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EMPLOYMENT DECISIONS and SUNSHINE LAWS

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Congratulations! You have just been appointed to the board of directors of a public housing agency. You have an important mission to accomplish for the term of your appointment. What will your role be?

Typically, the board of directors of any nonprofit organization, like a public housing agency, is the governing entity of the organization. This means that the board members, acting collectively, are responsible for making sound, ethical, and legal decisions to ensure the stable governance of the agency as it carries out its mission.

While there may be a number of reasons for your involvement on the board of directors, once you assume your role, there are various duties that govern your participation. Despite the lack of compensation for your participation and responsibilities, as a board member, in addition to being an advocate for the agency's mission, you are also a steward of the organization and owe it the duties of loyalty, care, and obedience. These fiduciary duties are inherent to your role, and supersede any personal agendas.

This article is intended to be a primer to explain the fiduciary duties you now owe to your organization and to discuss some best practices regarding one of the most important aspects of your responsibilities—hiring a chief executive to execute and further the mission of your agency.

What is fiduciary duty?

In accepting a role as a board member, an individual necessarily agrees to act in the best interest of that corporation at all times. In other words, you become a fiduciary to that organization. As a fiduciary, several obligations and responsibilities are imposed on board members by law, which are commonly referred to as fiduciary duties. Fiduciary duties are responsibilities that implicate both legal and ethical considerations for those that hold them. Failure to act in accordance with these duties can result in legal liability for both the fiduciary and the corporation depending on the circumstances. While the exact legal landscape surrounding fiduciary duties varies from state to state and with the kind of entity involved, the general duties and responsibilities of fiduciaries remain constant.

In their roles as fiduciaries, board members owe various duties to the nonprofit corporations they serve. However, those duties generally fall under two primary categories: the duty of care and the duty of loyalty. The duty of care requires fiduciaries to observe a certain level of attention and diligence in their handling of virtually every aspect of a corporation's affairs. In other words, fiduciaries are obligated to refrain from action or inaction that could foreseeably cause any harm whatsoever to the non-profit corporation they serve. As such, fiduciaries must act reasonably, prudently, and in good faith with respect to all decisions they make on behalf of the entity. Part of this includes and incorporates the duty of obedience, by which you must ensure that the agency obeys all applicable laws and follows its own bylaws and internal policies and procedures.

Although the duty of loyalty appears similar to the duty of care, it focuses more on the potential for a fiduciary to hold competing interests to that of the corporation they serve. While the duty of loyalty is most often implicated by a board member's apparent financial interests, it can arise in more obscure contexts as well. Common examples of improper conduct that violates the duty of loyalty includes usurping a corporate opportunity, taking part in a transaction or deal in which a conflict of interest between the fiduciary and the corporation exists, and the misappropriation of corporate assets. Put another way, any action taken by a fiduciary that is in furtherance of their own agenda or financial benefit, to the detriment of the corporation or its shareholders, is improper under the duty of loyalty.

An area in which these duties can furtively present themselves is through discussions raised in board meetings, which are typically available as public record. While navigating fiduciary duties and their implications can be both a legal and ethical minefield, there are various precautionary measures that can be taken to reduce risk and protect board members and their corporations alike. These measures, along with other legal considerations and recommendations, are discussed in further detail below.

Board Meetings Generally Are Open to the Public

As a board member, you will be required to inform the public of the decisions you make in a formal setting. Generally, at common law, there was not a requirement for the public at large to attend board meetings. Now, through statutes known as "sunshine laws," every state requires that meetings of public agencies be available and open to the public. These laws provide access to constituents so that they may obtain a better understanding of the internal workings of the organization and to learn how the public entity is responding to the needs of the community. In addition, in some states, the laws mandate that the public be allowed to engage and participate in meetings to better address their concerns.

Through statutes known as "sunshine laws," every state requires that meetings of public agencies be available and open to the public.

Sunshine laws apply regardless of how many board members attend or how formal the meetings are organized. For instance, in some states, such as Florida and New York, any gathering of two or more board members to discuss some agency-related matter is subject to the state's sunshine law.[1] In other states, such as Texas and Illinois, there needs to be a quorum (i.e., a majority of the board members) in order for a meeting to be open to the public.[2] Therefore, you should be aware that if your agency has separate committees to carry out the duties of the organization, those smaller meetings may also be subject to sunshine laws.

