THE BOARD

an overview of responsibilities for non-profit board members

irwin siegel agency, inc.
risk management services

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Introduction

People participate on nonprofit boards for a multitude of reasons. It is important that one considers those reasons and ensures the advancement of the organization's mission is at the top of that list. Board membership is something that should be taken seriously, as the community and constituencies are reliant upon organizations such as yours to provide quality services.

If you are on a board or are thinking about joining one, consider the following...

- How well do you know the organization and the services they provide?
- What are your motivations are for joining the Board of Directors?
- Will you be able to devote the time and energy required to meet your obligations as a board member?
- Do you understand the risks and responsibilities that come along with being on the board?
- Does the organization have Directors and Officers insurance and what protections are afforded to you as a member?




Non-Profit Board Duties

Members of a nonprofit board are required by law to fulfill their responsibilities with the care that a prudent person would demonstrate under similar circumstances. This standard is often described as encompassing the duty of care, loyalty, and obedience.

The **duty of care** requires that a director is informed about matters facing the board, participates in the board decision making process, and exercises good faith and sound judgment. Duty of care is fulfilled by:

- Attending scheduled meetings and actively participating in discussions and decisions affecting the organization.
- Staying up to date on key developments and matters affecting the organization.
- Understanding information provided by staff as required for informed decision-making.
- Exercising independent judgment in decision-making.
- Acting in good faith and in the best interests of the nonprofit.

The **duty of loyalty** requires that a nonprofit board member give undivided allegiance to the nonprofit when making decisions affecting the organization. Duty of loyalty is fulfilled by:

- Refraining from using information acquired as a member of the board for personal gain.
- Recognizing and acknowledging potential conflicts of interest, disclosing such conflicts as appropriate and required, and abstaining from decision-making until potential conflicts of interest are resolved.

The **duty of obedience** requires a board member to be faithful to the nonprofit's mission, values, and vision, acting in a manner that is consistent with the goals of the organization. Duty of obedience is fulfilled by:

- Monitoring the organization's activities to ensure they are consistent with underlying mission and goals.

Expectations for Board Oversight Responsibilities

General board responsibilities include:

- Establishment of a plan of organization consistent with the agency's articles of incorporation, mission, and vision. This should reflect the organizational by-laws. The plan must specify lines of accountability, a definition of the relationship between the Executive Director and the Board of Directors, and the process by which the Board of Directors will periodically evaluate the performance of the Executive Director, as well as the mission of the organization.
    - It is important to remember that before developing or revising the organizations mission, key stakeholders should be involved in the discussion, including those receiving supports.
- Provision for ongoing orientation and training of existing and incoming board members about their legal, fiduciary, and policy making responsibilities.
    - Board orientation and training are crucial to develope a knowledgeable and well-functioning board.
- Development of a long-range strategic plan consistent with the agency's vision and mission, supported by a process for preparation of an annual business plan.
- Approval of developed policies, updated as required, in the areas of:
    - Service provision
    - Human resource management
    - Fiscal management
    - Regulatory compliance/certification
    - Evaluation of the efficacy and efficiency of agency operations, service delivery, consumer response to services received, and untoward events
- Establishment of a process for board oversight activities to address:
    - Quality of care
    - Human resource management
    - Financial management
- Protection of organizational assets
    - Identification and evaluation of risk
- Assurance of adequate financial resources by:
    - Participating in organizational fundraisers
    - Assisting in soliciting new donors
- Oversight of legal and ethical issues within the organization

Areas of Board leadership and involvement include:

- Board members must keep themselves informed and educated about the services provided by their agency and the status of program certification.
- While boards closely monitor the fiscal status of the agencies they oversee, they also need to pay the same attention to service delivery. Board members should be updated periodically on the status of service provision, certification and other operational aspects of the agency. It is beneficial for board members to occasionally visit service delivery sites.
- Board members need to be well informed of their legal responsibility for the agency and the current service delivery philosophy.
- Boards should educate themselves about the state regulations on reportable incidents, serious reportable incidents, and abuse, as well as requirements that apply to all Boards of Directors, so they can respond accordingly.
- Boards are great advocates for nonprofit organizations. While people sit on the Board of Directors for a variety of reasons, board member participation in raising funds is crucial to the organization's success. Many foundation grant makers specifically ask what the board's participation in fundraising is. Such as in a traditional for profit business, "It takes money to make money".
- Boards should approve written agency policies and procedures relative to evaluating the quality and scope of services, goals and objectives of such services, and an evaluation plan by which the agency itself assesses the quality of services it delivers.
- Board should ensure effective and strategic planning through:
  - Insisting comprehensive planning occurs
  - Participation in the strategic planning process
  - Formally approving agreed upon objectives, goals, and outcomes
  - Tracking the implementation progress through stated goals and objectives

