

Part 9 Indemnification

16-6a-901 Indemnification definitions.

As used in this part:

- (1)
 - (a) "Director" means an individual who:
 - (i) is or was a director of a nonprofit corporation; or
 - (ii) while a director of a nonprofit corporation at the nonprofit corporation's request, is or was serving as a director, officer, partner, member, manager, trustee, employee, fiduciary, or agent of:
 - (A) another domestic or foreign corporation;
 - (B) another nonprofit corporation;
 - (C) another person; or
 - (D) an employee benefit plan.
 - (b) A director is considered to be serving an employee benefit plan at the nonprofit corporation's request if the director's duties to the nonprofit corporation also impose duties on, or otherwise involve services by, the director to the employee benefit plan or to participants in or beneficiaries of the employee benefit plan.
 - (c) "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.
- (2) "Expenses" includes attorneys' fees.
- (3) "Liability" means the obligation incurred with respect to a proceeding to pay a judgment, settlement, penalty, or fine, including:
 - (a) an excise tax assessed with respect to an employee benefit plan; or
 - (b) reasonable expenses.
- (4) "Nonprofit corporation" includes any domestic or foreign entity that is a predecessor of a nonprofit corporation by reason of a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.
- (5)
 - (a) "Officer," "employee," "fiduciary," and "agent" include any person who, while serving the indicated relationship to the nonprofit corporation, at the nonprofit corporation's request, is or was serving as a director, officer, partner, trustee, employee, fiduciary, or agent of:
 - (i) another domestic or foreign corporation;
 - (ii) another person; or
 - (iii) an employee benefit plan.
 - (b) An officer, employee, fiduciary, or agent is considered to be serving an employee benefit plan at the nonprofit corporation's request if that person's duties to the nonprofit corporation also impose duties on, or otherwise involve services by, that person to the plan or participants in, or beneficiaries of the plan.
 - (c) Unless the context requires otherwise, "officer," "employee," "fiduciary," and "agent" include the estates or personal representatives of the officer, employee, fiduciary, or agent.
- (6)
 - (a) "Official capacity" means:
 - (i) when used with respect to a director, the office of director in a corporation; and

- (ii) when used with respect to a person other than a director, as contemplated in Section 16-6a-907, the office in a corporation held by the officer or the employment, fiduciary, or agency relationship undertaken by the person on behalf of the corporation.
- (b) "Official capacity" does not include service for any:
 - (i) other foreign or domestic corporation;
 - (ii) other person; or
 - (iii) employee benefit plan.
- (7) "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.
- (8) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

Enacted by Chapter 300, 2000 General Session

16-6a-902 Authority to indemnify directors.

- (1) Except as provided in Subsection (4), a nonprofit corporation may indemnify an individual made a party to a proceeding because the individual is or was a director, against liability incurred in the proceeding if:
 - (a) the individual's conduct was in good faith;
 - (b) the individual reasonably believed that the individual's conduct was in, or not opposed to, the corporation's best interests; and
 - (c) in the case of any criminal proceeding, the individual had no reasonable cause to believe the individual's conduct was unlawful.
- (2) A director's conduct with respect to any employee benefit plan for a purpose the director reasonably believed to be in or not opposed to the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of Subsection (1)(b).
- (3) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.
- (4) A nonprofit corporation may not indemnify a director under this section:
 - (a) in connection with a proceeding by or in the right of the nonprofit corporation in which the director was adjudged liable to the nonprofit corporation; or
 - (b) in connection with any other proceeding charging that the director derived an improper personal benefit, whether or not involving action in the director's official capacity, in which proceeding the director was adjudged liable on the basis that the director derived an improper personal benefit.
- (5) Indemnification permitted under this section in connection with a proceeding by or in the right of the nonprofit corporation is limited to reasonable expenses incurred in connection with the proceeding.

Enacted by Chapter 300, 2000 General Session

16-6a-903 Mandatory indemnification of directors.

