

Key Documents

Bylaws, Incorporation Papers, IRS Ruling Letters, and Others



Most of the time, board members don't pay much attention to the legal documents forming and governing their organizations. However, when there's a legal challenge to the organization, when there's deep conflict on the board, when an aggressive or unscrupulous board member tries to take over, everyone's attention is drawn to the key legal documents. And too often, those documents were drawn up years ago and haven't been looked at since.

Here is a brief recap of the nonprofit organization's key documents.

1. IRS Form 1023: Application for Incorporation

This form is used for both nonprofit and for-profit corporations at the time of formation. Form 1023 requires that the organization state its purpose.

2. IRS Determination Letter

In response to the Application for Public Charity 501(c)(3) Status, the IRS issues a Ruling Letter stating that it has determined that the organization has a nonprofit purpose and has been granted nonprofit status. When an organization is first formed, the IRS issues a Temporary Determination Letter, which allows

the organization to operate as a nonprofit for the first three years, at which time the organization applies for a Permanent Determination Letter. If you have lost the Determination Letter, you can request a duplicate from the IRS.

3. State Determination Letter

Most legal aspects of nonprofit organizations are determined at the state level. Each state has a State Charity Official, although these individuals have different titles and work in different departments depending on the state. For example, in New Mexico, the Registry of Charitable Organizations is in the Consumer Protection Division in the Attorney General's Office. (A complete list of relevant regulators can be found through the National Association of State Charity Officials at www.nasconet.org.)

4. Articles of Incorporation

The articles of incorporation (in some states called a "certificate of incorporation" or "charter") is a publicly filed document that states the organization's name, the state in which it is located, and the purposes of the corporation, and describes its most basic legal structure.

5. Bylaws

Various aspects of bylaws are governed by the states. For example, in Ohio and New York, nonprofit boards must have a minimum of three members, but in California the minimum is two. It's important to obtain the applicable state laws and make sure that the bylaws are in compliance. In addition, some cities have further regulations for nonprofits. Ask the City Attorney's Office for guidance. For example, some states and cities have different rules for nonprofit organizations whereby the board automatically includes an elected official or government employee as a result of that individual's election or employment.

Here is a checklist to be sure the most important provisions are included in your bylaws:

- Indemnification. A statement that limits the personal liability of board members.
- Whether the organization has members (such as members of a neighborhood or professional association) and, if so, what their rights are. For example, in a true membership organization, members have the right to elect officers. Even if you don't have members with legally enforceable membership rights such as voting rights, you can still have people called "members," but the distinction should be clarified in the bylaws.
- Minimum and maximum number of board members. Example: minimum of five and a maximum of fifteen board members. Some states specify a minimum, and some specify a formula for a minimum and maximum, so check your state's law.
- The number required for a quorum.* Many states specify the minimum required for a quorum; for example, in California a quorum may be as low as one-fifth of the board.
- Terms and term limits. Example: two years, with term limits of three consecutive terms (making a total of six years); after a year off, a board member may be permitted to return. Similarly, terms can be staggered so that, say, one-third of the board is up for reelection each year.
- Titles of officers, how the officers are appointed, and their terms. Example: appointed by majority vote at a regular meeting of the board; an officer term is for one year with a maximum of two consecutive officer terms.
- Procedure for removing a board member or officer. Example: by majority vote at a regularly scheduled meeting where the item was placed on the written agenda distributed at least two weeks ahead.
- Conflict of interest policy.
- Minimum number of board meetings per year. Example: four, with one in each quarter.

- How a special or emergency board meeting may be called.
- How a committee may be created or dissolved.
- What committees exist, how member are appointed, and powers, if any.
- Conference calls and electronic meetings. Example: votes by e-mail or web-forum are prohibited. Meetings may be held by conference call if all members can simultaneously hear one another.

As Internet usage grows, some boards are adding sections to the bylaws that describe how to hold a board meeting on the Internet, or whether and how decisions can be made by e-mail.

Each board member should be given a copy of the articles of incorporation, the IRS and state determination letters, and the bylaws. Some organizations also post their bylaws on a password-protected section of their web sites—to allow board members to have access to them without having to search through a filing cabinet.

Every few years, it's important to review the bylaws. Occasionally, individuals are invited to join boards without much scrutiny and are later found to be disruptive and destructive. Too often the board looks for the bylaws to see how to remove such a person, only to discover that the bylaws were written twenty years ago (and seldom looked at since) and have no such provision. Appropriate changes to the bylaws should be recorded in the board minutes, added to copies of the bylaws, and, in some cases, reviewed by an attorney experienced in nonprofit law.

* A quorum is the minimum number of board members who must be present for official decisions to be made. For example, if an organization currently has fifteen members, and the bylaws state that one-third of the members constitutes a quorum, then official decisions can only be made at board meetings where five or more members are present. Note: states may determine the minimum percentage for a quorum.

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