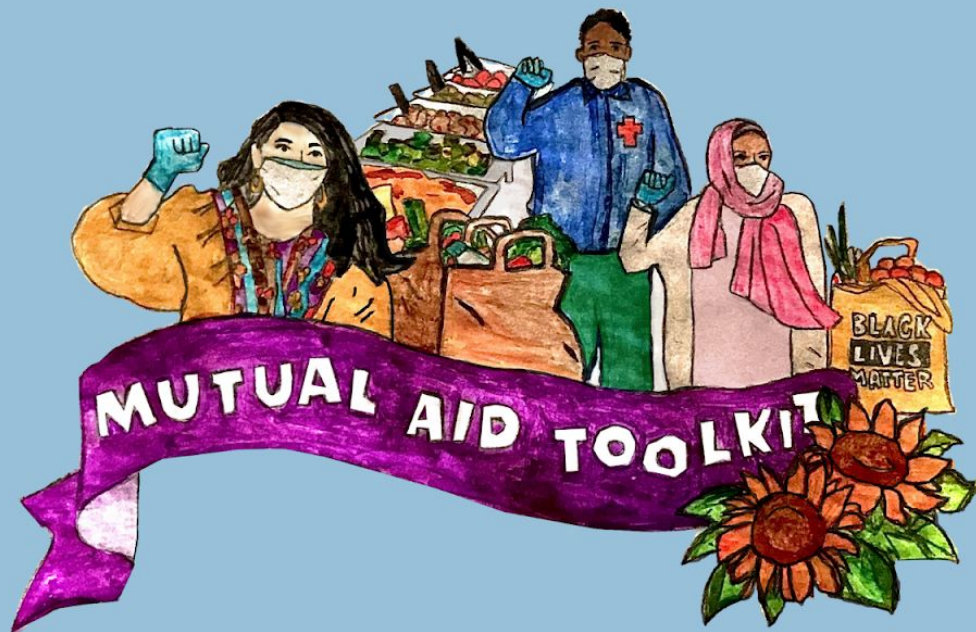


MUTUAL AID

LEGAL TOOLKIT



FAQS FROM MUTUAL AID ORGANIZERS



Sustainable
Economies
Law Center

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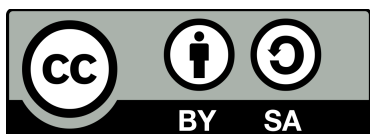


A word of caution! In addition to reading this guide, mutual aid groups are encouraged to consult with an attorney to discuss how the law applies to a specific situation, since this guide will not cover specific legal details that may apply to every group in every state.

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Preface

Background

Mutual aid networks exploded onto the scene with pandemic shelter-in-place orders. By some counts, there are well over 1,000 new mutual aid networks across the country,¹ and likely thousands more that are operating informally in hyperlocal efforts. Many start out as a simple Google sheet coordinating supply drop-offs. Others have evolved into massive crowdfunding campaigns and large scale food redistribution networks.

The practice of mutual aid itself is not new. In fact, mutual aid has deep roots in Black, Indigenous, and immigrant communities.² These displays of mutual aid were acts of resilience and defiance, practiced out of necessity in the face of inequitable access to basic needs. Examples of mutual aid in American history include the Black Panther free breakfast program,³ post-Depression reciprocal economies that provided for more than 300,000 people throughout California,⁴ and *mutualista* societies⁵ formed by Mexican immigrant communities in Texas.

Underlying these historical examples of mutual aid is a call to solidarity, distinct from charity. Charity under our current system can be problematic because it means those in power decide which poor are “deserving” of assistance. For example, grant money is often conditioned on certain factors and deliverables, which perpetuates the nonprofit industrial complex. In contrast, mutual aid networks challenge this top-down approach in favor of a grassroots, horizontal, caretaking economy.

Mutual aid is also a political act. The pandemic did not cause inequalities so much as magnify the cracks in our system. As with past natural disasters, the COVID-19 pandemic hit working class and communities of color the hardest.⁶ These include food industry and grocery workers who could not afford to stay home. Many immigrants, including farmworkers who

¹ Mutual Aid Hub, <https://www.mutualaidhub.org/>.

² Bridge the City, *Episode 81: Mutual Aid*, May 25, 2020, <https://www.bridgethecitypodcast.com/listen/2020/5/25/episode-81-mutual-aid>.

³ Nick Chiles, *8 Black Panther Party Programs That Were More Empowering Than Federal Government Programs*, Atlanta Black Star, March 26, 2015, <https://atlantablackstar.com/2015/03/26/8-black-panther-party-programs-that-were-more-empowering-than-federal-government-programs/>.

⁴ Jonathan Rowe, *What History Books Left Out About Depression Era Co-ops*, YES! Magazine, Sept. 14, 2018, <https://www.yesmagazine.org/issue/issues-5000-years-of-empire/2018/09/14/what-history-books-left-out-about-depression-era-co-ops/>.

⁵ Carlos E. Morales, *The Long and Forgotten History of the Mutualistas*, KWBU 103.3 Waco Public Radio, Dec. 23, 2016, <https://www.kwbu.org/post/long-and-forgotten-history-texas-mutualistas#stream/0>.

⁶ *Health Equity Considerations and Racial and Ethnic Minority Groups*, Centers for Disease Control and Prevention, July 24, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.



sustained our food supply chain while many of us stayed home, were too scared to apply for COVID relief due to the current administration's public charge rules. For these reasons, mutual aid cannot be divorced from an analysis of the system that produced these disproportionate impacts to begin with.

Mutual aid has given many communities hope and sustenance in the current moment. It can become an even more powerful tool for the long term. Yes, it might mean some difficult questions in the interim as we face the stark realities of our system, and along with it, our own complicity. And with this new information comes power and an opportunity to build something new and different. For us to effectively carry out mutual aid, we urge you to tie it to a deeper analysis of our current system and organizing efforts that were already doing this work long before COVID.

The economy is PEOPLE POWERED!



Why this guide?

We created this legal resource guide with grassroots mutual aid networks in mind. At the beginning of the pandemic, we started to receive questions from community organizers from across the country. As these operations grew in number and complexity, we noticed a pattern in the types of questions being asked. And so we set out to put together a collective repository of our research in response to the most common questions we received. This resource is in large part directed by you, and reflect actual questions you've submitted to us over the last few months.