Quality of Care

Service Provision

- Conduct site visits to service delivery locations
- Review reports from the Executive Director
- Participate in agency functions and events
- Review the results of consumer and staff feedback surveys
- Participate in committees related to service delivery and consumer protection

Certification

- Review reports from the Executive Director and ensure correction of any identified deficiencies
- Review reports from external review bodies

Protection

- Review incident trend reports
- At least one board member should participate on the agency incident review committee/quality assurance and enhancement committee

Health and Safety

- Ensure provision of adequate protection of each person's health, safety, comfort, and well-being

Board Performance Areas - QA/I

- Receive regular reports from the Executive Director and managers of all reviews done by external review bodies
- Ensure there is a satisfactory incident review and management process in place for all types of programs and services delivered by the agency, and that the board has been informed of all major incidents
- Develop and/or participate in standing committees to address specific areas of board responsibility, concern, or interest and have such committees address issues in a responsible and effective manner

Financial Management

Fiscal Issues

- Review and approve the annual budget
- Monitor the agency's financial status and ensure its financial sustainability
- Review audit information and plans of correction for all audit findings and recommendations
- Develop procedures for dealing with fiscal irregularities and problems
- Ensure diversification within the organizations funding streams
- Object to transactions that seem improper or may create a conflict of interest
- Assist in organizational fundraising efforts

Board Performance Areas - Fiscal

- Development of a fiscal management policy that provides for:
  - Board oversight and approval of an annual budget
  - Procedures and expectations for fundraising
  - Procedures for annual monitoring of the agency's fiscal status
  - Annual outside fiscal audits by recognized CPA firms to be closely scrutinized by the board (especially recommendations in the management letter)
  - Procedures for timely dealing with any fiscal irregularities and problems
- Consider changing lead auditors on average of every five years to ensure a different view of financial statements

Fundraising

- Many funders and grantors ask questions about board attendance to determine the activity and involvement of the board
- Your organization may consider implementing a “give or get” policy: board members are requested to contribute personally and/or solicit contributions from their friends, family and contacts. For individuals who are unable to contribute financially, a donation of additional time in volunteering to participate in events or fundraiser coordination may be considered.

Human Resource Management

Relationship to Executive Director

Establish employment contracts with annual performance programs.

- Establishment of clear and understandable performance criteria for the Executive Director, ensuring he/she is regularly and objectively reviewed against such criteria, as well as given both positive and negative feedback as to areas of performance and needed improvement in accordance with a signed written employment contract.
- Establish the Executive Director's salary and fringe benefits. The Board of Directors should consider evaluating like size and scope organizations to determine appropriate compensation for the Executive Director.
- Boards should recruit new members. They should not rely solely on Executive Directors to suggest new board members.

Staff Relations

- It is the responsibility of the board to set the direction of the organization and allow the staff to carry out the plan.
- Boards should review issues through reports from the Executive Director.
- Boards should participate in employee recognition events and work life enhancement efforts.
- Boards should review reports on the results of exit interviews but be cautioned not to become overly involved in individual specifics of the day-to-day operations.

While it is common for board members to interact with staff at all levels of the organization, it is important that the scope and purpose of the interactions remain focused on the advancement of the organization's mission.

Board Performance Areas - Program

- Establishment and revision of a plan that clearly specifies lines of accountability, the nature and extent of professional responsibility, and the relationship between the Executive Director and the Board of Directors. There must be evidence of ongoing and effective communication between the board and the Executive Director.

- Development of or re-evaluation of an agency mission and vision statement that relates agency services to the consumer valued outcomes of individuality, inclusion, independence and productivity. Operating principles and other program goals should be consistent with the agency's mission statement and corporate purposes.

Reimbursement, Compliance & Limited Fiscal Review

What Board Members, Officers & Executive Directors need to know...

