



Legal Corner

The Pursuit of Fundraising and the Legal Challenges

by Susan W. Berson, JD

Today's healthcare institutions must often supplement their income from third-party payers with fundraising activities ranging from hospital gift shops to black-tie galas. However, healthcare institutions need to keep in mind that any fundraising activities will be subject to various state and/or federal laws, as well as the provisions of the Health Insurance Portability and Accountability Act (HIPAA) and comparable state privacy laws.

While some laws, such as the privacy rules, will apply regardless of the tax status or other attributes of the institution, the tax status of the institution as a for-profit or not-for-profit institution may create certain fundamental differences in the fundraising activities that may be undertaken.

In the case of for-profit institutions, no representation can be made to prospective donors that amounts donated will be tax deductible—a feature that is often very important to donors undertaking significant donations. Additionally, a for-profit institution cannot establish a charitable foundation for the sole purpose of engaging in tax-deductible fundraising activities for its own purposes. Any charitable foundation must have broader-based charitable purposes, such as serving underserved or indigent populations, assisting in covering the cost of expensive care, or engaging in certain types of research. While these may be activities that the for-profit institution engages in, it cannot be the sole beneficiary of the charitable foundation and amounts raised cannot simply be used to fund the institution's internal operating expenses; the foundation must serve a public purpose. Therefore, a for-profit institution can establish a charitable affiliate to assist in fundraising activities, but it must carefully consider the exempt purposes of the affiliate and whether, based on the necessary scope of such purposes, the establishment makes sense.

In the case of a not-for-profit institution, the institution's tax-exempt status may permit significant donations that will be tax deductible. However, the institution must be careful to understand and stay within the parameters of its exempt status in order to avoid the receipt of taxable income or jeopardize its exempt status. Under some circumstances, it may make sense even for a not-for-profit institution to establish a charitable affiliate to assist in its fundraising activities.

In addition to the federal tax laws that impact the deductibility and charitable status of an institution, state laws—whether tax laws, privacy laws, or fundraising rules—must be considered for the jurisdiction in which the institution is located. Additionally, the rules promulgated pursuant to HIPAA must be considered in the structuring of any fundraising activities. Specifically, HIPAA imposes requirements on the use of protected health information (PHI) in support of fundraising activities.

Generally, an institution may use and disclose certain PHI for its fundraising activities provided that the fundraising materials give individuals the opportunity to choose to opt out of receiving further fundraising communications. Without obtaining an authorization from an individual, an institution may use the following information for fundraising activities: demographic information relating to the individual, including name, address and other contact information; age; gender; insurance status; and dates of healthcare provided. The institution may not use information about an individual's illness, diagnosis, or healthcare treatment or services for fundraising activities.

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The institution can use the permissible information on its own, may allow a business associate to use the information on its behalf, and may permit an "institutionally-related foundation," which is a charitable organization that is explicitly linked to the institution, to use information for fundraising activities. Permissible fundraising activities for which PHI may be disclosed include appeals for money, sponsorship of events, and other similar efforts. Royalties or payments obtained from the sale of products to third parties are not considered permissible fundraising activities unless they are, for example, in the nature of auctions or rummage sales.

To use PHI for fundraising activities, the institution must include in its Notice of Privacy Practices a statement explaining to patients that they may be contacted for fundraising activities on behalf of the institution. When fundraising material is then sent, if recipients of the material choose the opt out provision, the institution must make reasonable efforts to ensure that these individuals are not sent further fundraising communications. A copy of all fundraising communications in which PHI is used must be maintained by the institution, as well as a list of all individuals who have opted out of receiving such communications.

When planning and structuring its fundraising activities, an institution must consider the scope of permissible or appropriate activities taking into account its tax status, as well as the applicability of the privacy laws. Consideration of these requirements will help an institution attain the most beneficial activities.

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