Obedience does not prevent a nonprofit from evolving and changing activities and focus to remain relevant and respond to today's challenges**
  - However, the Duty DOES require that any such evolution or change be measured against the mission as stated in the organizational Charter
    - Board should consider whether any change in focus deviates from the overall mission (it may not)
    - Duty of obedience does not prohibit a change in the way the organization pursues its mission. In addition, it is possible for an organization to amend its mission
      - As discussed later, when considering evolving or changing, an organization also needs to consider the impact on its status as a tax-exempt organization
    - Must keep prospective donors apprised of any changes in mission so that such donors know that their money is going toward programs and activities they intend to support

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Scenario 1: Fund Restrictions

- **Limitations on use of donations can also impact an organization's ability to change focus**
  - General Restrictions: Timing of Donation
    - In connection with any change to the organization's mission, directors should take care in handling grants and donations – which must be used for the purposes for which they were received *at the time of the donation*
      - Changes to the mission after donations are accepted may necessitate contacting donors to explain the change to ensure that there are no objections and funds do not need to be returned
      - Changing activities and focus of the organization that do not require a change to the mission of the organization may not require notice and check-in

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Scenario 1: Fund Restrictions

- **Limitations on use of donations (cont’d)**
  - Restricted Funds
    - Restricted funds are funds set aside for a particular purpose as a result of designated giving. Restricted Funds cannot be used for anything other than that designated purpose.
    - Typically, restrictions are permanent, and restrictions may be removed *only with the consent of the original donor*
    - Nonprofits should keep donors apprised of any changes in mission and, if applicable, explain to donors how donations are being used for programs and activities they intended to support

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Scenario 1: Protecting Tax-Exempt Status

- **Are the new activities consistent with what the organization told the IRS?**
  - To qualify for tax-exempt status, an organization's activities must further exempt purposes
    - IRS formally recognizes tax-exempt status based on past, present, and planned activities of the organization, as described in an application for tax-exemption (a Form 1023)
      - Thus, recognition of exempt status confirms that the activities described in the Form 1023 further exempt purposes, in the IRS' view
      - If an organization engages in new activities that represent a "substantial change in the organization's character, purposes, or methods of operation," the IRS may conclude that such activities do **not** further exempt purposes -- jeopardizing exempt status
      - Changes in activity need to be reported to the IRS on its annual return if such changes are "significant." The IRS can be expected to closely scrutinize new activities that reflect a departure from the charitable activity that formed the basis of the organization's exempt status.

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Scenario 1: Protecting Tax-Exempt Status

- **Are the new activities consistent with what the exempt organization told the IRS? (Cont'd)**
  - IRS Private Letter Ruling
    - In advance of changing activities, organizations may request a "private letter ruling" from the IRS (a "PLR") confirming that such changes will not jeopardize exempt status
    - Advisable if the organization intends to begin a novel or unique charitable program, for which there is a lack of clear legal guidance recognizing such program as furthering exempt purposes; or if there otherwise is doubt as to whether the contemplated activities are sufficiently "charitable" in nature
    - Unfortunately, time and expense involved in receiving a PLR may be impractical if the organization intends to move quickly to address a new, emerging need
    - If no PLR is sought, the organization would report any significant changes on Form 990 -- and hope the IRS does not take issue after the fact

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Scenario 1: Protecting Tax-Exempt Status

- **Be careful about getting "political"**
  - Many of today's most pressing societal issues are mediated in the political realm. Exempt organizations may wish to apply their resources towards helping to solve these issues.
    - To the extent exempt organizations seek involvement in the political topics of the day, they should be aware of the following constraints on their ability to so…

Scenario 1: Protecting Tax-Exempt Status

- **Be careful about getting "political"**
  - Prohibition on participating/intervening in political campaigns
    - 501(c)(3)'s (the most common form of exempt organization) cannot participate or intervene in political campaigns on behalf of or in opposition to candidates, no exceptions
      - Cannot publish or distribute written statements, nor make oral statements (e.g., at official functions of the organization), on behalf of or in opposition to any candidate
      - Facts and circumstances test – does the organization's conduct either promote or undermine a specific person running for elected office?
  - Attempting to influence legislation cannot be a "substantial" part of 501(c)(3)'s activities
    - Generally, this applies to attempting to persuade legislators to enact or not enact a particular law, or encouraging their constituents to do so