We have tried our best to provide some answers, but we have to caveat this resource with 3 things: (1) This unprecedented time means there are no clear legal guidelines, because the law has not contemplated the situation we are seeing, or dealt with mutual aid groups of the scale and number we are seeing now. (2) Because of #1, this is an evolving document. We will update this as we get guidance from other technical advisors, tax specialists, and organizers on the



ground; and (3) You don't have to listen to this guide. Our current system of laws are not for autonomous, self sustaining group efforts. In this guide, we are merely bearers of information, and sharing what the law says. As our friends at [Movement Generation](#) say that, **"If it's the right thing to do, we have every right to do it!"**

Who is this for?

Mutual aid groups can form in at least a couple ways.

The first category of mutual aid groups are those that are completely volunteer-run and grassroots-led. These groups typically start off with a couple of volunteer organizers who coordinate the collection of food, money, and other resources, for redistribution to local neighbors in need. These groups tend to be unincorporated.

A second category are grassroots mutual aid groups that have evolved and grown to a point where they are now thinking of establishing an entity. These groups may be handling cash in the tens of thousands of dollars range, or starting to receive grants in large sums, or branching out to launch large-scale efforts to coordinate food delivery, etc.

Meanwhile, a third category of mutual aid efforts stem out as an activity of a pre-established nonprofit organization or cooperative. In these instances, the pre-existing organization has other activities in place, and the mutual aid isn't their sole focus.

This toolkit was drafted with the first and second type of mutual aid groups in mind. That said, we welcome all readers and mutual aid groups to dig in. This is an evolving document and we hope to adapt it as we receive feedback and learn from you.

Anything else?

Prior to drafting this guide, we hosted webinars and discussions on this very topic. Think of this as the written accompaniment to those videos!

Mutual Aid Teach-in Video #1



Topics covered:

Examples of mutual aid projects • Quick overview of laws that apply • Examples of mutual aid models • Peer to Peer Giving • Unincorporated Associations • Established Nonprofit • Local Investment Funds

Mutual Aid Teach-in Video #2



Topics covered:

Tax • 501(c)(3)s and Mutual Aid • Governance • Should Groups Formally Register or Incorporate? • Liability and Risk • Privacy and Security



Frequently Asked Questions

Entity Formation

What are our options for incorporating and formalizing our entity?

It depends. For the most part, temporary mutual aid groups are operating as unincorporated associations without realizing it, and with minimal legal consequence. (Unincorporated associations are automatically formed when individuals come together to carry on a regular activity, whether for profit, mutual benefit, or a charitable purpose.)

Reasons to incorporate:

- **Liability shield:** The liability shield would provide some liability protection for the organizers in the event that someone is harmed and demands compensation. That said, there are other steps a mutual aid group can take to mitigate liability and address harms without incorporating, including obtaining general liability insurance.



Reasons NOT to incorporate:

- **Culture:** Formally incorporating may have a chilling effect on the ad hoc, informal giving structure which the mutual aid group was premised on.
- **Corporate formalities:** You would have to pay fees (typically around \$100) to form the entity, and you'd need to abide by state laws governing the entity, including following the rules for how to dissolve the organization once you disband the mutual aid group.

A third option:

Generally, if the mutual aid group is operating on a temporary basis or does not yet have capacity to handle the administrative demands and formalities of forming an entity, the group may be better served by finding another entity to host the mutual aid activity. This is common in the nonprofit sector, and is often referred to as “fiscal sponsorship.”

At which point will incorporating be worth it for the organization?

Again, there's no clear threshold, but here are some guidelines that may help:

- Do you foresee yourself operating indefinitely?



- Are you disbursing funds, and not just services and goods? If so, are you moving cash funds of more than \$5,000?
- Is your group or are your volunteers engaging in high risk activities, such as entering homes or distributing food on a large scale?
- What is your level of risk tolerance: would you prefer to err on the side of abundant caution?

The more “Yes” responses you gave, the more complex your operation, and the more likelihood it is that some kind of entity formation discussion would be beneficial.

What entity should we choose?

Your entity choice will impact how you are taxed and governed, so choose wisely. Generally, we have found that the nonprofit corporation may be the most advantageous if only because it would more readily absolve the mutual aid group’s tax obligations.

If you decide to incorporate, some options at your disposal include forming as an LLC, a cooperative corporation (if it exists in your state), or a nonprofit corporation. All of these options offer liability protection for organizers. Which option is best depends on a slew of factors, of which we will outline what we believe to be the highlights of each one.⁷

Nonprofit corporation: The main difference between for-profit corporations and nonprofits is that nonprofits are subject to the “non-distribution constraint,” which prevents them from distributing any profits to the Board, members, or investors. Nonprofit organizations can also apply for tax-exempt status with the IRS. Nonprofits operate under a structure similar to traditional for-profit corporations, meaning that they must observe corporate formalities and maintain a Board of Directors with fiduciary duties⁸ to oversee the activities of the organization. Within these requirements, there is some flexibility to operate with cooperative or democratic principles; for example, by having all members of the organization democratically elect and remove Board members.⁹ At the same time, activists can be wary of the nonprofit approach because of the nonprofit industrial complex and sometimes unintended consequences of diluting or depoliticizing its message. **Bottomline: For mutual aid groups, we believe that a nonprofit approach may be the least cumbersome because of the many legal exemptions afforded to a nonprofit that are not otherwise available to other for-profit entities.**

⁷ You can find a more thorough analysis of the pros and cons of each of these entity types in Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide*, Hofstra Univ, (June 6, 2020), <https://ssrn.com/abstract=3622736>.

⁸ See *id.* at 11, “Fiduciary Duties.”

⁹ *Id.* at 12; see also *id.* “Flexibility of the Non-Profit Form” (detailing other options for structuring the governance of a nonprofit).



LLC: LLCs are a very common entity type for small businesses because they allow for much more flexibility in governance and taxation structure than other entity types. They don't need to have a Board of Directors and they can be structured as co-ops (although they generally can't use "co-op" in the name¹⁰); they are simply governed by internal contracts called operating agreements.¹¹ **Bottom line: The LLC model is, relatively speaking, very flexible entity. If you are ready to form an entity, but for whatever reason do not want to be a nonprofit, the LLC can get you the liability shield without many required corporate formalities.**

Cooperative corporation: Co-ops organized under a state's cooperative corporation law, such as California's Cooperative Corporation,¹² may have some advantages over other entity types such as using "co-op" in the name, special exemptions from securities laws that allow them to more easily raise financing from the community, and more flexibility than traditional corporations in tax structure.¹³ However, they must follow certain rules, such as having a Board of Directors (who may also be co-op members)¹⁴, appointing officers¹⁵, and following the principle of one vote for each member regardless of how much capital a member brings in. Cooperative corporations may also be required to treat working members as "employees." **Bottom line: Consider the cooperative corporation as a long-term strategy for creating a permanently organized community.**

How do we form a nonprofit organization?

