

Legal Governance Challenges for Associations During a Pandemic



May 27, 2020

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Like so many other operations, association governance processes have been disrupted by the COVID-19 crisis. The alternatives available for your membership and board meetings, voting, and other governance activities depend on state law and your governance documents. Here are several key questions and answers.

The COVID-19 pandemic has not only thrown a monkey wrench into associations' planned in-person meetings and conferences, but it also has thrown a curveball at association governance. From canceled membership meetings and virtual board meetings to online elections and obstacles to meeting governance requirements, associations are struggling to find answers to a host of

pressing governance questions.

It is possible to make association governance work in these highly unusual circumstances. What follows are key questions that many associations are asking, along with the legal context in which to analyze them and practical ideas for addressing these challenges.

If our bylaws require an annual membership meeting and we have canceled our annual conference, can this requirement be waived?

While associations understandably look first to their bylaws in attempting to answer governance questions, it is the nonprofit corporation statute of the state in which the association is incorporated (not the state in which its headquarters is located) that is the ultimate arbiter of governance-related issues. Such statutes supersede the association's bylaws and fill in the gaps where the bylaws or articles of incorporation may be silent.

It is important to note the hierarchy of association governance documents. In descending order, they are the state nonprofit corporation statute, articles of incorporation, bylaws, and board-approved policies. Each must be consistent with what is "above" it.

Most state nonprofit corporation statutes provide that the failure to hold an annual or regular membership meeting "will not affect the validity of any corporate action." This means that while there may be important actions to be taken at an annual membership meeting, there generally will not be any adverse legal consequences if the meeting is not held in a given year.

The actions that may need to happen without delay—such as officer and director elections—generally can occur via electronic ballot. While there is usually no reason to delay elections if they can occur virtually, most nonprofit corporation statutes provide that directors may continue to serve beyond the end of their term until successors are elected, appointed, or designated and until they take office, unless the articles of incorporation or bylaws say otherwise.

If we can't hold our annual membership meeting in person, can we hold it virtually? And can members vote by electronic ballot?

The answers to these questions are complex and nuanced, involving the applicable nonprofit corporation statute, as well as specific provisions in an organization's articles of incorporation and bylaws. And it is important to distinguish between provisions regarding virtual meetings and those regarding voting outside of a meeting.

Virtual membership meetings. Some states allow virtual membership meetings as long as the association's articles of incorporation or bylaws do not prohibit it, but some (such as the District of Columbia) only permit virtual meetings if the articles or bylaws expressly authorize them. To make it even more complicated, some state statutes require such provisions to be contained in the articles of incorporation specifically (not just the bylaws). And some states, such as New York, do not permit virtual membership meetings at all.

Online membership voting. Most state nonprofit corporation statutes permit members to vote by written ballot, via electronic or old-fashioned mail ballot. And generally, the quorum and approval requirements are the same as if the votes were occurring at a membership meeting.

Some states allow electronic membership voting outside of a meeting so long as the association's articles of incorporation or bylaws do not prohibit it.

Be sure to distinguish between statutory provisions regarding membership voting by electronic (or mail) *ballot* and those regarding membership voting by *proxy*. Almost all state nonprofit corporation statutes permit membership voting in connection with an in-person or virtual meeting to occur by proxy (which can generally be given electronically), but the state statutes differ more when it comes to membership voting by electronic (or mail) ballot outside of a meeting.

Board voting. With some exceptions (such as Texas), most state nonprofit statutes prohibit board voting by electronic ballot or proxy unless the action is taken by unanimous written consent. This stems from the fiduciary duties that board members owe to the organization, including a duty to carefully consider and deliberate about actions—duties that don't exist in the membership context.

Be sure to focus on statutory provisions that require the “unanimous written consent” of all members versus those that just require a quorum of voting members. This is a critical distinction, as obtaining unanimous written consent of all members is practically impossible in almost every association.

This being said, unless prohibited by the organization's own articles of incorporation or bylaws, most state nonprofit corporation statutes do permit boards of directors to hold meetings virtually so long as all directors can hear each other. Such meetings are subject to the same notice, quorum, and voting approval requirements as in-person meetings, can be combined with in-person meetings, and have the same legal force and effect as in-person meetings.



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I heard that New York's governor recently signed an executive order to allow New York not-for-profit corporations to hold membership meetings “remotely or by electronic means.” Have other governors signed similar orders, and are they necessary?

Developments like this are occurring on a regular basis during this pandemic at the federal, state, and local levels. Be sure to look carefully at any executive actions regarding the nonprofit corporation statute in your association's state of incorporation. For instance, in California, the attorney general recently issued guidance for that state's nonprofit corporations regarding actions that can be taken to conduct ordinary business operations during an emergency.

If an association is incorporated in a state where the nonprofit corporation statute allows virtual meetings only if codified in the organization's articles of incorporation, can the association amend its articles to permit them?

This can be a challenge. Virtually all state nonprofit corporation statutes require that amendments to the articles of incorporation be approved by the voting members of the organization. If your association decides that it wants to amend its articles of incorporation for a purpose like this, the issues described above regarding member meetings and voting may come into play.

What are the potential consequences if we don't follow a mandate or procedure dictated by state law or our own bylaws?

Generally speaking, any action an association takes that is inconsistent with state law or its bylaws is null and void and could later be challenged by an aggrieved board member, member, or even the state attorney general. That being said, there may be exceptions, as in New York where the governor provided emergency relief in connection with virtual membership meetings during the pandemic. It also may be possible for the membership or board to ratify such an action at a future meeting held in compliance with the association's governing documents to legitimize further reliance on the action.

While membership and board governance issues may not be the most pressing challenges facing associations in these trying times, they are critical to the healthy functioning of every association. This is a complex area of the law that varies from state to state—and from one set of association articles of incorporation and bylaws to the another. Understanding and properly interpreting the nuances in this area is important in helping your association survive the governance hurdles posed by this pandemic.

Tags:

 **BOARD OF DIRECTORS**

 **BY-LAWS**

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