



Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

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Annual Convention
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Miami, Florida**

Key Issues for Port Commissioners

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Disclaimer!



This presentation:

- does **not** include numerous legal liability issues facing ports and members of their governing boards
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Consult your legal counsel & insurance/risk manager for specific situations you may encounter!

Outline of Presentation

A. Welcoming Remarks

Larry Shipp

Tom Schroeter



B. Broad themes:

What is a Port?

What does a Port Commissioner do?

So you've been appointed or elected to your Port Authority's Board – now what?

Key Takeaway:

TRAINING & WORKSHOPS

- By the Chairman and Other Commissioners with Experience
- By the Executive Director and Key Port Staff
- By General Counsel
- **By AAPA**
 - Annual Convention – Nov. 2–4, Miami
 - Annual Commissioners Conference – Feb. 9–11, West Palm Beach



Some Issues to Think About

- ▶ So you've been appointed or elected to your Port Authority's Board – now what?
 - Oath of Office
 - Bond Requirements
 - Training Requirements
 - Texas – Open Meetings Act and Open Records Act
- ▶ Duties of Commissioners
- ▶ How Port Authorities are governed
- ▶ How Citizens get on Port Authority Boards
- ▶ What are the Benefits and Value of a Board of Commissioners?
- ▶ What does it mean to be a Port Commissioner?
 - Governing vs. Operating

Some Issues to Think About (*cont'd*)

- ▶ Liability Concerns
- ▶ Oaths of Office; Bonds
- ▶ Port Commission Meetings – How they are run
 - Open Meeting Upon Notice
 - Executive Sessions
- ▶ Sunshine Laws – Open Meetings Acts; Open Records Acts
- ▶ Fiduciary Responsibilities
- ▶ Financial Disclosure Statements
- ▶ Accounting Principles:
 - How to Understand, Investigate & Evaluate Financial Documents
- ▶ How to Perform Due Diligence
- ▶ Codes of Ethics
- ▶ Support & Oversight of Executive Director
- ▶ Committees – Pluses and Minuses
 - E.g. Audit, Governance, Community Relations, Procurement & Small Business, Pension & Benefits
- ▶ Election of Officers
- ▶ Some Substantive Problems Facing Commissioners Today (Time Permitting)

Texas Oath of Office

OATH OF OFFICE

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS,
I, _____, do solemnly swear
(or affirm), that I will faithfully execute the duties of the office of
_____ of the State of
Texas, and will to the best of my ability preserve, protect, and defend
the Constitution and laws
of the United States and of this State, so help me God.

Signature of Officer

State of _____) County of _____)

Sworn to and subscribed before me

this _____ day of _____

, 20 ____ . (seal)

Legal Issues Facing Commissioners

Takeaway:

Have General Counsel Give You A List
of and Training on Compliance
Statutes and Policies and An Opinion
That You Are in Compliance

Duties of Commissioners

From Port of Houston Authority Bylaws:

The responsibility for the management, control, and operation of the Port Authority is vested in the Port Commission. **The Port Commission has responsibilities that include:**

Framing and adoption of **matters of policy** including but not limited to budget, goals, vision, and plans;

Exclusive **authority for expenditures** out of the Promotion and Development Fund [may be delegated by Port Commission].

The sole authority to **select**, retain, and remove an **Executive Director**.

The authority to **monitor the performance of the Executive Director** for compliance with laws, the Port Authority's budget, and with the Port Commission's expectations of his performance, policies, vision, goals, and plans.

The authority to approve the selection of **consultants**.

Acting as **ambassadors on behalf of the Port Authority**, envoys who represent the Port Authority and articulate its vision, mission, and goals to the communities and stakeholders it works with and serves.

By exercising such powers and duties reserved to it under the **laws** of the State of Texas.



How Port Authorities are governed

By Boards of Commissioners

Sometimes ports are arms or agencies of the State

- Georgia Port Authority

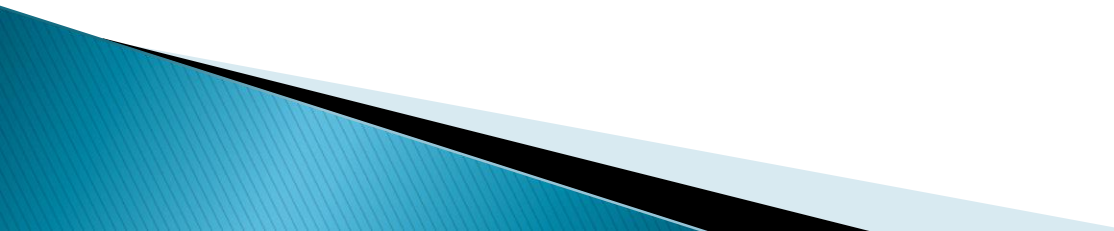
Other times they are a part of the local county or municipality

