

Article

Duties and liabilities of directors in private companies

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Article

A company, on incorporation, acquires its own independent personality distinct from the members constituting it and becomes a legal person in the eyes of law. However, being artificial person, a company cannot act on its own. It has to act through natural persons, that is, its officers commonly referred to as Directors. 'Directors', as the name suggests, mean to "direct" and look after the overall functioning of the company. Section 2(13) of the Companies Act, 1956 (the "Act") provides an inclusive definition of the term "Director" which reads as "*director includes any person occupying the position of a director by whatever name called*". Interpreting this, we can say that it is not the name by which a person is called but the position he occupies and the functions and duties which he discharges that determine whether in fact he is a director or not. However, where a person functions as a director without being lawfully appointed, he cannot be treated as a director.

The Board of Directors as the apex supervisory body, and the executive management, headed by the managing director (not every company needs to have one), are important organs in the overall schema of corporate governance. The Directors stand in a fiduciary position with the company and are expected to manage the affairs of the company in a manner beneficial to the interest of the company and its stakeholders.

The duties of directors include the following:

- Fiduciary duties
- Statutory duties
- General duties

Section 312 of the Companies Act puts a bar on assignment of office by directors. In other words, directors cannot absolve themselves of their duty as such either by assigning their duties to any one of them, or to any other person. Being vested with powers derived from those of members, a director may be viewed as a delegate, and hence, as per general rule against successive delegation, cannot further delegate his office or duties.

Fiduciary Duties:

Directors have a fiduciary relation with the company and directors have the duty to act in good faith and for proper purposes, duties of no conflict etc. Directors occupy a position of trust with respect to the assets of the company and their acts and deeds have to be undertaken for the benefit of the company. The fiduciary relationship towards the company and its shareholders enjoins upon them a duty to act on behalf of the company with utmost good faith and exercise due care and diligence in

Article

managing the affairs of the company. Even if all the shareholders pass a resolution relieving a director from any of his fiduciary or statutory duties, such resolution would be void.

Statutory Duties:

Directors need to be aware that they are personally subject to statutory duties in their capacity as directors of a company. These duties basically pertain to the regulatory requirement which needs to be taken care of from time to time. In addition, the company as a separate legal entity is subject to statutory controls and the directors are responsible for ensuring that the company complies with such statutory controls. Any violation under the Act would make the directors officers in default unless explicitly excluded from any section. Once a director becomes 'officer in default' he will be liable to monetary penalties and/or imprisonment for any violation of the Act. Some of the common regulatory provisions in the Act used in day to day business affairs are:

1. Filing of Form 32 with the Registrar of Companies (RoC) within 30 days from the date of change in directorship of the Company;
2. Appoint first auditor of the company;
3. Filing of return of allotments with the RoC within 30 days (Sec 75);
4. Directors need to disclose the nature of concern or interest where the resolution for entering into a contract or agreement in which a director may be interested is taken into consideration. (Sec 299);
5. Directors must not fail to attend three consecutive meetings or all meetings for three months whichever is longer without the permission of the board. If he does so, his office of directorship gets automatically vacated (Sec 283);
6. Directors should convene Board Meetings in every quarter and call the Annual General Meeting for every year;
7. Prepare and place Report of the Board of Directors, report on the Company's affairs, Profit & loss along with Balance Sheet at the AGM;
8. Authenticate and approve financial statements;
9. Giving Board's report on the auditor report and accounts (Sec 217);
10. Filing of Form 23AC, ACA and Form 20B after holding the AGM;
11. Directors should maintain proper accounting records and they should see to it that all the accounting standards are complied with;
12. Filing of charge created on the properties of the company (Sec 125);

Article

13. Directors should ensure that all the statutory registers i.e. minute books, register of members, register of charges, register of contracts, register of directors and directors shareholding etc are kept properly and updated timely.

Apart from the Companies Act, the directors are also expected to comply with the various other applicable provisions of other acts like tax laws, SEBI Rules and Regulations (though not applicable to private companies generally), FEMA, RBI Rules and Guidelines and other labor laws etc.