Scenario 1: Protecting Tax-Exempt Status

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- **Be careful about getting "political"**
  - On the other hand, 501(c)(3)'s may freely take positions on public policy issues, including those on which candidates disagree
    - Can produce educational materials on public policy issues; hold educational meetings; promote a general public policy position not tied to a specific legislative action currently under consideration
    - Must be careful not to do so in a way that indirectly identifies the issue with any particular candidate, though
  - Note – political activities conducted by a member or representative of an organization strictly <u>in their individual capacity</u> are OK
    - But should clearly be in such person's individual capacity and not in any way tied to the exempt organization

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Scenario 2

- **"We are not set up to be sustainable. We simply cannot raise enough money to support the work we do the way we need to do it. The work we do is important and really needs to continue, but we need to figure out a way to combine forces with another organization in a way that allows us to worry less about making ends meet and more on advancing our charitable mission."**

Scenario 2:
Nonprofit Collaborations

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- Like for profit companies, nonprofits often collaborate with other organizations to pursue a common mission and/or to achieve a common goal. Collaboration arrangements can take many forms, from somewhat informal working relationships, to contractual or other legal obligations binding upon them. These arrangements may include:
  - **1. Affiliation agreement/strategic alliances**
    - Generally, a relationship designed to leverage the strengths of two or more organizations to achieve a common goal
    - Can provide an avenue for for-profit and non-profit entities to work together
    - Less formal and while there may be contractual obligations, those will only arise out of a written agreement
    - Sometimes these are loosely referred to as "partnerships", but they are not carried out through a jointly-owned legal entity
  - **2. Partnerships and Joint ventures**
    - Legal relationship where parties jointly own/control an enterprise or program; the partnership or joint venture is ordinarily a separate legal entity
      - Under state law, certain contractual relationships can be viewed and treated as partnerships
    - Can impose duties on the partners beyond those expressed in legal documents (i.e., fiduciary duties)
    - Generally, partners will share in the successes and costs of the joint venture in proportion to their interests in the joint venture

Scenario 2: Nonprofit Collaborations

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- **3. Mergers and Acquisitions**
  - The legal combination of two or more entities into a single organization (which may include a number of different legal entities)
  - Increasing pressures for nonprofits to merge when financial resources are constricting
  - Mergers can often achieve efficiencies by eliminating redundancies and achieving greater economies of scale
  - May help organizations more effectively achieve organizational goals and increasing collective impact

- **4. Spin-out**
  - The separation of a business, unit or program of an organization into a separate and independent organization
  - The spun out business / program likely will be housed in a new entity, typically a nonprofit corporation. This new entity would not be tax-exempt. Thus, prior to spinout (or after, if there is a fiscal sponsorship arrangement in place at the time of the spin), the new, independent organization may wish to seek its own, separate tax-exemption.
  - Occasionally can increase opportunities to the spun out organization by allowing it to separately seek grant and other funding that my be limited as a program of another entity

Scenario 2: Nonprofit Collaborations

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- **5. Fiscal Sponsorship**
  - Typically, charitable contributions are given to the fiscal sponsor (a tax-exempt entity), which then grants them to a non-tax exempt entity or project to support the cause
  - May be used by newly formed organizations that need to raise money during the start-up phase, before they are recognized as tax-exempt
  - A fiscal sponsorship offers a way for a cause to attract funding for its operations that will, because of the relationship with the fiscal sponsor, be tax-deductible to donors
    - In addition to tax-deductibility, also permits the sponsored project to receive funds (indirectly) from private foundations or community funds, that often cannot or do not make grants to entities without tax-exempt status
  - Maintaining some degree of control and supervision over the donated funds is important for a legitimate fiscal sponsorship arrangement
    - If the exempt organization does not exercise sufficient control such that it is a "mere conduit," the donor's funds could be considered to have been transferred directly to the non-exempt entity and the donation would not be tax-deductible
  - It is important that the missions of the sponsored organization and the fiscal sponsor be consistent
- In all collaborations, it is important to consider whether the collaboration will impact the nonprofit's status for tax-exempt law purposes and whether the collaboration will cause the nonprofit to incur tax

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Question #3

Nonprofit organizations often team up with non-charitable partners whose goal in the collaboration is to make money. For example, a cancer research charity wants to go into partnership with a pharmaceutical company to develop a cancer treatment. What would be a valid reason for the charity to be part of such a collaboration?