Nonprofit corporation formation usually requires two components: (1) creating the legal entity then (2) getting tax exemption. You don't *have* to do both; you can do one without the other. The benefit of (1) is the liability shield; the benefit of (2) is being tax exempt.

Create the nonprofit corporation

First, at the state level, the organization must submit formation papers to create a nonprofit corporation.¹⁶ In California, nonprofit corporations may form as a public benefit corporation or mutual benefit corporation. Once you have established a nonprofit corporation, you must

¹⁰ Cal. Corp. Code §12311.

¹¹ Haber, [Legal Issues in Mutual Aid Operations: A Preliminary Guide](#), pp. 15-16.

¹² Cal. Corp. Code §§12200 - 12340.

¹³ Van P. Baldwin, Center for Cooperatives at University of California Davis, *Legal Sourcebook For California Cooperatives: Start-up and Administration* 10 (3d ed. 2004), http://cccd.coop/sites/default/files/resources/LegalSourcebookForCaliforniaCooperatives_0.pdf; Sarah Stephens, *Forming a Worker Coop: LLC or Cooperative Corporation?*, Sustainable Economies Law Center (May 18, 2016), https://www.theselc.org/llc_v_cooperative_corporation.

¹⁴ Cal. Corp. Code §12331(a).

¹⁵ In California, a Cooperative Corporation must have at least 3 appointed officers: President, Treasurer, and Secretary.

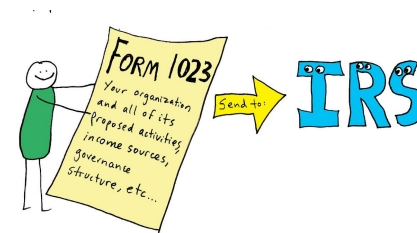
¹⁶ Lawyers Alliance of New York, *Providing Relief During COVID*, (April 6, 2020), https://lawyersalliance.org/userFiles/uploads/legal_alerts/Providing_Disaster_Relief_During_the_COVID_Crisis_FA_Qs_April_2020.pdf.



appoint or elect a Board of Directors, adopt bylaws to set forth governance procedures.¹⁷ (Check out our appendix for sample bylaws for a nonprofit corporation.)

Obtain tax exempt status

The second part is obtaining tax exemption from the IRS and from your state. (Again, you don't need to be incorporated to apply for tax exemption.) There are several options for obtaining tax exemption, including¹⁸:



- **Standard Process:** After forming a legal entity, the organization will submit an application for tax-exempt status through IRS Form 1023. The application is 28 pages long and the organization must pay a \$600 filing fee. The organization will be contacted by the IRS within 180 days to confirm receipt of the application. If the organization's application is approved, donations received prior to the approval will be retroactively treated as tax deductible as of the date of incorporation. The whole process can take up to 10 months or longer.
- **Expedited Review:** An organization must still complete the full Form 1023, but the IRS will let you “skip the line.” The organization must show that it will provide critical relief and that without the expedited approval, the organization’s ability to provide that relief will be materially affected. To apply, the organization must write a letter that fully explains the reason why they need expedited review. There is no guarantee that the IRS will grant the request for expedited review.
- **Form 1023-EZ:** This is an option for organizations that are projected to have gross receipts of less than \$50,000 per year for the first three years and whose total assets are under \$250,000. Form 1023-EZ is just three pages, while the normal Form 1023 is 28. The filing fee is also smaller, \$275 compared with \$600. Finally, Form 1023-EZ applications are generally processed much quicker than standard applications.
- **Fiscal Sponsorship:** Instead of applying for your own tax exemption, your organization can enter into a fiscal sponsorship agreement with an existing tax-exempt organization. By finding an established organization that can “graft” your mutual aid project onto their existing org, you can immediately begin to raise tax-deductible money. Fiscal sponsorships

¹⁷ *Id.*

¹⁸ *Four Fast Ways to Form a Charity to Address COVID-19-Related Matters*, Cooley Alert (April 7, 2020), <https://www.cooley.com/news/insight/2020/2020-04-07-four-fast-ways-to-form-a-charity-to-address-covid-related-matters>.

are private contracts and can be set up quickly. They can be long term or short term. (Go here for [more of the down-low on fiscal sponsorships](#).)

- “Nano”-nonprofit¹⁹: Nonprofit organizations (both corporations and unincorporated associations) with less than \$5,000 in gross annual income can be automatically tax exempt, as long as they are operating primarily for charitable purposes or other purposes under 501(c)(3).²⁰ (Although based on our reading of IRS guidelines on this, there may be some room to still qualify for this if your gross receipts slightly exceed \$5,000.) These small nonprofits still need to file a 990 Postcard each year and must have an EIN.

What's the easiest way to simplify legal compliance as an unincorporated group?

The simplest way to avoid legal or tax liability without incorporating is to not touch any money. Instead, facilitate peer-to-peer giving by matching people who can give with people who need money.

Established Charitable Organizations

Does an existing charitable organization need to take any special legal steps to establish a disaster relief program or engage in disaster relief activity?

Most organizations have the authority to organize a one-time disaster relief program, such as a drive up collection of canned food items to benefit local food pantries, without amending organizational documents.²¹

Even if a charity was not specifically organized to provide disaster relief and such activities were not specified in its application for exemption, an existing recognized charity may engage in disaster relief activities without obtaining prior permission from the IRS.²² However, the charity must report this new activity on its annual return and may wish to report a change in its activities to the IRS Exempt Organizations Determinations Office.²³

What are “qualified disaster relief payments”?

Qualified disaster relief payments (QDRP) are payments made in connection with qualified disasters. QDRP payments do not have to be counted as gross income to an individual receiving the money, but only if certain conditions are met. The two conditions most relevant for COVID mutual aid groups are below:

¹⁹ For more information on automatic tax exemptions, see [IRS Publication 557](#).

²⁰ Gross receipts “are the total amounts the organization received from all sources during its annual accounting period, without subtracting any costs or expenses.” More information on the IRS website: [Gross Receipts Test](#).

²¹ Lawyers Alliance of New York, [Frequently Asked Questions: Providing Relief During the Covid Crisis](#).