This section provides information in relation to strategies and procedures about how to protect your agency from non-compliance with Medicaid Regulations. Under the Sarbanes-Oxley Act ("SOX") the Board of Directors and Executive Management are required to base their assessment on a suitable, recognized control framework. In the United States, the Committee of Sponsoring Organizations of the Treadway Commission ("COSO") published "Internal Control-Integrated Framework," is the standard of best practices. The key element in protecting your agency is the implementation of the COSO and SOX principles of internal control reporting and monitoring. In addition, it is important to develop a corporate compliance review program.

The Enterprise Risk Management COSO framework emphasizes the importance of identifying and managing risks across the enterprise. The COSO framework consists of eight components:

1. Internal control environment
2. Objective setting
3. Event identification
4. Risk assessment
5. Risk response
6. Control activities
7. Information and communication
8. Monitoring

Internal Control is a process affected by the Board of Directors, Executive Management and other personnel. It is designed to provide reasonable assurance regarding the achievement of the following objectives: effectiveness and efficiency of operations, the reliability of financial reporting including the CFR and compliance with applicable laws and regulations. The best-laid plans can often be circumvented. Therefore, monitoring becomes essential.

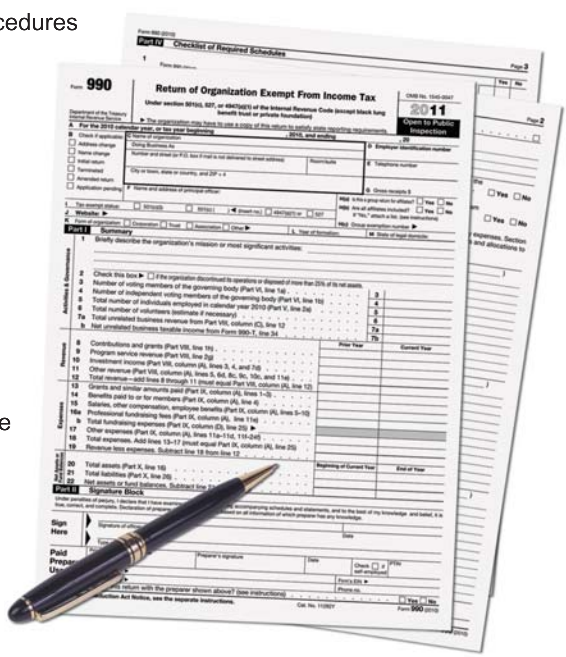
IRS Form 990

IRS Form 990 is a tax document that tax-exempt nonprofit organizations file each year with the IRS. The 990 allows the IRS and the public to evaluate nonprofits and how they operate. Beginning with tax returns filed in 2009 for 2008, nonprofits must file the new Form 990 that requires more disclosure of potential conflicts of interest, compensation of board members and key staff, and other details having to do with financial accountability and avoidance of fraud.

The new form requires each filing organization to provide information regarding the composition of its board or governing body, certain governance policies and practices, and is the means by which the organization is held accountable to the public by making governance and financial information publicly available. Good governance and accountability practices provide safeguards to help ensure the organization's assets will be used consistently with its exempt purposes. In addition, well-governed and well-managed organizations are more likely to be transparent with regard to their operations, finances, fundraising practices, and use of assets for exempt and unrelated purposes.

The IRS Form 990 requires the organization to adopt a number of policies in order to comply with the standards of governance, accountability and transparency. Some of the topics of the IRS Form 990 Policies are highlighted below.

- Suggested Policies and Procedures
- Disclosure on Fraud
- Committee Meetings
- Review of Form 990
- Conflict of Interest
- Whistle Blower
- Document Destruction
- Compensation Review
- Monitoring of Investments
- Disclosure of Documents
- Disclosure of Outside Income
- Travel Policies
- Loans to Board and Staff
- Gift Acceptance Policy



Key Elements of Internal Control

Risk Assessment

Every organization faces different types of risks which must be assessed. First we need to define an objective. For example, filing an accurate and timely budget report; once we identify the objective, we can analyze the risks relevant to meeting that objective. The Risk Analysis is the basis upon which determinations are made on how risks are managed and mitigated. Every Assessment needs to take into account the “Risk Appetite” of an organization and its leadership. Conducting an assessment without understanding the risk appetite will inhibit progress.

Control Activities

These are the policies and procedures that help ensure the Board of Directors and Executive Management's directives are carried out. It helps guarantee all necessary actions are taken to minimize and address the risks to the achievement of the agency's objectives. These include activities such as approvals, authorizations, verifications, reconciliations, reviews of operating performance, security of assets and segregation of duties.