- A) The charitable organization wants to make money from the jointly conducted activity
- B) The for-profit partner provides access to sources of funding otherwise unavailable to the charity
- C) The charity believes the collaborative activity is a good way for it to achieve its charitable mission
- D) Collaboration with the for-profit partner provides more business-like management that enhances the charity’s prospects to successfully fulfill its mission

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborations with for-profits**
  - It has become increasingly common for tax-exempt organizations to collaborate with for-profits, generally (from the exempt organization's perspective) for one or both of the following reasons:
    - The activities carried out in collaboration with the for-profit will advance exempt purpose(s) in their own right (e.g., curing disease), and the exempt organization simply can't do it alone
      - Access to the for-profit's capital, networks and business / management expertise are often the key draws for exempt organizations
    - The planned activity will (hopefully) create a reliable, sustainable source of funds for the exempt organization that it can use to pursue its charitable goals
      - Charitable donations, grants and government funding may not be sufficient to accomplish the organization's goals and, as many learned in 2020, availability can be unreliable and/or unpredictable

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - Typically, collaboration with a for-profit takes the form either of an affiliation agreement / strategic alliance, or it may rise to the level of a partnership / joint-venture
  - When nonprofits engage in such collaborations, a key concern will be whether the collaboration will jeopardize the organization's tax-exempt status
    - Additionally, consider impact on status as a public charity vs. private foundation and potential for incurring "unrelated business taxable income"
  - The following slides introduce certain of the key tax-exempt law doctrines that may be implicated when collaborating with a for-profit

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - The "Operational Test" –
    - To qualify for and maintain tax-exempt status, an organization must at all times be engaged "primarily" in activities that further exempt purposes
      - *For example, charitable, religious, scientific, or educational purposes*
    - Although somewhat inconsistent with the meaning of the word "primarily," this has been interpreted to mean that the organization may only engage in activities not furthering exempt purposes to the extent such activities are "insubstantial" to the organization

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - No Private Inurement –
    - The tax code provides that "no part of the net earnings of [an exempt organization may] inure to the benefit of any private individual or shareholder"
      - Essentially, this means that none of the income or assets (construed very broadly) of a tax-exempt entity may directly or indirectly provide undue benefit to an individual or entity who has a close relationship with the organization, or some aspect of control over the organization or its assets
      - Typically this includes founders, directors, trustees, officers and key executives, and family members of, and entities controlled by, these persons

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - No Private Benefit –
    - An outgrowth of the "operational test," the organization cannot provide a benefit to anyone (not just insiders) outside of the charitable class it serves, unless such benefit is "incidental" to the accomplishment of exempt objectives
      - A private benefit is incidental if it is quantitatively insubstantial compared to the benefit provided to the charitable class and if the exempt objective cannot be achieved without necessarily benefiting certain individuals privately

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - When an exempt organization engages in a collaboration or JV directly with a for-profit entity, its activities will be scrutinized for compliance with the foregoing restrictions
  - Moreover, where the activities of a JV are housed in a legal entity that is not treated as a corporation for tax purposes (such as an LLC or limited partnership that does not elect corporate status for tax purposes), the activities of that JV are generally attributed to its equity holders
    - Thus, when considering whether the exempt organization is in compliance with the tax law restrictions applicable to its activities, the activities of the JV will be considered to be the activities of the exempt organization
  - To avoid activity attribution, the JV could (1) be housed in a corporation (for tax purposes) or (2) owned or engaged in by the exempt organization through a subsidiary corporation (a "blocker")

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - Case Law & IRS Guidance –
    - With respect to JVs with for-profits (carried out either directly or in an entity that was not a corporation for tax purposes), guidance on when the JV will, and will not, compromise the organization's tax-exempt status has been developed in case law and, most recently, in two IRS Revenue Rulings; however, such guidance is limited, incomplete and somewhat perplexing
    - The framework described in the two IRS Revenue Rulings – the most recent sources of guidance which each attempted to synthesize the case law preceding them – generally differentiates between "insubstantial" JVs and "substantial" JVs, as described on the following slides

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - Case Law & IRS Guidance –
    - **Insubstantial JVs:** If the JV is "insubstantial," exempt status is not jeopardized by participation in the venture (taken alone), even if the JV activities do not advance exempt purposes
    - **Substantial JVs:** On the other hand, if the JV is more than "insubstantial," it may only be engaged in to the extent it primarily advances exempt-purposes (i.e., charitable goals must trump profit motives), and the exempt organization must maintain ultimate control over the venture
  - Additionally the terms of the venture should be commercially reasonable / negotiated at arm's length to avoid running afoul of the private benefit and (if applicable) the private inurement rules
    - This requires that full, fair-value is provided for any assets or services provided, directly or indirectly, by the exempt organization
    - Applies not only to JVs, but to any form of collaboration between an exempt organization and a for-profit

