

Directors Responsibilities

Introduction	<p>Directors are responsible for the management of companies and must act in a way most likely to promote the success of the business and benefit its shareholders and in accordance with the duties set out in the Companies Act 2006. They also have responsibilities to the company's employees, its trading partners and the state.</p>	<p>Directors have wide powers to help them to promote the company and face serious penalties if they abuse those powers or use them irresponsibly.</p>
General	<p>All companies must have at least one director and, since 1 October 2008, at least one of them must be an actual person (as opposed to another company).</p> <p>The first directors are appointed by the shareholders. Subsequent directors are appointed following procedures set out in the Articles of Association of the company, usually by the board (subject to the maximum number set by the Articles), or the shareholders can appoint someone who has either been recommended by the board or who has been proposed as a director in advance.</p> <p>Non-executive directors have no executive position within the company and may have no day to day involvement in running the company but still carry the same responsibilities as other directors.</p>	<p>Persons who have never been formally appointed may still carry many of the responsibilities of a formally appointed director and be subject to many of the penalties of other directors. These are classed as shadow directors if the other directors are accustomed to act under the instructions of such a person or de facto directors if such a person acts as if they were a director.</p> <p>Certain people are debarred from being a director as follows:-</p> <ul style="list-style-type: none"> • Auditors cannot be directors of companies for which they act. • Those people disqualified from acting as a director under the Company Directors Disqualification Act. • Un-discharged bankrupts cannot act as directors without the permission of the Courts. • Persons under 16 years of age.

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<p>Continued...</p>	<p>Directors must exercise their powers having due regard to the following seven duties: -</p> <p>A duty to act in accordance with the company's constitution and to use powers only for the purposes for which they were conferred.</p> <p>The objectives of companies formed under the Companies Act 2006 are described in its Articles of Association. Companies formed under the Companies Act 1985 (and under previous legislation) have their objects set out in the memorandum. Directors should be mindful of the objectives stand and not act outside of them.</p> <p>The powers of directors are set out in the Articles of Association.</p> <p>A duty to promote the success of the company for the benefit of its members as a whole.</p> <p>Success is not defined in the Act but the underlying principle is that every director has a legal duty to try to act in such a way, which in their judgement, is most likely to bring success to the company. In most cases success is likely to mean sustainable profit.</p> <p>In deciding how to promote the success of the company the directors are required to have regard among other matters to:</p>	<ul style="list-style-type: none"> • The likely long term consequences of their decisions. • The interests of the company's employees. • The need to foster the company's business relationships with its suppliers, customers and others. • The impact of the company's operations on the community and environment. • The desirability of maintaining a reputation for high standards of business conduct. • The need to act fairly as between members and the company. <p>This list has caused some concern but it appears that although the above factors must be considered, it is enough for the board to conclude a particular factor is not relevant and move on.</p> <p>The government has said that this provision is not intended to impose additional bureaucratic burdens on companies but is to reflect what is already widely regarded as best practice.</p> <p>Directors should document their reasons for making critical decisions and, when doing so, note that they have taken due consideration to the points above. It is also relevant to ensure that directors are aware of their requirements under the Act and have them explained to them.</p>
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Continued...	<p>A duty to exercise independent judgement.</p> <p>This is self explanatory. This does not stop directors from relying upon the judgement of others who may be more skilled in a particular area but they must when considering those views use their own judgement in deciding whether to accept them or take the views of others.</p> <p>A duty to exercise reasonable care, skill and diligence.</p> <p>The directors are required to exhibit a degree of skill in exercising their powers which may reasonably be expected given their knowledge and skills. A Chartered Accountant, for example, might be expected to know that a company is trading insolvently or not. The test of an acceptable degree of care is what a reasonable person would do in looking after their own affairs. Directors are not generally responsible for the actions of their fellow directors if they knew nothing of what was happening or took no part in them but there is a duty to be informed of what is going on in the company and turning a blind eye can be very dangerous.</p> <p>A duty to avoid conflicts of interest.</p> <p>The law gives a positive duty to directors to avoid any situation where they personally have, or may have, a direct or indirect interest which conflicts, or may conflict, with the interests of the company.</p>	<p>This duty extends to former directors.</p> <p>The duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict or the matter has been authorised by the directors, as appropriate to the type of company.</p> <p>A key element of the conflict provisions is to allow advance board authorisation where a director has an actual or potential conflict of interest or duty. A director will not fall foul of this provision provided they identify, disclose and where necessary seek authority for actual and potential conflicts and comply with any conditions the board imposes. There is a need to consider whether the interest or duty of someone connected to the director may be treated as an indirect interest or give rise to a conflict. Connected parties include family members, bodies corporate in which the director is connected, trustees of a trust of which the director is a beneficiary and a business partner.</p> <p>Board authorisation can be given only if:</p> <ul style="list-style-type: none"> • It is not invalidated by the company’s articles and in the case of a public company the articles expressly permit authorisation by the board. • Any quorum requirement is met without considering the interested director. • The matter is agreed without counting any vote cast by the interested director.
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<p>Continued...</p>	<p>For private companies incorporated before 1 October 2008, the shareholders must have passed a resolution to allow the board to authorise conflicts.</p> <p>A duty not to accept benefits from third parties.</p> <p>A director must not accept a benefit from a third party arising for any reason of that person being a director; or doing or not doing anything as a director.</p> <p>This is linked to conflicts of interest and any benefits that cannot reasonably be regarded as likely to give rise to a conflict of interest can be ignored.</p>	<p>A duty to declare to the company's other directors any interest a director has in a proposed transaction or arrangement with the company.</p> <p>The Act states "If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company he (she) must declare the extent of that interest to other directors".</p> <p>The declaration of an interest can be either verbal or written but must comply with the requirements set out in the Act.</p>
<p>Duties Under Company Law</p>	<p>These include the filing of statutory returns which include the annual report, notices of changes to directors and secretaries and the annual accounts. Failure to deliver may result in fines for which the director is personally liable, disqualification or criminal conviction.</p> <p>In the case of small to medium sized companies where there is no requirement to submit audited accounts i.e. if the company meets 2 of the following 3 criteria; turnover below £10.2 million, fixed and current assets below £5.1 million and no more than 50 employees, directors have to sign declarations that they have not hidden any material information.</p>	<p>If they are subsequently found to have done, so they face penalties fines or imprisonment. A director must also approve and sign off the annual accounts.</p> <p>Directors must ensure that all the company's business stationery carries its name, registered number, country of registration and registered address. These details must also appear on the company's website, emails and order forms.</p>