- Port of Miami

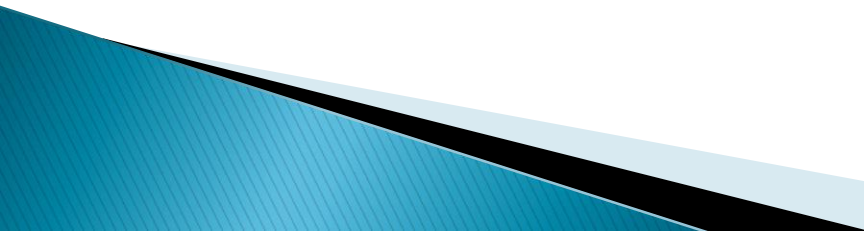
Or, in yet other cases, they are independent local government authorities

- Port of Houston Authority
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How Citizens Get on Port Authority Boards

- ▶ By election
 - ▶ By appointment
 - By the Governor
 - By State Agencies
 - By local counties and/or municipalities
- 

What are the benefits and value of a Board of Commissioners?

- ▶ Set Policy for the Port
 - ▶ Serve as the means of communication\ambassadorship to port stakeholders and the port community
 - Voters
 - Political officials
 - Tenants
 - Vendors
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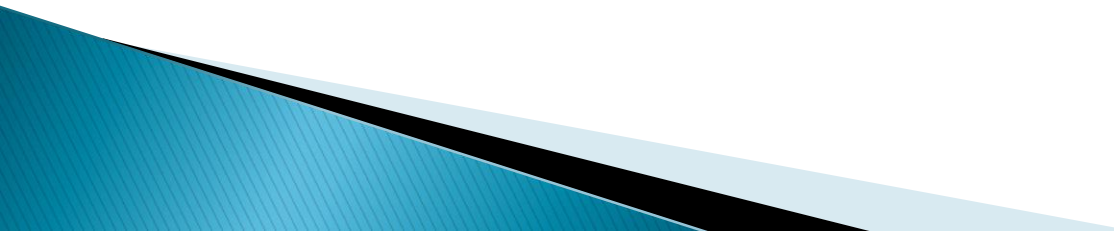
What does it mean to be a Port Commissioner?

Governing vs. Operating

- ▶ (Make Policy; Don't get "down in the weeds" of Operations; Keep your eye on the big picture
 - Hiring/Promoting/Firing Staff (Province of your Executive Director)
 - Procure supplies, equipment, etc.
 - Negotiating with tenants
- ▶ Remember your power as an individual Commissioner is limited; only the full Commission, acting as a body, has the legal authority to act
- ▶ Always, always remember, you are being watched and scrutinized by the public and the media aided by Sunshine laws and the public's demand for integrity, loyalty, due diligence, transparency, and accountability in their public officials

Setting Policy

Things like:

- ▶ Should the port expand?
 - ▶ If yes, which business lines?
 - ▶ Bring in new lines of business?
 - ▶ Increasing revenue vs. regional job creation and economic growth (e.g. lease rental)
 - ▶ Balancing economic efficiency with job creation and economic development
- 

Fiduciary Duties of Commissioners: The Public Trust

- ▶ **Duty to Govern** – pro-active – attend and participate in meetings
- ▶ **Duty of Diligence** – once you know something, can't put head in the sand (but some things must be kept confidentially – be discreet to protect the port – e.g. Security)
- ▶ **Duty of Obedience** – laws, codes of ethics, rules and procedures (e.g., meetings)
- ▶ **Duty of Loyalty**
 - Whom do you serve? Whom don't you serve?
The public? Shipping lines? Labor? The officials who appointed you?
Campaign supporters & donors?

Be sensitive to all while serving the port's interest first and foremost.

