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What You Need to Know About D&O: A Practical Guide to Directors & Officers Insurance for Nonprofit Organizations

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 - ✓ Be located in or serve the greater Atlanta area.
 - ✓ Serve low-income or disadvantaged individuals.
 - ✓ Be unable to afford legal services.
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Practical Guide – D&O Insurance

Step 1: Review Articles of Incorporation

Step 2: Review Bylaws and Indemnification

Step 3: Review D&O insurance policy

Articles of Incorporation – Exculpatory Provision

- The articles of incorporation may include a provision eliminating all future director liability except:
 - Misappropriation of a corporate business opportunity
 - Acts or omissions involving intentional misconduct or knowing violations of law
 - Conflicting interest transactions
 - Any transaction from which the director received an improper personal benefit
- (OCGA 14-3-202)

GNCC Indemnification Provisions

- A director may be indemnified for liability incurred in a proceeding to which that director was a party solely because of his/her position as a director (OCGA 14-3-851)
 - ✓ Standard of conduct:
 - In official capacity- reasonable belief that the conduct was in the best interests of the corporation
 - Outside of official capacity- reasonable belief that the conduct was at least not opposed to the best interests of the corporation
 - For criminal conduct- reasonable cause to believe the conduct was lawful

GNCC Indemnification Provisions

- A director may not be indemnified for liability incurred:
 - ✓ In connection with a proceeding by or in the right of the corporation (except for reasonable expenses incurred in connection with the proceeding, so long as the standard of conduct has been met)
 - ✓ In connection with any other proceeding in which the director was found liable on the basis that he/she received an improper personal benefit

Reimbursable Expenses

- A corporation shall indemnify a director who was successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because the director was a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding. (OCGA 14-3-852)

Advancement of Expenses

- A corporation may advance funds, prior to final disposition of a proceeding, to pay for or reimburse a director's reasonable expenses (OCGA 14-3-853)
 - ✓ The director must deliver to the corporation:
 - Written affirmation of the director's good faith belief that he/she has met the relevant standard of conduct or that the proceeding involves conduct for which liability has been eliminated under the corporation's articles of incorporation
 - Written undertaking to repay any funds advanced if it is ultimately determined that the director is not entitled to indemnification

Advancement of Expenses

- Authorization to advance expenses must be made by a majority vote of disinterested directors, so long as there are 2 or more disinterested directors; or if there are fewer than 2 disinterested directors, by a majority vote of a quorum, in which disinterested directors may not participate

Determination to Indemnify

- Corporation must make a determination that indemnification is permissible for the specific circumstances at issue (OCGA 14-3-855)
- Permissibility of indemnification must be made by:
 - ✓ A majority vote of the disinterested directors, if there are 2 or more disinterested directors; or
 - ✓ Special legal counsel selected in accordance with the GNCC; or
 - ✓ The members (excluding any interested director members)
- Determination of reasonableness of expenses is to be made in the same way as described above

GNCC Indemnification Provisions – Officers, Employees and Agents

- Officers may be indemnified and have expenses advanced to the same extent as a director (OCGA 14-3-856)
 - ✓ If the officer is not a director, he/she may be indemnified to a further extent provided in the corporation's governing documents
 - ✓ Excludes liability arising out of:
 - Misappropriation of corporate business opportunities
 - Intentional misconduct or knowing violations of law
 - Unlawful distributions
 - Receipt of an improper personal benefit
- Employees and agents may be indemnified to the extent provided by the corporation's governing documents or by contract

Insurance is Statutorily Permitted

- A corporation may purchase and maintain D&O insurance against liability whether or not the corporation would have the power to indemnify or advance expenses to the individual against the same liability under the code. (OCGA 14-3-857)

Why Obtain a D&O Policy?

- Georgia Nonprofit Corporation Code permits director exculpation
- Georgia Nonprofit Corporation Code provides for indemnification and advancement
- BUT:
 - ✓ Exculpation is limited (prospective only with exceptions)
 - ✓ Indemnification and advancement are optional
 - ✓ Nonprofit may become insolvent or otherwise be unable to indemnify
 - ✓ Indemnified parties (and the corporation) must satisfy the standards of the GNCC
 - ✓ Public policy and statutory limitations on indemnifiable expenses
 - ✓ Improve the ability of your nonprofit to recruit qualified officers and directors
 - ✓ Reduce liability exposure of your nonprofit
 - ✓ Provide a better defense against claims that arise
 - ✓ Shift risk to the insurer
 - ✓ Governing documents establishing indemnification policies can be changed
 - ✓ Code can be changed

Potential Sources of Lawsuits

- **Employees**
 - ✓ Most common
 - ✓ Discrimination, harassment, wrongful termination, retaliation
- **Volunteers**
 - ✓ Claims similar to those of employees
- **Donors**
 - ✓ Misuse of funds, misrepresentation of financial condition
- **Third parties**
 - ✓ Contract disputes, property disputes, personal injury
- **Governmental bodies**
 - ✓ Regulatory violations, tax liabilities
- **Beneficiaries**
 - ✓ Discrimination, misappropriation of funds
- **Members**

What's at Stake?

- Defense costs
- Amount of an adverse judgment
- Settlement value

D&O Insurance – Underwriting Process

- EPL exposure/employee count drives premiums
- Financial Stability
- Healthcare/Education – increased scrutiny
- Application
 - ✓ Entity list / list of subsidiaries
 - ✓ Claims history including investigations or demands/inquiries
 - ✓ Prior insurance history
 - ✓ Most recent audited financials/interim financials
 - ✓ Corporate governance information (board composition, committees, charters/codes of conduct, risk management program, etc.)
 - ✓ Employee count, turnover, HR policies, handbooks, etc.

D&O Insurance Basics

- Check Financial Stability of Insurance Partners (A.M. Best Ratings, S&P, etc.)
- Research Claims Handling Reputation
- Mono-line purchase or Package Policy
- Dedicated D&O Limits vs. Shared Limits across all coverage lines
- Duty to Defend vs. Duty to Indemnify/Reimburse vs. Optional Tender of Defense
- Defense Within or Outside of Policy Limits
- Policy Limits Per Claim vs. Policy Year Aggregate

D&O Insurance Basics - continued

- Policies are typically Claims-made vs. Occurrence-based
- Insuring Clauses and Deductible/Retention – interplay with corporate indemnification
 - Side A Coverage – individual coverage for non-indemnifiable claims
 - Side B Coverage – corporate reimbursement coverage for entity’s advancement/indemnification obligations
 - Side C Coverage – direct coverage for entity itself
- Shared Limits with numerous “insureds” –past, present, and future individuals + entity

D&O Insurance – Key Provisions

- What is a “claim” and when must it be reported?
- What is the conduct / personal profit exclusion “trigger” — “in fact,” “final adjudication in any proceeding,” or “final adjudication in the underlying action or proceeding”
- Insured vs. Insured Exclusion
- Severability of the Application and Exclusions



For More Information:

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

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