



Director's Responsibilities:

What are my responsibilities on insolvency?

Where a company is in financial difficulties the directors should seek independent advice as soon as possible if they are to avoid potential personal liability under insolvency legislation. The potential risks for a director in this area are complex and include the risk of being disqualified from holding the position of director or being involved in the promotion or management of a company for a period of up to 15 years.

Some of the key issues for a director of a company which is insolvent or approaching insolvency are:

Modification of the general duty to promote the success of the company – when a company is insolvent, at risk of imminent insolvency or when an insolvent liquidation or administration is probable, the general duty is modified to include an obligation to have regard to the interests of creditors. It is crucial for directors to remain informed about the financial position of the company as the road to insolvency is not always linear and the extent to which directors are required to take into account the interests of creditors will depend on where the economic interests lie. Where the financial difficulties of the company are less severe, the duty may be discharged by giving creditors' interests appropriate weight and balancing them against the interests of members (where they conflict) but if insolvency becomes inevitable, the interests of creditors will be of paramount importance.

Wrongful trading – a director can be ordered by the court to contribute towards the general pool of assets which are available to a company's creditors where they:

knew or ought to have concluded that there was no reasonable prospect of the company avoiding insolvent liquidation or administration; and continue to allow the company to trade after they knew or ought to have so concluded; and do not take every step they ought to from that time to minimise the potential loss to creditors.

A director does not need to have been dishonest to be liable for wrongful trading and they cannot avoid responsibility by resigning from the company when potential difficulties are spotted. This is a particularly thorny area for directors to navigate and proper advice should always be sought.

Fraudulent trading – this involves a degree of dishonesty on the part of the director as the offence requires an intention to defraud the company's creditors or some other fraudulent purpose. If found liable, a director may be required to contribute to the company's assets available for distribution to creditors or may face criminal proceedings.

Misfeasance – a director can be guilty of this if they have misapplied or retained company assets or wrongly exercised their authority. It does not necessarily involve moral blame. A director in breach may be ordered by the court to repay money or contribute to the company's assets available for distribution to creditors.

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