As one of the main goals of these laws is transparency, the board is required to publicly announce meetings in advance (generally at least 48 to 72 hours prior), typically by publishing a meeting agenda, to invite the public to attend, and to record the events during the meeting, through minutes, which are later made available for public view. Importantly, board members record meeting minutes to detail what happened at the meeting (i.e., to record motions made and the vote on a specific motion). The meeting minutes are not supposed to transcribe specific conversations between or amongst members. Please note that in some cases, depending on your jurisdiction, an audio recording may be made of the meeting, which may then be transcribed and made available to the public.

1 Fla. Stat. § 286.011 (1974 Fla. AG LEXIS 261); N.Y. Pub. Off. Law § 102(2).
2 Tex. Gov.t Code Ann § 551.001(6); 5 Ill. Comp. Stat. 120/1.02

While anyone may attend these meetings, in certain states, such as New York and Illinois, there is no general right to allow the public to participate or comment in these meetings. Depending on the circumstances and laws of a certain state (like Florida), however, it may be required to hear from the public on certain issues so that the agency is appropriately addressing the ultimate goals of the community it serves. While it is important to give the public an opportunity to voice any concerns or raise any issues, order is also important. To the extent that meetings become contentious, either amongst the public or between the board and the public, sunshine laws provide guidance on clearing the room if it becomes overly disruptive.

As a board member of a public agency, you must understand that in most cases, your work is and should be transparent. These laws serve the need for its agencies to be accountable to its community. Therefore, your conduct at meetings, and any written record, including meeting minutes, communications, and the like will be subject to review. With this in mind, board members should always be focused on advancing or advocating the organization's goals as opposed to any individual requests or personal goals.

The interplay between transparency and your fiduciary duties may seem to conflict at times. Specifically, the sunshine laws acknowledge that, occasionally, there are issues that must be addressed in a closed session, without public attendance. You should obtain guidance to understand these boundaries and to understand the appropriate topics discussed in a public setting versus a closed or executive session, so that there is no inadvertent waiver of any privileges or protections.

Summary of Meeting Structure – Robert's Rules for Board Meetings

In order to conduct an orderly and efficient meeting, public agencies adopt and memorialize certain procedures that will govern the board's proceedings. Most often, boards adopt the Robert's Rules of Order ("Robert's Rules") for assistance in how to organize and address the agenda for any meeting.[3] In almost all cases, an agenda is put forth in advance of each meeting so that is everyone is aware of the main topics that will be addressed. The meeting agenda would also include notice of a closed session so that your constituents are made aware of confidential discussions that will be taking place. Typically, notice of a closed session will

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3 If there is any federal, state, or local law that contradicts the rules, then the laws apply. The Robert's Rules of Order can be found at the following website address: https://www.robertsrules.com.

include notice of the subject matter to be discussed and the necessary participants invited for the closed session (i.e., legal counsel). Thus, you have satisfied your obligation to be transparent while protecting any privileges that may apply to your closed sessions.

Within the Robert's Rules, a chairperson is named and/or appointed to lead the agenda for each meeting. During the meeting, board members will discuss the items listed on the agenda, and make motions and vote to record the board's decision-making process.

The Robert's Rules also provide for members:

- to interject if an individual has breached the rules or procedures (point of order),
- to raise any additional points after or during debate (point of information), or
- to ask for clarification (point of inquiry).

These rules generally provide a method for having a clear debate among board members, without talking over one another.

In general, most meetings of the governing body of a public agency should be open to the pubic after appropriate notice is provided, as governed by local rules and regulations. In some states, the public only has the right to attend meetings and obtain publicly available documentation related to the board's agenda and decisions. In other states, the public also has a right to comment and participate in the meetings.

On the other hand, boards are generally permitted to conduct certain business in a closed or executive session. The ability to go into closed or executive session depends upon the subject to be discussed, which is likely to be dictated by the exemptions to a state's sunshine laws. For example, communications with in-house or outside counsel with respect to pending litigation or threatened claims, certain hearings involving minors, and/or consideration of confidential records are generally appropriate topics for an executive session. Permissible exemptions are different from state to state, so please identify and know those subject matters that are associated with closed meetings in your jurisdiction.