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<p>Other Legal Duties</p>	<p>The directors must comply with current employment law in dealing with employees.</p> <p>The directors must take reasonable care to ensure the health and safety of the employees and can be prosecuted for dangerous practices started or continued with their consent or any illness or accident attributable to their negligence.</p>	<p>If a company employs more than five persons it must have a written policy on health and safety and undertake an assessment of risk.</p> <p>It is the director's responsibility to ensure that the correct amounts of tax, VAT and National Insurance are paid on time to HMRC.</p> <p>The directors should also be mindful of data protection, defamation, libel and providing misleading information.</p>
<p>Potential Penalties</p>	<p>Despite limited liability directors can be made personally liable for losses arising from their acts or omissions. These include illegal acts and acts beyond the powers given to them or undertaken with insufficient skill and care. Directors may also be liable to contribute for company debts incurred through wrongful or fraudulent trading.</p> <p>Directors can be jointly and severally liable for the consequences if they act collectively in breach of their responsibilities and liability can be unlimited which could lead to extremely unpleasant consequences including bankruptcy. To protect themselves directors, if they disagree with decisions being made by the board, should have their objections formally noted in minutes to include the reason for the disagreement.</p> <p>Disqualification from acting as a director can arise for some types of conduct, including continuing to trade when a company is insolvent, failing to keep proper books and records, failure to pay tax and failure to cooperate with the Official Receiver. Disqualification lasts from two to 15 years.</p>	<p>Criminal convictions and the resulting penalties including imprisonment can be sought for certain actions, including failure to keep proper books and records, fraudulent trading, health and safety shortcomings and misappropriation of company funds.</p> <p>It is also a possibility that directors could be held personally liable for arrears of crown payments to HMRC. Under section 121C of the Social Security Administration Act 1992 HMRC has the power to issue a personal liability notice (PLN). The effect of the PLN is to make a director personally liable for the company's unpaid taxes. HMRC can issue a PLN whenever contributions are unpaid because of the neglect of a culpable director.</p> <p>In reality HMRC will only issue PLNs in the most serious cases and will look at such matters as:-</p> <ul style="list-style-type: none"> • Persistent failure to pay over PAYE/NI when other payments are being made on time. • Whether the individual has been involved in other cases which have failed to pay over taxes.

