

# STATE OF NEW YORK

5513

2021-2022 Regular Sessions

## IN SENATE

March 9, 2021

Introduced by Sen. COMRIE -- read twice and ordered printed, and when printed to be committed to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the not-for-profit corporation law, in relation to the indemnification of directors, officers and key persons; and to repeal sections 721, 722 and 723 of the not-for-profit corporation law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Sections 721, 722 and 723 of the not-for-profit corporation  
2 law are REPEALED.  
3 § 2. The not-for-profit corporation law is amended by adding a new  
4 section 721 to read as follows:  
5 § 721. Authorization for indemnification of directors, officers or key  
6 persons; insurance.  
7 (a) A corporation may indemnify any director, officer or key person  
8 against expenses, including judgments, fines, excise taxes, amounts paid  
9 in settlement, attorneys' fees, court costs and disbursements actually  
10 and necessarily incurred as a result of action or proceeding, or any  
11 appeal thereof, arising out of service as a director, officer or key  
12 person (1) who was or is a party or is threatened to be made a party to  
13 any threatened, pending or contemplated action or proceeding, or any  
14 appeal thereof, whether civil, criminal, administrative or investigative  
15 (including an action by or in the right of the corporation and/or by its  
16 members, if any, or in the right of any other corporation of any kind,  
17 domestic or foreign and/or by its members, if any), or by any partner-  
18 ship, joint venture, trust, employee benefit plan or other enterprise;  
19 and (2) who has met the standards of conduct set forth in section 717  
20 (duty of directors and officers and key persons) and elsewhere in this  
21 article and who is entitled to the protection of section 720-a of this  
22 article (liability of directors, officers, key persons and trustees) to

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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1 the extent applicable, and (3) with respect to any criminal action or  
2 proceeding, who had reasonable cause to believe that her or his conduct  
3 was lawful. A director, officer or key person who may be indemnified  
4 under this section shall include a person (i) whose testator or intes-  
5 tate is or was a director, officer or key person of the corporation, or  
6 (ii) who is or was serving in any capacity at the request of the corpo-  
7 ration as a director, officer or key person of another corporation,  
8 partnership, joint venture, trust, estate, employee benefit plan or  
9 other enterprise.

10 (b) The termination of any action or proceeding, including an action  
11 by or in the right of the corporation and/or by its members, by judg-  
12 ment, order, settlement, adjudging liability to the director, officer or  
13 key person, conviction or upon a plea of nolo contendere or its equiv-  
14 alent shall not necessarily create a presumption that the (1) director,  
15 officer or key person did not act in accordance with the standards of  
16 care set forth in paragraph (a) of this section, and (2) with respect to  
17 any criminal action or proceeding, did not have reasonable cause to  
18 believe that the director's, officer's or key person's conduct was  
19 unlawful.

20 (c) No indemnification shall be made by the corporation if such direc-  
21 tor, officer or key person shall have been adjudged to be liable,  
22 including liability to the corporation, unless and only to the extent  
23 that the court, in which such action or proceeding was brought, shall  
24 determine, upon application, that, despite the adjudication of liability  
25 but in view of all the circumstances of the case, such director, officer  
26 or key person is fairly and reasonably entitled to indemnification with  
27 respect to all or any of the judgments, fines, excise taxes, amounts  
28 paid in settlement, attorneys' fees, court costs and disbursements actu-  
29 ally and necessarily incurred, because the director, officer or key  
30 person had made a good faith effort to meet the standards of conduct set  
31 forth in this article.

32 (d) Expenses, including attorneys' fees, court costs and disburse-  
33 ments, incurred by a director, officer or key person of the corporation  
34 or by persons serving at the request of the corporation as directors,  
35 officers or key persons of another corporation, partnership, joint  
36 venture, trust or other enterprise, in defending any civil, criminal,  
37 administrative or investigative action or proceeding, arising out of  
38 such service, may be paid, if authorized in accordance with paragraph  
39 (e) of this section, in advance of the final disposition of such action  
40 or proceeding, upon receipt by the corporation of an undertaking in  
41 accordance with article 25 of the civil practice law and rules by or on  
42 behalf of such director, officer or key person to repay such amount if  
43 she or he shall ultimately be determined not to be entitled to be indem-  
44 nified as authorized in this section.