Before meeting in a closed session, however, you may need to jump through some hoops before actually engaging in the topic. For instance, in Illinois, New York, and Texas, a board first must hold an open session, raise a motion to go to a closed session (advancing by majority), and then identify the basis for going to a closed session (which in some cases, involves identifying the specific exemption) before transitioning to an executive session.[4] Therefore, it is important to know the sunshine laws in your state before calling for a closed session. Once the vote passes, the public must leave the room until the board votes to end the executive session.

Employment Decisions

As a board member, you will be responsible for making one of the biggest hiring decisions of the agency, namely the retention of a chief executive/executive director of the agency ("chief executive"). The board also is involved in determining the scope of the chief executive's responsibilities, setting performance expectations, leading a search committee, negotiating the terms of the employment agreement (to the extent one is used), and any compensation afforded for the position. The board is also responsible for evaluating the chief executive's performance and for properly managing his or her performance.

As long as your jurisdiction allows, reserve all discussions about any term or condition of employment of the chief executive for a closed or executive session. These types of discussions will likely involve more than policy agreement or disagreements with the chief executive and involve sensitive and personal information that is usually exempt from public disclosure (i.e., such as personnel records).

4 5 Ill. Comp. Stat. 120/2a; N.Y. Pub. Off. Law § 105(1); Tex. Gov.t Code Ann. § 551.101.

Generally, a board's deliberations relating to the employment, evaluation, discipline, or termination of the chief executive, or any other employee, are exempted from open-meeting sessions. There are several exceptions, however, depending upon the jurisdiction. For example, some states give the offending employee the right to have his or her hearing held in an open setting. For instance, in Texas and California, a public officer or employee, who is the subject of the deliberation, has the right to request an open hearing.[5] Upon this request, the board must comply. As another example, some states do not permit deliberations of employment decisions with respect to a subset or non-specific set of employees. For example, in New York, a board may conduct an executive session to discuss a disciplinary action or termination of a particular employee.[6] To the extent that the same board is discussing whether to lay off a class of employees or a position, then the board must conduct an open session.[7] As a third example, in Florida, whether an open or closed session is appropriate depends on the board's authority. A board can deliberate an employee's disciplinary action or termination in an executive session if it does not have the authority to terminate that employee. Thus, if the board provides a simple recommendation to a chief executive or to another individual who is not on the board, then those deliberations can be protected.[8] In contrast, if the board does have the decision making authority to discipline or terminate an individual's employment, then those deliberations related to that decision are not protected by an exemption and thus should be made in an open session.[9]

Notwithstanding the above, in most jurisdictions, to the extent that you are asking for and receiving legal advice from your attorneys about certain actions, such discussions should always be held in executive session.

As a result, we recommend contacting counsel prior to engaging in any significant personnel decision so that the appropriate protections can be asserted prior to taking action.

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5 Op. Tex. Att'y Gen. No. JM-1191 (1990) (see Tex. Gov't Code Ann. § 551.074); Cal. Gov't Code § 11126(a) (Bagley-Keene Act).

6 N.Y. Pub. Off. Law § l05(1)

7 Bogulski v. Erie Cty. Medical Center, No. 97/95 (Sup. Ct., Erie Cty., N.Y. Jan. 13, 1998) (hospital board violated open meetings law because it discussed layoffs in an executive session, and the open meetings law only permit those sessions if it is focused on particular persons).

8 See Jordan v. Jenne, 938 So. 2d 526, 530 (Fla. 4th DCA 2006).

9 See Drascott v. Palm Beach Cty., 877 So. 2d 8, 12, 14 (Fla. 4th DCA 2004).

Managing Potential Risks in Making Employment Decisions

Employment decisions can raise a number of legal considerations. The decision itself must be based upon legitimate, nondiscriminatory factors, and the decision-making process must comply with your fiduciary duties, any applicable regulations regarding the hiring process, and sunshine laws, if applicable.

Terminating an employee can be a difficult decision. This decision can also bring legal risk to the organization. For example, are there any factors that raise issues of interference or retaliation in violation of any law? Were lawful factors considered to make the termination decision? Are there any contractual issues with respect to termination?