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Directors' Duties and Insolvency	<p>Where a company gets into financial difficulties the necessity for directors to be aware of their duties should be heightened and the duty to promote the success of the company may be modified by an obligation to have regard to the interests of creditors. There may be some uncertainty as to when the interests of creditors of an insolvent company eclipse those of the shareholders. This is an area which will prove most difficult for directors. It is often very difficult to establish the exact point when a company is insolvent, identifying the point where a company is nearing insolvency is problematic for directors and, if formal insolvency ensues, the appointed insolvency practitioner.</p> <p>This point in time is important if a company ultimately succumbs to its financial difficulties and enters formal insolvency, because the appointed insolvency practitioner has a statutory duty to investigate the acts and dealings of the directors and how they protected the interests of the company and, in particular, those of its creditors will be a focus of that investigation.</p>	<p>The Insolvency Act 1986 defines a company's inability to pay debts in S.123. This section sets the test which is examined by a judge when deciding whether a company should be wound up. It also sets a standard for the determination of insolvency. A company is deemed unable to pay its debts if:</p> <ul style="list-style-type: none"> • A statutory demand has been issued and remains unsatisfied after 21 days. • A judgement debt remains unsatisfied after due process. • It is proved to the satisfaction of a court that the company is unable to pay its debts as they fall due. <p>A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.</p>

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<p>Offences of Officers Under Insolvency Legislation</p>	<p>S.206 to 211 of the Insolvency Act define the offences that directors can fall foul of in a winding up, as follows:</p> <p>S.206 Fraud, etc. in anticipation of winding up. This includes concealment or fraudulent removal of company property worth in excess of £500, concealing, falsifying or destroying books and records, making false entries in books and records, fraudulently parting with, altering or making omissions in any document relating to the company's property and pawning, pledging or disposing of any property that has been obtained on credit and has not been paid for. The period covered by this section is 12 months prior to the winding up.</p> <p>S.207 Transactions in fraud of creditors. An offence is committed if an officer of the company causes or contrives a situation where the company's property has been gifted, transferred or been made subject to a charge etc. which effectively takes assets out of the reach of creditors.</p> <p>S.208 Misconduct during the course of winding up. This section covers directors conduct after a winding up has started and deals</p>	<p>with directors cooperation post winding up and covers such matters as disclosing all assets, delivering up all assets and books and records etc.</p> <p>S.209 Falsification of company's books. An offence is committed if the director destroys, mutilates, alters or falsifies any books and records or makes entries with the intent of defrauding or deceiving any person.</p> <p>S.210 Material omissions from statement relating to company's affairs. This relates to the statement of affairs of a company, a document which is the responsibility of the directors and is filed at Companies House.</p> <p>S.211 False representation to creditors. A director commits an offence under this section if they obtain the consent of creditors to an agreement with reference to the company's affairs or to the winding up by making false representation or any other fraud.</p> <p>A person guilty of an offence under these sections of the Act is liable to imprisonment, or a fine, or both.</p>
<p>Other Matters Resulting in Penalisation of Directors</p>	<p>All of the following matters described in sections 212 to 214 of the Insolvency Act may result in personal liability to directors and officers of a company.</p> <p>S.212 Summary remedy against delinquent directors, liquidators etc.</p>	<p>This covers misfeasance and breach of fiduciary duty and provides a summary remedy for the restoration of property and the assessment of compensation or damages for breach of duty against current and former directors, including shadow and de facto directors. Actions under S.212 can be brought by the Official Receiver, the liquidator, or by any creditor or contributory.</p>