²² IRS Pub. 3833, *Disaster Relief: Providing Assistance Through Charitable Contributions*, www.irs.gov/pub/irs-pdf/p3833.pdf.

²³ *Id.*



- **“Qualified disaster”** - The payment must have been made in connection with a qualified disaster. (This is the case for COVID-19. In the present situation, COVID is considered a presidentially declared qualified disaster. Section 139 qualified disaster relief payments are not taxable as income to the individual recipient and are not subject to employment taxes or withholding.)
- **“Qualified expense”** - this includes using the money towards “necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster.” Furthermore, the payment must not have been compensated by an insurance company.

The full definition of a QDRP can be found under [Internal Revenue Code Section 139](#).

We are an established nonprofit and we've decided to classify these funds as disaster relief payments. What kind of recordkeeping is needed?

For IRS compliance purposes, a 501(c)(3) providing disaster relief must keep records of the aid given. The IRS has recordkeeping guidelines depending on whether the disaster relief is provided on a short-term or long-term basis.²⁴ Now that we are several months into the pandemic, the cautionary approach would be to assume that any ongoing mutual aid operations coordinated through a charitable entity are considered to be long term aid, in which case, the following is recommended for recordkeeping:

- a complete description of the assistance provided,
- costs associated with providing the assistance,
- the purpose for which the aid was given,
- the charity's objective criteria for disbursing assistance under each program,
- how the recipients were selected,
- the name, address, and amount distributed to each recipient,
- any relationship between a recipient and officers, directors, or key employees of, or substantial contributors to, the charitable organization, and,
- the composition of the selection committee approving the assistance.²⁵

²⁴ Whether aid being given is short-term or long-term disaster relief is a determination made by the IRS on a case by case basis. Based on IRS publications, short-term disaster relief is most commonly real goods such as blankets or hot meals given in the immediate aftermath of a disaster. However, at least one [IRS guideline](#) has said that in certain situations it may be appropriate to distribute funds without collecting information such as name and address as long as there is a record of what the funds were used for. It seems likely that almost all monetary distributions and all further COVID-19 related distributions will qualify as long term aid and thus those organizations will be subject to long term record keeping. “However, in some emergency circumstances, it may be sufficient merely to provide assistance to the distressed without even obtaining this minimal information provided there is some recordation concerning the uses to which the funds were put.” Ruth Rivera Huetter and Marvin Friedlander, *Disaster Relief And Emergency Hardship Programs*, IRS EO CPE Text, 1999, p. 228, <https://www.irs.gov/pub/irs-tege/eotopick99.pdf>.

²⁵ [IRS Publication 3833](#).



Ultimately, an organization must maintain adequate records to show that the payments further the organization's charitable purposes and that the persons served are needy. Organizations must also maintain appropriate records to show that they have made distributions to individuals after making appropriate needs assessments based on the recipients' financial resources and their physical, mental, and emotional well-being.²⁶

Can a 501(c)(3) charitable organization facilitate mutual aid?

A first question to ask is, “**Should** 501(c)(3)s facilitate mutual aid?” Our opinion: a resounding YES! Because without a large pre-existing cooperative sector, the nonprofit sector is best positioned to step in and fill immediate needs.

But, **can** they? If we're no longer in the qualified disaster relief window, can a charitable 501(c)(3) organization continue facilitating mutual aid? The short answer is yes; the long answer is, “It's a grey area, but we believe there is a strong argument for it!”

Traditionally, the IRS has denied 501(c)(3) tax exemption to organizations that provide private benefit to people involved in governance. As such, it might sound like 501(c)(3) would be an awkward fit for a mutual aid group, where, by design, people providing aid and deciding aid are also often receiving it.

However, the IRS has often expanded the scope of what it considers to be “charitable” when existing infrastructure is not meeting people's needs. For example, the IRS has started granting tax exemption to low bono law firms, in recognition that most people cannot afford essential legal services from conventional law firms. Similarly, we are in a crisis where many people's needs are not being met by current systems. Mutual aid already has proven to be a highly effective way to mobilize aid during this particular crisis. Further, scholars such as Nobel Prize-winning economist Elinor Ostrom have demonstrated that communities – across the world and throughout time – more effectively and efficiently manage scarce resources when the users of those resources participate in their management. Therefore, mutual aid – where recipients of the aid participate in the management of resources – may advance charitable purposes even more effectively perhaps than conventional charities with top-down or detached decision-making.

²⁶ [IRS Publication 3833](#).



Liability

How much risk is there if I continue to do this informally (i.e. not forming an entity) and not purchasing insurance?

This is one of those questions where we have to give the annoying lawyer answer of, “It depends.” If your organization makes food deliveries to a person and they get sick, they could potentially sue. If someone gets sick while volunteering for your organization, they could sue. If your organization is not incorporated, that means that there is no legal entity to sue. As a result, individuals associated with the organization are the ones who could be on the hook. However, just because someone can sue doesn’t mean they’ll win. And most cases settle out of court, meaning that your group could find ways to remedy the harms without it turning into an expensive legal battle.

But we are just trying to help. Shouldn't that count for something?

In the early 20th Century, yes. Until the 1940s, nearly every state had incorporated the doctrine of charitable immunity, which meant that charitable organizations could not be sued for damages.²⁷ However, starting in the 1950s, states started limiting charitable immunity such that today, nearly every state has functionally abandoned charitable immunity.²⁸ As a result, most charitable organizations are liable for damages just like any for-profit business.

So there aren't any special protections for us?

Well it depends what you mean by “us” and the activity involved. Let’s break it down:

- **Volunteers:** In 1997, Congress passed the Federal Volunteer Protection Act, which says that volunteers of a nonprofit organization or government entity generally are not liable for harm they caused.²⁹ This immunity only extends to volunteers, not the organization itself.³⁰

In addition to federal law, some states have **Good Samaritan laws**. Oftentimes, states limit their Good Samaritan laws extend only to a *health care worker* intervening in an emergency situation (e.g. doctor providing CPR).³¹ The health worker limitation applies for the Good

²⁷ Bradley Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 Law & Soc’y Rev. 969, 971-72 (1979).

²⁸ Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 Cornell L. Rev. 401 (1991).

²⁹ See 42 USC 14503 (saying that the volunteer shall not be liable as long as the volunteer was acting within the scope of their responsibilities, had any necessary licences or certifications, and the harm was not caused by willful or reckless conduct).

³⁰ The VPA protections only apply to volunteers that do not receive compensation, other than reasonable reimbursement not exceeding \$500 per year.