To mitigate the risk from the legal minefield of issues that may attend to a termination decision, here are some key suggestions for your consideration:

- Understand your role as a fiduciary. You should understand the roles and responsibilities of a fiduciary before acting like a manager. Remember, your decisions should be made in the best interests of the organization. This may mean making a decision that conflicts with any personal motives or agenda. In addition, other factors, such as political fallout or public reaction, should not deter you from making a decision that you believe is in the best interest of the organization.
- Documenting performance issues. Whether good or bad, you should get in the habit of documenting performance issues or concerns. Do this from the very beginning—your feedback provides valuable guidance to the executive director and can help cultivate a culture of confidence, stability, and positive reinforcement within the agency and among the stakeholders. Moreover, "papering the file" after a specific incident could invite retaliation claims (for example, that you did not start to scrutinize an employee's file until the employee complained about discrimination). Managing an employee's performance must be done consistently and must be a sustained effort—it should be rewarding as well as corrective. Ultimately, the history of performance evaluations will help justify subsequent personnel decisions, whether to renew a contract or to terminate the employment relationship.
- Always get legal counsel. Whether consulting with in-house or outside counsel, you should always seek advice and counsel from an attorney who specializes in employment and labor laws to review a termination decision for high-profile positions, such as the executive director. By seeking legal counsel, you will be advised about the legal risks of your decision, which may help you make a more informed decision in furtherance of your fiduciary duties to the organization. In addition, communications with your attorney are protected by the attorney-client privilege, which are generally exempt from disclosure under public sunshine laws. We are not encouraging you to make your decision-making process less transparent. However, you, as a board, are entitled to receive substantive legal advice before making a decision that may have contractual implications or raise other legal concerns. The privacy and confidentiality afforded of the attorney-client privilege is to allow you to have open and frank discussions with your attorney to evaluate your legal questions from multiple angles. The privacy allows you to voice concerns that you might not otherwise wish to disclose, freeing you from public scrutiny when you need to consider the legal implications of your decision.
- Listen to your legal counsel. Getting legal advice does not mean that you must always follow it. The important point is to listen to your attorney and to weigh and evaluate that advice against the operational and other legitimate needs of the agency. Your attorney is going to be acting in your best interest and providing advice to mitigate your legal risk, so it would be best to follow his or her advice. However, we recognize that sometimes a hard decision must be made that raises other related concerns. At a minimum, you will be more fully informed about the risks and will be in a position to make a more fully informed decision and to be aware of the risks that may be attendant to that decision.

- Never discuss personnel issues in an open, public session. As noted above, personnel issues are generally afforded from protection from disclosure under sunshine laws. This is to protect the privacy of the employee. While certain information about public employees will be disclosed to the public, such as salary information, other information about the employee does not have to be disclosed, such as disciplinary action. If you have concerns regarding personnel-type issues with respect to your executive director, such as contract renewal or termination, reserve that discussion for a closed, executive session to the extent possible. Oftentimes, your attorney will be present during the closed session to provide legal advice so that you can make a more informed decision. This does not mean that you cannot have a discussion on the record about substantive issues related to the operation of the agency, such as budget or capital programs. The point is that if you are going to raise personnel-related issues, such as contract renewal, fit for organization, or termination, these types of discussions should be held privately in closed session with legal counsel.
- Protect the privilege. Never have a discussion with your counsel on the record during an open session. The confidentiality of the attorney-client privilege is protected by not disclosing your open and frank discussions to anyone outside the attorney-client relationship. Here, you as a board member are the client. You hold the privilege. You should not disclose any communications you have with your attorney with anyone other than a fellow board member. This is not about covering up or circumventing the sunshine laws—rather, the point is protect the confidential nature of your attorney-client communications by keeping those communications within the attorney-client relationship.
- Other relevant privileges. Your attorney-client communications may also overlap with another important agency privilege: the deliberative process privilege, which also protects the agency's evaluation of issues. The deliberative process privilege may differ in different jurisdictions, but it generally protects predecisional, internal agency communications from disclosure, whether in litigation or through a Freedom of Information Act request. This privilege is intended to allow for a substantive, thoughtful review of issues and to avoid inhibiting candid discussions for more informed, optimal decision-making by public agencies.

Being a board member is more than having a title. You are part of the governing body and are legally responsible for the agency's governance. Your actions are guided by your fiduciary duties of care, loyalty, and obedience; you must also exercise sound reasonable business judgment. You do not have to be a lawyer to fulfill your role. However, you should consult your lawyer for guidance and protect the confidentiality of that communication.

Do you know a colleague who could benefit from this information? Feel free to forward this document with them.