General Duties:

Directors who act as agents of a company have fiduciary duties towards the company:

1. Directors must act bona fide and in good faith in the interest of the organization and the stake holders.
2. Directors must display care in performance of the work done by him/her.
3. Directors while discharging their duties must exercise some skill and diligence. A director need not exhibit in the performance of his duties a greater degree of skill that may reasonably be expected from a person of his knowledge and experience. The directors are not liable for mere errors of judgment.
4. Director must perform his/her activities personally and not delegate it. However under certain conditions he/she may opt to do so.
5. Directors should not place himself/herself in a position where there is conflict between their duty to the company and their personal interest toward others.
6. Directors must promote success of the company for the benefit of its members.
7. Directors are expected to exercise independent judgment.

Liabilities

When directors fail to perform their statutory duties under the Companies Act, 1956, they bring themselves within the mischief of the penal provisions of law. Under the Act, directors are generally liable for various acts of omission and commission. The Act defines the term "Officer-in default" under section 5 of the Companies Act

Article

Liability towards the company

1. A director should act honestly keeping in mind the interest of the company and should not think about personal gain. He shall be held liable for breach of fiduciary duty if he/she fails to do so.
2. Director shall be held personally liable if he/she acts beyond the provisions of the Companies Act, Memorandum and Articles of Association as it being ultra vires the company or the directors.
3. Any loss or damage arising due to the negligence of directors while discharging their duties makes them liable for the same.
4. Directors are liable for their act of misfeasance i.e. misconduct or willful misuse of powers.
5. Loss or damage arising due to breach of trust makes the directors liable for it.
6. Directors should not make any secret profits, if any earned, the same should be disclosed by them to the company.

Liability under the Companies Act

Any default or violation under the Companies Act would attract monetary penalty and/or imprisonment depending upon the default. In some of the Sections, directors have been made personally liable for the damages to the third party. Apart from civil liability, directors are also held liable for acts of fraud, default in discharging their duties and misdemeanor.

It is to be noted that the mandatory sections which do not expressly provide any penalty provision, penalty will be levied under section 629A of the Act.

Below is a list of some sections, nature of default and penalty to be imposed on violation of different provisions of Companies Act:

Section	Default	Fine/imprisonment
75	When a company with a share capital makes allotment of its shares and does not file a return of allotment within 30 days to the Registrar of Companies.	Every officer in default shall be punishable with fine which may extend to rupees 500 for everyday during which the default continues.
143	If a company fails to keep	If any officer knowingly

Article

	at its registered office a register of charges of the company and does not enter all charges specifically affecting property of the company and all floating charges on the undertaking or on any property of the company.	omits, or willfully authorizes or permits the omission of, any entry required to be made, he shall be punishable with fine which may extend to rupees 500.
162	<p>If a company:</p> <p>(a) fails to file an annual return with the registrar within 60 days from the day on which annual general meeting (AGM) was held.</p> <p>(b) fails to get the copy of the annual return signed by both a director and by the manager or secretary of the company or where there is no manager or secretary, by two directors of the company, one of whom shall be managing director where there is one.</p>	The company and every officer in default shall be punishable with fine which may extend to rupees 50 for every day during which the default continues.
168	Failure to hold an AGM every year.	The company and every officer in default shall be punishable with fine which may extend to rupees 5000 and in case of continuing default with a further fine which may extend to rupees 250 for

Article

		every day after the first during which default continues.
217	Failure to provide adequate information in directors report or signing of directors report in a way other than what is stated in the section	All directors are punishable with an imprisonment which may extend to 6 months or fine up to rupees 20,000 or with both.
224-231	Default in complying with appointment of auditors and related provisions	The company and every officer in default shall be punishable with fine which may extend to rupees 5000
303	If the company fails to keep at its registered office a register of its directors, managing directors, manager and secretary.	The company and every officer in default shall be punishable with fine which may extend to rupees 50 for every day during which the default continues.

Relieves available to a Director under Companies Act

Compounding of offences

Offences which are punishable with fine only or with fine or imprisonment, may be compounded under section 621A and the director can be relieved from the offence committed.

Relief under section 201

The proviso to Section 201 of the Act provides for indemnification of any officer of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is

Article

acquitted or discharged or in connection with any application under section 633 in which relief is granted to him by the Court.

Relief under section 633

Under section 633 of the Act, a director can claim relief in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust in cases where:

- (a) The court is of the opinion that though he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and having regard to all the circumstances of the case, he ought fairly to be excused,
- (b) A director apprehending any claim might be made against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on any such application shall have the same power to relieve him as it would have had under sub-section (1) of the section.