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L A W G R O U P P L L C

**Ask the Nonprofit Attorney: AI, DEIA, and Other Hot-Button
Legal Training Topics**

Nonprofit Legal, Finance, & Grants Conference

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Tuesday, October 1, 2024

Generative AI and Its Legal Risks for Nonprofits

Data Privacy

- AI relies on inputted data to generate new data. It does not differentiate between public data and personally identifiable information (PII) or confidential information. Because PII is so heavily regulated by federal, state, and international law, nonprofits should not allow staff, contractors, volunteer contributors, or other agents to input PII into an AI application unless comprehensive compliance measures are implemented and enforced.
- In addition, to safeguard confidential, proprietary, sensitive, and/or attorney-client privileged information, nonprofits should prohibit staff, contractors, volunteer contributors, and other agents from inputting confidential, proprietary, or sensitive information or privileged content of any sort into any AI application – even if the “sharing”/“learning” feature of the AI application is disengaged, as can be done with paid and enterprise versions of most of the leading AI platforms.
- Where a nonprofit relies more heavily on sensitive PII, we recommend engaging expert privacy counsel to (1) determine applicable data privacy laws, (2) review and classify all existing data that may be used by the AI application, (3) identify the purpose and use of the data in a clear and articulable way, (4) develop a compliance plan, and (5) monitor compliance over time and take appropriate action in the event of noncompliance.

Generative AI and Its Legal Risks for Nonprofits *(cont.)*

Intellectual Property

- The law governing copyright rights with respect to AI-generated content is novel and rapidly evolving. Based on existing law, nonprofits should assume that they have no intellectual property rights in and with respect to AI-generated content. Nonprofits should require human authors to substantially and materially contribute to any nonprofit work product.
- Nonprofits should revise existing author and speaker agreements (both for volunteers and paid contributors) to require a written attestation from employees, contractors, and volunteer authors and speakers representing and warranting that (i) any submitted content has been revised substantially such that the author/creator has all necessary rights to assign or license the work to the nonprofit and (ii) the submitted content does not infringe the intellectual property rights of any third party.
- That same attestation also should address defamation, privacy, and other third-party rights.
- At least for paid contributors, the author/creator should indemnify the nonprofit for any breach of these representations and warranties.

Generative AI and Its Legal Risks for Nonprofits (*cont.*)

Discrimination

- AI systems can inadvertently perpetuate bias and discrimination, particularly if they are trained on data that reflects historic biases or inequalities.
- Nonprofits must ensure that their AI systems do not discriminate on the basis of race, ethnicity, national origin, gender, age, disability, or other legally protected characteristics, and must take steps to identify and address any biases that may be present in their algorithms.
- While discrimination only creates *legal* exposure in certain contexts (*e.g.*, employment), algorithmic bias has the potential to create discriminatory effects in nonprofit settings (such as membership, volunteer leadership, and peer review) and needs to be carefully addressed.
- To best guard against this undesirable outcome, humans should always review AI processes and outputs for bias and/or discrimination and should record efforts to test for bias (*e.g.*, documentation of a hiring process, meeting minutes) or submit an attestation as an accompaniment to submissions fixed in any tangible medium (*e.g.*, written works, artistic works, videos, recordings, etc.).

Generative AI and Its Legal Risks for Nonprofits (*cont.*)

Tort Liability

- If an AI system produces inaccurate, negligent, or biased results that harm members or other end users, the nonprofit could potentially be held liable for any resulting damages.
- Nonprofits must ensure that their AI systems are reliable and accurate, and that all resulting work product is carefully vetted by human beings for accuracy, veracity, completeness, and efficacy.
- AI-generated content is not always accurate, potentially bearing on the reputation of a scholar, a scholarly publication, or a nonprofit publisher. To the extent that a statement of fact is not only false, but also adversely bears on a person's reputation, the publication of the false statement could expose an author and/or publisher to liability for defamation. Sufficient human vetting is the best risk mitigation strategy to capture and correct factual inaccuracies.
- In addition, nonprofits should consider requiring that authors affix a conspicuous disclaimer to any submissions incorporating AI-generated content signaling that “the content was produced with the assistance of artificial intelligence” and that “the author/creator(s) reviewed and edited the content as needed and take(s) full responsibility for the content of the publication.” Disclaimers of this sort likely also will satisfy the ethical requirements embedded in some international AI laws.