³¹ A more comprehensive overview of nonprofit immunity laws can be found at the following source; however, please note this resource was last updated in 2009, and may contain some outdated information: Nonprofit Risk



Samaritan laws passed by California, as with a number of other states. So while it appears that the Good Samaritan laws enacted by state legislatures might not be as useful, there is a *federal* Good Samaritan law that may be more applicable to mutual aid groups coordinating food donations (see next paragraph).

- **Donors and donees of donated food:** The federal Bill Emerson Good Samaritan Food Donation Act provides civil and criminal liability protection for food donors and donees³² (including, very likely, mutual aid groups and nonprofits!). To qualify for this federal protection, the donated food must be in a relatively fit state. Furthermore, the Bill Emerson Act does not apply in circumstances of gross negligence and intentional misconduct.
- **The mutual aid group:** In thinking about how to protect the mutual aid *group* (distinct from individual volunteers) from liability, there is no immunity from liability like the one provided for individuals under the federal Volunteer Protection Act, or state immunity for helpful bystanding volunteers through state-enacted “Good Sam” laws. What does this mean? If a mutual aid group did not incorporate, then there is no legal shield. If there is no legal shield, it is possible for the main organizers to become liable for the actions of the mutual aid group. More discussion about how liability would reach different members in a mutual aid group can be found [here](#) (ps. 4-5). (Note: in court, the standard for reasonable care in a COVID response situation is going to be adjusted accordingly to the “emergency” at hand, though it is hard to say how this will play out exactly.³³ Additionally, because of COVID-19 some states may pass laws that protect businesses from civil liability.³⁴ Your group should check the laws in your state to see if there are any immunity laws that may apply.)

How can I protect myself?

First and foremost, you should return to the conversation regarding entity formation and determine if the benefits of formation (i.e. establishing a liability shield) outweigh the

Management Center, *State Liability Laws for Charitable Organizations and Volunteers*, (2001), <https://www.probonopartner.org/wp-content/uploads/2016/01/stateliabilitylawsforcharitiesandvolunteers.pdf>

³² For more information about the Bill Emerson Act, go to: Public Health Law Center, *Liability Protection for Food Donation*, (Mar. 2013),

<https://publichealthlawcenter.org/sites/default/files/resources/Liability%20Protection%20Food%20Donation.pdf>.

³³ See Sharona Hoffman, *Responders' Responsibility: Liability and Immunity in Public Health Emergencies*, 96 Geo. L.J. 1913, 1926 (2008); see also *Estate ex rel. Campbell v. Calhoun Health Servs.*, 66 So. 3d 129 (Miss. 2011) (saying that the “hectic environment in hospital’s emergency room was relevant to determination whether emergency room personnel breached applicable standard of care”); *Heath v. Swift Wings, Inc.*, 40 N.C. App. 158, 162, 252 S.E.2d 526, 529 (1979) (“while the standard of care of the reasonably prudent man remains constant, the quantity or degree of care required varies significantly with the attendant circumstances”).

³⁴ See, e.g., Taylor Steven, *Utah governor signs bill shielding businesses, property owners from coronavirus-related suits*, Salt Lake Tribune (May 5, 2020), <https://www.sltrib.com/news/politics/2020/05/04/utah-governor-signs-bill/>.



administrative and financial costs. Beyond formation, there are a number of things that your organization can do to protect you and your organization, including³⁵:

- Having written safety policies which reflect current public health knowledge;
- Adopting processes for grievances and dispute resolution so that harm can be addressed before things escalate to a lawsuit,
- Understanding potential tax liability with regard to your organization's activities;
- Learning about the risks associated with your group's activities (disaster relief, crowdfunding, food handling, etc.);
- Using liability waivers where appropriate; and/or
- Buying insurance for your organization.

Ok, maybe I'll start looking into buying some type of insurance. Where should I start?

The first type that your organization should consider is a general liability insurance, which covers bodily injuries, property damage and other losses that might result due to your organization's activities.³⁶ Beyond general liability insurance, other insurance policies that your organization might consider purchasing include workers' compensation insurance (if you have employees), commercial automobile insurance (if your organization uses vehicles), or an accidental injury policy for your volunteers.

Governance and decisionmaking

What governance and decisionmaking structures do you recommend?

Many mutual aid organizations formed quickly and organically among groups of energized people working together to meet their communities' needs. Many haven't felt the need to formalize their governance structures, since everyone has been on the same page. Which is great! However, we recommend that as your group moves from rapid triaging to longer-term organizing, you take the time to sit down and come to some group agreements, which can serve to:

- Preemptively establish decisionmaking structures while everyone is on the same page, so you know how to approach conflicts if/when they do arise.
- Establish who is accountable for what, so that as the initial momentum subsides, the effectiveness of the group does not.
- Make it clear who has authority to make decisions, which is an opportunity to counteract invisible power structures and enforce accountability.

These governance agreements don't have to be long, complicated, or formal. To get you started, we have created a [sample set of bylaws for an unincorporated group](#). There is just enough in

³⁵ Haber, [Preliminary Legal Guide to Mutual Aid Operations](#), p. 5.

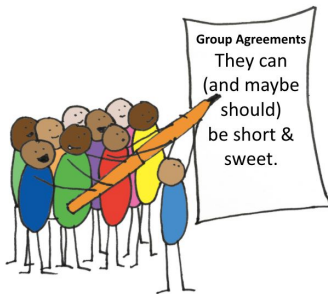
³⁶ Sustainable Economies Law Center, [Think Outside the Boss](#), p. 9.



there to jumpstart conversations on decisionmaking and accountability, but not so much as to overwhelm the group.

*Regardless of whether or not we are incorporated, what are some things we might want to create agreements about?**

*The following is excerpted, with some sections shortened, from [Legal Issues in Mutual Aid Operations: A Preliminary Guide](#) by Michael Haber of Hofstra University.



Even if your mutual aid group plans to never incorporate, it is a good idea to establish some written rules for how your group makes decisions and operates. As Jo Freeman observed decades ago, saying that your group has no structure and that people are free to do whatever they please is not liberation: it means that unwritten rules, friendship cliques, and popularity contests fill the void where a set of mutually agreed-upon group rules could otherwise be.

What are good things to put in writing for your members to know and agree to follow?

