



Fiduciary Duties: An Important Consideration in Owning and Running a Business

If you own or control a business, you likely have responsibilities known as "fiduciary duties." Fiduciary duties exist with respect to most entity forms (other than sole proprietorships), but to varying degrees.

Corporations

Directors and officers are required to act (1) in good faith, (2) in a manner the director or officer reasonably believes to be in or not opposed to the best interests of the corporation (the duty of loyalty), and (3) with the care that an ordinarily prudent person in a like position would use under similar circumstances (the duty of care). In Ohio, these duties are owed primarily to the corporation.

The Ohio Revised Code does not impose fiduciary duties upon shareholders. However, Ohio courts impose duties upon shareholders of closely-held corporations (i.e., ones with relatively few owners) who exercise some control over the corporation. These duties are owed primarily to the other shareholders. Furthermore, a majority owner of a closely-held corporation owes a heightened duty to the minority shareholders. In these situations, the majority shareholder must be careful not to take actions that "squeeze out" or oppress the minority shareholder.

LLCs

Members of LLCs owe a duty to (1) account to the company and hold as trustee for the company any property, profit, or benefit derived by the member in the conduct of the company's business or derived from a use by the member of the limited liability company's property, including the appropriation of a company opportunity (the duty of loyalty), and, (2) in the conduct of the

company's business, to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law (the duty of care). These duties are owed to the LLC and the other members. Managers of LLCs who are not members owe duties only to the LLC. These are the same duties that directors and officers owe to a corporation. Ohio law permits fiduciary duties applicable to LLCs to be modified to a reasonable extent if set forth in an operating agreement. Corporations, on the other hand, are not permitted to alter the applicable fiduciary duties.



So, practically, what does all of this mean?

If you are subject to fiduciary duties, you must put the success and benefits to the company above potential personal advantages you might gain due to your position as an owner. You cannot directly compete with the company, and you must avoid conflicts of interest with the company. You should also avoid any action that could be considered "waste" or self-dealing—such as paying yourself an extravagant salary or bonus at the expense of the company and, by extension, the other owners. Additionally, you cannot usurp the company's

business opportunities to the detriment of the company and your co-owners. For example, through your position in the company, you may gain knowledge of a highly profitable investment opportunity. Your duty of loyalty generally mandates that you not take such opportunity for your own personal gain (though, taking such opportunity may be allowable if the opportunity has been presented to the company first and the company declines the opportunity).

You also must act in good faith and exercise reasonable care while carrying out your obligations to the company or directing its activities. You should be consistently present, informed, and engaged in the company's business. However, this does not mean that all of your decisions have to be perfect. Under the business judgment rule, as long as you act in good faith and as a "prudent" person would, you have not breached your fiduciary duties.

Understanding the fiduciary duties are crucial to owning and running a business and protecting yourself against claims of breach of those duties. If you have any questions or concerns or otherwise wish to discuss these matters further, please contact your Carlile Patchen & Murphy business attorney.