45 (e) Any indemnification or advancement under this section, except for  
46 one ordered by a court, shall be made only in the specific action or  
47 proceeding upon a determination that indemnification of the present or  
48 former director, officer or key person is proper in the circumstances  
49 because the person has met or in the case of an advance can be reason-  
50 ably expected to meet the applicable standard of conduct set forth in  
51 paragraph (a) of this section:

52 (1) by a majority vote of the directors of the corporation who are not  
53 parties to such action or proceeding, even though less than a quorum;

54 (2) by a committee of such directors designated by majority vote of  
55 such directors, even though less than a quorum;

1 (3) if there are no such directors, or if such directors so direct, by  
2 independent legal counsel in a reasoned written opinion; or

3 (4) by the members, if any.

4 (f) A right to indemnification or to advancement of expenses arising  
5 under a provision of the certificate of incorporation, a bylaw or a  
6 resolution of the board or of a committee thereof shall not be elimi-  
7 nated or impaired by an amendment to the certificate of incorporation to  
8 the bylaws or to the resolution after the occurrence of the act or omis-  
9 sion that is the subject of the civil, criminal, administrative or  
10 investigative action or proceeding for which indemnification or advance-  
11 ment of expenses is sought, unless the provision in effect at the time  
12 of such act or omission explicitly authorizes such elimination or  
13 impairment after such action or omission has occurred.

14 (g) A corporation may purchase and maintain insurance on behalf of any  
15 person who is or was a director, officer or key person of the corpo-  
16 ration, or is or was serving at the request of the corporation as a  
17 director, officer or key person of another corporation, partnership,  
18 joint venture, trust, estate, employee benefit or other enterprise,  
19 against any liability asserted against such person and incurred by such  
20 person in any such capacity, or arising out of such person's status as  
21 such, whether or not the corporation would have the power to indemnify  
22 such person against such liability under this section.

23 (h) For purposes of this section, references to "the corporation"  
24 shall include, in addition to a consolidated or surviving corporation,  
25 any constituent corporation, including any constituent of a constituent,  
26 absorbed in a consolidation or merger which, if its separate existence  
27 had continued, would have had power and authority to indemnify its  
28 directors, officers or key persons that any person who is or was a  
29 director, officer or key person of such constituent corporation, or is  
30 or was serving at the request of such constituent corporation as a  
31 director, officer or key person of another corporation, partnership,  
32 joint venture, trust, estate, employee benefit plan or other enterprise,  
33 shall stand in the same position under this section with respect to the  
34 resulting or surviving corporation as such person would have with  
35 respect to such constituent corporation if its separate existence had  
36 continued.

37 (i) The indemnification and advancement of expenses provided by, or  
38 granted pursuant to, this section shall continue as to a person who has  
39 ceased to be a director, officer or key person and shall inure to the  
40 benefit of her or his heirs, executors and administrators if that person  
41 was a director, officer or key person at the time the cause of action or  
42 claim arose or prosecution was threatened or information or indictment  
43 was filed.

44 (j) For the purpose of this section, a corporation shall be deemed to  
45 have requested a person to serve an employee benefit plan where the  
46 performance by such person of her or his duties to the corporation also  
47 imposes duties on, or otherwise involves services by, such person to the  
48 plan or participants or beneficiaries of the plan; excise taxes assessed  
49 on a person with respect to an employee benefit plan pursuant to appli-  
50 cable law shall be considered fines; and action taken or omitted by a  
51 person with respect to an employee benefit plan in the performance of  
52 such person's duties for a purpose reasonably believed by such person to  
53 be in the interest of the participants and beneficiaries of the plan  
54 shall be deemed to be for a purpose which is not opposed to the best  
55 interests of the corporation.

1 § 3. Section 724 of the not-for-profit corporation law, as amended by  
2 chapter 368 of the laws of 1987, paragraph (a) as amended by chapter 549  
3 of the laws of 2013, is renumbered section 722 and amended to read as  
4 follows:

5 § 722. Indemnification of directors [~~and~~], officers or key persons by a  
6 court.

