

BASIC LEGAL RESPONSIBILITIES OF KENTUCKY NONPROFIT CORPORATIONS: HIGHLIGHTS FOR NEWLY INCORPORATED ORGANIZATIONS

Once a nonprofit corporation comes into being, the corporation itself as well as its officers and members of its board of directors become subject to a host of legal rules and responsibilities under state and federal law. This overview highlights some of the most basic.

Part I highlights basic legal duties of board members (directors) and officers; **Part II**, basic responsibilities under the Kentucky Nonprofit Corporation Acts and the Kentucky Business Entity Filing Act; **Part III**, basic responsibilities concerning federal income tax and information returns; **Part IV** flags selected additional miscellaneous responsibilities; and **Part V** provides contact information for the public agencies mentioned in Parts I through IV..

Please note that this publication is for general information only and cannot substitute for legal advice. Always consult an attorney for advice on specific situations.

PART I - BASIC LEGAL DUTIES OF DIRECTORS AND OFFICERS

I. First Meeting of the Board of Directors (KRS 273.257)

After the Articles of Incorporation are filed and date-stamped by the KY Secretary of State, an organizational meeting of the board of directors named in the Articles must be held for the purpose of adopting bylaws, electing officers and transacting any other business that might be brought up. It is the responsibility of the incorporator named in the Articles of Incorporation – or a majority of the incorporators, if there are more than one – to call the meeting. The incorporator(s) must give the directors at least three (3) days' notice by mail of the time, date and place of the meeting.

2. Governance by Bylaws (KRS 273.191 and KRS 273.257)

Upon adoption of bylaws at the first post-incorporation meeting of the board of directors, the corporation is governed by those bylaws, subject to the Articles of Incorporation and Kentucky law. The latter includes provisions of the Kentucky Nonprofit Corporation Acts (KRS Chapter 273) addressing various details of corporate governance and decision making.

Failure to abide by its own bylaws may place a nonprofit corporation at risk of adverse legal action. Unless otherwise provided in the Articles of Incorporation or the bylaws, the board

of directors has the power to alter, amend or repeal the bylaws, or to adopt new ones should future circumstances so warrant.

3. Duty of Care (KRS 273.215)

The board of directors of a nonprofit corporation is legally responsible for managing the affairs of the corporation. In discharging this duty, directors must act in **good faith**; on an **informed basis**; and in a manner the director honestly believes is in the **best interests** of the corporation. “**Good faith**” generally means honesty of intention, openness and fair dealing. A director acts on an “**informed basis**” by making inquiry into the business and affairs of the corporation (or into a particular action or decision to be made) with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

In carrying out these duties, a director may rely on information prepared or presented by **(1)** professionals (such as attorneys or accountants) or experts if the director honestly believes the matters presented are within the person's professional or expert competence; **(2)** a committee of the board of directors of which they are not a member if the director honestly believe the committee merits confidence; or **(3)** officers or employees of the corporation whom the director honestly believes to be reliable and competent in the matters presented.

4. Duty of Loyalty

The duty of loyalty requires a director to have an undivided allegiance to the organization and its mission when exercising the power of the position or using information known to or about the organization. This duty bars the director from using such power or information for personal gain. The duty of loyalty may also be violated if the director assists a third person in pursuing financial gain through the director's knowledge or power.

5. Conflict of Interest Transactions (KRS 273.219)

Potential for breach of the duty of loyalty arises when a director may have a potential conflict of interest with the corporation. To protect the interests of the corporation in such circumstances, the board of directors should adopt and follow a conflict of interest policy and procedure. The policy and procedure should be invoked any time there is a potential “conflict of interest transaction” – meaning a transaction with the organization in which a director has a direct or indirect interest. At a minimum, the policy should require that the material facts of the transaction and the director's interest be disclosed to the board of directors or a committee of the board, and that the board or committee authorize, approve or ratify the transaction and ensure that it is fair to the corporation.

6. Loans to Officers and Directors (KRS 273.241)

On another point related to loyalty and conflicts of interest, Kentucky law absolutely forbids nonprofit directors and officers from borrowing money from the corporation, and the corporation from making such loans. Any director or officer who assents to or participates in

the making of such a loan is liable to the organization for the amount of the loan until it is paid off.

PART II - BASIC RESPONSIBILITIES UNDER THE KENTUCKY NONPROFIT CORPORATION AND BUSINESS ENTITY FILING ACTS

I. Registered Office and Registered Agent (KRS 273.182, KRS 14A.4-010, KRS 14A.4-020, KRS 14A.4-040 and KRS 14A.7-010)

Every Kentucky corporation must continuously maintain within the state a “Registered Office” and a “Registered Agent.” The business address of the registered agent must be identical to the address of the registered office of the corporation. The registered office may be any place the corporation conducts business, but may not be a post office box.