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - Case Law & IRS Guidance –
    - Unfortunately, IRS guidance is unclear as to what constitutes a "substantial" vs. "insubstantial" JV
      - Is "substantial" measured by a fixed dollar amount?
      - Does the size of the organization matter?
      - Does the organization's percentage ownership / involvement in the JV play a role?
    - Although not expressly laid out in such guidance, it is possible to interpret "substantial/insubstantial" as referring to the *relative* "size" of the JV activities – as measured by the time, attention and assets devoted to it, and the revenue generated by it – as compared to the total time, attention and assets that the exempt organization devotes to its activities as a whole, and as compared to its overall revenue, respectively

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - Case Law & IRS Guidance: Examples –
    - The IRS has held that a JV between a university and a for-profit entity that would provide off-campus training seminars to elementary and high-school teachers was an "insubstantial" JV of the university
      - Though not explicit in the ruling, it can be inferred that the assets and time of the university devoted to the JV constituted a very small portion of the university's total assets and activities
    - On the other end of the spectrum, the IRS has made clear that a JV between a hospital and a for-profit entity – where the hospital contributed all its assets to such JV – was (obviously) considered a "substantial" JV of the hospital

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - Case Law & IRS Guidance –
    - The available guidance leaves us with the following benchmarks: a JV that constitutes *the entirety* of the organization's activities and assets is "substantial," while a JV that is a very small component of the organization as a whole is not
      - Unfortunately, little guidance exists as to where the line is between these two extremes – or whether there is a line
    - That said, guidance in the non-JV context suggests that "substantial" may be well below a 50% threshold (e.g., an outlay of 33% of revenue on non-exempt purposes constituted "substantial" non-exempt activities)
    - Case law may also support the view that the test is qualitative rather than quantitative in nature – specifically, one should ask, does the activity *call into question whether the organization as a whole is truly focused on charitable (or other exempt) goals?*

Scenario 2: Collaborating with For-Profits – Impacts on Tax-Exempt Status

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- **Collaborating with for-profits (Cont'd)**
  - Case Law & IRS Guidance –
    - Often, the conditions that must be present for a "substantial" JV to not risk exempt status are not commercially feasible, given that for-profits may not be willing to enter a JV that expressly prioritizes charitable ends over profit *and* which gives the exempt organization ultimate control over the venture
    - As a result, unless a JV is clearly "insubstantial," many exempt organizations will "block" the JV (i.e., house the venture in a corporation or own their interest or otherwise engage in the venture through a corporation) so that the activities of the JV are not attributed to the exempt organization
      - The applicable corporation would not qualify for tax-exempt status and would pay tax on the income of the JV; thus, although this protects tax-exempt status, it is an imperfect solution

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Scenario 3

- **"Sometimes it feels like we are not prepared for the evolving world, that we are set up for yesterday but not for tomorrow. Is there a way to be better at that?"**

Scenario 3: Duty of Care

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The Duty of Care requires Board members to act with the diligence, care and skill an ordinary prudent person would exhibit in similar circumstances

- Board members must be well informed and diligent
- Inquire when appropriate – be alert to “red flags”/irregularities
- Establish internal controls – “follow the money”
- Decision-making must be thorough – discuss actions, including costs and benefits; consider alternatives
- Set clear expectations to increase accountability
- Encourage candor and diversity of opinion
- Hold management accountable

Scenario 3: Planning for tomorrow

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- **Checklist for occasional (2-5 year) board or committee tasks**
  - Risk management and scenario planning
  - Review and approve strategic and long-term plans
  - Consider board refreshments tools: age and term limits, rigorous self-evaluation
  - Succession planning for directors and officers; Review of board size and composition
  - Evaluate governance and policy documents
  - Evaluate committees: structure, charters, authority, membership and chairmanship
  - Review mission statement (consider changes in charter and Form 990 as needed)
  - Review bylaws: board size; board composition; “constituency” directors; board leadership; committee structure and operations; staff positions

Scenario 3: Planning for tomorrow (cont'd)