Information and Communication

Capturing and communicating pertinent information makes it possible to run and control the operations of the agency. It produces reports containing operational, financial and compliance information as it deals with information necessary to make informed business decisions and provide accurate external reporting, financial statements, annual report of operations, IRS and charities filings, and the budget.

Monitoring

Used to assess the quality of the internal control system's performance over time as it occurs in the natural course of business. It includes Board of Directors and Executive Management's supervisory activities and reviews the results of the internal audit activities.

Corporate Compliance Program

Developing a Corporate Compliance Program for an agency is based in part on public information rules and regulations, which are then tailored to the specific resources and circumstances that exist at each agency. These general guidelines serve as a starting point for a Corporate Compliance Program. A successful Corporate Compliance Program has less to do with paperwork and more to do with the culture created or enhanced at an agency.

Through this baseline document, agencies can set forth their general views on the value and fundamental principles of Compliance Programs and the specific elements that agencies should consider when developing and implementing effective Compliance Programs.

Components of an Effective Compliance Program

This starting point for the customization of your agency's Corporate Compliance Program provides guidance and contains key elements fundamental to an effective Compliance Program. Key components that provide a solid basis upon which an agency can create a voluntary Compliance Program include identification of compliance risk areas, including:

- Internal monitoring and auditing
- Written standard procedures
- Designation of a compliance officer or contact
- Appropriate training and education of all staff, volunteers, and associates
- Appropriate responses to detected offenses followed by corrective actions
- Open lines of communication (Hotline # to access corporate compliance program/officer)
- The enforcement of disciplinary standards through well-publicized guidelines
- Non-intimidation/non-retaliation for good faith participation in the compliance program

FEATURED RESOURCE

For additional information regarding Corporate Compliance Programs, please contact us for a copy of our recently updated educational resource:

Compliance and Ethics: A Guide to the Development of a Compliance Program

SARBANES-OXLEY AND CORPORATE COMPLIANCE

When creating a Corporate Compliance Program, it is important to consider the standards set forth by the Sarbanes-Oxley Act. Some rules to keep in mind include:

- Whistle Blower and Non-Retaliation Policy
- Document Retention and Destruction Policy
- Regular financial statements in accordance with GAAP
- Conflict of Interest Policy (signed annually by board members)
- Timely filings of IRS form 990
- Audit Committee (composed of at least three volunteers – preferably one with a financial background)
- Financial statements reviewed by the board and audit committee at least quarterly

FISCAL TIPS

TIP: Conduct internal billing audits and cross reference to clinical documentation to ensure billing is for services rendered.

TIP: Provide annual staff training on fraudulent billing, False Claims Act, and the severity of penalties for those actions.

TIP: Keep all Medicaid documentation for at least seven years (or longer depending on state regulations).

TIP: Assess your internal audit process and make changes as necessary.

Risk Management

Risk is the uncertainty of personal or financial loss arising from a given set of circumstances. Risk management is a process of protecting an organization's assets through exposure identification and analysis, controlling identified exposures, financing losses with internal and external funds, and the implementation and monitoring of the risk management process. All entities, from large for-profit organizations to small charitable organizations and individual volunteers, are exposed to risk and must make risk management decisions.

The goal of risk management is to forecast and take steps to alleviate the effects of potential losses. These steps include:

- ***Identification of exposure areas***
  Typical classifications include property, human resources (staff and those you serve) and general liability
- ***Analysis of the potential impact of loss to the agency***
  Qualitative analysis looks at the "what" and quantitative analysis looks at "how much"
- ***Control through action, the probability, frequency, severity, or unpredictability of loss***
  Identifying the failure mode and controlling it (human error vs. process or equipment failure)
- ***Financing through the acquisition of internal and external funds to pay losses***
  This will include your insurance coverage, deductibles, contracts, etc.
- ***Administration of the risk management program through implementation and monitoring.***
  Benchmarking, continuous evaluation, training and education, etc.

The organization should establish a risk management committee including at least one board member, and should have a written risk management plan. The plan should rely on a systemic approach to minimizing loss potential with a strategic focus that is intended to ensure quality outcomes and the protection of assets.

RISK CONTROL TECHNIQUES

Below are a few of the typical risk control techniques employed within nonprofit organizations:

Risk Avoidance - This technique is typically used in situations that involve a likely chance of loss in conjunction with the loss costing the agency a large amount of money.

Risk Prevention - This is a program that removes circumstances that can cause loss.