Generative AI and Its Legal Risks for Nonprofits (*cont.*)

Insurance

- Nonprofits need to ensure that they have appropriate insurance coverage in place to protect against potential liability claims in all of these areas of legal risk.
- Traditional nonprofit directors and officers (D&O) liability, errors and omissions liability (E&O), commercial general liability, and cyber insurance policies may be insufficient to fully protect nonprofits in all of these areas.
- Work closely and proactively with your nonprofit's insurance broker and legal counsel to do everything possible to minimize insurance coverage gaps in these areas.

Generative AI and Its Legal Risks for Nonprofits (*cont.*)

AI Policies

- Nonprofits should develop and implement written AI usage policies, informed by the considerations outlined.
- As the work of nonprofits involves both staff, contractors, and volunteer leaders, adopting and distributing appropriate written policies governing AI usage by staff, contractors, officers, directors, committee members, and other volunteer leaders is critical, as is policing and enforcing compliance with such policies.
- Some nonprofits have developed AI usage policies that cover everyone who uses AI for or on behalf of the organization (such as staff, contractors, and volunteer contributors), while others have created different policies for different sets of users. At a minimum, such policies should set forth a purpose, define material terms, scope coverage, describe permitted and prohibited uses of AI, require disclosures and disclaimers, and describe potential consequences of non-compliance.
- Because international data privacy and AI laws vary and continue to evolve, and because AI itself is rapidly evolving, nonprofits should commit to revisiting the policy(ies) on a periodic basis to ensure that it/they remain(s) legally compliant, reflect(s) best practices and industry standards, and meet(s) the nonprofit's needs.

Mitigating the Legal Risks of Nonprofits' ESG and DEIA Programs

- **“ESG”** - Environmental, Social, and Governance.
- **Environmental** - climate change, resource depletion, waste and pollution, and deforestation
- **Social** – working conditions, employee relations and DEIA, health and safety, local communities (including indigenous communities), and conflict and humanitarian crises
- **Governance** – board diversity and structure, executive compensation, and ethics
- Regulators both in and outside of the United States have promulgated new mandatory rules, disclosure obligations, and enforcement mechanisms for ESG-related conduct, but these rules in the United States, as of now, do *not* apply to nonprofit organizations.

Mitigating the Legal Risks of Nonprofits' ESG and DEIA Programs (*cont.*)

- While ESG is a broader concept than **Diversity, Equity, Inclusion, and Accessibility (“DEIA”)**, it includes and incorporates DEIA.
- DEIA programs fostering the hiring and promotion of workers from racial and ethnic minorities, women, members of the LGBTQ+ community, diverse religious groups, and others have been prominent in corporate America in recent years.
- A number of states have passed laws and issued executive orders both requiring, and in some cases *prohibiting*, DEIA practices.
- ESG and DEIA are controversial in some circles. There is a growing attack from the political right on corporate policies aimed at diversity in hiring and promotion and other social and environmental goals in the form of lawsuits, requesting agency investigations, congressional investigations, public pressure, and in other ways.

Mitigating the Legal Risks of Nonprofits' ESG and DEIA Programs (*cont.*)

- While nonprofit, tax-exempt organizations are not subject to the specific ESG regulatory requirements and legal standards applicable to certain for-profit companies (such as those enforced by the SEC), nonprofits have incorporated DEIA into their programs, activities, governance, and operations for years.
- In doing so, nonprofits expose themselves to potential legal jeopardy in a wide array of areas.

The Primary Legal Risks of Nonprofit ESG Programs

Employment Law

- ESG initiatives – and particularly those that involve DEIA issues – can involve changes to hiring and promotion practices, workplace diversity, and employee compensation and benefits, which can trigger employment-related legal risks such as discrimination, harassment, and wrongful termination.
- Recently, there is the *potential* impact of the U.S. Supreme Court’s 2023 ruling (*Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*) rejecting race-conscious admissions in higher education.
- Many experts maintain that, as a practical matter, the ruling will likely discourage some employers from putting in place ambitious diversity policies in hiring and promotion – or prompt them to rein in existing policies – by encouraging new lawsuits in the employment arena under the new legal standard.
- The Court’s decision is likely to be greater pressure on policies that were already on questionable legal ground, including internship programs and staff leadership acceleration programs.

