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TOP TEN RISK MANAGEMENT TIPS FOR CHARITIES AND NFPS

By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent

tcarter@carters.ca
1-877-942-0001

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BARRISTERS . SOLICITORS . TRADEMARK AGENTS
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville

www.carters.ca www.charitylaw.ca www.antiterrorism.ca

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>CSAE Trillium's 2022 Summer Summit Thursday - July 14, 2022</p>  
<p>Top Ten Risk Management Tips for Charities and NFPs</p> <p>By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent tcarter@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p>	
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2

**OVERVIEW OF THE TOP TEN TIPS FOR EFFECTIVE
LEGAL RISK MANAGEMENT**

- 1 Get to Know Your Organizational and Legal Documentation
- 2 Know Who is in Charge
- 3 Check Insurance and Risk Transfer Documentation
- 4 Monitor Third Party Use of Property
- 5 Watch Out for Wasting IP Assets

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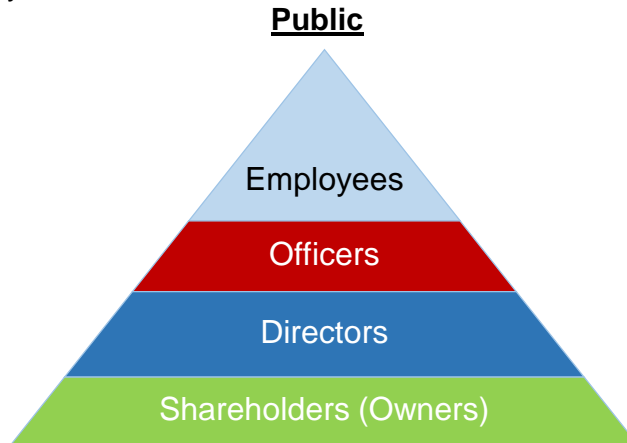
- 6 Watch for Privacy, Data Breaches and Anti-spam Compliance Issues
- 7 Monitor Employee and Volunteer Liability Risks
- 8 Be Prepared for a CRA Audit
- 9 Ensure Compliance With Donor Restrictions
- 10 Develop an Effective Crisis Management Plan

RESOURCE MATERIALS FROM CARTERS

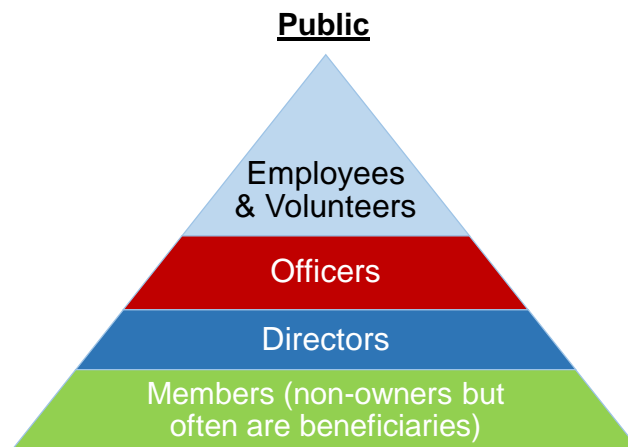
- See Legal Risk Management Checklists dated February 2022
 - For Ontario-Based Charities
<https://www.carters.ca/pub/checklst/Charity-Checklist.pdf>
 - For Ontario-Based Not-For-Profits
<https://www.carters.ca/pub/checklst/NFP-Checklist.pdf>
- See monthly Charity & NFP Law Update for updates in the law and legal risk management issues at www.carters.ca
- See Charity & NFP Law Bulletin No. 398 “*Charity and NFP Legal Check-Up: 10 Tips for Effective Legal Risk Management*” by Terrance Carter and Jacqueline Demczur dated February 23, 2017
<http://www.carters.ca/pub/bulletin/charity/2017/chylb398.pdf>

COMPARISON OF DIFFERENT TYPES OF CORPORATIONS

- **Share Capital Corporations**
 - Business purpose is to make a profit
 - Pays income tax



- **Not-for-Profit Corporations**
 - Not-for-profit purpose
 - Tax exempt as non-profit organizations



- **Charitable Corporations**
 - Not-for-profit corporation with a charitable purpose akin to a public trust
 - Tax exempt
 - Can issue tax receipts for donations and receive gifts from charities



WHY SHOULD YOU CARE ABOUT LEGAL RISK MANAGEMENT?