Risk Reduction - This is a program designed to mitigate the magnitude of a loss and the frequency of the occurrence.

Risk Transfer - This technique generally includes the purchase of insurance. While risk transfer is the cornerstone of the risk management program, it is almost always used in combination with other alternatives.

Board of Directors' Role in Managing Risk

The primary responsibility of the Board of Directors is to guide the organization in accomplishing its mission. In fulfilling this obligation, the board has a legal duty to use and protect the organization's assets. The assets of a nonprofit vary, but generally fall within one or all of the following categories: people, property, income, and goodwill. The board's oversight role empowers it to exercise tremendous influence to ensure the organization protects and uses its core assets solely to further its goals.

Risk Management is, and should be, within the nonprofit Board of Director’s domain. Risks the organization face affect its ability to pursue the nonprofit’s mission, as well as the overall sustainability of the organization. Regardless of a board’s philosophy concerning governance or the size/age of the organization, risk management is a significant role of the Board of Directors in their role as the oversight body. Any risk that may impact the overall mission and goals of a nonprofit is worthy of inclusion on the board’s agenda.

When the board takes the lead in protecting the organization's assets, it supports the organization's operation. A successful organization helps to ensure the agency's positive impact on the community for many years to come. The principal risk management goals for most nonprofits are:

- Protecting clients, staff, volunteers, and the public from harm.
- Conserving the agency's assets for its community-serving mission.
- Ensuring that resources are available to compensate individuals harmed by the organization's activities.

The board's position enables it to protect a nonprofit against potential risks by:

- Establishing long-term goals and short-term objectives for the nonprofit's program initiatives, board and staff.
- Measuring performance against established goals and objectives.
- Approving an action plan to meet the organization's goals and objectives, and delegating responsibility for plan implementation to the nonprofit's executive director.
- Monitoring the plan's implementation.
- Ensuring the availability and proper use of funds to support administrative and program activities through active participation in fundraising programs and the development and monitoring of financial management and fundraising policies.
- Directing necessary changes in focus and monitoring the impact of these changes.

The board of a nonprofit can contribute significantly to managing risk by paying close attention to the areas most likely to result in losses. A few suggested practices are outlined below:

- Careful selection of the Chief Executive Officer.
- Oversight of employment practices.
- Oversight of financial management and fundraising policies.
- Assessment and understanding of Directors and Officers (D&O) coverage.
- Adoption of good procedures regularly followed and periodically reviewed.

An Example of Risk Management Alternatives

An example of pure risk exposure may help clarify how these alternatives can be used.

A charitable organization may keep cash in a petty cash drawer in its office. In such a case, this financial asset is subject to numerous loss exposures, including loss by fire, misappropriation by employees, or theft by a burglar. The organization can use any of the five risk management alternatives it deems best to handle this exposure:

- The organization could decide the risk of loss is greater than the benefit of the petty cash readily available and end the practice of keeping the money on hand. This is the use of **risk avoidance**.
- The organization could decide the loss of this money would not cause any financial hardship and the amount in petty cash would not meet the organization's insurance deductible. In other words, it **accepts** or **retains** the risk.
- Organization officials could **transfer** the risk to another party by amending their insurance policy to include protection of this asset in the event of fire, employee fraud or criminal activity. The risk is now transferred to the insurance company provided enough money is in the account to justify the claim
- The organization could decide that it only needs to maintain $100 in petty cash. While the exposure still exists, it is much lower. This is the use of **risk reduction**.
- The organization could decide to place the money in a locked fire and water resistant safe. This is an example of **risk prevention**.

Case Studies

Case Study 1

A 47 year old Hispanic female was employed as a project coordinator for a National Nonprofit Association. She contended that she was the victim of wrongful discharge and retaliation after she reported that the association President had misused funds. After an investigation, it was discovered that the President in fact, had been misusing funds over the course of 3 years. She also contended the company had failed to provide her with a written employment contract as promised.

A jury awarded $200,000 in compensatory damages and $250,000 in punitive damages. Several members of the board were also named in the suit for failure to oversee the organization's finances.

Case Study 2

A Mental Health Center was sued by a former employee. This employee is 55 years old and had taken medical leave multiple times due to a variety of respiratory illnesses. She alleged she was fired for reporting poor air quality to regulators. The agency maintained she was terminated due to combativeness and abusive behavior towards other employees.