The initial registered office and registered agent will have been identified in the corporation’s Articles of Incorporation. Subsequent changes in either the address of the registered office or the identity of the agent must be made by filing a “Statement of Change of Registered Office or Registered Agent or Both” form with the Kentucky Secretary of State, and paying the required fee. Once the Secretary of State has accepted the form and stamped it “Filed,” the organization must download copy from the Secretary of State’s website, www.sos.ky.gov, and file it with the County Clerk’s office in the county in which the registered office is located, again paying a required fee.

The purpose of these requirements is to provide a public record of the person to be served if a lawsuit is filed against the corporation and to enable government agencies and others to contact the corporation on official matters. If the registered office address on file with the Secretary of State is incorrect, or the registered agent named can no longer be reached at the registered office or is no longer associated with the organization, the corporation may not receive important legal notices sent to it. **This can result in default judgments against a corporation that has been sued, accumulated fines plus interest if a tax bill is unpaid or required nonprofit tax forms are not filed, automatic dissolution of the corporation and/or other negative consequences.** In addition, the Secretary of State may move to administratively dissolve a nonprofit corporation if it is without a registered address or registered agent for 60 (sixty) days or more, or if it does not notify the Secretary of State within sixty (60) days that its registered office or registered agent has been changed, that its registered office has been discontinued, or that its registered agent has resigned. Naming a new registered agent when necessary and updating this information, along with any changes in the registered office, is thus of the utmost importance.

2. Principal Office Address (KRS 273.161(10), KRS 273.1842 and KRS 14A.5-010)

Kentucky law defines a corporation’s “principal office” as the office where the principal executive offices of the corporation are located. The corporation’s Articles of Incorporation will state the mailing address of the principal office, which, unlike the registered office, may be a post office box. Any subsequent changes must be reported to the Secretary of State on the appropriate form, and the required fee paid. As is the case with changes in registered agent or

registered office, once the Secretary of State has accepted the form and stamped it “Filed,” the organization must download copy from the Secretary of State’s website and file it with the County Clerk’s office in the county in which the registered office is located (and pay the required fee). Failure to keep this information current can result in the corporation not receiving important notices and communications from the Secretary of State.

The principal office may be the same as the registered office. However, it is wise for small nonprofits to use a different address to avoid at least some of the pitfalls of having a registered agent move without notifying the corporation. Lawsuits and other legal documents may still be served at the Principal Office if the Registered Agent cannot be reached.

3. Filing Annual Report (KRS 273.3671, KRS 14A.6-010, KRS 14A.7-010, KRS 14A.7-030)

Nonprofit corporations must file an annual report with the Secretary of State and pay the required fee each year between January 1 and June 30. The first annual report is due between January 1 and June 30 of the calendar year after the year in which the organization was incorporated. For example, if an organization filed its articles of incorporation in February of 2023, its first annual report would be due by June 30, 2024.

The annual report is a short form that updates the names and addresses of the officers and directors of the organization. It may be filed on-line at [https://web.sos.ky.gov/FastTrack/\(S\(ixu24qtsmajl5atkjfkud2tj\)\)/Arp_Search.aspx](https://web.sos.ky.gov/FastTrack/(S(ixu24qtsmajl5atkjfkud2tj))/Arp_Search.aspx), or by printing an annual report form from the Secretary of State’s website and returning it by mail. The annual report cannot be used to change the principal or registered offices, or the registered agent; these changes must be made by filing the particular forms discussed above.

Failure to file an annual report, including paying the fee, will result in administrative dissolution of the corporation. Reinstatement requires submission of an application to the Secretary of State and payment of a \$100.00 penalty as well as the annual report fee for each year in which the corporation failed to file.

4. Maintaining Corporate Records (KRS 273.233)

A very important aspect of maintaining the corporation as an entity separate from its officers and Board members is keeping accurate and complete corporate records. The Articles of Incorporation and bylaws, with all their amendments, must be kept on file for reference and followed. The corporation must also keep on file at its registered or principal office a record of the names and addresses of its members entitled to vote.

Since a corporation cannot act without a decision of its members or Board of Directors (or both), minutes of all meetings of members, the Board and committees with any Board authority must be maintained. All resolutions and decisions must be recorded in the minutes, including such things as, for example, opening a checking account, taking a position on an issue, electing officers, and adopting or changing a procedure. Accurate financial records must also be kept.

5. Making Major Corporate Changes

Kentucky law specifies procedures for amending Articles of Incorporation; merger or consolidation with another corporation; sale, lease, exchange or mortgage of all or substantially all of a corporation's property or assets; and dissolving the corporation and distributing assets. Failure to comply with these procedures may have adverse legal consequences. Consult an attorney if your corporation plans to take any of these actions.

PART III - BASIC RESPONSIBILITIES REGARDING FEDERAL INCOME TAX AND INFORMATION RETURNS

Some, but not all, nonprofit corporations are exempt from paying income tax. Both exempt and nonexempt nonprofits must file an annual return with the U.S. Internal Revenue Service. Exempt organizations file an "information return." Nonexempt organizations file a corporate tax return.