- **Principles and Purposes** – What are your goals? Shared values or points of unity?
- **Community Agreements or Group Agreements, and an Anti-Oppression Statement or Safer Space Policy** – These are different, but all speak to creating an environment for collaboration that aims to support and be respectful toward all participants. A community agreement or group agreement asks all members to consent to a set of member-created statements describing what all members of the group need from—and are willing to commit to—one another in order to feel safe. Antioppression statements and safer spaces policies aim to fight against white male-domination of activist spaces by specifically calling on activist spaces to address oppression and discrimination within their groups.
- **Safety Policy** – We recommend that all mutual aid groups adopt a policy on how you will be keeping each other and the community as safe as you can from COVID-19.
- **Policies Regarding Membership, Participation, and Voting** – Does a person need to take some action to participate in the group? Is there a way to formally leave the group? What process is used to make decisions—majority vote, consensus, consent, something else? Do all members get to participate in decision-making? Is there more than one decision-making body? Are all decisions made by the group as a whole?
- **Policies on Money** – If your group has a bank account, or an account with a payment processing firm like PayPal or Venmo, who has access to those accounts, and what are your policies on keeping records of those funds, requesting funds, and authorizing payments?
- **Policies on Engagement** – Are there rules regarding how you interact with the community or broader public? Are there rules on who can speak for the group?

- **Policies on Communications and Recordkeeping** – How does someone join your communications platforms? Where do you keep records of your decisions and internal communications? Are there people tasked with maintaining those records?

Managing funds

We have been raising funds on a crowdfunding platform (e.g. GoFundMe). Will we have to pay tax on the funds collected?

The answer depends on your incorporation status and where the funds are being kept.

We are unincorporated, and the funds are kept in an organizer's personal bank account.

Although using a personal bank account is often the easiest way to transfer money quickly, there is some risk that the IRS will characterize these funds as taxable income to the account holder. Therefore, if your group is able to create a new account specifically for the organization, this may be a safer option. If you have already been using a personal bank account, however, don't worry--there are a few different arguments you can use to avoid characterizing the funds as taxable income to the individual:

1. You have taxable income, but no net income.

With this method, the account holder reports the income and expenses on Schedule C. Chances are you pay little to no tax, because you'll have little to no net income as long as you pay out most or all of the funds you receive. However, it's possible that the IRS will argue that the payments are not truly deductible business expenses, but rather non-deductible gifts, in which case you may have net income. As such, this may not be the best approach.

2. You are acting as an agent or trustee of an organization, and the organization reports the income.

The IRS reports that that "income received as agent on behalf of another person is not income to the agent," and "[a]gency" . . . results from the manifestation of consent by one person (the principal) to another (the agent) that the agent shall act on the principal's behalf and subject to the principal's control, and consent by the agent so to act."³⁷ So an individual who collects and transfers funds on behalf of an organization and subject to its control can be seen as an "agent" of the organization and does not have income herself. This may be the strongest argument of the three, but one drawback to this method is that the organization still needs to figure out its tax status and report the funds.

³⁷ Internal Revenue Service, *C. Agency: A Critical Factor in Exempt Organizations and UBIT Issues*, 128 - 29 (2002), <https://www.irs.gov/pub/irs-tege/eotopicc02.pdf>.



3. You and your organization are agents or trustees of the donor of the funds, and no one reports the income.

This option is likely tempting to use because neither you nor your organization would need to report any income. Both are simply agents of the donor, facilitating the movement of money from person to person, and there's no taxable income to the intermediary. But this argument is also the most dubious, especially if your organization exercises some control over how to allocate the funds.

The group is unincorporated, and we keep the funds in a bank account under the organization's name.

You will have to determine your tax status as an organization. By default, if you don't incorporate and don't apply for tax exempt status,³⁸ you are technically on the hook for taxes unless you can qualify under the following.

1. The funds are non-taxable gifts to the group

In order to characterize the funds as a non-taxable gift to the organization, they must be a "true gift" as defined by tax law. True gifts are defined as "detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses."³⁹ To determine whether a donation was made out of generosity, affection, or charity, the most important consideration is the donor's intention. If the funds meet this definition of a true gift, then they are not taxable to the organization, but it may still have to report them.

2. The group elects corporate tax treatment and zeroes out net income

If the funds your group receives do not qualify as gifts, it may be able to report them as income, and then deduct the funds you send out to members as ordinary (i.e., short-term rather than capitalized) and necessary (i.e., appropriate and helpful) expenses on a corporate tax return, such that your net taxable profit is zero.⁴⁰ However, there may be a problem with this characterization, because "necessary" is generally understood as meaning appropriate and helpful *within a profit-seeking motive*.⁴¹ If the IRS agrees that the funds received are income (rather than gifts) but disputes that the funds sent out are business expenses and re-characterizes them as gifts, your group could be liable for taxes on the entire amount.

3. The group obtains tax exempt status

³⁸ You could automatically qualify for tax exemption, however, if your gross receipts, before expenses, are under \$5,000.

³⁹ See *Commissioner v. Duberstein* 363 U.S. 278, 286 (1960).

⁴⁰ See Internal Revenue Code 26 U.S.C. §162.

⁴¹ See, e.g., *Deducting Business Expenses*, Internal Revenue Service (Mar. 16, 2020)

<https://www.irs.gov/businesses/small-businesses-self-employed/deducting-business-expenses>, ("A necessary expense is one that is helpful and appropriate *for your trade or business*.") (emphasis added).



Obtaining tax exempt status from the IRS is the safest route if the organization wants to avoid tax obligations. You can remain unincorporated (meaning you don't need to abide by corporate formalities and mostly retain your grassroots nature) but obtain tax exemption. Before you obtain tax-exempt status, you are required to apply for an EIN (Employment Identification Number)^{42 43}, which can be easily done through an online application. Learn more about the various options, including shortcuts, for obtaining tax exempt status [here](#).

Will the beneficiary (e.g. the final recipient) of the funds have to pay tax on the money?

The simplest way to ensure that the recipient of funds will not have to pay taxes on them is to ensure the funds meet the legal definition of a gift. Generally, funds will be considered a gift as long as they are given out of generosity and without expecting anything back in return.⁴⁴ So, as long as your group is distributing funds without any additional conditions, those receiving the funds will likely not have to pay taxes on them.

Alternatively, if the funds are a qualified disaster relief payment, then the recipient does not have to pay taxes on them. For funds to be considered a qualified disaster relief payment, they must be made to cover expenses resulting from a qualified disaster.⁴⁵ But not all payments made during a disaster are tax free, they must be made to cover certain expenses directly relating from the disaster, including “necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster.”⁴⁶ COVID-19 is a “qualified disaster” for which you can receive qualified disaster relief payments.⁴⁷

What can I use a “qualified disaster” payment for? Are there any restrictions?