The Primary Legal Risks of Nonprofit ESG Programs *(cont.)*

Contracts (Including Fellowships, Scholarships, and Internships)

- Section 1981 of the federal Civil Rights Act of 1866 prohibits racial discrimination in contracting and is limited solely to race discrimination.
- In 2023, the American Alliance for Equal Rights (AAER) – led by the same conservative activist (Edward Blum) who filed the higher education affirmative action cases described above – sued Fearless Fund Management LLC, a Black women-run venture capital fund, for claims of racial discrimination and violations of Section 1981, using the reverse discrimination rationale underlying the U.S. Supreme Court’s 2023 decision regarding race-conscious college admission practices.
- AAER alleges that the Fearless Fund is operating a racially discriminatory program called the Strivers Grant Contest that violates Section 1981’s “guarantee of race neutrality” in making “contracts.” AAER claims that the Fearless Fund’s grant program discriminates against other races by awarding \$20,000 grants, business support services, and mentorship specifically and only to Black women-owned businesses.

The Primary Legal Risks of Nonprofit ESG Programs *(cont.)*

Contracts (Including Fellowships, Scholarships, and Internships) *(cont.)*

- AAER also filed lawsuits in 2023 against two national law firms that have operated paid diversity fellowship programs to bolster diversity and inclusion in their attorney ranks. The lawsuits allege that the paid fellowship programs – which are limited solely to certain underrepresented groups in the legal profession, such as students of color, those who identify as LGBTQ+, and those with disabilities – are a violation of Section 1981 by illegally discriminating against students on the basis of their race.
- If these suits – and/or others like them which have been filed and are working their way through the courts – are ultimately successful, it is not at all inconceivable that the result would be a prohibition of numerous nonprofit fellowship, scholarship, internship, and other programs (where contracts are involved) aimed at increasing diversity and inclusion on nonprofits' staff and in the industries and professions represented by nonprofits.

The Primary Legal Risks of Nonprofit ESG Programs *(cont.)*

State Laws and Executive Orders Restricting DEIA Policies, Trainings, and Practices

- Florida's 2022 Individual Freedom Act (the so called "Stop-WOKE" law) restricts diversity related training in private Florida workplaces; it is currently subject to legal challenge in court.
- In 2022, Texas Governor Abbott issued a memorandum to state agencies warning them to not use any DEIA programs in hiring that are "inconsistent" with Texas law.
- California's adopted laws requiring certain racial and ethnic, as well as gender, diversity on boards of directors of public companies headquartered in California, have been struck down by courts and appeals are underway.
- New state laws and executive orders could effectively prohibit DEIA initiatives in other aspects of nonprofit governance and management, such as board composition, volunteer leader selection, grantmaking, contracting, and government grants, contracts, and cooperative agreements.

The Primary Legal Risks of Nonprofit ESG Programs *(cont.)*

Misrepresentation and Greenwashing

- Be mindful of the risks of making misleading or non-substantiated claims in connection with all programs and activities.
- Publicly misrepresenting or overstating a nonprofit's ESG performance could lead to "greenwashing" or otherwise engaging in deceptive or misleading conduct.
- This could result in member backlash, reputational damage, and potentially even regulatory enforcement by the FTC or state Attorneys Generals as well as private litigation.

Member "Derivative" Suits

- Associations that incorporate ESG into their investment policy statement and base investment decisions, in part, on ESG criteria and then face material investment losses may risk being on the opposite end of "derivative"-type lawsuits from members alleging that the association's board of directors and/or investment committee were not prudent stewards of the organization's resources.

Data Privacy and Security

- There is a risk of data breaches or mishandling of information, which could result in legal action, regulatory penalties, and reputational harm.

Mitigating the Legal Risks of Nonprofit ESG Programs

- Design scholarship, fellowship, grant, and similar programs using race-neutral criteria which are designed to accomplish the purpose of the scholarship, fellowship, grant, or other program.
- Ensure that your nonprofit's employment policies and practices are fully compliant with all *current* federal and state legal standards in areas involving discrimination, harassment, wrongful termination, and otherwise.
- Note that **most** state laws and executive orders to date that restrict DEIA policies, trainings, and practices do not apply to nonprofits.
- Ensure that all public statements regarding your nonprofit's ESG performance are accurate, fully substantiated with appropriate data and documentation, and not in any way overstated, misleading, or deceptive.
- Working with a professional investment advisor, adopt an investment policy statement that reflects the nonprofit's priorities, goals, risk tolerance, and financial needs but that is defensible as being reasonable, prudent, and appropriate.
- Implement strong data privacy and security measures to protect sensitive information and to mitigate the risk of data breaches or mishandling of such information.

Questions?

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