



SHAW & LINES, LLC

COUNSELORS TO COMMUNITY ASSOCIATIONS

FEATURING:

- HIRING VENDORS IN COMPLIANCE WITH EMPLOYMENT LAWS
- BOARD MEMBER DUTIES

AUTHORED BY:

MARK E. LINES, ESQ
AARON M. KELLY

Hiring Vendors in Compliance With Federal and State Employment Laws

Mark E. Lines, Esq.

I was recently asked in a panel discussion how to "guarantee" that their vendors are not hiring "illegal immigrants" in violation of recently enacted Arizona State legislation. First of all, it is very difficult to "guarantee" that a vendor is not hiring "illegal immigrants". An association could request that vendors provide a written statement that they are complying with Arizona and Federal employment laws. However, this is still problematic because in order to affect your rights to terminate, the association must prove that the vendor did not "comply with employment laws." This is not as simple as one might assume.

The recent law that passed in Arizona regarding penalties for hiring illegal and undocumented workers only applies to employers that "knowingly" hire illegal workers. It is very difficult to prove that somebody did something "knowingly." For example, if an employer asks for a Social Security Number (tax identification number) and identification and on the face of the documentation, the employee appears to be a legal resident of the United States, the employer has done enough to satisfy not "knowingly" hiring an illegal worker. All the employer has to do is claim "I did not know" and he has a defense. Therefore, it is not as simple as it first appears to try to stop such action and conduct.

As an additional caveat, there is a surface appearance of discrimination when it comes to attacking certain vendors that hire a particular class of workers

(i.e., Hispanic). This seems like a silly hypothetical, but an Association can get itself into hot water if it automatically requests such verifications from vendors that may have a reasonable tendency to employ Hispanic workers (i.e., landscaping vendors, etc.) and not have the same requirements with other vendors (i.e., an interior decorator to redecorate the clubhouse). If any vendor is required to sign such a statement, all vendors must also be requested to sign such a statement. It is unlawfully discriminatory to pick and choose who will be required to verify this and who will not. Also, the association will certainly have egg on its face if the landscapers all turn out to be legal residents, but the interior decorator is an illegal alien from Europe.

This simplest thing to do is request add very general language into a vendor contract that allows the association to terminate their services with or without cause and have the vendor sign it (making sure that it is either properly incorporated into their vendor contract expressly or by reference). That way, the Association does not find itself in having to prove anything with respect to the legality or illegality of the employers and employees and can simply terminate the vendor contract when it deems it is necessary. Such termination clauses should include some reasonable time frame (like 30 days' notice). Any association, however, must still be advised that there is potential liability if the reasons for terminating vendor contracts are unlawfully discriminatory. Also, any association looking to implement an "at will" or "without cause" term into its vendor contract should consult with legal counsel and have an attorney review each vendor contract and suggest language to allow such at will termination in a legal and practical way.

CONTACT THIS AUTHOR:

Mark E. Lines -- mllines@shawlines.com

Board Member Duties

Aaron M. Kelly, Esq.

When acting as a member of the board, you are not simply acting as an interested homeowner. Your obligations of duty and loyalty are to the association, and not necessarily to the homeowners. There are several basic duties that the board is responsible for, including: (1) protect the common area; (2) protect the property of the association; (3) collecting assessments; (4) maintain & increase property values; and (5) enforce the restrictions.

One particular duty entrusted to the board is to protect and properly maintain the common areas. This can be done by ensuring that these areas are safe, and properly maintained so as to be aesthetically pleasing. Also, the board has the same duty to protect anything that is considered "property" of the association.

Another important duties is to collect assessments. As the lifeblood and source of revenue for an association, the board should take an active role in ensuring that the assessments are levied and collected. By so doing, the board is also helping to maintain and increase property values throughout the association and people choose to live in community associations for this reason.

Pursuant to both Arizona law and most governing documents, the board has an affirmative obligation to enforce mandatory provisions of its restrictions. In enforcing its restrictions, the board must analyze appropriate enforcement methods, and ensure that all members are in compliance.

Another duty is a "fiduciary duty" to the association. This fiduciary duty is also called the "duty of care". In making decisions on behalf of the association, each board member should act in good faith in a manner that would be in the community's best interest.

Board members should remember that when they are acting on behalf of the association, their actions may be challenged and they can be held personally liable for their decisions. However, pursuant to A.R.S. §10-3830, board members may be insulated from personal liability so long as they acted in the "same manner as a reasonable person would in a like position under similar circumstances, and in what they believed to be in the

best interest of the association". Evidence of reasonableness can be relying upon attorneys, accountants, management companies, or other relevant professionals in making decisions.

To avoid a possible breach of the duty of care, the board should adhere to the following:
(1) understand general association business;
(2) attend and participate in meetings;
(3) register a dissent in the minutes when disagreeing with the board's action; and
(4) understand the CC&Rs, Articles, Bylaws and other association documents.

This obviously doe not encompass the broad range of duties board members have. Yet, it is important not to underestimate the value of assistance of of professional advice to avoid breaching a duty as a board member.

NEWS & EVENTS

HOA GUY TEACHES ARIZONA LEGAL SEMINAR FOR LORMAN

**ISSUES CONCERNING THE DEVELOPMENT, CREATION
AND OPERATION OF THE ARIZONA OFFICE CONDO:**
JANUARY 30, 2008
SPONSORED BY LORMAN EDUCATIONAL SERVICES

Attorney Augustus H. Shaw IV has once again been invited by Lorman, a nationally recognized continuing legal education service provider, to assist in drafting materials for and teaching a seminar on Office Condominium Associations in Arizona. For more information, please call our office, or visit www.lorman.com.

QUESTIONS? COMMENTS? IDEAS?

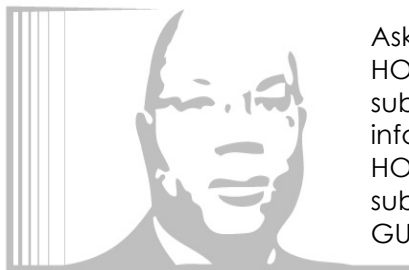
P: 480.456.1500

www.shawlines.com

ashaw@shawlines.com

mlines@shawlines.com

www.HOAGUY.com



Ask the HOA GUY is a monthly column for HOA board members or managers to submit questions and receive relevant information on HOA issues. If you are an HOA board member or manager, you may submit questions or comments to the HOA GUY at hoaguy@hoaguy.com.



SHAW & LINES, LLC
COUNSELORS TO COMMUNITY ASSOCIATIONS

WWW.SHAWLINES.COM

© 2007