- (1) Unless limited by its bylaws, a nonprofit corporation shall indemnify a director described in Subsection (2) against reasonable expenses incurred by the director in connection with the proceeding or claim with respect to which the director has been successful.
- (2) Subsection (1) applies to a director who was successful, on the merits or otherwise, in the defense of:

- (a) any proceeding to which the director was a party because the director is or was a director of the nonprofit corporation; or
- (b) any claim, issue, or matter in the proceeding, to which the director was a party because the director is or was a director of the nonprofit corporation.

Amended by Chapter 228, 2006 General Session

16-6a-904 Advance of expenses for directors.

- (1) A nonprofit corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:
 - (a) the director furnishes the nonprofit corporation a written affirmation of the director's good faith belief that the director has met the applicable standard of conduct described in Section 16-6a-902;
 - (b) the director furnishes the nonprofit corporation a written undertaking, executed personally or on the director's behalf, to repay the advance, if it is ultimately determined that the director did not meet the standard of conduct; and
 - (c) a determination is made that the facts then known to those making the determination would not preclude indemnification under this part.
- (2) The undertaking required by Subsection (1)(b):
 - (a) shall be an unlimited general obligation of the director;
 - (b) need not be secured; and
 - (c) may be accepted without reference to financial ability to make repayment.
- (3) Determinations and authorizations of payments under this section shall be made in the manner specified in Section 16-6a-906.

Enacted by Chapter 300, 2000 General Session

16-6a-905 Court-ordered indemnification of directors.

- (1) Unless a nonprofit corporation's articles of incorporation provide otherwise, a director of the nonprofit corporation who is or was a party to a proceeding may apply for indemnification to:
 - (a) the court conducting the proceeding; or
 - (b) another court of competent jurisdiction.
- (2) On receipt of an application described in Subsection (1), the court, after giving any notice the court considers necessary, may order indemnification in the following manner:
 - (a) if the court determines that the director is entitled to mandatory indemnification under Section 16-6a-903, the court shall:
 - (i) order indemnification; and
 - (ii) order the nonprofit corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; and
 - (b) if the court determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the applicable standard of conduct set forth in Section 16-6a-902 or was adjudged liable as described in Subsection 16-6a-902(4), the court may order indemnification as the court determines to be proper, except that the indemnification with respect to any proceeding in which liability has been adjudged in the circumstances described in Subsection 16-6a-902(4) is limited to reasonable expenses incurred.

Amended by Chapter 240, 2015 General Session

16-6a-906 Determination and authorization of indemnification of directors.

- (1)
 - (a) A nonprofit corporation may not indemnify a director under Section 16-6a-902 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in Section 16-6a-902.
 - (b) A nonprofit corporation may not advance expenses to a director under Section 16-6a-904 unless:
 - (i) authorized in the specific case after the written affirmation and undertaking required by Subsections 16-6a-904(1)(a) and (1)(b) are received; and
 - (ii) the determination required by Subsection 16-6a-904(1)(c) has been made.
- (2)
 - (a) The determinations required by Subsection (1) shall be made:
 - (i) by the board of directors by a majority vote of those present at a meeting at which a quorum is present if only those directors not parties to the proceeding are counted in satisfying the quorum;
 - (ii) if a quorum cannot be obtained under Subsection (2)(a)(i), by a majority vote of a committee of the board of directors:
 - (A) designated by the board of directors; and
 - (B) consisting of two or more directors not parties to the proceeding; or
 - (iii) by persons listed in Subsection (3).
 - (b) The directors who are parties to the proceeding may participate in the designation of directors for the committee described in Subsection (2)(a)(ii).
- (3)
 - (a) The determination required to be made by Subsection (1) shall be made by a person described in Subsection (3)(b) if:
 - (i)
 - (A) a quorum cannot be obtained in accordance with Subsection (2)(a)(i); and
 - (B) a committee cannot be established under Subsection (2)(a)(ii); or
 - (ii) even if a quorum is obtained or a committee is designated, a majority of the directors constituting the quorum or committee directs.
 - (b) If a condition described in Subsection (3)(a) is met, the determination required to be made by Subsection (1) shall be made:
 - (i) by independent legal counsel selected by:
 - (A) a vote of the board of directors or the committee in the manner specified in Subsection (2)(a)(i) or (ii); or
 - (B) if a quorum of the full board cannot be obtained and a committee cannot be established, by independent legal counsel selected by a majority vote of the full board of directors; or
 - (ii) by the voting members, but a voting member may not vote on the determination if the voting member is:
 - (A) a director; and
 - (B) at the time seeking indemnification.
- (4)
 - (a) Except as provided in Subsection (4)(b), an authorization of indemnification and advance of expenses shall be made in the same manner as the determination that indemnification or advance of expenses is permissible.