Your fiduciary duty is to the organization and to the public interest; not to outside supporters, friends or other outside interests

Do NOT use your office for personal gain or private advantage – not even coincidentally

Commissioner Liability

Remember the Basics

- Indemnity – Does the Port have an approved written indemnity in favor of Commissioners?
- Public Officials' (Directors and Officers, or Errors & Admissions) Insurance
- Reliance on Legal Counsel (check statutes)

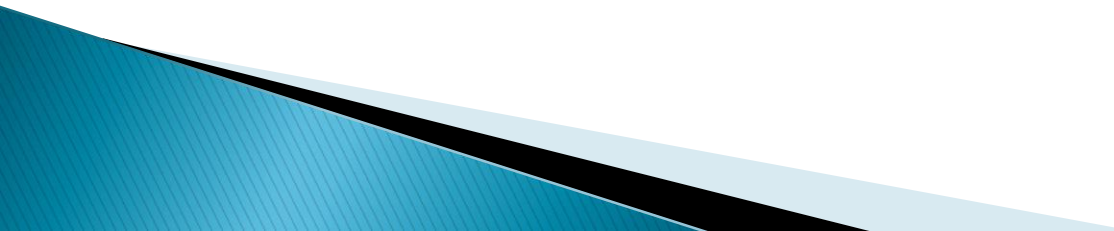
Commissioner Liability

Insurance & Indemnity in Favor of Commissioners:

Port of Houston Authority By-Laws:

- ▶ It is the intent of the Port Authority to protect its Port Commissioners from defense expense and legal liability through the purchase of appropriate public officials liability insurance, and such other liability insurance as the Port Authority obtains and maintains in force and effect.
- ▶It is the express intent of the Port Authority to indemnify its Port Commissioners to the fullest extent allowed by Texas law for liabilities or legal expense arising from conduct (including acts or omissions) that reasonable appears to be within the scope of a Port Commissioner's authority as such.
- ▶A...Commissioner's legal expense related to a civil or criminal action, proceeding, subpoena, investigation or demand is intended to be funded on a current basis.

Special Case: Bonds

- ▶ Public Governing Boards are subject to SEC anti-fraud laws and regulations pertaining to the issuance of municipal bonds
 - ▶ A public official who approves the issuance of securities and related disclosure documents may not authorize the disclosure of information that the official knows to be materially false or misleading and cannot recklessly disregard facts that are misleading
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Sunshine Laws - Open Meetings Act

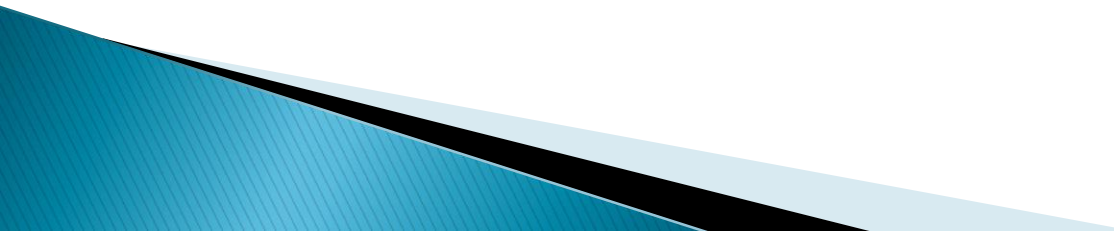
General Principle: The only time you as a commissioner can carry out official port business is when you are in a public meeting that has been given the required public notice and when the other legal requirements such as proper quorum, voting procedures, minutes, etc. have been met.

- What you can talk about – published notice indicating matters that will be discussed and possibly voted upon
- Need Quorum for actions
- Can't talk about public business with a majority of your commissioners elsewhere – e.g. over coffee at a restaurant; a conference call, email exchange among a majority, or a “rolling” email
- What can be discussed in Executive Sessions (but NO action – i.e., voting or other final decision-making – can be taken in the Executive Session)
- Don't make mistake of sending out an email to fellow Commissioners and a port project and getting feedback
- Ok to attend purely social events with other Commissioners where port business will not be discussed, but watch out for the temptation to talk about port matters and the perception that you are doing so

Sunshine Laws – Open Records Act

- ▶ Open Records Acts (a/k/a Public Information Acts or Freedom of Information Acts)
 - Covers almost everything; few exemptions (security, port employee matters, sometimes real estate, attorney–client/litigation matters)
 - Usually covers email, text, government electronic and physical documents – whether on port computers, home computers, smart phones and watches, tablets, voice mails (especially where you have an internet based phone system that links with Windows Outlook, photos
 - Photos – photo booth pictures, drink in your hand?
 - May include Metadata – hidden bits of information – who worked on document, when revisions
 - Must Original be retained or is a copy sufficient?
 - Be careful before you send out that emotional/angry email or leave that angry voice mail
 - Your expense reports and reimbursement requests are subject to scrutiny
 - Social Media – you may be creating public documents in your social media (Twitter, Facebook, etc.) communications without knowing it – subject to both disclosure and public document retention laws
 - On the other hand, transparency ends where protected confidential information comes up – security, proprietary, financial, HIPPA and PPI, attorney–client