7 (a) Notwithstanding the failure of a corporation to provide indemnifi-  
8 cation, and despite any contrary resolution of the board, of a committee  
9 thereof or of the members in the specific case under section [~~723~~] 721  
10 [~~(Payment of indemnification other than by court award)~~] (Authorization  
11 for indemnification of directors, officers or key persons; insurance),  
12 indemnification [~~shall~~] may be awarded by a court to the extent author-  
13 ized under section [~~722 (Authorization for indemnification of directors~~  
14 ~~and officers), and paragraph (a) of section 723 (Payment of indemnifica-~~  
15 ~~tion other than by court award)~~] 721 (Authorization for indemnification  
16 of directors, officers or key persons; insurance). Application therefor  
17 shall be made on notice to the attorney general and may be made, in  
18 every case, either:

19 (1) In the civil action or proceeding in which the expenses were  
20 incurred or other amounts were paid, or

21 (2) To the supreme court in a separate proceeding, in which case the  
22 application shall set forth the disposition of any previous application  
23 made to any court for the same or similar relief and also reasonable  
24 cause for the failure to make application for such relief in the action  
25 or proceeding in which the expenses were incurred or other amounts were  
26 paid.

27 (b) The application shall be made in such manner and form as may be  
28 required by the applicable rules of court or, in the absence thereof, by  
29 direction of a court to which it is made. Such application shall be upon  
30 notice to the corporation. The court may also direct that notice be  
31 given at the expense of the corporation to the members and such other  
32 persons as it may designate in such manner as it may require.

33 (c) Where indemnification is sought by judicial action, the court may  
34 allow a person such reasonable expenses, including attorneys' fees,  
35 during the pendency of the litigation as are necessary in connection  
36 with his defense therein, if the court shall find that the defendant has  
37 by his pleadings or during the course of the litigation raised genuine  
38 issues of fact or law.

39 § 4. Section 725 of the not-for-profit corporation law is renumbered  
40 section 723.

41 § 5. The section heading and subdivision (a) of section 723 of the  
42 not-for-profit corporation law, as amended by chapter 368 of the laws of  
43 1987 and such section as renumbered by section 4 of this act, are  
44 amended to read as follows:

45 Other provisions affecting indemnification of directors [~~and~~], offi-  
46 cers and key persons.

47 (a) All expenses incurred in defending a civil or criminal action or  
48 proceeding which are advanced by the corporation under paragraph [~~(e)~~]  
49 (d) of section [~~723~~] 721 [~~(Payment of indemnification other than by~~  
50 ~~court award)~~] (Authorization for indemnification of directors, officers  
51 or key persons; insurance) or allowed by a court under paragraph (c) of  
52 section [~~724 (Indemnification of directors and officers by a court)~~] 722  
53 (Indemnification of directors, officers or key persons by a court) shall  
54 be repaid in case the person receiving such advancement or allowance is  
55 ultimately found, under the procedure set forth in this article, not to  
56 be entitled to indemnification or, where indemnification is granted, to

1 the extent the expenses so advanced by the corporation or allowed by the  
2 court exceed the indemnification to which he is entitled.

3 § 6. Section 720-a of the not-for-profit corporation law, as amended  
4 by chapter 445 of the laws of 2019, is amended to read as follows:

5 § 720-a. Liability of directors, officers, trustees and key persons.

6 Except as provided in sections [~~seven hundred nineteen~~] 719 and [~~seven  
7 hundred twenty~~] 720 of this chapter, and except any action or proceeding  
8 brought by the attorney general or, in the case of a charitable trust,  
9 an action or proceeding against a trustee brought by a beneficiary of  
10 such trust, no person serving without salary or other compensation as a  
11 director, officer, key person or trustee of a corporation, association,  
12 organization or trust described in section 501 (c) (3) of the United  
13 States internal revenue code shall be liable to any person other than  
14 such corporation, association, organization or trust based solely on his  
15 or her conduct in the execution of such office unless the conduct of  
16 such director, officer, key person or trustee with respect to the person  
17 asserting liability constituted gross negligence or was intended to  
18 cause the resulting harm to the person asserting such liability. For  
19 purposes of this section, such a director, officer, key person or trustee  
20 shall not be considered compensated solely by reason of payment of  
21 his or her actual expenses incurred in attending meetings or otherwise  
22 in the execution of such office.

23 § 7. This act shall take effect on January 1, 2022, provided, however,  
24 that rights to indemnification that accrued prior to such effective date  
25 shall be determined by the not-for-profit corporation law as then in  
26 effect, unless the director, officer or key person elects to have those  
27 rights or obligations determined by the not-for-profit corporation law  
28 as amended by this act.