

Director's duties and responsibilities

The following is a brief summary of the duties and responsibilities of directors of private companies in Ireland. There are further requirements and considerations for directors of public companies.

A number of recent high profile cases both in Ireland and overseas have highlighted the pitfalls to which company directors can be exposed. All directors, whatever their involvement with a company (e.g. executive director, non executive director, nominee director, shadow director), are bound to the duties and responsibilities of a director as set out in law.

With increasing legislation and government vigilance it is essential that directors take these responsibilities seriously and ensure that they do not suffer penalty from the Office of the Director of Corporate Enforcement (ODCE) or the Companies Registration Office (CRO). In fact, over the last number of years the ODCE has secured an ever increasing number of convictions against companies and individuals and according to the CRO, on average over 5,000 companies are being struck off each year for not filing their accounts on time.

Company directors' duties are owed in the first instance to the company itself, the shareholders and the employees. These duties and responsibilities are wide and diverse and arise primarily from two sources: common law and statute (Acts of the Oireachtas and other legislation e.g. EU Regulations).

Directors' common law duties

There are three common law duties that must be adhered to by directors. These are:

- Directors must exercise their powers in good faith and in the interests of the company as a whole.
- A director may be liable to account to the company for any profits he makes as a result of his office (whether or not there has been an abuse of power or a breach of duty).
- Directors are obliged to carry out their functions with due care, skill & diligence. A director is liable for any loss resulting from negligent behaviour.

Directors' statutory duties

The position of Company Director holds a variety of statutory responsibilities which must be complied with to ensure that the Company operates within the provisions of the Companies Acts 1963-2006. The principal duties are:

- **Duty as a company officer to comply with the Companies Acts**

A director, as an officer of a company, is under a duty to comply with his or her obligations under the Companies Acts and to ensure that the company complies with the requirements of the Companies Acts. A breach of any of the laws set out can result in significant penalties.

If a company breaches a law, the director is presumed to have been aware of this breach unless he or she can prove that they took reasonable steps to prevent it or that it was out of their control.

- **Duty to maintain proper books of account**

Every company is required to maintain proper books of account. These books should ensure that the position of the company can be adequately assessed at any given time. If the company is in breach of this provision the directors can be held personally liable under order of the Court.

- **Duty to prepare annual accounts**

Financial statements are to be prepared annually and must be presented in accordance with the requirements of company law and accounting standards.

- **Duty to have an annual audit carried out**

Directors are required by law to have an annual audit of the financial statements. The auditor presents their opinion of the financial statements to the members of the company. In some cases a

company may satisfy the criteria to be audit exempt.

- **Duty to maintain company registers and other documents**

Directors are responsible for the maintenance of company registers, contracts and company minute books. They must ensure that these are kept up to date and in accordance with the requirements of the Companies Acts.

- **Duty to file documentation with the Companies Registration Office**

Every Irish company must be registered with the CRO. Each company has an annual return date which must be filed each year. Non-compliance may lead to prosecution, court injunction or strike off. The company must also ensure that all details registered with the CRO are up to date and correct.

- **Duty to disclose certain personal information**

Each director must disclose personal information to be recorded in the company register of directors and secretaries. This includes personal details and interests held.

- **Duty to convene general meetings of the company**

An annual general meeting must be held every fifteen months unless the company is a single member private limited company. Circumstances can arise that require an extraordinary general meeting to be called.

- **Duty regarding transactions between the directors and the company**

Certain transactions relating to the sale or purchase of assets between the company and directors are regulated by the Companies Acts. Loans, credit transactions and guarantees made to or on behalf of directors are restricted.

- **Duties when the company is in liquidation or insolvent**

If a director is found to have wrongfully exercised their authority as director or breached the duty of trust that comes with the office of director legal proceedings can be instituted. Directors can be held personally liable (without limitation of liability) for company debts if found to be trading recklessly or fraudulently.

What is fraudulent trading?

Fraudulent trading arises when a person is knowingly a party to the carrying on of any business of the company with intent to defraud its creditors or for any other fraudulent purposes. Fraudulent trading is a criminal offence and can lead to criminal conviction.

What is reckless trading?

All directors need to be aware of the statutory duty they owe to the company not to trade recklessly and of their potential liability for the debts of the company if they do so.

Provision 135 of the Companies Act 1993 states that a director must not:

“Cause or allow to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company’s creditors”.

An example might be if the director was party to the company contracting a debt and did not honestly believe on reasonable grounds that the company would be able to repay its debts.

Some important points to note on this are:

- The company does not need to be in liquidation for a director to be liable for reckless trading.
- It can even relate to an isolated transaction unrelated to the usual business of the company.
- A “sleeping director” (one who has abdicated responsibilities to other directors) may be held liable also.

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