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Tenn. Code Ann. § 48-243-101

Current through 2017 Regular Session (Chapter 493).

Tennessee Code Annotated > Title 48 Corporations And Associations > Limited Liability Companies > Chapter 243 Indemnification

48-243-101. Indemnification.

(a) Definitions. As used in this chapter, unless the context otherwise requires:

- (1)** "Expenses" include counsel fees;
- (2)** "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding;
- (3)** "LLC" includes any domestic or foreign predecessor of an LLC in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction;
- (4) (A)** "Official capacity" means:
 - (i)** With respect to a governor in a board-managed LLC, the position of governor;
 - (ii)** With respect to a member in a member-managed LLC, a member who took an action of management as a member; and
 - (iii)** With respect to a person in a capacity not described in subdivision (a)(4)(A)(i) or (a)(4)(A)(ii), the elective or appointive office or position held by a manager, member of a committee of the board of governors or member of a committee of the members, or the employment or agency relationship undertaken by an employee or agent on behalf of the LLC;
- (B)** "Official capacity" does not include service for any other foreign or domestic corporation, LLC, partnership, joint venture, trust, employee benefit plan, or other enterprises;
- (5)** "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding;
- (6)** "Proceeding" means any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, and whether formal or informal;
- (7)** "Responsible person" means an individual who is or was a governor of a board-managed LLC or a member of a member-managed LLC acting pursuant to chapter 238, 239 or 240 of this title or an individual who, while a governor of a board-managed LLC or member of a member-managed LLC, is or was serving at the LLC's request as a governor, manager, director, officer, partner, trustee, employee, or agent of another foreign or domestic LLC, corporation, partnership, joint venture, employee benefit plan or other enterprise. A governor of a board-managed or member of a member-managed LLC is considered to be serving an employee benefit plan at the LLC's request if the governor's or member's duties to the LLC also impose duties on, or otherwise involve services by the governor or member to the plan or to participants in or beneficiaries of the plan. "Responsible person" includes, unless the context requires otherwise, the estate or personal representative of a responsible person; and
- (8)** "Special legal counsel" means counsel who has not represented the LLC or a related LLC, or a governor, manager, member of a committee of the board of governors, member of a committee of the members, agent or employee, whose indemnification is in issue.

- (b) Authority to Indemnify.** (1) Except as provided in subsection (d), an LLC may indemnify an individual made a party to a proceeding because such individual is or was a responsible person against liability incurred in the proceeding if the individual:
- (A) Acted in good faith; and
 - (B) Reasonably believed:
 - (i) In the case of conduct in such individual's official capacity with the LLC that such individual's conduct was in its best interest; and
 - (ii) In all other cases, that such individual's conduct was at least not opposed to its best interests; and
 - (C) In the case of any criminal proceeding, had no reasonable cause to believe such individual's conduct was unlawful.
- (2) A responsible person's conduct with respect to an employee benefit plan for a purpose such person reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subdivision (b)(1)(B).
- (3) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the responsible person did not meet the standard of conduct described in this section.
- (4) Except as provided in subsection (e), an LLC may not indemnify a responsible person under this section:
- (A) In connection with a proceeding by or in the right of the LLC in which the responsible person was adjudged liable to the LLC; or
 - (B) In connection with any other proceeding charging improper personal benefit to such responsible person, whether or not involving action in such person's official capacity, in which such person was adjudged liable on the basis that personal benefit was improperly received by such person.
- (c) Mandatory Indemnification.** Unless limited by its articles, an LLC shall indemnify a responsible person who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the person was a party because the person is or was a responsible person of the LLC against reasonable expenses incurred by the person in connection with the proceeding.
- (d) Advances for Expenses.** (1) An LLC may pay for or reimburse the reasonable expenses incurred by a responsible person who is a party to a proceeding in advance of final disposition of the proceeding if:
- (A) The responsible person furnishes the LLC a written affirmation of good faith belief that the person has met the standard of conduct described in subsection (b);
 - (B) The responsible person furnishes the LLC a written undertaking, executed personally or on such person's behalf, to repay the advance if it is ultimately determined that the person is not entitled to indemnification; and
 - (C) A determination is made that the facts then known to those making the determination would not preclude indemnification under this part.
 - (2) The undertaking required by subdivision (d)(1)(B) must be an unlimited general obligation of the responsible person but need not be secured and may be accepted without reference to financial ability to make repayment.
 - (3) Determinations and authorizations of payments under this section shall be made in the manner specified in subsection (f).
- (e) Court-Ordered Indemnification.** Unless an LLC's articles provide otherwise, a responsible person of the LLC who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or

to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification if it determines:

- (1) The responsible person is entitled to mandatory indemnification under subsection (c), in which case the court shall also order the LLC to pay the responsible person's reasonable expenses incurred to obtain court-ordered indemnification; or
- (2) The responsible person is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the person met the standard of conduct set forth in subdivision (b)(1) or was adjudged liable as described in subdivision (b)(4), but if the person was adjudged so liable the person's indemnification is limited to reasonable expenses incurred.

