



Amendment 53 (Initiative # 74) Criminal Accountability of Executive Officials

Position: *OPPOSE*

SUMMARY

- Holds that an executive official may be criminally liable for an organization's failure to perform a specific duty required by law if the official knew or reasonably should have known about the duty.
- Defines executive official as an officer, director, managing partner, managing member, or sole proprietor of a business entity.
- For an offense committed after Jan. 1, 2009, would subject an executive official to pay a fine within the ranges authorized by 18-1.3-401 (I) (a) (III) or 18-1.3-501 or 18-1.3-503 respectively for a misdemeanor or petty offense.
- For an offense committed after Jan. 1, 2009, would subject an executive official to imprisonment within the ranges allowed by Section 18-1.3-401 (I) (a) (V).
- It would be an affirmative defense if the executive official reported any facts pertinent to the conduct to the Attorney General prior to being charged.

PROS

- Increased accountability for executive officials who are aware of criminal misconduct.
- Allows executive officials to report misconduct to the Attorney General to reduce their own liability.
- Holds executive officials to the same criminal liability standards as organizations for failing to perform duties required by law.

CONS

- Would make nonprofit directors, officers and executive staff criminally liable for knowing or being in a position to know about criminal conduct by the organization even if they were not directly involved.
- Could be a great disincentive for individuals seeking to serve as directors or officers.
- Generally, indemnification in the bylaws and directors and officers' insurance does not protect executive officials from personal acts of negligence or other criminal misconduct. Additional accountability for these persons is unnecessary.

ANALYSIS

This amendment is intended to address situations where an organization has engaged in fraud or other criminal misconduct and executive officials have pleaded ignorance or looked the other way. It holds them to similar criminal standards as the entity itself but allows officials to defend themselves by reporting misconduct to the Attorney General.



Indubitably, an executive official who knows about criminal misconduct in an organization should act within his or her capacity to stop it. The concern with this policy is that it would place criminal penalties on individual executive officials based on what they are presumed to know given their position and not necessarily actual knowledge of or participation in criminal activity.

Nonprofit directors and officers may be more removed than executive staff from the day to day operations of the organization and may have less capacity to know about misconduct and to have the means to address it in a timely manner. For example, a board member may be held criminally liable if he or she is not aware if the organization has completed its annual registration with the Colorado Secretary of State prior to soliciting charitable contributions from the public. This is a legally required duty that board members should know about but since they do not directly manage such operational details, they may not know if it was actually completed.

Increased liability may also lead to more lawsuits, which, frivolous or not, impact defendants personally, professionally, and financially. and could deter people from volunteering on nonprofit boards.

Amendment #53 encourages increased executive accountability but is also an overly punitive measure to ensure that executive officials act to stop criminal misconduct in their organization.

ACTION

In its July meeting, the Colorado Nonprofit Association board voted to OPPOSE Amendment 53 out of concern about extending criminal liability to executives and board members who were not involved in criminal misconduct. Such increased liability is unnecessary and would discourage individuals from serving as nonprofit executives, directors, or officers.