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- **Look Backward**
  - Review financial statements and Form 990 disclosure
  - Oversee audit
  - Review prior budget vs. actual performance
  - Follow-up on prior requests and discussions
- **Look Now**
  - Monitor: corporate performance against plans and budgets; fundraising activities; investment performance and liquidity
  - Review any "red flags" – listen to your intuition
  - Monitor & balance constituent relations
  - Delegate to committees
  - Delegate to management and establish limitations on management's authority
- **Look Forward**
  - Review and approve strategic planning, material capital allocations, budgets and projections
  - Select, monitor, evaluate, compensate & replace (when necessary) senior management
  - Monitor changes in best practices, legal and regulatory developments and industry pressures

Scenario 3: Employment Law Considerations in a Work-From-Home (WFH) Environment

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- **What will your organization's "new norm" be re: WFH?**
  - Whatever it is, it should be communicated, and applied consistently
- **WFH accommodation requests (disability or otherwise)**
  - If in-person is essential, update job descriptions to so state and indicate why
  - Funnel requests through the appropriate channels to ensure consistency
- **Work hours**
  - Enforce timekeeping policies for hourly employees
    - Avoid WFH leading to off-the-clock (or unauthorized OT) work
  - Beware of WFH leading to expanded work hours, employee dissatisfaction
  - Consider how best to monitor productivity when employees WFH

Scenario 3: Employment Law Considerations in a Work-From-Home Environment (cont'd)

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- **Impact of WFH on performance, mentoring and professional development opportunities, etc.**
  - Consider unique WFH challenges when making employment decisions (promotions, terminations, evaluations, compensation)
  - Risk of legal claims related to childcare responsibilities, lack of opportunity for minority employees, etc.
- **Protection of confidential information**
  - Speak with IT re: any cybersecurity concerns when employees WFH
  - Be mindful of phone or Zoom discussions when others may be within earshot
- **Update handbook policies to reflect your organization's "new norm" re: WFH expectations and procedures**

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Scenario 4

- **“We struggle every year with our budget, and this year it is as bad as ever. There are things we do so well; can’t we start charging (or charging more) for what we do, or otherwise monetize the work we do or the assets we have developed?”**

Scenario 4:
Duty of Obedience

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- **A nonprofit must act within its mission even as it develops new approaches to its work and new ways to raise money**
  - Any new funding or monetization approaches should be considered in light of organization's mission, including the following considerations:
    - Whether changes will take organization away from its stated mission and core function
    - Reputation of organization and perception by donors of new activities or focus
    - Governing documents and legal requirements (e.g., federal, state or local laws) related to new changes or monetization approaches
  - Organizations may charge more for work or services they provide if the work or services remain consistent with its mission; but must ensure that the organization does not morph into one that is more commercial in nature than charitable

Scenario 4: Monetization of Resources – Key Tax Considerations

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- **Key tax considerations when monetizing resources**
  - Operational test -
    - As described earlier, exempt organizations must be operated “primarily” for exempt purposes; i.e., no more than an insubstantial part of their activities may further non-exempt (e.g., commercial) purposes
      - Similar to concerns that arise in the JV context, to the extent an activity does not further exempt purposes – as may well be the case when the organization’s resources are monetized – such activities must be “insubstantial” to not run afoul of the operational test. As in the JV context, the line here is unclear and thus conservatism is generally recommended.
  - No private benefit or private inurement –
    - Ensure that full, fair-value is provided for any assets or services provided, directly or indirectly, by the exempt organization
      - Consider also the potential applicability of excise taxes on “excess benefit” transactions by public charities and acts of “self-dealing” by private foundations

Scenario 4: Monetization of Resources – Key Tax Considerations

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- **Key tax considerations when monetizing resources**
  - **Taxation of "UBTI"**
    - If the organization's resources are monetized, the exempt organization could be subject to tax (at regular corporate rates) to the extent such monetization constitutes a trade or business regularly carried on by the organization that is unrelated to its exempt purposes
      - Trade or business = activity carried on for production of income from sale of goods or performance of services; generally requires a profit motive
      - Regularly carried on = frequent and continuous, in a manner comparable to commercial organizations
        - One-time activities generally don't qualify, but intermittent activities carried on at regular intervals may (e.g., seasonal activities)
      - Unrelated = where the business activity itself *does not* have a causal relationship to the accomplishment of exempt purposes
        - Focus here is on the activity itself; the fact that the income produced by the activity will help the organization accomplish exempt purposes is not relevant