- (b) Notwithstanding Subsection (4)(a), if the determination that indemnification or advance of expenses is permissible is made by independent legal counsel, authorization of indemnification and advance of expenses shall be made by the body that selected the independent legal counsel.

Enacted by Chapter 300, 2000 General Session

16-6a-907 Indemnification of officers, employees, fiduciaries, and agents.

Unless a nonprofit corporation's articles of incorporation provide otherwise:

- (1) to the same extent as a director, an officer of the nonprofit corporation is entitled to:
 - (a) mandatory indemnification under Section 16-6a-903; and
 - (b) apply for court-ordered indemnification under Section 16-6a-905;
- (2) a nonprofit corporation may indemnify and advance expenses to an officer, employee, fiduciary, or agent of the nonprofit corporation to the same extent as to a director; and
- (3) a nonprofit corporation may indemnify and advance expenses to an officer, employee, fiduciary, or agent who is not a director to a greater extent if:
 - (a) not inconsistent with public policy; and
 - (b) provided for by:
 - (i) its articles of incorporation or bylaws;
 - (ii) general or specific action of its board of directors; or
 - (iii) contract.

Amended by Chapter 197, 2002 General Session

16-6a-908 Insurance.

- (1) A nonprofit corporation may purchase and maintain liability insurance:
 - (a) on behalf of a person who:
 - (i) is or was a director, officer, employee, fiduciary, or agent of the nonprofit corporation; or
 - (ii) while serving as a director, officer, employee, fiduciary, or agent of the nonprofit corporation at the request of the nonprofit corporation, is or was serving as a director, officer, partner, trustee, employee, fiduciary, or agent of:
 - (A) another foreign or domestic nonprofit corporation;
 - (B) other person; or
 - (C) an employee benefit plan; and
 - (b) against liability asserted against or incurred by the person in that capacity or arising from the person's status as a director, officer, employee, fiduciary, or agent, whether or not the nonprofit corporation would have power to indemnify the person against the same liability under Section 16-6a-902, 16-6a-903, or 16-6a-907.
- (2) Insurance may be procured from any insurance company designated by the board of directors, whether the insurance company is formed under the laws of this state or any other jurisdiction of the United States or elsewhere, including any insurance company in which the nonprofit corporation has an equity or any other interest through stock ownership or otherwise.

Enacted by Chapter 300, 2000 General Session

16-6a-909 Limitations on indemnification of directors.

- (1)

- (a) A provision treating a nonprofit corporation's indemnification of, or advance for expenses to, directors that is contained in the following is valid only if and to the extent the provision is not inconsistent with this part:
 - (i) the articles of incorporation or bylaws of the nonprofit corporation;
 - (ii) a resolution of the nonprofit corporation's members or board of directors;
 - (iii) a contract, except an insurance policy; or
 - (iv) other writing.
 - (b) If the articles of incorporation limit indemnification or advance of expenses, indemnification and advance of expenses are valid only to the extent not inconsistent with the articles of incorporation.
- (2) This part does not limit a nonprofit corporation's power to pay or reimburse expenses incurred by a director in connection with the director's appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent to the proceeding.

Enacted by Chapter 300, 2000 General Session

16-6a-910 Notice to voting members of indemnification of director.

- (1) If a nonprofit corporation indemnifies or advances expenses to a director under this part in connection with a proceeding by or in the right of the nonprofit corporation, the nonprofit corporation shall give written notice of the indemnification or advance to the voting members with or before the notice of the next voting members' meeting.
- (2) If the next voting member action after the indemnification or advance is taken without a meeting at the instigation of the board of directors, the notice shall be given to the voting members at or before the time the first voting member signs a writing consenting to the action.

Enacted by Chapter 300, 2000 General Session