



9 Director Duties and Key Corporate Governance Actions in the COVID-19 Era

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Why the Director Role is Essential During the Coronavirus Pandemic

The uncertainty created by the COVID-19 pandemic has created a business environment unlike anything encountered in recent history—well beyond the effects of [“normal” crises](#). Given the increased stress that this situation puts on businesses and its uncertain duration, director duties include vigilant and proactive corporate governance in consultation with management on an ongoing basis. In this article, we offer some thoughts on actions directors should take in light of the COVID-19 pandemic.

Director Duties

In all circumstances, directors have a duty (i) to act honestly, in good faith, and in the best interests of the corporation (i.e. the duty of loyalty), and (ii) to exercise the same skill, diligence and care that a reasonably prudent person would exercise in similar circumstances (i.e., the duty of care). Directors owe these duties to the company and its owners, but in certain circumstances should also consider the interests of other stakeholders, like employees and creditors, when making major corporate decisions. The current crisis has not changed the director role. However, in light of the crisis, the fulfillment of these duties may be more difficult because the situation is anything but business as usual. Also, while corporate legal duties may flow to shareholders, directors may hold the workers’ and customers’ health in their hands, which highlights a different, but equally

important category of responsibilities.

The directors must be in constant communication with management, since certain issues presented by the crisis may not be obvious from the boardroom. The board should be reaching out to its peers, as management does the same to help identify evolving best practices. Once decisions are made, the directors must remain cognizant that its mandates will need to be implemented by company management, so all decisions should be clear and concise. Moreover, given the unfolding nature of the crises, there will not be one decision or one set of directives, but rather a continuous process of communication, investigation and adjustment.

What Should be Considered

With these obligations in mind, and in light of the current circumstances, directors should consider taking the following actions:

1. First and foremost, directors should adopt or revise plans for a “crisis” workplace.
 - Address the impact on current company policies, including but not limited to, sick leave, parental leave, and working from home through a company-wide communication, including the impact of many changes in federal, state and local law that impacts the treatment of employees.
 - Address any new procedures or restrictions that apply to your business regarding travel, group meetings, cleaning practices and visitors to company facilities. Most important will be new policies letting your employees know what to do if they are or feel sick, with communications to include a list symptoms, where to go, what to do if they have been exposed to a COVID-19 positive individual, what to do if they test positive for COVID-19 and who at the company should be contacted.
 - Review and improve, where necessary, information technology capabilities in order to ensure employees have access to the information and technical support they need to do their jobs which

may be difficult even if workers can work from home, given the increased universal use of internet and cloud resources.

- A structured communication protocol should be implemented for the entire company that lets employees know when/where/how to get factual information that they need to perform their jobs.
 - Management should remain open to suggestions and comments without retaliation and review any whistleblower policies in place to ensure a smooth flow of information from the rank and file.
 - If applicable, provide information to all employees regarding steps the company has taken and will be taking to focus on safety in the workplace.
 - Consider periodic communications to maintain a sense of community and combat the anomie associated with working from home or working in isolation at the business location. The business should attempt to maintain company cohesion despite the separation resulting from working from home and the isolation that social distancing engenders.
2. Director duties should include working with management to ensure health and safety best practices are implemented and that employees act accordingly. Given the lack of basic infection protection equipment in the current marketplace and the limited knowledge of the COVID-19 virus' mechanisms of transmission, the best practices are unlikely to be a static set of rules. Remember, anytime a change is made to procedures, to communicate new rules widely and quickly.
 3. If the corporation is an "Essential Business" under applicable law allowing employees to physically be on-site, this likely entails mandatory spacing requirements, the use of protective equipment—which may not be currently available—and possibly multiple shifts. If the corporation is not an Essential Business or, alternatively, employees can work remotely, employees (or even just a portion of employees) should be permitted and encouraged to work from home with no non-essential travel.

4. The corporation's by-laws and stockholders' agreement should be reviewed to determine whether telephonic or video board meetings and shareholders' annual general and special meetings can be held. Directors should ensure remote or virtual meetings are in fact permissible or have documents modified to permit virtual meetings now that shelter-in-place laws and remote working are becoming standard.
5. Business contracts should be reviewed to determine whether performance by the company or the counterparty may be hindered or [performance excused](#).
6. General business continuity plans should be reviewed and modified (including measures to specifically respond to the COVID-19 pandemic) at a minimum to ensure that such plans consider the potential risks of disruption to supply chains, production, staffing, financial liquidity, access to technology resources and the possible unavailability of key personnel.
7. Have management calculate pro-forma financial statements that envision a number of possible future scenarios, including projected cash flow based on disruption scenarios for supply chain and customers.
8. Gain an understanding of any governmental relief resources for the company and its employees. This may include federal, state and local grants, government loans or [SBA disaster assistance loans](#).
9. While it may not be obvious, directors should stay focused on long-term company goals. While short-term necessities may dominate during this crisis, it is important to make sure that the short-term actions are consistent with overall company vision.

Directors Must Be Proactive

While there may be no exact [blueprint to follow during the current crisis](#), your existing company documentation (even if it needs to be "dusted off") and information from governmental agencies, medical professionals and other outside experts may help to provide a framework. Taking the above actions will help your company navigate these difficult times by promoting organization,

setting clear expectations and ensuring that the company will survive for the future.

Finally, remember that the above will create a record (and actions should be recorded) that, no matter the outcome, the board took a measured and proactive attempt to carry out its director duties to the best of their abilities in uncertain times. The protection of the business judgment rule on directors does not depend on outcomes as much as that they engaged in a thoughtful and well-researched process to attempt to manage the massive uncertainty that lies ahead.

About Jeremy Waitzman

Jeremy chairs the Corporate Group at the Sugar Law Firm (Sugar Felsenthal), a national boutique serving the affluent and the companies they own or otherwise control. He advises his clients on significant transactions and operational issues in their businesses. Described by clients as "an essential business advisor" and "a partner in the success of my business," Jeremy has substantial experience representing businesses of all types and sizes from inception, guiding them through significant growth, and often through ownership's exit. His clients include privately-held middle market and emerging growth companies, family offices/funds, investors, C-level executives, boards of directors, family-owned businesses and entrepreneurs. Jeremy counsels clients in the areas of corporate law, mergers & acquisitions, private placements, and general contract law. He represents individuals, closely held businesses, start-up companies and serves as outside counsel to several large corporations. His work with companies often includes strategies for the creation of enterprise value.

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