It did appear she was fired for whistle blowing because her termination occurred three days after she contacted regulators about the poor air quality. Since a jury could easily see how her complaints to authorities played some part in the decision to fire her, the agency decided to settle the case at private mediation, ultimately paying $100,000.

THE BOARD

Glossary of Terms

While an attempt has been made to use non-legal, standard English throughout this publication, some technical terms had to be used. When used in this publication, these terms have the following meaning.

Charitable Organization

An organization organized and operated exclusively for benevolent, educational, philanthropic, humane, patriotic, or religious purposes; an organization exempt from taxation under the Internal Revenue Code.

De Facto

In fact; actual; in reality.

Defendant

The one who the plaintiff claims should pay the expenses caused by the injury.

Exclusion

In an insurance policy, that section which deletes or defines what is not covered.

Exempt

Freedom from or released from an obligation.

Fair Labor Standards Act

Federal statute regulating employees' wages and hours. In general, FLSA applies to non-supervisory employees in public and private settings. All employees covered by the FLSA must be paid a fair wage for all hours worked in accordance with applicable Federal labor law.

Fiduciary

A person obligated to act in the best interest of another; a person or entity designated to hold something, usually money, in the trust of another, including acting for another's benefit in such matters.

Gross Negligence

A higher degree of negligence; for example when one acts in a reckless, wanton or malicious manner, unconcerned about the consequences. A degree of carelessness greater than negligence but not rising to the level of deliberate wrongdoing.

Hold Harmless (Indemnification Clause)

A contractual agreement where by one party agrees to pay the cost of claims against another (assumes the liability of another, thus releasing the other party from responsibility.)

Immunity

Freedom from legal liability or responsibility for wrongs committed.
Intentional Torts
A category of deliberate wrongdoing that includes actions such as assault, battery, false imprisonment, slander and defamation of character.

Liability

Responsibility for wrongs committed.

Malice

An improper motivation that implies evil intent, which may be inferred from the intentional commission of a wrongful act.

Negligence

Unintentional failure to exercise the care that a prudent or reasonable person usually exercises.

Non-Exempt

Not included from or released from a rule or organization.

Plaintiff

The alleged injured party who complains or sues.

Primary Insurance

The insurance policy or coverage that applies first in the loss situation.

Tort

A legal wrong, other than breach of contract, which is civil, rather than criminal in nature. Two major categories of torts are negligence and intentional torts.

Volunteer

A person who performs a service of his or her own free will without compensation.

Wanton

Heedless, malicious; extreme recklessness in regard to rights of others.

Notes

Notes

About Irwin Siegel Agency, Inc.

Irwin Siegel Agency, Inc. (ISA) is a leading insurance and risk management organization serving the Human Service field and insures service providers in 50 states. ISA continues to set the standards of quality, innovation and value when it comes to developing new programs that meet the dynamic nature of the Human Services field.

We are here to support your efforts of supporting others, to provide the products and coverages your facilities need, to develop and share risk management tools and services to protect, while maintaining the compassion and education that holds ISA above ordinary insurance providers

Insurance coverages include General Liability, Professional Liability, Property, Inland Marine, Crime, Umbrella and Commercial Automobile. Additional coverages are available for Youth Protection, Directors & Officers, Volunteer Accident, Environmental and Pollution Liability, HIPAA Protector, and Workers' Compensation.

Are You Covered?

Some relevant products available through ISA include:

- Directors & Officers Liability Insurance
- Fiduciary Liability Coverage
- HIPAA Coverage (Health Insurance Portability & Accountability Act)
- NetProtect 360 - Network Security, Privacy Liability, and Identity Theft Coverage
- Volunteer Accident Insurance

Availability may vary by state

Sample of Available Resources

Printed Publications

- Compliance and Ethics: A Guide to the Development of a Compliance Program
- Safety Committee: A Guide to the Development and Implementation of an Effective Safety Committee
- Employee Dishonesty

Flyers & Bulletins

- Conducting a Proactive Risk Assessment
- Developing an Effective Risk Management Committee Structure
- Workers' Compensation: Tips to Reduce your Workers' Compensation Insurance Costs

Newsletters

- Executive Perspective
- Matter of Record
- Safety Matters

Video Lending Library

- Corporate Compliance Confidential
- Cyber Crime
- Media Relations: What to do When the News is You!

Partner Programs

- Online Training
- Background Checks and Screening Services
- Vehicle Incident Monitoring

And much more...

Contact our Risk Management Department
for additional resources and partner services

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