Qualified disaster payments can be used for personal, family, living or funeral expenses. They can also be used to repair damage to a person's home and to repair or replace the contents of the home. All qualified disaster payments must be used on expenses caused by the qualified disaster and must be reasonable and necessary. To that end, qualified disaster payments can not be used for expenses that would otherwise be paid by insurance or through other reimbursements. They

⁴²Internal Revenue Services, *Employer Identification Number for Tax-Exempt Organizations*, <https://www.irs.gov/charities-non-profits/employer-identification-numbers-for-tax-exempt-organizations>.

⁴³ The EIN application contains a question asking for entity type (Question 8A). For a mutual aid group that functions as an unincorporated nonprofit association, there are two possible responses to this question: select “Other nonprofit organization” or “Other organization.”

⁴⁴ [IRS Publication 559](#), p. 25.

⁴⁵ 26 U.S.C. § 139. Qualified disasters are ones that result from terrorist or military actions, result from an accident involving a common carrier, is a Presidentially declared disaster, or, is an event that the Secretary of the Treasury determines is catastrophic.

⁴⁶ [IRS Publication 3833](#), p. 15.

⁴⁷ IRS, *Coronavirus and Economic Impact Payments: Resources and Guidance*, (Aug. 2020), <https://www.irs.gov/coronavirus/coronavirus-and-economic-impact-payments-resources-and-guidance>.



also cannot be used as income replacement to compensate for lost wages, business income, or unemployment benefits.⁴⁸

What are tax considerations for a donor?

Gifts are generally not tax deductible to the original donor, unless they give to a charitable organization that can provide them with a tax deductible receipt.⁴⁹ When making a gift of \$15,000 or more to one individual, business, or *non-charitable* organization, donors generally have to report the gift on Form 709, with some exceptions, which includes gifts paid directly to a medical provider to cover an individual's medical expenses.⁵⁰ Even though the donor must report the gift, the donor will not pay taxes on any gifts until they have exceeded a lifetime gift tax exemption, which is \$11.58 million in 2020 and which the federal government may increase or decrease over time.⁵¹

Is there a limit to how much our group can raise on GoFundMe before we have to pay tax?

There does not appear to be a limit on how much you can raise through GoFundMe.⁵² As for tax obligations, donations made through GoFundMe are usually considered personal gifts, but that is not always the case.⁵³

We have also heard from some mutual aid groups asking about different crowdfunding "limits." These limits are often conflated with different tax rules. It's important to note that these figures are not crowdfunding LIMITS, but rather, thresholds that impose different obligations on different parties involved in the mutual aid flow of money. Below are some of these thresholds, explained:

Threshold	Benefit Explained	Who does this threshold apply to?
\$5,000	If your group is engaging in charitable activity and brings in less than \$5,000 (before expenses and disbursements) all year, you can qualify for 501(c)(3) tax-exempt status from the IRS without	Mutual aid group

⁴⁸ [IRS Publication 3833](#), p. 15.

⁴⁹ [IRS Publication 559](#), p. 26.

⁵⁰ Gifts bigger than \$15,000 paid directly to a school for tuition or to a medical provider to cover a bill are not subject to gift taxes. See [IRS Publication 559](#) at 26.

⁵¹ Internal Revenue Code § 2503; IRS, FAQs on Gift Taxes, <https://www.irs.gov/businesses/smallbusinesses-self-employed/frequently-asked-questions-on-gift-taxes>.

⁵² For more information about GoFundMe, see <https://support.gofundme.com/hc/en-us>.

⁵³ GoFundMe, *Taxes for Organizers*, <https://support.gofundme.com/hc/en-us/articles/204295498-Taxes-for-Organizers>.



	filing a Form 1023 application.	
\$15,000	Givers/donors may be responsible for reporting the gift to the IRS if they give a gift of \$15,000 or more. ⁵⁴ But note: the gift tax only applies for those donors whose lifetime gifts exceed \$11.4 million in 2019. ⁵⁵	Giver/Donor
\$20,000	Crowdfunding platforms are required to fill out a 1099-K for campaigns that exceed \$20,000 in gross payments and have more than 200 transactions (e.g. > 200 donors)	Crowdfunding platform, the mutual aid group

Can one of the mutual aid organizers also receive funds?

Technically yes, though it should be done with some safeguards in place. We believe that an action is well served when the organizers come from the same community and struggles, and in this context, that may very well mean that the mutual aid organizers are also themselves requiring aid.

Disbursing support to an organizer is possible, but should be approached with caution due to the potential conflict of interest involved. Giving funds to one of the organizers can make it look like your group was created to benefit its founders. That is not to say that an organizer can't receive funds, just that you should follow a few steps to avoid it looking like anything fishy is going on, including:

- Create some process for navigating conflict of interest.
- The organizer who is applying for funds should perhaps not be involved in the final determination of whether or not they receive the funds.
- The group should clearly document how the decision is made on whether or not to give funds to the organizer and how they qualified under the groups' objective standard.⁵⁶ Following an objective process is even more important if your organization is an exempt entity, as providing excess private benefit could result in losing your exempt status.⁵⁷

⁵⁴ IRS, *Frequently Asked Questions on Gift Taxes*, 2020.

<https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes>.

⁵⁵ TurboTax, *The Gift Tax Made Simple*, 2020,

<https://turbotax.intuit.com/tax-tips/estates/the-gift-tax-made-simple/L5tGWVC8N>.

⁵⁶ See Appendix for a Sample Conflict of Interest Policy and a Recordkeeping Checklist.

⁵⁷ Emily Chan, *Private Benefit Rules – Part I: Private Benefit Doctrine*, Nonprofit Law Blog (September 27, 2012), <https://nonprofitlawblog.com/private-benefit-rules-part-i-private-benefit-doctrine/>.



Here is a sample of a [Conflict of Interest Policy](#) that the Law Center created with this situation in mind; the sample policy allows for *confluences* of interest, or in other words, instances where the aims of the group and the individual align.

We are a nonprofit corporation. Can I distribute the funds we've raised to struggling businesses in our community?

Although it is fairly easy to give tax-free money to *individuals* as either a “gift” or a “qualified disaster relief payment,” it can be more difficult to give tax-free money to *businesses*. Businesses likely don’t qualify for disaster relief payments, but can receive tax-free “gifts.” Because the IRS may not expect to see people giving “gifts” to businesses, however, it is important to make sure the gift is motivated by a charitable impulse rather than any moral or legal obligation, and ensure that it comes with no strings attached or anticipation of return.⁵⁸ Otherwise, the funds will likely constitute taxable income to the business.

