

MAJOR CHANGES TO PENNSYLVANIA'S NONPROFIT CORPORATION LAW

THE 2022 AMENDMENTS

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Major Changes to Pennsylvania's Nonprofit Corporation Law: The 2022 Amendments



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For a deeper dive on the 2022 amendments and their applicability to nonprofits, see the on-demand recording and course materials for [PBI course no. 115763](#)). See also [PAnonprofitlaw.com](#) for an annotated version of Title 15 (May 2022 version) and other helpful links and resources, including sample bylaws and other downloadable templates and tools.



AGENDA

- Introduction
- Reasons for the Changes
- Overview of the Changes
- What Didn't Change?
- Biggest Changes
- Other Changes – *some examples of why it's a good time to revisit bylaws*
- Reminders & Action Items

INTRODUCTION

On November 3, 2022, Pennsylvania made major changes to its business corporation law statute governing many types of entities, including nonprofit corporations.

The impacted provisions are in Title 15 (and Title 54) of Pennsylvania's Consolidated Statutes.

Most of the amendments went into effect on January 3, 2023,* others will be phased in.**



*60 days after November 3, 2022, is January 2, 2023, but see 1 Pa.C.S. § 1908 regarding effective dates that land on public holidays.

** See for example the new annual report filing requirement and administrative dissolution provisions.

WHY THE CHANGES?

- Deferred maintenance
- Clarifying edits
- Fixing mistakes
- Keeping up with industry standards
- Removing gender-specific pronouns
- Affording flexibility in emergency situations
- Providing additional safe harbors for directors and officers
- Changes to support the Pennsylvania Department of State's goals (e.g., clearing out of Corporation's Bureau's database of defunct entities, communicating using email)
- Changes in the Delaware General Corporation Law and the American Bar Association's Model Business Corporation Act
- Case law influence; clarification of directors' duties

WHAT HAS CHANGED?

ADMINISTRATIVE CHANGES

- Annual reporting revamped
- Administrative dissolution & reinstatement
- Registered office changes
- Correction of filings
- Tax clearance certificates
- Inappropriate filings

GOVERNANCE MATTERS

- Forum selection
- Resignation of directors
- Election of directors if no directors
- Later effective date for written consents
- Quorum for class voting by members
- Date for determining members
- Ratification process
- Emergency situations
- Definition of disinterested directors
- Duty of loyalty in related-party transactions

SAFE HARBOR & OTHER RULES PROTECTING DIRECTORS & OFFICERS

- Renunciation of opportunities
- Mandatory indemnification
- Recklessness standard clarified
- Personal liability of directors and officers
- Standard of care and the business judgment rule

MISCELLANEOUS

- Derivative suits
- Special litigation committees
- Divisions
- Foreign entities
- Binding nature of bylaws
- Corporate records inspection

WHAT HAS CHANGED?

OUR FOCUS FOR TODAY

ADMINISTRATIVE CHANGES

- ★ Annual reporting revamped
- ★ Administrative dissolution & reinstatement
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WHAT DIDN'T CHANGE?

- Section 202 (c)(2)(ii), prohibiting names that contain “words that constitute blasphemy, profane cursing or swearing or that profane the Lord's name,” was not removed, despite being found to violate the Establishment Clause and the Free Speech Clause of the First Amendment to the U.S. Constitution.
- Section 5307, requiring the advertising of the filing of articles of incorporation (publication in two newspapers of general circulation in the English language in the county in which the registered office is located, one of which must be the legal newspaper, if any, designated by the rules of court for the publication of legal notice).
- Some “his” references - see if you can find them!



THE BIGGEST CHANGES





Major Changes to Pennsylvania's Nonprofit Corporation Law: The 2022 Amendments

Annual reporting completely revamped

ANNUAL REPORTING COMPLETELY REVAMPED

- Annual reports required every year.
- No more decennial reports.

EXISTING REPORTING REQUIREMENTS (BEFORE THE AMENDMENTS)

- Annual reports, only required if change in principal officers in prior year; due on or before April 30 (no filing fee for nonprofit corporations); could not be used to change corporation's address.
- Decennial reports, only due in years ending in the number '1' if no filings made in 10-year period (\$70 filing fee); failure to file (if required) resulted in forfeiture to exclusive right to the organization's name.



