

# New Ohio Bill Clarifies Fiduciary Duties of Corporate and Limited Liability Company Officers in Ohio

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**Ohio Senate Bill Number 181** went into effect on July 6, 2016 (the Act).<sup>1</sup> This Act changed the fiduciary obligations of officers of corporations and limited liability companies by amending certain sections of the **Ohio Revised Code** and enacting several new provisions. The purpose of the Act was to enhance Ohio's statutory corporate law by clarifying the fiduciary duties owed by officers of corporations and limited liability companies and enhancing the ability of limited liability company members to set the terms of their business association. The amended and newly enacted provisions are summarized below:

## Corporations:

§1701.56 – *Chairman of the Board of Directors*. This section was revised to allow the board of directors of a corporation to elect a chairman. The chairman must be a director, but he or she is not considered an officer of the corporation unless the company's articles of incorporation, code of regulations or a resolution of the board provides otherwise. Section 1701.64 was amended to reflect the changes made to Section 1701.56.

§1701.641 – *Fiduciary Duties of a Corporation's Officers*. This new section was added to outline the fiduciary duties owed by each of a corporation's officers: the president, secretary, treasurer, vice presidents and assistant officers. Corporate officers must perform their duties:

1. in good faith;
2. in a manner reasonably believed to be in, or at least not opposed to, the best interests of the corporation; and
3. with the care that a reasonably prudent person in a similar position would use under similar circumstances.

In performing his or her duties, the officer can rely on information and opinions provided by:

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1. directors, other officers, and employees of the company, as long as the officer reasonably believes that person is reliable and competent with respect to the information or opinion given; and
  2. lawyers, accountants, and other persons, as long as the officer reasonably believes the information or opinion given is within that person's professional competence or expertise.

The officer may be liable for breach of these duties if it is proven by clear and convincing evidence that he or she did not act in accordance with the three standards first prescribed above. Further, the officer did not act in good faith if he or she knew that relying on information or opinions from other persons was unwarranted. The officer may be liable for damages caused by the breach only if a court determines by clear and convincing evidence that the officer's action or failure to act was taken (i) with deliberate intent to cause injury to the corporation or (ii) with reckless disregard for the best interests of the corporation.

The fiduciary duties imposed on a corporation's officers can be increased – but not decreased – by the corporation's articles of incorporation, code of regulations or a written agreement between the corporation and the officer. Further, the corporation's articles, regulations or a written agreement with the officer can also remove the application of the provision related to liability for damages as long as Section 1701.641(D) is specifically referenced.

### **Limited Liability Companies:**

§1705.301 – *Application to All Limited Liability Companies*. This section was added to clarify that the current provisions of the Ohio Revised Code that apply to Ohio limited liability companies apply to all Ohio limited liability companies, regardless of when or how they were formed.

§1705.081 – *Power of the Operating Agreement*. A provision was added to this section stating that it is the policy of Ohio's limited liability company laws to give maximum effect to the principle of freedom of contract and to the enforceability of operating agreements. Nevertheless, Section 1705.081 contains a list of actions that an operating agreement is prohibited from doing, which includes eliminating certain fiduciary duties owed by members, managers, and officers. However, new provisions of this section add flexibility to the law and state that the company's articles of organization or a written operating agreement that modifies, waives or eliminates the duty of loyalty or the duty of care for members, managers or officers must be given effect.

§1705.161 – *Duties Owed After Withdrawal of a Member*. The provision that a member's duty of loyalty terminates when he or she withdraws as a member was deleted.

§1705.281 – *Members' Duties to the Company and the Other Members*. This section was revised to modify a member's duty of loyalty to the limited liability company and to the other members. Specifically, there is no longer a default duty to refrain from competing with the limited liability company.

§1705.291 – *Limited Liability Company Officers*. This new section allows limited liability companies to have officers.

§1705.292 and §1705.30 – *Default Fiduciary Duties for Officers*. New Section 1705.292 and changes to Section 1705.30 outline the fiduciary duties owed by officers of a limited liability company. As long

as the officer is not a member nor serving as a representative of a member, the same duties that apply to officers of a corporation – outlined in the summary of Section 1701.641 above – apply to officers of a limited liability company. Similarly, the provisions for when a corporation's officers are liable for breach of fiduciary duty now apply to limited liability company officers. These default provisions can be modified by the company's articles of organization, operating agreement or a written agreement with the officer.

§1705.48 – *Personal Liability of Officers*. This section was revised to add officers to the list of persons who are not personally liable to satisfy any judgment, decree, debt, or obligation of a limited liability company.

A link to the Act can be found [here](#), and the analysis issued by the Ohio Legislative Service Commission can be found [here](#).<sup>2</sup>

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<sup>1</sup> S.B. 181, 131st Leg. (Oh. 2016).

<sup>2</sup> Jeff Hobday, Final Analysis, OH LEGIS. SERV. COMM'N, (2016), located.

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