If your nonprofit gives to businesses, it is also important to stay within the bounds of your charitable purpose. Funds that fall within this purpose could include “aid individual business owners who are financially needy or otherwise distressed, to combat community deterioration, [or] to lessen the burdens of government,” but nonprofits should “have criteria and procedures in place to determine when aid should be offered and discontinued.”⁵⁹

On sharing goods and services (i.e. bartering)

Our mutual aid network is starting to see exchanges of goods and services. Will we be taxed?

If your organization has crossed over into the territory of facilitating exchanges and barter, then you may be subject to tax reporting requirements depending on whether you meet the IRS’s definition of a “barter exchange.”

The IRS defines a “barter exchange” as an organization “with members or clients that contract either with each other or with such person to trade or barter property or services either directly or through such person. Barter exchanges are required to report transactions among barterers by filing 1099-B forms for people involved.

The term “barter exchange” **does not include arrangements that provide solely for the informal exchange of similar services on a noncommercial basis.**⁶⁰ Other IRS guidance has mentioned

⁵⁸ See *Commissioner v. Duberstein* 363 U.S. 278, 285 (1960) (defining “gift” for tax purposes).

⁵⁹ [IRS Publication 3833](#), p. 8.

⁶⁰ Treas. Reg. § 1.6045-1(a)(4).



that a barter exchange is an “organized marketplace”⁶¹ and that one factor they are concerned with is whether it is a profit motive by the organization or by individuals involved.⁶² Other factors the IRS is likely to consider when determining if you are a barter exchange are how formal is the exchange itself, whether the exchange creates contractual liability, and how involved your organization is in the transactions.⁶³

So what does this all mean? If your members are simply trading similar services on a noncommercial basis, then you likely will not have tax reporting obligations. If you want to avoid becoming a barter exchange, you should be cautious about appearing like your organization is facilitating the transactions. Ideally you would not allow members to negotiate the exchange of goods or services on your website or social channels. The organization should also not be responsible for keeping track of any barter transactions or appear to benefit from any such transaction.

On data security

What are we legally obligated to do when it comes to handling personal information, especially when it comes to sensitive information like immigration status?

Civil rights groups warn about the government’s use of social media to surveil activists.⁶⁴ For example, Immigration and Customs Enforcement (ICE) used social media to locate members of Migrant Justice and arrested more than 40 immigrants involved.⁶⁵ To prevent misuse of personal data by the government and by other bad actors, please read Electronic Frontier Foundation (EFF)’s article [Keeping Each Other Safe When Virtually Organizing Mutual Aid](#). When it comes to personal info, EFF urges mutual aid groups to **collect as little data as possible**.⁶⁶

El Pueblo’s [Mutual Aid for Immigrant Families](#) program is a good example of a COVID-19 fund created to support immigrant families. In their [application](#) for aid, El Pueblo doesn’t ask about immigration status. Instead, they merely state the purpose of the fund (i.e. to help immigrants financially impacted by COVID-19) while still collecting as little data as possible.

⁶¹ <https://www.irs.gov/newsroom/four-things-you-should-know-if-you-barter>.

⁶² IRS Private Letter Ruling 200724006, 960800, 853606.

⁶³ Sustainable Economies Law Center, *Legal Basics for Time Banks, Barter Exchanges, and Complementary Currencies*, (2012), <http://www.communitycurrencieslaw.org/2014/07/legal-basics-for-time-banks-barter-exchanges-and-complementary-currencies/>.

⁶⁴ See *Social Media Surveillance by Homeland Security Investigations: A Threat to Immigrant Communities and Free Expression*, Brennan Ctr. for Justice (November 15, 2019), <https://www.brennancenter.org/our-work/research-reports/social-media-surveillance-homeland-security-investigations-threat>.

⁶⁵ *Id.*

⁶⁶ Okuda, Soraya et al, *Keeping Each Other Safe When Virtually Organizing Mutual Aid*, Elec. Frontier Found. (March 30, 2020)., <https://www.eff.org/deeplinks/2020/03/keeping-each-other-safe-when-virtually-organizing-mutual-aid>.



As a group based in California, what are California-Specific Privacy Laws we should know about?

If your group has a website that collects personally identifiable information from California consumers, you must conspicuously **post a privacy policy** on the site.⁶⁷ “Personally identifiable information” includes email addresses, first and last names, physical addresses, etc. The privacy policy must, among other things, identify the types of information collected about site visitors and the kinds of third parties with whom you might share that information. An example of a privacy policy can be found on Mutual Aid Hub’s website at <https://www.mutualaidhub.org/site-information>.

In California, you must **notify folks of data breaches**⁶⁸ if you own personal information that has been accessed by an unauthorized person. “Personal information” means an individual’s name PLUS one or more of the following: SSN, drivers license number, financial account numbers, medical info, etc. You must also notify someone if their user ID and password were accessed by a third person. Click here for the required [template](#) of a data breach notice.

⁶⁷ Online Privacy Protection Act, Ca. Bus. & Prof. Code §§22575-22579.

⁶⁸ CA CIV CODE §1798.82



Appendix:

Sample Forms & Other Resources

Sample Fiscal Sponsorship - Model A Agreement: In a fiscal sponsorship, an unincorporated group may affiliate with an established nonprofit and use the nonprofit's tax-exempt status to receive grants and donations. There are many models of fiscal sponsorship; in a Model A, the nonprofit sponsor takes a more hands on approach to managing the project. (More on fiscal sponsorships [here](#).)

Recordkeeping Checklist: For charitable 501(c)(3) organizations providing mutual aid as a form of disaster relief. You may opt to include less. For groups that want to minimize recordkeeping in order to protect community members, some groups have experimented with using a 501(c)(4) instead since a (c)(4) may not be subject to the same disaster relief recordkeeping as a 501(c)(3).

Sample Conflict of Interest Policy: For charitable organizations providing mutual aid, where organizers may also be recipients of the mutual aid funds or resources.

Sample Bylaws for an Unincorporated Mutual Aid: A simple governance document to use as a baseline for mutual aid groups. This can also be adapted further even after incorporation, should a group choose that route.

Other resources:

- Community Law Center, [Sample Bylaws for a Volunteer Run Membership Organization](#).
- Public Counsel, [Sample Bylaws for a Volunteer-Run Membership Organization](#), 2010.