- Charities and Not-for-Profits (NFPs) that provide programs to their members and stakeholders are facing increasing challenges and risks in delivering needed goods and services
- This is in part because of a more litigious environment (e.g. class actions), as well as a more complicated regulatory context in which to operate
- In facing these challenges, charities and NFPs need to be familiar with an increasing array of legal requirements and related risks
- In order for charities and NFPs to comply with and avoid exposure to legal liability, it is important that they undertake regular legal risk management check-ups
- The key to managing legal risk is to implement effective legal due diligence and to do so on a regular basis

- Charities and NFPs often experience challenges adequately addressing legal risks for many reasons:
 - Failure to maintain corporate records
 - Inadequate governance policies
 - Increasingly complicated tax issues
 - Incomplete maintenance of financial books and records
 - Increasing operational risks, such as physical, emotional, and sexual abuse involving children and vulnerable persons
 - Violation of privacy rights involving donors, clients, employees and volunteers
 - Increasing risk of data breach and cyber attacks
 - Failure to comply with anti-spam requirements
 - Inadequate receipting practices by registered charities
 - Failure to comply with fundraising requirements by charities

- Due diligence in addressing risk management issues requires the charity or NFP to address the following questions:
 - What is the legal and tax status of the charity or NFP?
 - What are the applicable legal requirements that apply?
 - How can those legal requirements be most effectively met?
- Due diligence needs to be undertaken in a purposeful way in order to manage risks and avoid legal liability before they occur
- A due diligence approach involves a shift from passivity to pro-active legal risk management
- The “top ten tips” that follow identify a selection of key issues and tips that charities and NFPs may want to consider in order to implement effective legal risk management
- However, specific legal advice should be sought before deciding what to do

TOP TIP #1: GET TO KNOW YOUR ORGANIZATIONAL AND LEGAL DOCUMENTATION

- What are the applicable organizational and legal documentation of the charity or NFP?
 - Develop an inventory of key legal documents
 - Maintain central location of key documents and/or digital copies
- Identify key organizational documents if the charity or NFP is organized as an unincorporated association
 - Constitution and any amendments
 - Policies and procedures, if applicable
 - Minutes of the board and membership meetings
 - Consider becoming incorporated

- Identify key organizational documents if the charity or NFP is a corporation
 - Letters patent/articles of continuance and supplementary letters patent/articles of amendment if applicable
 - By-laws
 - Minutes of board and membership meetings
 - Minutes of committees
 - Directors, members and officers registers
 - Mission statement, if applicable
 - Membership covenant, if applicable
 - Copies of government filings
 - Governance policies, e.g. conflict of interest and confidentiality policies

- Identify other key legal documents
 - Leases, deeds and mortgages
 - Agency, partnership, association, contracts for service and joint venture agreements
 - Funding and grant agreements
 - Business names, trade-marks, domain names
 - Intellectual property (IP) license agreements
 - Operational risk management policies, e.g. vulnerable persons and volunteer policy statements
 - Privacy policy
 - Anti-spam policy
 - Investment policy
 - Charitable registration number, CRA registration letter, T3010s and correspondence from CRA, where applicable
 - Membership agreements in federated, national and international structures

- Questions to ask when reviewing key documents of an incorporated charity or NFP
 - Letters patent/articles of incorporation or continuance
 - Is the name in the letters patent/articles of incorporation or continuance the correct name of the charity or NFP and is the name consistent with the objects/purposes?
 - Has there been “mission drift” from the original objects or purposes of the charity or NFP?
 - Are the current activities of the charity or NFP authorized by its corporate objects/purposes?
 - For those charities or NFPs incorporated in Ontario, are they taking steps to transition to the Ontario *Not-for-Profit Act, 2010* (“ONCA”) within the three years, i.e. by October 18, 2024
 - See December 8, 2021 ONCA Webinar and CSAE presentation dated May 18, 2022 for details www.carters.ca

