

As always, we love to hear from community managers and board members regarding potential topics for upcoming issues of this newsletter. What topics do you want to read about or see discussed? Please contact attorney Greg Stein at (480) 427-2843 or [greg@carpenterhazlewood.com](mailto:greg@carpenterhazlewood.com) with any suggested topics for upcoming issues.



## Spring Cleaning in Employment Law: Time to Dust off & Update those Employee Handbooks!

by [Charitie Hartsig, Esq.](#)

Current and up-to-date employee handbooks that comply with federal, state, and local law are essential tools in the HR and legal compliance toolkits of all employers, including planned community and condominium associations, that employ one or more employees.

Employee handbooks are often a new employee's first substantive introduction to their employer and its objectives, expectations, and culture. Yet, not only are employee handbooks necessary to achieve an employer's practical HR objectives, such as communicating workplace policies and other key terms and conditions governing the employment relationship, current and complete handbooks can also play a crucial role in an employer's defense against certain legal claims brought by a disgruntled former or current employee.

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## Taking the Association's Medicine: Reserve Accounts and Long-Term Risk Management

by [Sean Moynihan, Esq.](#)

Assessment increases may be one of the most politically unpopular actions an association's board can take. A director

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Mar. 18 - Parking, Parking and More Parking (*Tempe*)

Mar. 27 - Fast Track Your Collections (*Prescott*)

Apr. 7 - Vendors (*Tempe*)

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For more information contact Andrea Rizen at 480.427.2880 or [andrea.rizen@carpenterhazlewood.com](mailto:andrea.rizen@carpenterhazlewood.com)

may have even campaigned for election on the promise of low assessments. Nevertheless, an association that is not financially prepared for future expenses can face serious consequences, including personal liability for directors who fail to ensure adequate funding.

Combing through the familiar statutes, you may scratch your head as to where the risks of under-funded reserves lie.

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## IN OTHER NEWS:

Bad Airbnb Hosts - "Scale of Airbnb's scam problem detailed in new Vice report" - The Verge [READ STORY](#)  
Please feel free to contact any CHDB attorney to discuss short-term rental issues you may be experiencing within your Association.

Important information for associations that broadcast live sports (especially PPV events) and other TV programs in their clubhouse - "How some Phoenix restaurants sued for TV piracy can lose 'by default'" - AZ Central [READ STORY](#)

## Spring Cleaning in Employment Law: Time to Dust off & Update those Employee Handbooks!

*Cont.*

A well-drafted employee handbook with current and legally compliant anti-discrimination policies, including compliant reporting, investigation, and anti-retaliation provisions, can provide an employer with specific affirmative defenses against claims in a number of circumstances. Specifically, a legally compliant anti-harassment policy may give rise to an affirmative defense against certain harassment claims such as when (1) the employer also has other sufficient safeguards in place to prevent workplace discrimination and harassment (including annual training), and (2) the employee files a claim without first reporting the alleged conduct and affording the employer an opportunity to investigate and take remedial action if needed.

Given the ever-shifting and changing landscape of federal, state, and local employment law, it is critical for employers to review and update their employee handbooks and other workplace policies at least annually. Indeed, in 2019 alone, employers saw changes to a whole host of federal, state, and local employment laws that mandate updated workplace policies. The laws subject to these changes ranged from those governing wage and hour issues (such as minimum wage and worker misclassification) and paid leave, to those granting and expanding protections against workplace discrimination and harassment (such as some jurisdictions' newly implemented protections against discrimination based on an employee's

natural hairstyle or medical marijuana use). While some employment laws only apply to employers with 15 or more employees, many of the laws, including the anti-sexual harassment provisions of the Arizona Civil Rights Act, apply to employers with only a single employee.



Of course, those employers with employees in multiple jurisdictions should pay particular attention to the differences in state and local laws, being mindful that when it comes to multi-state handbooks, one size does not fit all. What is required in one jurisdiction may not be required in another jurisdiction. Indeed, what is permitted in one state may actually be *unlawful* in another state. For example, the employment law provisions in Arizona's Medical Marijuana Act would render the vast majority of zero-tolerance drug and alcohol policies unlawful under Arizona law.

Unlawful employment policies bring a significant risk of liability to the employer because a non-compliant policy could be viewed by courts or administrative agencies as potential evidence of a legal violation. In some circumstances, employers can be deemed to have committed an unfair labor practice or other unlawful act just by virtue of having non-compliant handbooks or other workplace policies, even if the policy is not being enforced by the employer. Thus, if employers do not have current,

up-to-date employee handbooks, they are taking a significant gamble that legally non-compliant workplace policies will operate as a weapon in the hands of a disgruntled current or former employee to wield against the employer in an agency action (e.g., Equal Employment Opportunity Commission, Department of Labor, National Labor Relations Board, etc.) or in a lawsuit.

