

Duties and Personal Liabilities of a Company Director

INTRODUCTION

The position of Company Director carries with it a number of important obligations. It is not a position which should be undertaken without a full appreciation of these responsibilities and a knowledge of the potential personal liabilities imposed on Directors. This factsheet is an overview only; the topic is one upon which professional advice must be sought.

WHO IS A DIRECTOR?

- A Director is usually appointed to his or her office under the Companies Articles of Association (usually by the other Directors or shareholders).
- In certain circumstances a person who carries out the duties of a Director without actually being named as a Director can be treated as such in law (a "de facto" Director).

MAIN DUTIES OF DIRECTORS

Directors must –

- comply with their obligations set out in the Companies Acts and in the company's Articles of Association
- exercise reasonable care and skill in carrying out their duties. They must show the degree of skill reasonably to be expected from a person of their knowledge and experience. So an "expert Director" (e.g. someone from a professional background) must display a higher degree of skill than a Director lacking such a background.
- act in good faith, honestly, in the best interests of the company and without ulterior motive. Directors must not use company property or information gained in the course of their duties for their own private gain. This is sometimes called the Director's "fiduciary duty" (i.e. a position of trust).

Other Duties

Directors principally owe their duties to the company itself (i.e. the company's members collectively). However,

- A director may sometimes owe a duty to creditors. Directors of an insolvent or near insolvent company need to consider the position and interest of creditors.
- Under the Companies Acts, directors are required to have regard to the interests of the company's employees in general.

PERSONAL LIABILITIES

The personal liabilities which can be imposed on an individual director are extremely wide. They can arise both under the criminal and civil law.

Criminal Liability

- There are numerous sections of the Companies Act which render a director liable to a fine, or in some cases to imprisonment (e.g. failure to deliver an annual return to Companies House).
- There is a trend towards making directors or other individuals in senior managerial positions personally liable under criminal law. Many statutory provisions provide that if a company commits an offence and it is due to the neglect, consent or connivance of a director, then the director will be equally liable. There are examples in the Environmental Protection Act 1990, the Consumer Protection Act 1987 and the Health and Safety at Work Act 1974.
- A director can be personally liable if he/she aids and abets a company to commit a criminal offence.
- If a director fails to notify the Board of Directors that he/she is interested in a transaction involving the company, then he/she commits a criminal offence.

Fraudulent Trading

A director may be found guilty of *fraudulent* trading if he/she allowed the company to trade with intent to defraud creditors. In addition a liquidator can apply to the court to make a director personally liable for company debts and to contribute towards the assets available to pay creditors.

Civil Liability

A director can be sued if he/she is in breach of his/her common law and/or statutory duties.

- A person who has been disqualified by the court from acting as a director but who continues to be involved with the company's management will be liable for all the debts of the company while he/she is involved with it.
- Directors will be personally liable if they contract in a personal capacity.
- A director can be held personally liable for damages for an act or omission that constitutes negligence.

Wrongful Trading

- Under the Insolvency Act 1986 (under what is known as *wrongful trading*) the courts can impose personal liability for the company's debts, if it is shown that the director knew or ought to have realised that there was no reasonable hope of avoiding the company going into insolvent liquidation and the director took insufficient steps to minimise the risk to creditors.
- Section 52 of the Supreme Courts Act 1981 gives the Court discretion to award the costs of a civil action against the director, even if the limited company was the named party in the action.

PROTECTIVE MEASURES: WHAT DIRECTORS SHOULD BE AWARE OF AND WHAT STEPS THEY NEED TO TAKE

If you are a company director, you should –

- Be aware of the exact nature of your responsibilities within your own Company.
- Be fully aware of the obligations and responsibilities imposed on Directors. You should always consult professional advisors on specific problems.
- Always be satisfied that duties delegated to others are being properly and competently carried out.
- Ensure that you are kept fully informed of company affairs and are kept up to date. You should attend all directors' meetings and make sure decisions are properly recorded (together with any reservations/disagreements you personally have).
- If you are also an employee, seek legal advice on your service contract with the company.
- Take full and professional advice before giving any personal guarantees for business purposes. A guarantee may, for example, involve a charge being placed on a private residence.
- Ensure that full and regular accounting and management records are provided to you in a form you understand! In this way you can identify problems in their early stages. Directors need regular financial information to properly carry out their duties. Insolvency warning signs (e.g. increase in creditors, falling sales, dependence on one product) should never be overlooked.
- Take out director's liability insurance. This will provide indemnity against costs incurred in successfully defending an action brought against you as a director.

This fact sheet is an outline of the position at the time of writing.

It offers general guidance only and should not be regarded as a complete or authoritative statement of law.

No part of this fact sheet should be copied or transmitted to any third party.

If you wish to adapt the fact sheet for your own internal use, you must contact the Helpline before doing so.

This fact sheet is not a substitute for accessing the Helpline

If you currently subscribe to an insured advisory service through Croner Consulting your insurance for a particular employment issue covered by this policy could be invalidated if you do not access advice via our Helplines Service and follow such advice in accordance with the terms of your policy.

Wolters Kluwer (UK) Ltd, registered in England no. 450650 is a member of the Wolters Kluwer Group. Croner Consulting is a trading name of Wolters Kluwer (UK) Ltd. Registered Office: 145 London Road, Kingston Upon Thames, Surrey KT2 6SR