- General operating by-law:
 - Is there a conflict between the by-law and the letters patent/articles of incorporation or continuance concerning the objects/purposes or dissolution clause of the corporation?
 - Does the by-law reflect the actual organizational and operational structure of the charity or NFP?
 - Does the by-law reflect changes to applicable corporate legislation?
 - Does the by-law include an adequate indemnification and D&O insurance provision that has been authorized in accordance with the requirements under the Charities Accounting Act (Ontario)?
- Was initial corporate organization of the charity or NFP done correctly including a proper transfer of assets?
 - If not, need to consult with legal counsel for advice

TOP TIP #2: KNOW WHO IS IN CHARGE

- Do the members of the board of directors understand their fiduciary duty to further the purposes of the charity or NFP?
- Who is in charge of running the charity or NFP?
 - Where does the actual *de facto* control of the charity or NFP actually lie?
 - Is it with the board, a committee of the board or senior management?
 - Is authority of the board and the liability faced by the board recognized and acknowledged by senior management?
 - Are there clearly defined lines of authority defining the different roles of the board and senior management?
 - Has senior management had to take on excessive authority and become unnecessarily exposed to liability?
 - Is there a constructive relationship of mutual respect and co-operation between senior management and the board?

- Are there clearly stated qualification requirements in becoming a director?
 - Have those qualification requirements been communicated?
 - Have the applicable qualification requirements been met by each director in writing?
 - Are there conflicting qualifications to be a director referenced in the by-laws, articles of incorporation or board policies?
- Has the register of directors been maintained and are changes in director information being sent to the relevant government authority?
- Does the board meet on a regular basis?
- Do all directors regularly attend board meetings?
- Has an audit committee been established to review financial statements and the auditors' report?

- Are there effective policies in place to address board governance e.g. conflict of interest, confidentiality, code of conduct, as well as succession planning, recruitment, orientation, etc.?
- Are there overlapping board memberships that require a more nuanced conflict of interest policy?
- Is there adequate communication of board responsibilities for existing and new board members?
 - Is there a board binder of all organizational documents and inventory of assets, as well as an explanation of the general operations of the charity or NFP and the board of directors' legal duties and liabilities?
 - Are all board members provided with regular updates on changes in the law as part of their fiduciary obligations?

TOP TIP #3: CHECK INSURANCE AND RISK TRANSFER DOCUMENTATION

- Has the charity or NFP maintained a historical record of its insurance policies in the event of a claim?
- Has the charity or NFP provided full written disclosure of all risks to its insurer to avoid possible denial of coverage?
- Does the charity or NFP request regular written reports from its insurance broker on existing coverage, who is covered, exclusions from coverage and recommendations to enhance coverage?
- Is there a regular review of the adequacy and extent of general liability coverage and property insurance, as well as employment practices liability coverage?
- Is there directors' and officers' liability coverage in place and is it reviewed regularly to ensure its adequacy?

- Is there need for special endorsements to extend insurance coverage to “out of the ordinary” activities, such as non-owned vehicles, errors and omissions, social media, cyber attacks and data breaches, or incidental medical malpractice?
- Is there a vulnerable person policy and if so has it been reviewed by the insurers as well as legal counsel?
- Are volunteers included as “additional named insureds” to provide them with coverage if they are named in a lawsuit and for personal legal defense costs?
- Has the charity or NFP considered obtaining the services of an independent insurance consultant to conduct an assessment of insurance coverage?
- Has the charity or NFP implemented the use of liability shields as necessary, such as informed consents, disclaimers, releases, waivers and indemnities by program participants?

TOP TIP #4: MONITOR THIRD PARTY USE OF PROPERTY

- Is the charity or NFP aware of potential liability exposure from permitting third parties use of its property?
- Has the charity or NFP developed and implemented a facility use policy and license agreement with appropriate releases of the charity or NFP and indemnification provisions?
- Does the charity or NFP require evidence of adequate liability insurance from third party users of its facilities, as well as indemnification?
- Has the charity or NFP provided written notice to its insurer concerning the use of its property by third parties?

- Does the charity charge appropriate fair market rental fees to non-charity users of its property?
 - Charitable property requires fair market value for rent charged to non-charities
 - Properties owned by non-charities have more flexibility in the amount of rent that can be charged
- Does the rental of property to third parties by charities meet CRA's "related business" requirements of "linked and subordinate"?
- For charities and NFPs that have lifestyle expectations, has consideration been given to compliance with provincial human rights legislation and applicable exemptions?