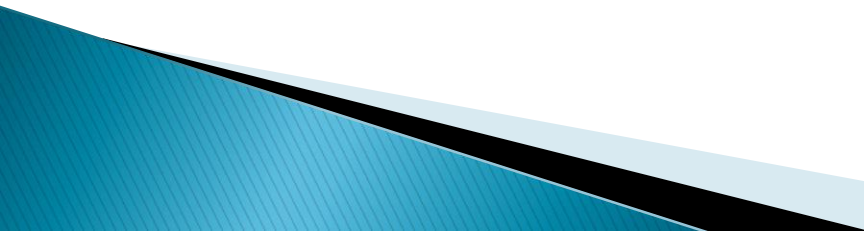
Document Retention Laws

- ▶ Vary from state to state, but generally set time periods during which port records and documents must be retained and cannot be destroyed
 - ▶ Typically would cover written communications from Commissioners concerning port matters
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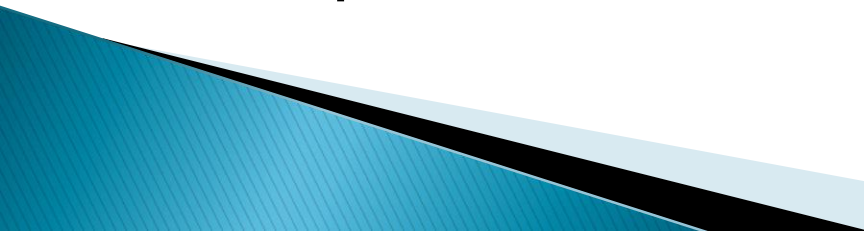
Confidential Information

Notwithstanding Sunshine Laws and the culture of transparency in government, some information must remain confidential in order for a port or other governmental entity to function.

Some typical examples:

- ▶ Security (SSI – 49 CFR 1520); Port's Facility Security Assessments and Facility Security Plans
 - ▶ Employee Matters (but salaries are generally not exempt)
 - ▶ Real Estate Matters – e.g. determining price or rental for purchase or sale of port property
 - ▶ Collective Bargaining matters
 - ▶ Medical, Social Security Numbers, and Other Personal Identifiable Information (PII)
- 

Due Diligence

- ▶ When you know something that appears to involve a violation of law, don't bury it, rather have it investigated
 - ▶ Good to have an internal auditor who reports directly to the Board and who determines whether port policies and laws binding the port are being followed; regular reports important
 - ▶ Consider an independent outside audit
 - ▶ Follow advice of Legal Counsel
 - ▶ Cooperate with Government Investigators
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Codes of Ethics

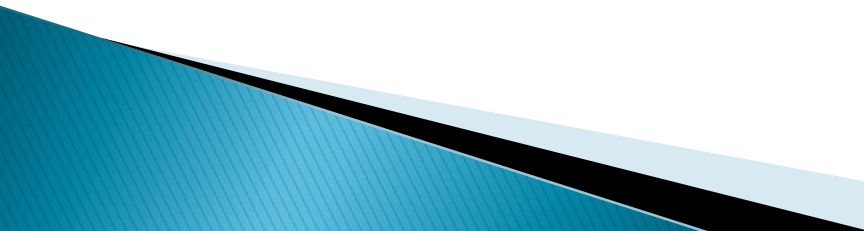
- ▶ Review them carefully
- ▶ Don't use your office for “personal gain or private advantage”
- ▶ Covers Conflicts of Interest, including:
 - Gifts to commissioners and their relatives – do NOT accept if it can appear to influence your vote or other action
 - Nepotism
 - Need to disclose relationships, property interests
 - Dealings with vendors, tenants, etc.
 - When a conflict of interest arises, RECUSE yourself from both deliberations and voting on the matter
 - But RECUSAL does not solve a conflict of interest problem where a Commissioner is financially interested in a port contract (e.g., Commissioner has an ownership interest in a vendor under contract with the port)
 - FULL DISCLOSURE UP FRONT!