Consequences of UBTI: Tax cost, compliance costs, possible audit exposure, and potentially invites greater IRS scrutiny of the organization's activities (e.g., w/r/t whether it is meeting the operational test)

Scenario 4: Monetization of Resources – Key Tax Considerations

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- **Key tax considerations when monetizing resources**
  - **Public Charity vs. Private Foundation Status**
    - 501(c)(3)'s are either "public charities" or "private foundations", and public charities enjoy certain advantages over private foundations –
      - Public charities enjoy fewer restrictions on deductibility of donations, fewer operating restrictions and reporting requirements, and the inapplicability of certain excise taxes
      - Private foundations, on the other hand, are subject to the following additional rules:
        - 1.39% excise tax on net investment income
        - Must meet minimum levels of distributions or spending on specified charitable activity
        - Ownership of equity in corporations, partnerships and other entities is restricted
        - Enhanced restrictions on types of investments the organization may make
        - Certain forms of spending otherwise available to charities are prohibited
        - "Self-dealing" tax imposed on transactions between the organization and certain related persons or substantial contributors

Scenario 4: Monetization of Resources – Key Tax Considerations

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- **Key tax considerations when monetizing resources**
  - **Public charity or private foundation?**
    - Public charities often qualify for such status on the basis of receiving a substantial amount of their support from the public or from governmental bodies (generally, 33 1/3% or more)
    - Income from the monetization of resources would constitute non-public support for purposes of this 33 1/3% test, and therefore could adversely impact public charity status in the long-run

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Scenario 5

- **"It seems like there are so many ways organizations are getting into trouble as a result of workplace issues. Sexual harassment, hostile environment, micro-aggressions and worse biases, failure to diversify, conflicts between an employee's privacy and her duty to the employer, and more. And now, with the normalization of work-at-home, on top of the challenges of just keeping everything together organizationally, we also are confronting our duty or desire to monitor and assist with employee health issues. Is there a way for us to get ahead of this?"**

Scenario 5: Employment Law Duties and Constraints

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- **Heightened awareness and new laws concerning workplace issues**
  - High-profile lawsuits regarding workplace issues such as pay equity (e.g., USWNT) and sexual harassment (e.g., Fox News)
  - State and local bans on asking applicants about salary history
  - State laws (e.g., NY) changing the standard for unlawful harassment; trainings and written policies required
  - Public backlash against arbitration agreements and NDAs, and state legislative activity in these areas
  - Employees more emboldened to “speak up” on any issues

Scenario 5: Employment Law Duties and Constraints (cont'd)

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- **Workplace impact of national reckoning on systemic racism issues**
  - Diversity, Equity and Inclusion initiatives
    - Increasingly commonplace and expected
    - Supporting employees during difficult times
    - Enhancing opportunities for advancement
    - Changing Executive Orders related to diversity training
  - Public pressure on organizations to address inequalities
    - E.g., NYS Retirement Fund campaign for public disclosure of workforce data
  - Possibility of increase in race discrimination claims
    - "Traditional" race discrimination claims
    - Reverse discrimination claims (backlash against DEI initiatives)

Scenario 5: Corporate Governance Considerations

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- **Board duty of oversight**
  - General "duty to monitor" ("*Caremark* duties" after a Delaware Supreme Court case):
    - A good faith effort to exercise the board's oversight function
      - Implementation and oversight of information and reporting systems that are "reasonably designed" to provide the board timely, accurate information sufficient to enable judgments
- **Business judgment rule** protects directors as long as they act reasonably, in good faith and in the organization's best interest
- **Governance/oversight role as distinguished from management**
  - The board oversees the organization's strategies and material risks and opportunities, while day-to-day company operation's are delegated to management

Scenario 5: Board Diversity

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- **Board Composition**
  - Look critically at the board's composition, taking into consideration the current make-up of the board, as well as the skills and attributes necessary for the future of the nonprofit
    - Consider how board diversity and composition reflect the diversity of the community the nonprofit serves
    - Enhance diversity of the board through recruitment and board succession planning
  - Support diverse viewpoints and respectful discussion in the board room
- **Board Oversight**
  - Review how the board oversees and monitors diversity, equity and inclusion ("DEI") at the nonprofit
    - Allocate DEI oversight to a current board committee or form a new committee or sub-committee dedicated to DEI
  - Provide board education sessions and resources on DEI matters
  - Review and update, as necessary, governance documents and board policies in light of DEI issues