TOP TIP #5: WATCH OUT FOR WASTING IP ASSETS

- Intellectual property is an essential asset of any charity or NFP and consists in general terms of both trademarks (*i.e.* branding) and copyright
- Trademark rights exist at common law but those rights are limited and should be supplemented by a trademark registration under the *Trademarks Act*
- Trademarks can be lost if not properly protected and can also depreciate over the passage of time, therefore, becoming wasting assets
- Corporate name or business name registration does not by itself give trademark protection
- Domain names should be protected as trademarks as well
- CRA does not monitor for confusingly similar names of charities
- Copyright gives the charity or NFP the sole right to produce or reproduce its work, through publication, performances, etc., or to authorize such activities

- Who owns the copyright in publications and website content of the charity or NFP, and is it properly identified with a notice of copyright protection, *i.e.* ©?
 - Unless there is an agreement to the contrary with an employee, copyright vests in the charity or NFP as the employer
 - This presumption, though, does not hold true for contractors or volunteers
 - Has the website designer assigned the copyright in the website design to the charity or NFP?
 - Have independent contractors and volunteers also assigned their copyright to the charity or NFP as may be necessary?
- The charity or NFP needs to develop a portfolio management approach for identifying, registering, using and enforcing trademarks and copyright, both in Canada and in other countries as applicable

TOP TIP #6: WATCH FOR PRIVACY, DATA BREACHES AND ANTI-SPAM COMPLIANCE ISSUES

- Privacy, data breaches and anti-spam compliance are interrelated legal risk management issues
- 1. Privacy Legislation and Best Practices**
- Depending on where the charity or NFP operates, different privacy legislation, or no privacy legislation, may apply
- Canada's *Personal Information Protection and Electronic Documents Act* ("PIPEDA") applies to any private sector organization that collects, uses, or discloses personal information in the course of "commercial activities"
- Charities and NFPs are not automatically exempt from PIPEDA, but PIPEDA does not generally apply to them because most of the activities they regularly engage in do not qualify as "commercial activities"
- However to the extent that charities or NFPs engage in commercial activities, they must comply with PIPEDA in the course of those activities

- Charities or NFPs selling goods and services to earn revenue – increasing likelihood that revenue-generating activities may be caught by PIPEDA
- Some provinces have provincial privacy laws that are deemed to be "substantially similar" to PIPEDA - the provincial privacy law applies instead of PIPEDA
- Charities and NFPs operating in BC, Quebec and Alberta are subject to substantially similar provincial privacy legislation
- Charities and NFPs in those provinces must comply with the substantially similar provincial privacy legislation
- Most charities and NFPs in the other provinces (unless caught by provincial health privacy statutes e.g. PHIPA in Ontario, by provincial public sector privacy legislation e.g. FIPPA in Ontario, or by federal legislation PIPEDA in the territories) are not subject to any privacy legislation except to the extent that they engage in commercial activities

- Even if charities and NFPs are not subject to PIPEDA or other privacy legislation, members, donors, clients and other stakeholders will expect them to safeguard their personal information
- Charities and NFPs also face increasing risks associated with:
 - Recognition of new privacy law torts
 - Increasing incidence of privacy and cyber security incidents
 - Increasing risks of tort claims, class action litigation, court awarded damages and reputational injury
- Charities and NFPs should have robust privacy policies, practices and procedures based on the 10 Fair Information Principles in Schedule 1 to PIPEDA - the basis of most Canadian privacy legislation. See link below <https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/page-7.html#h-417659>
- Charities and NFPs should also manage their cyber security risk by following best practice guidelines, such as those set out by the Canadian Centre for Cybersecurity in order to address data breaches

- The Office of the Privacy Commissioner of Canada recommends that charities and NFPs follow the Fair Information Principles as best practices
- Fair Information Principles may set court and regulator expectations for how charities and NFPs should manage and safeguard personal information
- Compliance with the Fair Information Principles could allow charities and NFPs to be able to demonstrate good faith, due diligence and maintain donor/stakeholder trust and confidence
- Directors and officers of charities and NFPs impacted by privacy breaches may be exposed to claims that they should be found liable for the data breach
- Compliance with the Fair Information Principles may allow them to show that they met the required duty of care
- Important to implement an up-to-date privacy policy that is posted on the website of the charity or NFP and is cross referenced to its website's "Terms and Conditions"