NEW REPORTING REQUIREMENTS

1. Required every year, regardless of whether officers changed
2. New due date (depends on entity type)
3. Can now be used to change registered office address
4. Still no fee for nonprofit corporations
5. Consequences for non-filing (administrative dissolution)
6. No more decennial filing requirement

NEW ANNUAL REPORT

WHAT TO EXPECT ON THE FORM

1. the organization's name
2. jurisdiction of formation
3. the address of its registered office
4. the name of at least one board member
5. the names and titles of the organization's principal officers
6. the address of the organization's principal office
7. its Pennsylvania Department of State entity number

ANNUAL REPORT DUE DATES

§ 146. Annual report.

- (c) **Filing deadlines.**--An annual report must be delivered to the department for filing each year, beginning with the calendar year after which an entity or association first becomes subject to this section, and:
- (1) **before July 1** in the case of a domestic or foreign corporation for profit or not-for-profit;
 - (2) **before October 1** in the case of a domestic or foreign limited liability company; and
 - (3) **on or before December 31** in the case of any other form of domestic or foreign association.
- (h) **Transitional provision.**--This section shall take effect on January 3, 2024.

Domestic nonprofit corporation = incorporated in Pennsylvania
Foreign nonprofit corporation = incorporated outside of Pennsylvania

ADVANCE NOTICE ANNUAL REPORT

- The PA Department of State (“DOS”) has an obligation to notify organizations of the annual report requirement at least 2 months before the annual report is due.
- The failure of the DOS to provide this notice, or an organization’s failure to receive this notice, does not relieve an organization of the obligation to file its annual report.



Annual reporting completely revamped

ANNUAL REPORT FILING FEE

- There is no filing fee for annual reports filed by nonprofit corporations and nonprofit-purpose LLCs and LPs; other entities pay \$7.

§ 153. Fee schedule.

(a) General rule.--The nonrefundable fees of the bureau, including fees for the public acts and transactions of the Secretary of the Commonwealth administered through the bureau, shall be as follows:

* * *

18) Annual report of domestic or foreign association:

(i) Annual report delivered to the bureau by a nonprofit corporation or a limited partnership or limited liability company with a not-for-profit purpose.....0



ANNUAL REPORT

CHANGE ADDRESS FREE OF CHARGE

- The new annual report can be used to change a nonprofit corporation's registered address at no charge (under the old law, it cost \$5 and you had to use a separate form to change a registered address).
- Filing the annual report with the new address has the effect of amending the address in the articles of incorporation.



FAILURE TO FILE ANNUAL REPORT CONSEQUENCES

- Failure to file the new annual report within six months of the due date can now result in **administrative dissolution** of the corporation.

ADMINISTRATIVE DISSOLUTION PURPOSE

- The purpose of the administrative dissolution provision is to create a more accurate picture of entities actually doing business in the Commonwealth and to allow the Department of State to free up organization names.





NEW RULE PHASED IN

- There is a 3-year phase in for the new administrative dissolution rule, which applies first to annual reports due by the July 1, 2027 deadline (due before July 1 for nonprofit corporations).
- Do **not** confuse this dissolution rule with the IRS's revocation rule (3 consecutive years of non-filing triggers revocation of tax-exempt status). There's a 3-year roll-out period, but Pennsylvania's rule is **not** a 3-year non-filing rule.



ANNUAL REPORT GRACE PERIOD

- There is a 6-month grace period after the deadline, and then the organization has another 60 days to cure after the Department of State provides notice of the failure to file.
- The soonest we are likely to see administrative dissolutions of nonprofit corporations will be March 2028.

ADMINISTRATIVE DISSOLUTION EFFECT

- If a nonprofit corporation is administratively dissolved, the nonprofit **may not carry on activities except to wind up and liquidate its assets or to apply for reinstatement.**
- Because tax clearances are not required for a nonprofit corporation to be administratively dissolved, some organizations may be counseled to take the administrative dissolution route as a simpler path to dissolution, though under Pennsylvania law, directors (assuming they have not resigned) have a continuing obligation to the organization after an administrative dissolution.
- **An entity that is administratively dissolved continues to be managed by or under the direction of its board members, who remain subject to the same standards of conduct as before administrative dissolution.**



ADMINISTRATIVE DISSOLUTION REINSTATEMENT

- The process for reinstatement is simple.
- It allows for retroactive reinstatement back to the date of the administrative dissolution.
- There is no deadline for reinstatement.
- If another entity has claimed the administratively dissolved nonprofit's name during the period of dissolution, the nonprofit corporation seeking reinstatement will have to choose a new name.