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<p>Continued...</p>	<p>S.213 Fraudulent trading</p> <p>This provides remedies where it is shown that any business of the company has been carried on with the intent to defraud creditors of the company or any other person, or for any other fraudulent purpose. The court can order any person found guilty under this section to make such contributions to the company's assets as it thinks proper.</p> <p>S.214 Wrongful trading</p> <p>This section applies in relation to a person if:-</p> <ul style="list-style-type: none"> • The company has gone into insolvent liquidation. • At some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. • That person was a director of the company at that time. <p>This concept was brought in to provide a deterrent to directors continuing to operate companies to the detriment of creditors and forces them to consider their actions when a company finds itself in financial difficulties. There is no mention of trading in the text of the section which was deliberately done at the drafting stage to catch situations, other than just an increase in liabilities, where for instance during the relevant period the directors may have paid themselves excessive remuneration thereby depleting the assets available to creditors in a winding up. The section does give a defence in that it states that the court will not make a declaration</p>	<p>under this section with respect to any person if it is satisfied that after that person has satisfied the test of knew or ought to have known that person took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken.</p> <p>S.216 Restriction on the use of company names</p> <p>This applies to any person who in a period of 12 months prior to a company going into insolvent liquidation was a director or shadow director of the company. It introduces the concept of a prohibited name which is the name by which the liquidated company was known in the preceding 12 months or a name so similar as to suggest an association. It restricts those persons, who in a period of 12 months prior to a company going into insolvent liquidation was a director or shadow director of the company, from taking part in the promotion, formation or management or of being a director of any company that is known by a prohibited name. It also prohibits such a person being concerned or taking part in the carrying on of a business using a prohibited name.</p> <p>S.217 Personal liability for debts, following contravention of S.216</p> <p>A person is personally responsible for all the relevant debts of a company if at any time in contravention of S216 they are involved in the management of the company or as a person involved in the management of a company acts or is willing to act on instructions given by a person whom they know at that time to be in contravention in relation to the company of S216.</p>
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<p>Company Directors Disqualification Act 1986</p>	<p>The court has the power under this Act to make a disqualification order against a person for a specified period during which time that person shall not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned in the promotion, formation or management of a company unless (in each case) they have the leave of the court. That person cannot act as an insolvency practitioner. The minimum period of disqualification is currently two years and the maximum 15 years.</p> <p>The Act also allows for a disqualification order by agreement where there are grounds for unfitness and the relevant director accepts the position and agrees to a disqualification undertaking. This, avoids unnecessary court time and cost.</p>	<p>Grounds for unfitness are described in detail in the Act and include failings in directors statutory duties, build up of crown debt, misfeasance and allowance of certain antecedent transactions e.g. preferences and transactions at an undervalue.</p> <p>Insolvency practitioners are under a statutory duty to undertake their investigations within 3 months of being appointed as Liquidator, Administrator or Administrative Receiver. A report on the directors' conduct is submitted to the Secretary of State via completing an online questionnaire, setup by the Insolvency Service, on the Government's website. Insolvency practitioners are not allowed to discuss the content of their submissions with anyone. It is up to the Secretary of State to decide whether the matters reported are of sufficient importance to proceed further with disqualification proceedings.</p>
<p>What can Directors do to Protect Themselves?</p>	<ul style="list-style-type: none"> • Monitor the financial situation of the company on a regular basis and take proper professional advice. • Take appropriate steps to minimise losses to creditors if the company is in, or seems likely to face, financial difficulties. • Make sure that proper minutes are kept of directors' meetings or important decisions made and ensure that if there is disagreement that this is duly noted. • Ensure that they understand the requirements of any employment contract they have and that they are acting 	<p>within the powers and objectives described in the Memorandum and Articles of the company.</p> <ul style="list-style-type: none"> • Consider taking out indemnity insurance or explore the possibility of an indemnity from the company. • Avoid giving personal guarantees if possible. <p>If aware of wrongdoings by fellow directors do not remain passive. Document the objection to their actions and ensure that by subsequent actions it is not seen that the wrongdoing has been effectively sanctioned.</p>

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