I. Exempt Organizations

If a nonprofit corporation meets the criteria for tax-exempt status under section 501(c) of the U.S. Internal Revenue Code – for instance, if it has been organized as a 501(c)(3) or 501(c)(4) organization, and has otherwise taken proper steps – it does not generally have to pay income tax (except on unrelated business income), and does not file a corporate tax return. It must instead file an annual information return with the IRS. *The annual information return must be filed regardless of whether the organization has or has not applied to the IRS for recognition of 501(c)(3) or other tax-exempt status.**

Depending upon its annual receipts and assets, the organization must file one of three possible forms: (1) The Form 990-N "electronic postcard," (2) Form 990-EZ or (3) Form 990. Form 990-N, by far the simplest, is filed online may only be used by organizations whose gross annual receipts are normally \$50,000.00 or less. An organization with gross receipts over this limit will have to file either Form 990-EZ or Form 990 (depending upon its gross receipts and total assets). An exempt organization that has \$1,000.00 or more in gross income from an unrelated business must also file a Form 990-T.

The appropriate form(s) must be filed by the 15th day of the fifth month after the end of the organization's fiscal year, as must the Form 990-T, if required. **There are stiff financial penalties for failing to file or filing a late or incomplete Form 990 or 990-EZ. In addition, if an organization fails to file a Form 990-N, 990 or 990-EZ for three years in a row its tax-exempt status is automatically revoked.**

* Certain religious organizations are exempt from these filing requirements. Further information is available on the IRS website at <https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file>.

Please note that filing requirements are different for any 501(c)(3) organization that the IRS considers a “private foundation” rather than a “public charity.” Further information about private foundations is available on the IRS website at www.irs.gov/charities-non-profits/private-foundations/life-cycle-of-a-private-foundation-required-filings .

2. Additional Requirement For 501(c)(4) Organizations

Apart from its annual information return, an organization intending to operate as a 501(c)(4) organization must file a special notice with the IRS within 60 days of its formation, meaning within 60 days of its incorporation date. Failure to do so will result in a penalty of \$20 per day for each day that the notice is overdue, up to a maximum of \$5,000. The notice must be filed online, using the electronic Form 8976. There is a \$50.00 fee. For more information visit the IRS website at www.irs.gov/charities-non-profits/electronically-submit-your-form-8976-notice-of-intent-to-operate-under-section-501c4.

3. Nonexempt Organizations

Organizations that do not meet the criteria for tax-exempt status under section 501(c) ordinarily must file a federal corporate tax return, using Form 1120, as well as a return with the KY Department of Revenue. These are due by the fifteenth day of the third month following the end of the corporation’s fiscal year. Local tax returns may also be required. Nonprofit corporations in this situation should consult a professional tax accountant.

4. Homeowner and Condominium Associations

If your nonprofit corporation is a homeowner or condominium association, different federal and state filing rules apply unless, in the case of a homeowner association only, the organization is able to qualify for 501(c)(4) status. Homeowner and condominium associations should consult a professional tax accountant to determine their federal, state and local tax status and filing responsibilities.

PART IV - SELECTED MISCELLANEOUS ADDITIONAL RESPONSIBILITIES

1. Charitable Solicitation

Nonprofits that solicit funds must comply with Kentucky registration and reporting requirements. Before beginning any fundraising, an organization should contact the KY Attorney General’s Office of Consumer Protection for state-law requirements and check with local government authorities for any additional regulations.

2. Charitable Gaming

Charitable gaming, which includes raffle tickets, is heavily regulated in Kentucky. Any organization planning to raise money through games of chance should contact the Kentucky

Department of Charitable Gaming before doing so for information on licensing, operational and reporting requirements.

3. Responsibilities as Employers

Nonprofits that are employers have the same legal and financial responsibilities to their employees as other employers. Failure to fulfill these responsibilities can result in large fines and legal action against the corporation.

4. Responsibilities Under Civil Rights Laws

Nonprofit corporations have the same legal obligations under local, state and federal civil rights laws as do other entities (subject to certain exceptions for some kinds of religious organizations). These include laws prohibiting discrimination on the basis of age, ancestry, color, disability, ethnicity, familial status, gender, gender identity, limited English proficiency, lawful source of income, national origin, political beliefs or affiliations, race, religion, sex, sexual orientation, or veteran's status.

PART V - IMPORTANT CONTACT INFORMATION

1. Office of the Kentucky Secretary of State

- (502) 564-3490
- www.sos.ky.gov

2. Internal Revenue Service, Exempt Organizations Customer Service

- (877) 829-5500 (toll free number)
- www.irs.gov/charities-non-profits,

3. Internal Revenue Service, Form 990-N Filing Center

- <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>

4. Office of the KY Attorney General, Division of Consumer Protection (charitable solicitation)

- (502) 696-5389
- <https://www.ag.ky.gov/Resources/Consumer-Resources/charity/Pages/default.aspx>

5. Kentucky Department of Charitable Gaming

- (502) 573-5528
- www.dcg.ky.gov