Administrative dissolution & reinstatement

ADMINISTRATIVE DISSOLUTION REINSTATEMENT FEES

There's a reinstatement fee for all domestic associations (including nonprofit corporations). The Application for Reinstatement is \$35 or \$40, plus an additional fee for each missing annual report (\$15) in accordance with 15 Pa.C.S. § 153(a)(19).

§ 153. Fee schedule.	
(a)(19) Reinstatement of domestic association:	
(i) Application for reinstatement delivered to the bureau electronically.....	35
(ii) Application for reinstatement not delivered to the bureau electronically.....	40
(iii) Additional fee required by section 383(a)(4)(ii) (relating to reinstatement) for each annual report not previously paid.....	15



NEW PROVISION

EMAIL COMMUNICATIONS FROM THE DEPARTMENT OF STATE

§ 113. Delivery of document.

(d) **Delivery by electronic communication.**--The department may deliver documents in record form to an address for email or other electronic communications supplied to the department by a person until the person notifies the department in record form that the person no longer wishes to have documents delivered to that address.

Tips for staying in compliance

ACTION ITEMS FOR COMPLIANCE

- Inventory all your entities (including affiliates).
- Check entity listings on Department of State website.
- Update registered office addresses /agents with the Department of State (\$5 each).
- Register to use online filing system with the Department of State.
- Be careful with your use of emails for purposes of communicating with the Department of State (have designated account; set up auto forward; make sure system is in place).
- Add ticklers to your calendars for the annual filing requirement(s).

OTHER CHANGES – IT'S TIME TO REVISIT BYLAWS



JUST A FEW EXAMPLES

- Renunciation of opportunities
- Indemnification
- Business Judgment Rule
- Personal liability
- Forum selection
- Informational rights/access to documents

Renunciation of opportunities

NEW SAFE HARBOR RENUNCIATION OF OPPORTUNITIES

- There's now an available safe harbor (if organizations choose to provide it) for a nonprofit's directors, officers, and members who may have competing interests with the nonprofit organizations they serve.
- A new provision protects those who are taking advantage of business opportunities and who do not offer the opportunities to the nonprofit corporation.
- The new statutory provision authorizes a nonprofit corporation to limit or eliminate, in advance, the duty of its directors, officers, or members to offer opportunities to the nonprofit.



NEW SAFE HARBOR RENUNCIATION OF OPPORTUNITIES

§ 5719. Renunciation of corporate opportunities.

The articles of incorporation or bylaws, or an action of the board of directors, may renounce any interest or expectancy of a nonprofit corporation in, or in being offered an opportunity to participate in, a specified corporate opportunity or specified classes or categories of corporate opportunities that are presented to the corporation or to one or more of its directors, officers or members.

Mandatory indemnification

AMENDED INDEMNIFICATION

- The new amendments make clear that Pennsylvania's mandatory indemnification rule is applicable only to **present and former** directors and officers, and no longer applies so broadly to include any "representative" as was previously the case (of course, organizations can provide broader indemnification).
- This limitation of scope of indemnification only applies prospectively, to acts occurring after the effective date of the amendments: January 3, 2023.

Mandatory indemnification

AMENDED INDEMNIFICATION

§ 5743. Mandatory indemnification.

(a) General rule.--To the extent that a [representative] **present or former director or officer** of a nonprofit corporation has been successful on the merits or otherwise in defense of any action or proceeding referred to in section 5741 (relating to third-party actions) or 5742 (relating to derivative and corporate actions) or in defense of any claim, issue or matter therein, [he] **the director or officer** shall be indemnified against expenses (including attorney fees) actually and reasonably incurred by [him] **the director or officer** in connection therewith.

(b) Prospective application.--**The limitation of the scope of subsection (a) to a present or former director or officer applies only to acts occurring after January 3, 2023.**

Mandatory indemnification

AMENDED INDEMNIFICATION

§ 5750. **Duration and extent of coverage.**

The indemnification and advancement of expenses provided by or granted pursuant to this subchapter shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a representative of the corporation and shall inure to the benefit of the heirs and personal representative of that person. **A right to indemnification or to advancement of expenses arising under a provision of the articles or bylaws may not be eliminated or impaired by an amendment to or repeal of the provision after the occurrence of an act that is the subject of the threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative, for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of the act explicitly authorizes the elimination or impairment after an act has occurred.**



AMENDED STANDARD OF CARE & BUSINESS JUDGMENT RULE FOR DIRECTORS & OFFICERS

- Amendments clarify the standard of care & business judgment provisions for fiduciaries.
- A conscious disregard of risk and consideration of circumstances actually “known to” a person are required to establish that a person acted with recklessness.
- The definition for the term “recklessness” was added – it is patterned after the definition in the Pennsylvania Crimes Code.
- Directors fulfill their fiduciary duties by adhering to the business judgment rule when it is applicable.