2. Anti-Spam Compliance Issues

Canada's Anti-Spam Legislation ("CASL") came into force on July 1, 2014

CASL prohibits the sending of commercial electronic messages ("CEM") unless the sender has express or implied consent, the message contains prescribed identification information and there is an unsubscribe mechanism

CASL applies to all electronic messages sent in connection with a "commercial activity"

- The definition of "commercial activity" is very broad, could include many activities and it does not matter whether or not the sender expects to profit from the activity
- Being a charity or NFP does not exempt an organization from CASL. An email may be a CEM even if it is sent by a charity or NFP
- Regulations exclude messages that are sent by or on behalf of a registered charity where the message has as its primary purpose raising funds for the charity - not all communications from registered charities will fall within the exemption
- It is very difficult to know whether a message is a CEM within the meaning of CASL
- Since at least some electronic messages will be CEMs, prudent for charities and NFPs to assume CASL will apply and to comply with CASL
- There are two kinds of consent under CASL – express and implied

- Implied consent – only in limited circumstances and may be time limited
- Express consent - never expires unless revoked
- Burden of proof is on the organization to demonstrate that it had express consent, implied consent or an exemption from CASL
- Therefore preferable to obtain express written consent, which must be opt-in (e.g. no pre-filled boxes)
- The penalties for CASL violations can be severe:
 - Fines of up to \$10,000,000 for corporations and \$1,000,000 for individuals. Directors and officers can be personally liable for violations of CASL. Organizations are liable for any breach of CASL committed by their employees or agents
- Charities and NFPs should have robust CASL policies and procedures that ensure consistent compliance with CASL to prevent significant harm to the charity or NFP and its directors and officers

TOP TIP #7: MONITOR EMPLOYEE AND VOLUNTEER LIABILITY RISKS

- Has the charity or NFP developed appropriate policies and practices for hiring, disciplining and terminating employees and volunteers, including employment and volunteer agreements?
- Is the charity or NFP aware of and complying with applicable statutory requirements, such as pay equity, employment standards, human rights legislation, privacy legislation and occupational health and safety legislation?
- Does the charity or NFP have a policy in place concerning accommodation for disabled employees pursuant to provincial human rights legislation?
- Does the charity or NFP have a policy concerning workplace violence and harassment in accordance with provincial occupational health and safety legislation that is appropriately and consistently implemented?

- Does the charity or NFP have conduct requirements for employees and/or volunteers?
 - If it is mandatory, can it be enforced?
 - Does it comply with provincial human rights legislation?
- Are employees and volunteers who deal with children and other vulnerable persons screened and supervised in accordance with an appropriate vulnerable individual policy statement?
- Does the charity or NFP have a Covid-19 vaccination policy in place and has it taken into account the various legal issues that need to be considered?
 - See the Charity and NFP Bulletins no. 503 “Ontario Covid-19 Vaccination Policies: Important Legal Issues for Employers” and no. 512 on recent Ontario Divisional Court dismissal at <https://www.carters.ca/publications>

TOP TIP #8: BE PREPARED FOR A CRA AUDIT

1. Considerations for NFPs

- Does the NFP meet the test to be a non-profit organization under par.149 (1)(l) of the *Income Tax Act* (“ITA”) in relation to both income generation and excessive reserves?
- Are the surplus funds of the NFP being used to fund subsidiary business operations of the NFP?
 - If so, does it still comply with the requirements of a non-profit organization under par.149(1)(l) of the ITA
- Is the legal name of the NFP and/or its operating name consistent with the records of CRA?
- Does CRA have the current head office address of the NFP?
- Does the NFP file a Non-Profit Organization (NPO) Information Return T1044?

2. Considerations for Charities

- Does the charity know what charitable purposes/objects are on file with the CRA?
- Has the charity ensured that its activities and programs are undertaken in accordance with its charitable purposes/objects?
- Is the legal name of the charity and/or its operating name consistent with the records of CRA?
- Has the charity filed all of its governance documents with CRA, including supplementary letters patent/articles of amendment and by-laws?
- Does CRA have the current head office address of the charity?
- Does the charity submit its annual information return (Form T3010) within six months of the financial year end of the charity in order to avoid loss of charitable registration?

