

Director duties and Covid-19

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Please note: the information contained in this legal update is correct as of the original date of publication

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Understandably, boards may be feeling overwhelmed by the number of urgent decisions ahead of them. This article looks to remind directors of their duties and to provide guidance as they navigate the difficult decisions in the weeks to come.

A director's role

Statutory directors are legally responsible for the day to day running of the business. In many businesses, this duty is delegated to a wider management team with individuals responsible for specific areas (e.g. finance, human resources, customer relationships etc.) and statutory directors may have limited involvement in the day-to-day running of the business. However, in times of crisis, it is important that directors do not forget that they are ultimately accountable for the actions of the company and those acting on behalf of the company. During the current situation, directors should ensure they are involved in the decisions that the senior management team are being required to consider - such as cost reductions, prioritising critical payments and protecting employees.

What are the legal duties?

There are a wide range of legal responsibilities that have been codified in statute and evolved through case law. However, the overarching principle under the Companies Act 2006 is for directors to act in a way which they consider, in good faith, promotes the success of the company, which is widely perceived to be synonymous with acting in the best interests of the shareholders as a whole. Alongside the interests of the shareholders, the directors are also required to perform a careful balancing act between:

1. the long-term impact of any decision on the company's future prospects;
2. the interests of employees;
3. the need to foster the company's business relationships with customers, suppliers and other stakeholders;
4. the impact of the company's actions on the community;
5. the reputation of the business; and
6. the need to act fairly between the shareholders.

Balancing these considerations can be difficult – for example, when deciding whether to make certain employees redundant to ensure the long-term survival of the business.

How can directors protect themselves?

- **Good decision making** - meet (virtually) regularly to discuss issues. Always ensure you are making decisions in line with the requirements of your company's constitution or other legal agreements – for example, are you familiar with requirements for remote or virtual meetings? Meetings via phone or video link are usually permitted under the articles of association of modern companies.
- **Keep an audit trail** - when making decisions, directors should record key factors considered by the board at that time (including any supporting documentation) in case they need to justify the actions that they took in future – what was the rationale for a particular decision? With hindsight, it can be easy to judge whether a course of action was the right or wrong approach and, once the dust has settled, directors may find they are being held to account. If such a situation arises, it is important that directors can evidence that, based on the information available to them at the time, they acted in good faith and with integrity.
- **Up to date financial information** - in such a fast-moving environment, it is important to have accurate and up to date financial information e.g. cash flow forecasts. The position and outlook can be changing on an almost daily basis and the data and information provided to a board when making decisions needs to keep pace. If it is likely that cash flow will be an issue, consider approaching suppliers, landlords and other stakeholders in advance to try and agree revised payment terms.
- **Consider government support packages** - take into account the availability of government sponsored support that has been recently announced – but ensure you act responsibly in taking that support and consider its terms (and longer-term consequences) carefully.
- **Communication is key** - maintaining credible dialogue with lenders and other key stakeholders is also crucial at this time – especially if you are likely to look to them for additional financial support in the coming weeks and months.
- **Adequate insurance cover** - we also recommend ensuring that you have appropriate insurance in place, including D&O cover.
- **Ask for help** – where appropriate, reach out to your wider business network to share issues and ideas. Take professional advice if you have any concerns about the sustainability or financial position of the company. You should note, at the point a company becomes insolvent the requirement to act in the best interests of the company is usually subject to acting in the best interests of the company's creditors. However, the government has recently announced relaxations to some of the usual obligations imposed on directors around insolvency and insolvent trading (e.g. regarding wrongful trading). We are waiting for further clarity from the government on the changes but, in the meantime, please refer to [this article](#) for further details.

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