(f) Determination and Authorization of Indemnification.

- (1) Except as provided in subsection (e), an LLC may not indemnify a responsible person under subsection (b) unless authorized in the specific case after a determination has been made that indemnification of the responsible person is permissible in the circumstances because the person has met the standard of conduct set forth in subdivision (b)(1).
- (2) The determination shall be made:
 - (A) By the board of governors in the case of a board-managed LLC or by the members of a member-managed LLC by majority vote of a quorum consisting of governors or members, as the case may be, not at the time parties to the proceeding;
 - (B) If a quorum cannot be obtained under subdivision (f)(2)(A), by majority vote of a committee duly designated by the board of governors in the case of a board-managed LLC or by the members of a member-managed LLC (in which designation governors or members as applicable who are parties may participate), consisting solely of two (2) or more governors or members (as applicable) not at the time parties to the proceeding;
 - (C) By independent special legal counsel:
 - (i) Selected by the board of governors in the case of a board-managed LLC or by the members of a member-managed LLC or by a committee in the manner prescribed in subdivision (f)(2)(A) or (f)(2)(B); or
 - (ii) If a quorum of the board of governors in the case of a board-managed LLC or a quorum of the members of a member-managed LLC cannot be obtained under subdivision (f)(2)(A) and a committee cannot be designated under subdivision (f)(2)(B), selected by majority vote of the full board of governors in the case of a board-managed LLC or by the members of a member-managed LLC (in which selection governors or members, as appropriate, who are parties may participate); or
 - (D) By the members of a board-managed LLC, but ownership interests owned by or voted under the control of members who are at the time parties to the proceeding may not be voted on the determination.
- (3) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subdivision (f)(2)(C) to select counsel.

(g) Indemnification of Managers, Employees and Agents. Unless the articles provide otherwise:

- (1) A manager of the LLC who is not a responsible person is entitled to mandatory indemnification under subsection (c), and is entitled to apply for court-ordered indemnification under subsection (e), in each case to the same extent as a responsible person;
- (2) The LLC may indemnify and advance expenses to a manager, employee, independent contractor or agent of the LLC who is not a responsible person to the same extent as a responsible person;

- (3) An LLC may also indemnify and advance expenses to a manager, employee, independent contractor or agent who is not a responsible person to the extent, consistent with public policy, that may be provided by its articles, operating agreement, general or specific action of its board of governors of a board-managed LLC or by members of a member-managed LLC, or by contract.
- (h) **Insurance.** An LLC may purchase and maintain insurance on behalf of an individual who is or was a responsible person, manager, employee, independent contractor, or agent of the LLC, or who, while a responsible person, manager, employee, independent contractor, or agent of the LLC, is or was serving at the request of the LLC as a responsible person, manager, partner, trustee, employee, independent contractor, or agent of another foreign or domestic LLC, corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by such person in that capacity or arising from such person's status as a responsible person, manager, officer, employee, independent contractor, or agent, whether or not the LLC would have power to indemnify such person against the same liability under subsection (b) or (c).
- (i) **Application of Part. (1)** The indemnification and advancement of expenses granted pursuant to, or provided by, this section shall not be deemed exclusive of any other rights to which a responsible person seeking indemnification or advancement of expenses may be entitled, whether contained in this section, the articles, or the operating agreement, or when authorized by such articles or operating agreement, in a resolution of members, a resolution of governors, or an agreement providing for such indemnification; provided, that no indemnification may be made to or on behalf of any responsible person if a judgment or other final adjudication adverse to the responsible person or officer establishes such person's liability:
- (A) For any breach of the duty of loyalty to the LLC or its members;
- (B) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or
- (C) Under § 48-237-101.
- (2) Nothing contained in this section shall affect any rights to indemnification to which the LLC's personnel, other than responsible persons, may be entitled by contract or otherwise under law. If the articles limit indemnification or advances for expenses, indemnification and advances for expenses are valid only to the extent consistent with the articles.
- (3) This section does not limit an LLC's power to pay or reimburse expenses incurred by a responsible person in connection with such person's appearance as a witness in a proceeding at a time when such person has not been made a named defendant or respondent to the proceeding.

History

Acts 1994, ch. 868, § 1.

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