

Just Joined the C-Suite? Don't Get Spooked!

You've been promoted to the C-Suite (CEO, COO, CFO, etc.). Congratulations; there are tremendous benefits associated with joining the C-Suite: usually an increase in salary, prestige, and restricted stock units (RSUs) or stock options.

But aside from the treats accompanying your new role, there is one "trick" you should be aware of: now you may face legal liability for actions of the company, even if you are unaware of any misconduct.

Wait, what?

You may wonder, don't corporate laws and director and liability insurance protect you? They do, to a point. And it is at the point when they don't, when you may be exposed to responsibility for the payment of legal damages out of your own wallet.

First, Delaware corporate law allows companies' bylaws to indemnify directors and officers for negligent conduct that causes harm (breach of the duty of care) and the business judgment rules insulate most day-to-day decisions made by corporate officers and directors from challenge by corporate officers.

Second, directors' and officers' insurance (referred to as "D&O insurance") usually provides for both coverage for individual liability that is not indemnifiable and payment of the costs of defense (payment for attorneys' fees, experts, etc.).

Neither of these protections actually prevents you from being named as a defendant or a witness in a lawsuit. Once that happens, you are in the position of requesting that the company provide the coverage promised. It is generally advanced, but often with strings attached.

The D&O insurance may limit who you can choose to represent you as counsel. It may refuse to pay for certain fees charged by the attorney, claiming they are not necessary or unrelated to the covered claim, despite your attorney's professional judgment that the services were required. You may be responsible for any overage.

And neither the bylaws, business judgment, or the D&O insurance will likely provide coverage if a court finds that you committed fraud.

You might think, that's fine, I would never commit fraud. And fraud usually requires intent, right?

Yes, intent is required, but you may intend merely to commit the act that is later found fraudulent. And you may not realize all the ways that you can be found to have committed fraud.

For example, as the CFO of a public company, you owe a duty of loyalty to the shareholders of the company. It is your job to ensure that the books and records of the company are accurate and not misleading. An aggressive corporate culture focused on keeping "the street" happy and interested can be detrimental. If you sign off on a quarterly report that misleadingly provides an overly optimistic view of the business, a plaintiff's attorney might use that report as the basis for a fraud claim and allege that you reaped a benefit from that report. And your intent to defraud investors may^[1] be inferred from setting an "improper tone at the top" and maintaining "poor internal controls." [San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc., 732 F. Supp. 3d 300, 321 \(S.D.N.Y. 2024\)](#). If (and more likely when) the truth comes out and the shares decline in value, shareholders who purchased shares based on the misleading report and saw the value of those shares decline may be able to state a claim against you for fraud.

In this scenario, even if the company agrees to advance costs of the defense, you will likely be on the hook if a jury ultimately finds that you committed fraud.

So what can you do to protect yourself? Not only should you be diligent in the performance of your job (that's a given). You should always keep in mind who you work for – the shareholders, not the CEO. And you should have good counsel in your corner so you can ask the tough questions before you take or fail to take action that may lead to liability.

There are tremendous benefits of reaching the upper echelon of corporate America, but you must remain vigilant and not complacent in any conduct likely to harm the shareholders. If you have any questions about whether your anticipated conduct or inaction is likely to cause harm, consult a trusted attorney!