

Title: When and How to Register a DBA (Doing Business As) Name for Your Nonprofit

Brief Overview: This article addresses key considerations related to registering a DBA as a nonprofit organization, including what a DBA is, when it makes sense to use a DBA, and where and how to register that DBA, as well as intellectual property considerations. It is designed to offer principles of broad applicability, but laws vary by state, and what is best for your organization will depend on your individual circumstances. This article is not legal advice.

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What is a DBA?

A “DBA” refers to a name, other than an organization’s legal name, that an organization uses to conduct business or activities. A DBA is also sometimes referred to as an “assumed” or “fictitious” name. Importantly, using a DBA is not a legal name change – a nonprofit could change its legal name by amending its articles/certificate of incorporation, but it may instead prefer to use a DBA for various reasons.

In most states, an entity that wants to conduct activities using a DBA will need to register the DBA in that state (and in some states, like New York, in each county where it does business). The reason states generally require this registration of DBAs is for transparency, so that people and businesses know the identity of the entity with which they are doing business—for example, it is difficult to conduct diligence on a counterparty to a contract (or an entity to which a donor may wish to donate), or to bring a lawsuit against that counterparty, if the DBA is not registered to the legal entity using that DBA.

Why Use a DBA?

A nonprofit may choose to use a DBA for a variety of reasons, such as the desire for a change in image or re-branding (and to gain media coverage around that re-branding), to differentiate an existing or new product or service, to shorten a long legal name, or to avoid confusion and distinguish a nonprofit from a for-profit arm or affiliate.

For example, a nonprofit whose legal name is Nonprofit Giving Philanthropy USA may decide it wants to use the DBA “Philanthropy USA” to make certain communications snappier or more succinct. However, it may not want to change its official legal name which can, in some cases, create questions or complications with respect to bequests or donor-restricted endowments; or the entity may have goodwill or brand recognition associated with its legal name that it wants to maintain even while using a new DBA name.

Once a nonprofit has decided that it would benefit from using a DBA and has chosen a DBA name, it is important to register this new DBA in the states that require such registration before it begins doing business or conducting activities in those states under that DBA name. Failing to do so risks violating the applicable state law requiring such registration and may result in possible enforcement action from an active state regulator.

So, You’ve Decided to Use a DBA. Where are You “Doing Business”?

If your nonprofit is not “doing business” in a state (or any state), then you do not need to register a DBA in that state (or any state), including in the nonprofit’s state of incorporation. It is also not necessary to register to do business in your nonprofit’s state of incorporation.

If you are a domestic nonprofit only doing business in your state of incorporation, you will need to register your DBA with that state of incorporation. If you are a “foreign” nonprofit (meaning either incorporated in another U.S. state or a legal entity created under the laws of another country), the first question is whether the nonprofit is “doing business” in one or more U.S. states.

Each state defines doing business (also sometimes referred to as “conducting activities”) a little differently. Generally, the test for whether your organization is doing business in a state is akin to a constitutional “minimum contacts” analysis, i.e., does the nonprofit have sufficient contacts with a particular state such that the nonprofit could reasonably expect for that state’s regulators to assert jurisdiction over it. For example, having a physical office or having employees in a state generally constitutes doing business in that state.

States typically define doing business in the negative, which can be frustrating – state statutes typically contain a non-exclusive list of activities which, without more, do not constitute doing business in that state. These activities typically include maintaining bank accounts, holding board meetings or other internal corporate affairs and engaging in isolated or one-off transactions. Note that what constitutes “doing business” for DBA purposes may be similar, but is not the same as, what constitutes doing business for state tax jurisdictional purposes or what establishes personal jurisdiction for purposes of being subject to state judicial proceedings, both of which are beyond the scope of this article.

If a foreign nonprofit is doing business in a particular state, then it should be registered (sometimes also referred to as “qualified”) to do business in that state. If a nonprofit is not already registered to do business in that state, the nonprofit will need to first register to do business in that state and then register the DBA.

Registering to do business in a state is different than registering with a state’s charities bureau or other charities regulator to solicit charitable contributions from residents of that state or to hold charitable assets in that state. For example, in New York, nonprofits register to solicit charitable contributions with the Office of the Attorney General, Charities Bureau, by filing Form CHAR410, and register to conduct activities in the state with the Department of State by filing an Application for Authority on Form DOS-1555-f-a.

How to Register a DBA

DBA registrations are filed with various state regulators. For example, in New York, they are filed with the New York Department of State; in New Jersey, with the New Jersey Division of Revenue; and in Washington, DC, with the Department of Licensing and Consumer Protection. DBA registration forms are generally available on the websites of these regulators and are relatively simple to complete and submit with the required fees. Not all states require nonprofit organizations to register their DBA. For example, California generally exempts nonprofit organizations from its fictitious name registration requirements.

Special Considerations for Nonprofits

Registration of your DBA is particularly important for purposes of ensuring your fundraising materials are clear and accurate. Fundraising under an unregistered DBA may cause donor confusion or even claims of charitable solicitation fraud by donors or regulators. Charitable solicitation materials that are branded with a DBA should also make clear somewhere (e.g., in disclaimer language in the footer) the full name and federal tax ID (EIN) of the legal entity to which a donor is contributing.

Nonprofit organizations that register a DBA must note their DBA on their annual IRS Form 990 or 990-PF and on annual charitable solicitation and other required state filings.

As noted above, a DBA is not a legal name. In general, when entering into a contract, a nonprofit should use and sign under its full legal name (referencing the DBA in conjunction with the nonprofit’s full legal name in the contract is fine). Contracts made and signed using only the DBA (and not the full legal name) may be subject to enforceability or other challenges for not observing corporate formalities.

Intellectual Property Considerations

Establishing and using a DBA raises important trademark considerations. DBAs can be registered with the U.S. Patent and Trademark Office as trademarks if they are distinctive and used as a brand for the organization. Newly adopted DBAs can also create the risk of a trademark challenge from an existing user of a potentially similar DBA or trademark. Internet searches, and searches of the U.S. Patent and Trademark Office registration database, are a good first step in determining whether a proposed DBA raises any trademark risk. If an organization intends to make a major push to publicize the DBA and rebrand its identity, consulting with

intellectual property counsel is essential, both to avoid or minimize the risk of a third-party challenge, and to help capitalize on the opportunity for strengthening the new DBA brand identity by trademark registration.

Please reach out to one of the attorneys listed below if you would like to discuss DBAs or any other topic addressed in this article.

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