Therefore, in addition to its regular annual review of employee handbooks, an employer should take immediate steps in the event of changes in the law or the employer's circumstances to update its workplace policies to ensure compliance with the law. Changes in laws that generally will require update to employee handbooks include those governing wage and hour issues (e.g., minimum wage or worker classification); paid family and/or sick leave (e.g., earned paid sick time provisions under Arizona's Fair Wages and Healthy Families Act); expansions of protected classes under anti-discrimination laws; employees' concerted activity rights under Section 7 of the National Labor Relations Act; and privacy laws.



Charitie Hartsig is a partner who joined the firm in 2017. Charitie, who practices in our Tempe office, leads the firm's labor and employment practice.

If you have questions regarding employee handbooks, workplace policies, or any other employment law issues, please, contact Charitie at (480) 427-2888 or [charitie.hartsig@carpenterhazlewood.com](mailto:charitie.hartsig@carpenterhazlewood.com).

## Taking the Association's Medicine: Reserve Accounts and Long-Term Risk Management *Cont.*

Arizona statutory law contains no express obligation for associations to maintain reserves. Instead, the legal consequences of inadequate financial planning relate to the directors' fiduciary duties to the association. The Arizona Nonprofit Corporation Act (NPCA) set forth at A.R.S. § 10-3101 *et seq.* requires directors to act (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation. A.R.S. § 10-3830(A). Claims involving breaches of duty can present personal liability for directors both during and after the expiration of a director's term.



Owners may cheer when directors work to keep assessments low, but owner approval is not a benchmark for whether directors fulfilled their duties. It is critical to distinguish between interests of the corporate entity and interests of its members. The association, albeit not for profit, is a business that manages

valuable assets, sometimes millions of dollars' worth of real property, investments, and cash. The board's task is to responsibly manage those assets, which largely means ensuring the association can afford to repair and maintain its property so that it remains fit for the use and enjoyment of both current and future members.

Reserve funding is the most reliable way to ensure that an association is financially capable of performing the repairs, maintenance, and management of the community that are the core of its corporate purpose. In the absence of meticulous planning, annual budgets will not generally account for major expenses like repaving streets, repairing roofs, or refurbishing the community pool. Special assessments or financing could cover these costs, but membership approval requirements often make them impractical options. Loans expose the association to creditor remedies that also raise breach of duty questions. Special assessments and financing are remedial rather than preventative, and harms may have already occurred by the time those measures are taken.

The liability risks, therefore, lie in the harms that arise from deteriorating property. Property in disrepair may diminish home values. Poorly maintained facilities may create hazards that damage owners' property or cause bodily injury. Negligence claims based on a breach of duty could arise because an association lacked adequate funds to maintain its property in a safe condition. Deferred maintenance may also create dangers resulting in premises liability to third parties. In the worst cases, improperly funded reserves can result in large monetary judgments or even the end of the association itself. For an extreme example, please consider a recent verdict against a Las Vegas homeowners'

association for \$20 million: <https://www.ktnv.com/news/contact-13/hoa-hit-with-20m-verdict-over-swing-set-negligence>.

What is a board to do when past decisions have left them with depleted funds? A reserve study is a first step to back to financial health. The study can also help insulate current or new directors from personal liability if they follow its recommendations. Furthermore, the NPCA contains a "safe harbor" provision insulating directors from liability when they reasonably rely on the advice of experts. A.R.S. § 10-3830(B).

To fund the reserve accounts, an association's primary option is to increase annual assessments and refill reserves periodically over time. By statute, a planned community association can only raise its annual assessments to an amount no greater than 20% above the previous year's assessment. A.R.S. § 33-1803(A). While there is no reciprocal provision in the Arizona Condominium Act, the governing documents for many planned community and condominium associations contain provisions limiting the amount an association can increase its annual assessments above the previous year's assessment. Associations should take care to comply with the more restrictive provision—either their governing documents or A.R.S. § 33-1803(A) (for planned communities).

Additionally, an association may consider utilizing conservative investment strategies (certificates of deposit, treasury bills, etc.) to see greater appreciation on reserve funds. However, an association's reserve account is a corporate asset, and the board's primary responsibility is to protect the principal balance. Placing Wall Street bets in an attempt to fast-track reserve growth creates a level of financial risk that can violate the directors' duties to the association. Finally, a board

should always review its association's governing documents because they may provide additional specific requirements for reserve accounts and/or investing such funds.

Reserve funding is often a bitter pill to swallow. Growing or restoring these accounts can be an arduous process. It may make the directors unpopular with their neighbors. Nonetheless, without adequate reserves, an association cannot effectively manage risk as the community ages. Ignoring these risks to avoid confrontations with owners or because the account deficit appears insurmountable exposes the association to substantial liability. It diminishes current members' quality of life and property values and increases expenses in the future.

If your association is facing difficult decisions related to its reserve accounts, please contact us to discuss options to help get your community back on the path to proper funding.



Sean Moynihan is an associate attorney who joined the firm in 2017. Sean practices in our Tucson office and is happy to answer

any reserve account (or any other legal) questions you may have. You can reach Sean at (520) 392-8866 or [sean.moynihan@carpenterhazlewood.com](mailto:sean.moynihan@carpenterhazlewood.com).



## 2020 CAN-Struction Event

Friday, March 20, 2020  
El Zaribah Shrine Hall



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