

The Essential Company Director

An essential guide
on the duties and
responsibilities
of a co-operative
Company Director

***Take your co-op
to the next level***

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All companies incorporated under the Companies Act 2006 (CA2006) must have a governing body – most commonly referred to as the Board of Directors. However, regardless of the name given to the governing body, if a person holds themselves out as director it is likely that the law will view them as such. Therefore, it is important that all directors understand their duties and responsibilities to enable them to carry out their role.

There are three types of limited company: a public limited company; a private company limited by guarantee; and a private company limited by shares. This guide will focus on the duties and responsibilities of private limited company directors.

What qualifications does a company director need?

Directors of private limited companies are not required to hold any specific qualifications. However, he/she must have attained the age of 16, be able to carry out the role to the best of their ability when measured against the company he/she is a director of and not be disqualified from acting as a director.

How are company directors appointed?

All private limited companies must have at least one director. However, Co-operatives UK would expect any co-operative incorporated as a company to have a minimum of three directors. Thereafter, the governing document of the company should set out who is eligible to be a director and how they are appointed.

How are company directors removed from office?

The governing document should set out the process for the removal of a director. Typically, examples include: resignation; conclusion of his/her term of office; removal by resolution of the company's members; or where he/she ceases to be eligible to carry out the role such as disqualification under the Company Directors' Disqualification Act 1986.

What are the liabilities of directors?

Company directors are protected by limited liability. This means when the society goes into liquidation or is wound up with outstanding debts, they will not have to contribute to the assets of the society above the guarantee amount (in the case of a company limited by guarantee) or the amount unpaid on their shareholding at the point at which the company is wound up. This protection may be lost in certain situations as follows:

Wrongful trading

The court can order the director of a company that has gone into insolvent liquidation to make a contribution to the assets of the company, if it appears

that he/she knew, or ought to have known that the company was going into insolvent liquidation, but took no steps to try and avoid it. The court may make such an order even if the director did not know the company was going insolvent. The crucial test is that he/she ought to have known.

Fraudulent trading

If it can be proved that directors have carried on trading with the intent to defraud creditors, the court has the power to order a director to contribute to the assets of the company. This is also a criminal offence under CA 2006, so the directors concerned can be imprisoned as well as being required by the court to contribute to the company's assets.

Personal guarantees

If a company approaches a bank or other financial institution for a loan, it is common practice for them to ask that the directors give personal guarantees, particularly if the company of which they are a director does not have many assets. Giving a personal guarantee is the equivalent of taking out a personal mortgage and the director will not be protected by limited liability.

Liabilities to third parties

A director of a company can be personally liable to a third party in these situations:

- If he/she signs a cheque which does not contain the society's full and proper name
- If he/she does not make it clear he/she is signing as an agent of the society
- If the third party has the impression that the contract is being made personally with the director and not with the company
- If he/she makes fraudulent or negligent statements to the third party which that person subsequently relies on
- If he/she acts outside his/her area of responsibility without the authority of the board of directors (a concept known as 'breach of warranty')

In each of the above situations any debt which follows and which remains unpaid will be considered to be the debt of the director and he/she may be sued for payment.

What powers do company directors have?

The governing document of a co-operative company should give the governing body power to manage the company on behalf of the members. These powers are generally very wide to enable the governing body to manage and conduct the business of the company.

Directors have overall management responsibility for the company and it is essential that the directors are familiar with their provisions of the governing document and abide by them, so that they can carry out their duties in the correct manner.

What duties do company directors have?

CA 2006 codifies the duties and responsibilities of directors by bringing together and clarifying duties previously dealt with under case law. The statutory company directors' duties are as follows:

Duty to act within powers

A director of a company must always act in accordance with the powers granted to directors in the company's constitution. The 'constitution' includes not only the Memorandum and Articles of Association but any special resolutions and binding agreements made by the company.

Duty to promote the success of the company

A director must act in the way he/she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. Specifically having regard to the:

- Consequences of any long term decisions
- Interests of the company's employees
- Need to maintain the reputation of the company and foster business relationships
- Impact of the company's operations on the community and the environment

Duty to exercise independent judgement

A director must exercise independent judgment. This duty requires a director to act in what s/he considers to be in the interests of the Company and not someone else. This duty is not infringed if s/he acts in a way authorised by the company's constitution or with an agreement entered into by the Company that restricts the directors from exercising this discretion in the future.

Duty to exercise reasonable care, skill and diligence

A director of a company must exercise reasonable care, skill and diligence. An assessment as to whether a director has carried out this duty adequately will consider the knowledge, skill and experience the director has and measure this against the standards expected of another person carrying out similar duties to the director in question.

Duty to avoid conflicts of interest

A director must avoid a situation in which s/he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether a company could take advantage of the property, information and opportunity). This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement a director has with the company.

Non-conflicted directors can authorise a conflict, provided that nothing in the company's constitution prevents such authorisation, the director with the conflict does not count towards a quorum at the meeting where the matter is

considered and s/he does not vote on the matter. Alternatively, members of the company can authorise a conflict by ordinary resolution

Duty not to accept benefits from third parties

A director must not accept any benefit from a third party if this benefit is connected with his/her carrying out, or not carrying out, the duties associated with him/her being a director.

Duty to declare interest in proposed transactions or arrangements with the company

If a director has directly or indirectly an interest in a proposed transaction or arrangement with the company s/he must, before the company enters into the transaction or arrangement, declare the nature and extent of that interest to the other directors.

A declaration can be made at a board meeting, by notice in writing, or through a general notice. A director may give a general notice to the directors if s/he has a conflict to declare any interest in another organisation and will continue to have an interest in any transaction or arrangement with that organisation after the original notice has been given. A general notice must be given at a meeting of the directors and be raised at the next meeting of the Board after such a notice has been given.

Duty to declare an interest in existing transactions or arrangements

A director must declare an interest to the directors in any transaction or arrangement that has been entered into by the company. However, if a director has already declared an interest before the company entered into such a transaction or arrangement s/he does not have to declare it again. The declaration must be made at a meeting of the directors, by notice in writing or through a general notice. If at any time, the declaration of interest becomes inaccurate, the director must make a further declaration.

- A director is exempt from making a declaration if s/he is not aware of his/her interest, the transaction or arrangement
- A director is not required to declare an interest if: it cannot reasonably be regarded as likely to give rise to a conflict, the directors are already aware of the conflict or it concerns a director's service contract that had been considered at a Board meeting.

Essential reading

This is part of a series of resources making up the **Directors Toolkit** accessed via www.thehive.coop/governance

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