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A Director Needs to Take a Leave of Absence? 5 Considerations



Here's a topic that hasn't been written about - but that I hear a lot about - so you're likely to encounter it if you do this stuff long enough. A member on your board seeks to take a prolonged leave of absence for personal or other reasons. Maybe the director has scheduled surgery and can't travel. They could be ill. Or perhaps they have an ill spouse that needs immersive care. Life happens.

Here are five things to consider:

1. State Law Allows a Director to be "In" or "Out": No Middle Ground. You'll be looking to state law - in the state in which your company is incorporated - and when you look, I doubt a leave of absence would be allowed under state law since directors are elected and then remain on until the end of their term (or until resignation). A director isn't like an employee who could take a paid or unpaid leave. Instead, a director has fiduciary responsibilities from the moment of election or appointment, until the moment of resignation.

So don't think you could give a director a valid leave of absence under state law that would relieve the director of fiduciary duties during the leave. And taking a "leave" would in effect prevent the director from actively fulfilling those duties.

2. Remote Attendance to the Rescue Perhaps. The good news is that one silver lining of the pandemic is that remote attendance has become mainstream. Even a board meeting that is entirely in-person may be able to accommodate a director who is physically unable to travel. So that even if the rest of the board is meeting in-person, it's not unusual for such a director to attend virtually. Perhaps that director might still miss a meeting or two but there wouldn't be a long, prolonged absence that could be problematic.

3. Proxy Disclosure for Poor Meeting Attendance is a Motivator. Under Item 407(b) of Regulation S-K, remember that any director who attends less than 75% of a board's meetings (and board committee meetings) for a fiscal year must be identified in the proxy as having missed that threshold. Any director facing a challenge of

making meetings should be reminded of this disclosure obligation too. Meetings missed during a "leave of absence" for a director who has started a term and not resigned would simply be counted as meetings not attended.

4. Directors Can't Resign With a Promise to Renominate Them. If a director is going to be totally unavailable for a year, they should resign and stay in touch if they want to - but with no promise of nomination a year later.

When that director says they are ready to rejoin the board, the nominating committee must evaluate the board's needs at that time. Because of the importance of creating a board whose members, as a whole, match the challenges that the corporation is then facing, the former director's skills and background would need to be reassessed at that future date. Or perhaps the board size is such that there simply isn't a need to enlarge the board by one at that time. It is what it is.

5. Need a Form 8-K to Announce a Departing Director. If the director does indeed resign, the company will have to file a Form 8-K announcing the resignation that includes the date of the resignation and the committee positions held by that director (as well as file any correspondence the director might have sent to the company upon resignation concerning the resignation circumstances as an exhibit to the 8-K). The company might want to note in the 8-K that the director served with distinction and perhaps that the director may be considered for renomination in the future if the board's circumstances warranted it (but that there is no formal commitment to re-nominate).

Note I haven't delved into the sticky question of what to do if a director doesn't want to resign. That challenge is a great topic for another day...

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