

Risk, Liability and Insurance – What Your Organization Needs to Know

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Today's Agenda

- Governing Authority
- Role of the Board
- Unique Aspects of a Foundation Board
- Legal Duties
- Board Liability Issues
- General Q&A

Governing Authority

1. State law requirements for nonprofit corporations and trusts
2. Articles of Incorporation & Bylaws
3. Trust document as applicable
4. Will provisions (testamentary gifts)
5. Internal Revenue Code, Treasury Regulations and other Federal laws

Compliance and Enforcement

State Attorney General or Other State Charity Regulators (Secretary of State)

- Consumer protection function
- Charitable solicitation registration
- Represents the public interest

Internal Revenue Service EO Division

- Various statutory penalties
- Revocation of exempt status

Statutory Protections

- Good Samaritan Laws
- Volunteer Protection
- Volunteer Immunity
- Liability Limitation
- Shield Laws
- Charitable Immunity
- Federal Volunteer Protection Act (1997)

Federal Volunteer Protection Act (1997)

The Act provides that a “volunteer” of a nonprofit organization generally will not be liable from harm caused if:

- (1) the volunteer was acting within the scope of the volunteer’s responsibilities;
- (2) the volunteer was properly licensed, certified, or authorized by the state in which the harm occurred (where such authorization is required);
- (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the volunteer; and
- (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the owner or operator is required to possess an operator’s license or maintain insurance.
- (5) The limitations on liability do not apply to terrorist or violent criminal acts, hate crimes, sexual offenses, misconduct in violation of civil rights laws, or offenses committed while the volunteer was under the influence of alcohol or “any drug.”

Example - Maryland

Maryland Volunteer Service Act provides:

“volunteer is not liable in damages beyond the limits of any personal insurance the volunteer may have in any suit that arises from the volunteer’s act or omission in connection with any services provided or duties performed by the volunteer on behalf of the association or organization, unless an act or omission of the volunteer constitutes gross negligence, reckless, willful, or wanton misconduct, or intentionally tortious conduct.”

Example: State Law Protection (PA)

§ 5713. Personal liability of directors.

(a) General rule.--If a bylaw adopted by the members of a nonprofit corporation so provides, a director shall not be personally liable, as such, for monetary damages for any action taken unless:

- (1) the director has breached or failed to perform the duties of his office under this subchapter; and
- (2) the breach or failure to perform constitutes self-dealing, willful misconduct or recklessness.

(b) Exception.--Subsection (a) shall not apply to:

- (1) the responsibility or liability of a director pursuant to any criminal statute; or
- (2) the liability of a director for the payment of taxes pursuant to Federal, State or local law.

Caution

Know you own state laws and watch for:

- Limitations or exclusions (acts involving automobiles)
- Requirement that express statement be in the Bylaws

Role of the Board

- Determine mission
- Select CEO
- Support CEO and review performance
- Ensure organizational planning
- Determine adequate resources
- Oversee resource management
- Monitor programs and services
- Enhance the organization's public image
- Ensure ethical behavior and accountability
- Recruit and orient new board members and assess board performance

Board Governance

What is Unique about a Foundation Board?

- Authorize grants
- May raise funds to build foundation assets
- Ensure donor and grant agreements are honored

Board is ultimate governing authority – not employees!

Board Governance

Duties and Responsibilities:

- ✓ Duty of care/duty of loyalty
- ✓ “Good faith” standard
- ✓ Conflicts of interest
- ✓ Volunteer status and liability protection
- ✓ Bylaw provisions for indemnification
- ✓ Board role in connection with variance power

Purpose of D&O Insurance

Can cover the organization and its directors, officers and trustees against actual or wrongful acts in 3 major areas:

- Governance liability (claims resulting from general governance decisions)
- Fiduciary liability (claims resulting from alleged fraud and improper financial oversight)
- Employment practices liability (claims resulting from employment-related activities)

Costs of Defense

Insurance company may have the right to:

- Select the defense attorney
- Make decisions regarding settlement of a case
- More board control may add to the policy cost

Importance of a Good Broker

- Talk to several brokers to find someone who understands nonprofit law and the role of the board
- Understand policy differences – for example will the policy fund the defense but not pay any settlement or penalties

Other Board Liability Issues

- ✓ Donor-initiated fundraising
- ✓ Fiscal sponsorships
- ✓ 990 reporting and audit responsibilities
- ✓ Owning real estate and other property
- ✓ Employment law issues (most common)
- ✓ Whistleblower claims (do you have a policy?)
- ✓ Record retention (do you have a policy?)

Donor-initiated Fundraising

- Donor acting as “agent” for foundation
- Charitable solicitation issues
- Event specific liability concerns
- Grant applications and responsibility for grant funds

Bottom line: Foundation must be aware and approve all donor-initiated fundraising activities

Fiscal Sponsorships

If a Foundation accepts a fiscal sponsorship role – it is responsible for the project including:

- Ensuring distributions are limited to charitable purposes
- Contracts and payments with vendors and consultants
- Accounting and reporting

990 Reporting and Audits

- Board is responsible for financial oversight of foundation
- Board needs to be aware of 990/990-PF information - IRS Form 990 – Part VI(B)
Question 11a: “Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?”
- State laws may require audits for foundations of a certain asset size

Real Estate and Other Property

Ownership of real estate and other property can pose liability risks:

- Premises liability
- Landlord-tenant law
- Recreational property (athletic facilities, hunting)
- Could require additional coverage

Employment Practices

94% of claims under D&O policies

- Sexual harassment
- Racial, gender and age discrimination
- Retaliation against whistleblowers
- Defamation
- Failure to accommodate (ADA)
- Improper employment classification (wage and hour claims)

Necessity for employee handbook

Sarbannes Oxley Policies

- Whistleblower policy
- Record retention (and destruction) policy

Questions?

Contacts & Additional Resources



Web Resources

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