CLARIFIED BUSINESS JUDGMENT RULE

Business judgment rule.--A director who makes a business judgment in good faith fulfills the duties under this section if:

- (1) the subject of the business judgment does not involve self-dealing by the director or an associate or affiliate of the director;
- (2) the director is informed with respect to the subject of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
- (3) the director rationally believes that the business judgment is in the best interests of the corporation.



Recklessness standard clarified

NEW DEFINITION RECKLESSNESS

§ 102. Definitions.

* * *

"Recklessness." Conduct that involves a conscious disregard of a substantial and unjustifiable risk. **The risk must be of such** a nature and degree that, considering the nature and intent of the actor's conduct and the **circumstances known to the actor**, its conscious disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

* * *

NO MORE PRESUMPTION OF GOOD FAITH

(d) Presumption. – **[Absent breach of fiduciary duty, lack of good faith or self-dealing, any act as the board of directors, a committee of the board or an individual director shall be presumed to be in the best interests of the corporation.]** In assessing whether the standard set forth in section 5712 or 5728 (relating to interested directors or officers; quorum) has been satisfied, there shall not be any greater obligation to justify, or higher burden of proof with respect to, any act as the board of directors, any committee of the board or any individual director relating to or affecting an acquisition or potential or proposed acquisition of control of the corporation than is applied to any other act as a board of directors, any committee of the board or any individual director. Notwithstanding section 5712(d) and the preceding **[provisions]** provision of this subsection, any act as the board of directors, a committee of the board or an individual director relating to or affecting an acquisition or potential or proposed acquisition of control to which a majority of the disinterested directors shall have assented shall be presumed to satisfy the standard set forth in section 5712 or 5728, unless it is proven by clear and convincing evidence that the disinterested directors did not assent to such act in good faith after reasonable investigation.

PERSONAL LIABILITY PROVISIONS PROSPECTIVE APPLICATION

- New section adds that an articles of incorporation or bylaws provision affording personal liability protection for a director or officer that is allowable under Title 15 is generally only effective prospectively from the date the provision's enactment.

Personal liability of directors

PERSONAL LIABILITY PROVISIONS PROSPECTIVE APPLICATION

§ 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] a director 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.

(c) Application. – An amendment or repeal of a provision adopted under subsection (a) does not affect its application with respect to an act by a director occurring before the amendment or repeal unless the provision in effect at the time of the act explicitly authorizes its amendment or repeal after an act has occurred.

INTERNAL CLAIMS FORUM SELECTION

- A new section authorizes nonprofit corporations to add a provision to their bylaws or articles of incorporation specifying an exclusive forum for the adjudication of “internal corporate claims” (e.g., claims based on an alleged breach of duty, internal governance disputes, and derivative suits).



INFORMATIONAL RIGHTS

- Under the amended statute, members and directors now explicitly have the right to receive on demand a copy of the bylaws (though the corporation can put reasonable restrictions and conditions on access and use).

REMINDER ARTICLES ALWAYS TRUMP BYLAWS

- Amended section explains that any provision that may be included in the bylaws may be included in the articles instead.
- Added clarification that bylaws are not an end-run around the articles.
- Articles always trump bylaws when the two documents are in conflict.

GOOD GOVERNANCE ACTION ITEMS

- Be sure to keep a record of bylaws amendments.
- Make sure bylaws are dated and in the minute book.
- Make sure that your organization is adhering to corporate formalities (recordkeeping and retention, procedural requirements).
- Revisit bylaws provision in light of revised language in the amended statute.
- Understand what is required by statute and what can be tailored by your organization's governing documents (articles & bylaws), reviewing in particular voting requirements and notice provisions (some organizations are still living with pre-2013 bylaws, when the last amendments were made).
- Tailor provisions as desired and make sure bylaws are consistent with articles.

TITLE 15 ANNOTATED

For more about how Title 15 impacts nonprofits, see *Stern's Pennsylvania Nonprofit Corporation Law* (3rd Edition, May 2022, revised and newly annotated by Cheshire Law Group and published by PAnonprofitlaw.com), available at www.PAnonprofitlaw.com.

A forthcoming 2023 supplement to this 3rd edition will provide more details and a deeper discussion of the 2022 amendments.



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