Codes of Ethics (cont'd)

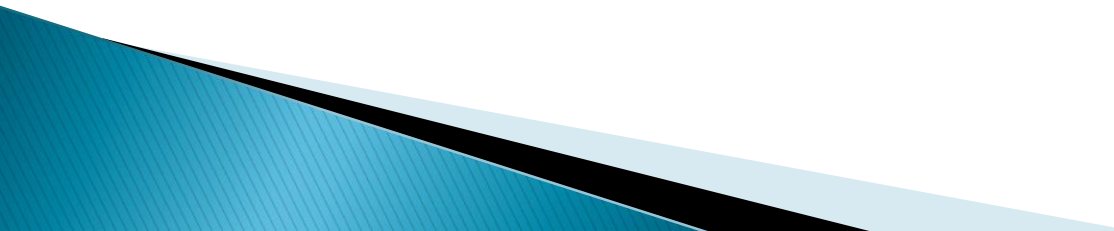
▶ Political campaigns

- Don't use port facilities to assist in any political campaign – this includes use of equipment, stationery, office space, employees
- Generally ok to express an opinion, for example, on an upcoming bond issue on the ballot that benefits the port

Attorney Client Privilege

- ▶ Benefit when properly exercised (generally when legal advice is requested): the content of the communication remains confidential
 - ▶ Don't send an email from your port attorney to a vendor or person "on the other side of the matter" – will cause a waiver of the privilege
 - ▶ Remember, a port attorney represents the port, not you personally! And the port owns the privilege and can decide whether to waive it
 - ▶ Merely copying a port attorney on your emails or having him/her in your meetings does not guarantee that the communications will be privileged and confidential
- 

Support & Oversight of Executive Director

- ▶ Oftentimes, this is the only staff hiring/firing position in which Commissioners will be involved
 - ▶ The Executive Director, in turn, is given authority to hire/promote/fire staff employees and fix wages and salaries, subject to the many state and federal laws that must be followed in this area
- 

Committees

Examples:

- Audit, Governance, Community Relations, Employee Pensions & Benefits, Procurement & Small Business

In many cases still subject to Sunshine Laws (check your State's law)

- Open Meetings Acts
- Open Records Acts
- Document Retention Laws

Minutes may be required and are a good idea in any event

Pluses and Minuses

- Can focus on particular items more thoroughly and bring recommendations to the Port Commission, freeing up valuable time of other commissioners
- Doubling up efforts? Overall – more work or less work?
- Tendency for other commissioners not to focus as much on a problem?
- Does not change Port Commission's role as having sole overall authority for governance of the Port

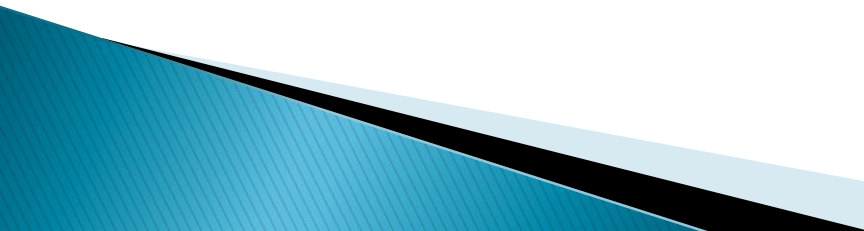
Election of Officers

Typically, the Port Commission will appoint (by the Chairman) or elect several officers. Check to make sure this is consistent with your governing statutes and bylaws.

These may include one or more of the following (see your Bylaws and any state legal requirements):

- Chair
- Vice-Chair
- Secretary
- Treasurer


Some Substantive Problems Facing Commissioners Today

- ▶ National Shipping Act
 - ▶ Risk Management/Insurance
 - ▶ Dredging and Harbor Maintenance Tax
 - ▶ Security: FSAs, FSPs, Security Guard contracts; SAFETY Act; Sensitive Security Information
 - ▶ Cyber Security
 - ▶ Environmental Matters
 - ▶ Employee Matters
 - ▶ International Transactions: FCPA and OPAC
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Some Substantive Issues Facing Commissioners

