



September 27, 2010

## New Law Affects Nonprofit Governance

AB 1233 went into effect on January 1, 2010. This new state statute amends the Nonprofit Corporations Law and may require educational foundations that are public benefit corporations to review and possibly amend their bylaws. The summary below highlights the major provisions of the new law. This summary is not intended to be legal advice. Local Education Foundations are encouraged to consult with their own legal counsel about the impact of AB 1233 on their governance documents and practices.

### **Nonprofit corporations may not have non-voting directors**

The new law clearly defines a "director" as someone sitting on a board with the power to vote on board actions or decisions. If your LEF has board members with honorary titles under this law they may not be designated "directors." The rationale is that the term director carries with it legal status including calculating quorums and liability for use of corporate resources and assets. Most LEFs engage these volunteers as advisory committee members without voting status.

### **Ex officio directors have the same rights (including the right to vote) as any other director**

Some LEFs designate in their bylaws that some board member seats are filled by virtue of someone's title or organizational affiliation. For example, an executive director or a superintendent is automatically on the board because of his or her position. The new law states that they still must have all rights and responsibilities of any other director including the right to vote. However, LEFs can involve non-directors at their meetings as guests and may even require an executive director to be present as part of their employment contract.

### **Only directors may serve as voting members of committees that exercise board power**

To clarify existing law, AB 1233 prohibits anyone who is not a voting member of the Board of Directors to serve as a voting member of any committee that exercises the authority of the Board of Directors. Committees with non-voting volunteers can still function as advisory committees, but may not take actions that are binding on the Board of Directors.

### **Directors may not vote by proxy**

Because their fiduciary responsibility, directors may not designate someone else to act or vote in their place on nonprofit corporation issues or decisions.

### **Each director has only one vote**

The new law clarifies that weighted voting is not permitted; one person, one vote.

### **Bylaws may require specific directors to be present in order to constitute a quorum for conducting business**

Some nonprofits designate seats on their boards for specified constituencies. This provision enables them to factor that into quorum calculations.

### **Default allows Boards to bypass nonresponsive third parties in approving governance changes**

Some nonprofits have provisions that require the approval of a third party to any changes in the bylaws or articles. AB 1233 enables boards to bypass that requirement if the individual is unavailable, deceased or non-responsive. If the third party no longer exists and also has the power to designate directors for seats on the board the new law creates a default provision terminating that power.

**Nonprofits can set the size of their Board by formula**

Current law allows board to designate a set number or range for the size of their board of directors. This provision enables them to tie the number of seats on their board to other objective factors (like one seat per a certain number of members).

**Officers and directors are immune from negligence lawsuits only if their insurance covers that type of claim**

Nonprofits should carefully review their general liability insurance policies to ensure that they contain appropriate language and coverage. The law says directors are immune from lawsuits over negligence, errors and omissions if those actions are done in good faith and arise out of their decision-making role as a director. However, the immunity only applies if the claim can also be made against the corporation, the nonprofit maintains an insurance policy covering that type of claim, and the policy is found to cover any damages.

**A board may dissolve a nonprofit even if they do not have a quorum**

When nonprofits have been dormant or are ready to dissolve their operations they often do not have enough board members left to constitute a quorum. AB 1233 states that if the bylaws have a dissolution provision the remaining board members may vote by unanimous consent, an affirmative majority vote of the remaining directors, or the vote of a sole remaining director.

**Ending a director's term immediately if a board seat is eliminated**

Unless a board's decision to eliminate a director's board seat specifies that the director's term ends immediately that board member may complete their term on office.

**Directors may rely on advisory committees in exercising their fiduciary responsibilities**

This expands the group to advisory committees that a director may rely on (like audits, compensation, etc.) for certain necessary technical or financial advice provided those committees are comprised of corporation officers and employees, people with relevant professional expertise, and/or other directors.

**"Chair" is now an appropriate leadership designation**

Chairman of the board may now be referred to as chairwoman or the gender neutral term, "Chair." Previously, the Secretary of State would reject documents that did not use "Chairman."

**Nonprofits must have as officers either a Treasurer or Chief Financial Officer or both**

Prior law said nonprofits only needed to have a designated chief financial officer. Nonprofits will not have to make bylaw changes to comply with this law.

**Unincorporated associations no longer need to incorporate first before merging with nonprofit corporations**

AB 1233 eliminated the two-step process and changed the rule that unincorporated associations could only merge *into* other entities to now read *with* other entities.