

Legal Strategies and Challenges in the COVID-19 Era

CORY MACDONALD

ATTORNEY

CMACDONALD@MRFIRM.LEGAL

512-579-0087



MACDONALD
RESNEVIC

Remote Board Governance

The likely continued inability to meet in person presents an opportunity to review and update governing documents.

Specifically, does your Certificate of Formation and/or Bylaws allow for remote meetings, written action by less than unanimous consent?

Remote Board Governance

Chapter 22 governs nonprofit corporations and says:

Sec. 22.002. MEETINGS BY REMOTE COMMUNICATIONS TECHNOLOGY. A meeting of the...the board of directors...or any committee designated by the board of directors...may be held by means of a conference telephone or similar communications equipment, another suitable electronic communications system, including videoconferencing technology or the Internet, or any combination of those means, *in accordance with Section [6.002](#)*.

Remote Board Governance

Per previous slide, remote meetings are permitted *whether they are not allowed in your governing documents*. HOWEVER, make sure your governing documents do not directly or indirectly prohibit them.

And, the meetings must comply with Section 6.002 of the Code which says...

Remote Board Governance

Sec. 6.002. ALTERNATIVE FORMS OF MEETINGS.

(a) ***Subject to*** this code and ***the governing documents of a domestic entity***...the governing persons of the entity, or a committee ...may hold meetings by using a conference telephone...or another suitable electronic communications system, including videoconferencing technology or the Internet, or any combination, if the...system permits each person participating in the meeting to communicate with all other persons participating in the meeting.

Remote Board Governance

Sec. 6.002. ALTERNATIVE FORMS OF MEETINGS, cont'd

(b) If voting is to take place at the meeting, the entity must:

(1) implement reasonable measures to verify that every person voting at the meeting by means of remote communications is sufficiently identified; and

(2) keep a record of any vote or other action taken.

Remote Board Governance

Right to take action with less than unanimous consent must be in Certificate of Formation or Bylaws

Sec. 22.220. ACTION WITHOUT MEETING OF DIRECTORS OR COMMITTEE.

(a) The ***certificate of formation or bylaws of a corporation may provide*** that an action required by this chapter to be taken at a meeting of the corporation's directors...or a committee may be taken without a meeting if a written consent, stating the action to be taken, is signed by the number of directors or committee members necessary to take that action at a meeting at which all of the directors or committee members are present and voting. The consent must state the date of each director's or committee member's signature.

Remote Board Governance

Sec. 22.220. ACTION WITHOUT MEETING OF DIRECTORS OR COMMITTEE, cont'd

(b) Prompt notice of the taking of an action by directors or a committee without a meeting by less than unanimous written consent shall be given to each director or committee member who did not consent in writing to the action.

Informal Dispute Resolution During COVID-19

2567 Finding

“Based on observation, interview, and record review, the facility failed to maintain an infection prevention and control program designed to provide a safe, sanitary and comfortable environment including the use of PPE and following CDC guidelines for COVID-19...”

- Main allegation is that staff treating one readmitted resident that had a negative COVID-19 test at hospital used surgical masks, not N95s
- Two residents, Scope and Severity Level “K” (IJ widespread)

IDR Delay

No Penalties imposed/recommended at time of 2567...

From the letter that is sent with 2567 stating the deadline for the plan of correction and the IDR:

“You may choose to delay a request for an IDR until after the survey and enforcement suspensions have been lifted. The provider will have ten days from the date the suspensions are lifted to submit a request for an IDR in accordance with the instructions above. If you choose to delay a request for IDR please submit a copy of this letter along with your IDR request form.”

Communication with HHSC re: Delay Option

HHSC Appeals Division/IDR Department:

“Thank you for providing the letter. It seems there is no information out there right now regarding the timeframe on when the survey and enforcement suspensions will be lifted. We assume there will be a formal announcement when this happens. If the facility chooses to delay the IDR process until they are lifted, they will then have 10 days from the date they are lifted to request an IDR. When they do, they will need to submit the IDR Request Form along with the letter the facility received (not redacted at that time of course). From there, the IDR process will resume as normal.”

Update Today, July 21, 2020

Email from HHSC saying CMS lifted Suspension of Enforcement Activity Effective June 1. According to HHSC:

“Enforcement template letters specific to Focused Infection Control surveys will no longer be issued. The Texas Health and Human Services Commission will issue its normal enforcement letters for all surveys with exit dates of June 1 and later. Providers that choose to dispute findings should ensure the Informal Dispute Resolution request is submitted within 10 days of receipt of the forms CMS 2567 and HHSC 3724.”

COVID-19 Liability

Negotiated Risk Agreements

- “Perhaps the most controversial aspect of NRAs is the potential for them to include improper waivers of liability, rather than addressing specific deviations from resident care plans. This concern of experts and lawmakers emerges from the aforementioned possibility for exploitation of residents...Vermont, Delaware, New Jersey, and Washington specifically prohibit NRAs as liability waivers.”
- “One assessment of NRAs summarized the limitation of this tool for shielding care providers: ‘Unless state laws are changed, the liability waivers won’t insulate providers from negligence claims.’”

Negotiated Risk Agreements, cont'd

- A recent Delaware decision:
 - Rockland contends that Mr. Storm was aware of and expressly consented to the risks involved when residents of an assisted living facility are given appropriate opportunities to exercise independence in their day-to-day living activities.
 - For the reasons that follow, the Court finds that Delaware “healthcare providers” may not, as a matter of law, invoke the affirmative defense of primary assumption of the risk in claims brought by patients alleging substandard care.

Enforceability of Liability Waivers

- The Texas Supreme Court has adopted the fair notice requirement to apply to two kinds of provisions—releases and indemnity agreements—both of which have the effect of relieving a party in advance of responsibility for its own negligence.
- “Fair notice,” as developed by the supreme court, has two necessary elements—the questioned provision must satisfy the conspicuousness requirement and the express negligence doctrine.

Enforceability of Liability Waivers, cont'd

- Conspicuous means it stands out (bold, big text, etc.)
- Express negligence doctrine means it specifically says the party is releasing the other party from the other party's negligence. Example:

“I/WE accept and assume such risks and responsibility for the losses and/or damages following such injury, disability, paralysis or death, however caused and whether caused in whole or in part by the negligence of the Releasees named below.”

COVID-19 Liability Strategies

- New Admission/Move-In Informed Consent with Optional Liability Waiver:
 - Outline specific risks and inability to guarantee safety...can't control community spread;
 - Recite that current COVID-19 mitigation efforts were provided but do not commit to specific measures because they keep changing;
 - Know that liability waiver is likely unenforceable...limit nature of waiver if used.
- Resumption of Services Informed Consent with Optional Liability Waiver:
 - Know that there are contractual issues if services are not being provided.

QUESTIONS?



thank you

CORY MACDONALD

ATTORNEY - MACDONALD RESNEVIC

CMACDONALD@MRFIRM.LEGAL

512-579-0087



MACDONALD
RESNEVIC