- Does the board of directors, the charity's accountant and legal counsel review and approve the annual information return (Form T3010)?
- Does the charity comply with split receipting and anti-tax shelter provisions of the ITA?
- Is the charity aware of the CRA Guidance on Fundraising and the need to calculate and track its fundraising ratio?
- Does the charity follow the CRA's requirements for "related business"?
- Is the charity aware of the new rules in dealing with Public Policy Dialogue and Developmental Activities (PPDDA) replacing rules for Political Activities?
- Does the charity know how to calculate its disbursement quota and whether it is meeting its disbursement quota obligations?

Are agency relationships, joint venture relationships, or contractual transfer arrangements with non-qualified donees, both inside and outside of Canada, documented and implemented with appropriate “direction and control?”

Is the charity aware of the option to make gifts and other resources available to “grantee organizations” under the 2022 federal budget and Bill C-19?

Are the charity’s books and records maintained in accordance with the requirements of the ITA?

Does the charity screen its board of directors, trustees, officers or equivalent official, or any individual who otherwise controls or manages the operation of the charity to see if any are “ineligible individuals” under the ITA?

TOP TIP #9: ENSURE COMPLIANCE WITH DONOR RESTRICTIONS

1. Considerations for Charities

- Are there donor restricted funds being held by the charity?
 - Building funds
 - Scholarship funds
 - Endowment funds
 - Special project funds
 - Legacy “ten year gifts” that may have been given in the past under the ITA
- Is there a regular review of donor restricted funds to ensure compliance?

- Are restricted funds used only in accordance with applicable restrictions and not borrowed against?
- Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds, particularly with endowment funds?
- Are restricted funds kept segregated from the general funds of the charity?
- Are restricted funds of the charity pooled for investment purposes?
- If yes, and if operating in Ontario, has there been compliance under the *Charities Accounting Act* to co-mingle restricted funds for investment purposes?

2. Considerations for NFPs and Charities

- For NFPs and charities that receive government grants and contributions, is there compliance with the applicable restrictions on the use of funds received?

TOP TIP #10: DEVELOP AN EFFECTIVE CRISIS MANAGEMENT PLAN

- Does the charity or NFP have a crisis management plan to deal with:
 - Pandemics?
 - Death or injury of a key individual, like a founder?
 - Loss of access to the use of facilities and equipment?
 - Disrupted or significantly diminished operations?
 - Cash flow problems?
 - Cyber attack? Data breach, including breach of personal information?
 - Loss of crucial information?
 - Intense media scrutiny?
 - Irreparable damage to the charity or NFP's reputation?
 - Unexpected financial shortfalls and/or fraud (especially cyber fraud)?
 - Harm to beneficiaries, staff, volunteers (e.g. those who work in dangerous situations such as a conflict area)?

- Does the charity or NFP's crisis management plan outline how to:
 - Quickly convene board or executive meetings as necessary?
 - Develop an effective communication strategy to notify all applicable stakeholders?
 - Address employee issues, such as continuing to pay wages?
 - Legally access restricted funds, when necessary as a last resort?
 - Notify and cooperate with regulators?
 - Develop a reserve fund to offset cash flow issues during a crisis?
 - Notify insurers as necessary?
 - Conduct an internal investigation or engage an external investigator?

Does the charity or NFP have an existing committee or group that can develop a crisis management plan? If so, is the group diverse enough to consider the full range of crises that the charity or NFP might face?

Can some of the liability risks associated with a possible crisis be covered by a specialized insurance policy?

Is the charity or NFP dependent on another charity or NFP? Could the relationship between them be terminated with little or no warning?

KEY TAKEAWAYS

Important to exercise necessary due diligence by:

1. Getting to know your organizational and legal documentation
2. Knowing who is in charge
3. Checking insurance and risk transfer documentation
4. Monitoring third party use of property
5. Watching out for wasting IP assets
6. Watching for privacy, data breaches and anti-spam compliance issues
7. Monitoring employee and volunteer liability risks
8. Being prepared for a CRA audit
9. Ensuring compliance with donor restrictions
10. Developing an effective crisis management plan

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