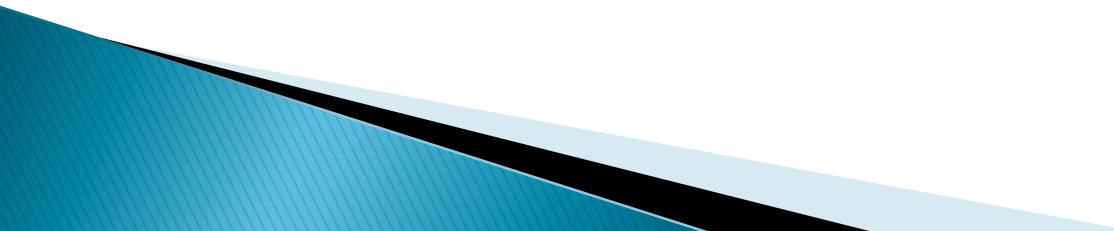
- ▶ National Shipping Act, 46 U.S.C. Section 40101 et seq.
 - *Non-discrimination* and *Reasonableness* in Dealings with Carries, Shippers, Stevedores, Tenants
 - AAPA Law Committee work to make the imposition of attorneys' fees equitable when litigation ensues

Risk Management/Insurance

- ▶ What types and amounts of insurance does your port have?
 - ▶ What types and amounts of insurance does your port require of its tenants, vendors, construction contractors and others that interact with the port?
 - ▶ General Commercial Liability
 - ▶ Business Automobile Insurance
 - ▶ Workers Compensation
 - ▶ Professional Liability (Errors & Omissions)
 - ▶ Terrorism Insurance
 - ▶ Cyber Security Insurance
 - ▶ Read your policies carefully & negotiate!
- 

Some Substantive Issues Facing Commissioners

Cyber Security Breaches:

- ▶ Of concern in the Maritime Industry
 - ▶ Result in bad publicity, investigations and lawsuits against corporations AND their governing boards
- 

Cyber Security

- ▶ Check Your Insurance Carefully – does it cover damages and injuries from cyber events?
 - Directors and Officers (E&O)
 - General Commercial Liability
 - Cyber Security
- Vendors and Tenants – Remember Target
 - Information Technology; Cyber Security.
 - Service Provider shall not have access or connect to PHA's computers, computer system, computer networks without the express prior authorized written consent of PHA. Service Provider shall at all times maintain cyber security in accordance with industry standards and all applicable laws, and shall not allow, through its systems or otherwise, unauthorized access to PHA's computer systems, programs and the data thereon. Unless prohibited by applicable law, Service Provider shall promptly notify PHA of any data breach of which is has knowledge on its own or PHA's computer systems in which any data or information may be at risk belonging or otherwise pertaining to PHA, its commissioners, officers, directors, agents, employees, or any others related to this Agreement.
- Watch for US Coast Guard regulations and NVICs

Cyber Security

Takeaways:

Implement a Cyber Security Plan, including:

- ▶ Conduct a Cyber Security Assessment of your Port's IT computer network system
- ▶ Implement improvements based on the vulnerabilities found in the assessment, and on national industry standards, including National Institute of Standards and Technology (NIST)
- ▶ Review the DOJ Cyber Security Guidelines on best practices for companies before, during and after a cyber attack.
- ▶ Have an ongoing Cyber Security Team with managerial, technological and legal expertise
- ▶ Remember the Target experience – your vendors' and other third parties' IT systems are important too
- ▶ Keep in contact with US Coast Guard for issuance of regulations and (33 CFR Part 105) and guidance (NVICs) in this area

Employment Matters

- ▶ Employment Law is Exploding!
- ▶ EEOC Aggressively Pursuing Discrimination
- ▶ “Traditional” forms of discrimination claims -- Gender, Race, Ethnicity, Age
- ▶ Current Hot Areas
 - Retaliation
 - ADA – American Disabilities Act
 - FMLA – Family Medical Leave Act
 - Workers Compensation Issues
 - Hiring Practices
 - Criminal Background Checks
 - Expanding LGBT Rights
 - Public Employees’ First Amendment Rights

Employment Matters

Takeaways

- Commissioners: Be careful and avoid getting involved in employment decisions – that’s the Executive Director’s responsibility
- Executive Director/Managing Director –
 - knows HR law and procedures; great people person; is sensitive towards port employees and their issues while keeping proper focus on port operations
- HR Director –
 - experienced, knowledgeable, great people person, knows the law and the EEOC and DOL regulations
- Employment Counsel:
 - General Counsel with knowledge of HR law
 - Outside Counsel – knowledgeable AND available on short notice! Problems arise quickly and need prompt expert review
- **Conduct Anti-Harassment Training!**
 - Commissioners, Management, Staff, Vendors, Tenants, All Who Frequent Port Facilities

Questions?



Thank You for
Your Attention and Participation
and Enjoy Miami!