

Directors' duties for B Corporations: A Coronavirus Guide

During the coronavirus crisis, the directors of certified B Corporation (“B Corp”) companies will want to be sure they are complying with their duties. This quick guide aims to help them to do so, however it is not a comprehensive guide to directors’ duties.

Some of the issues considered below may apply to other forms of profit-with-purpose business, but each set of circumstances should be considered specifically on its own facts. If you would like to find out how your business’ governance and directors’ duties may be impacted by the current crisis, we’d be happy to talk with you.

How does being a B Corp affect directors’ duties?

To be certified as a B Corp, a company will have amended its constitution in order to meet, at a minimum, the B Corp legal test. This means that the purposes of the company will be to both benefit its shareholders and have a material positive impact on society and the environment, taken as a whole. This displaces the default position for a company limited by shares, that the overarching duty of the directors is to run the company for the benefit of the shareholders.

A B Corp’s directors must act in a way that promotes its purposes, and in doing so consider the interests of stakeholders such as its employees, its suppliers and customers, its impact on the community and environment, and the long-term sustainability of the business. The directors are not required to treat the interests of any particular stakeholder as more important than the interests of the others.

Directors’ duties during the coronavirus crisis

Over the coming months, it may not be possible for the business to run as planned. Some companies may need to cease or refocus activities, prioritise those which are financially viable, or put their current strategy on hold.

Some businesses may feel in crisis or survival mode, focusing on emergency measures and taking attention from creating the positive social and environmental impact that the company intends. As the focus shifts and decisions are taken to ensure the sustainability of the business during this difficult period, the company’s directors need to bear in mind that their obligation is not just to ensure the viability and value of the company for its owners and investors.

The directors will need to consider how their decisions could impact on the company’s relationships with different stakeholders of the business. Practically, this will likely include considering the business’ on-going commercial contracts with suppliers and customers, the rights of its employees and contractors and whether the workforce can be maintained in its current form, and whether the business can service its

current debt obligations. We've prepared a number of resources to try to help businesses to consider these issues, on our Coronavirus page on our website.

The approach that a B Corp will want to take to these issues is likely to reflect the purpose and values of the business. For example, with regards to staffing, some B Corps may want to preserve and also proactively support their workforce during this time, and may wish to consider options such as creating an employee hardship fund. In addition, employee ownership models are more common among purpose-driven businesses, which may create an extra layer of complexity when considering options for managing staffing during these difficult times.

Similarly, B Corps may seek to work collaboratively with contractors and suppliers. For example, preferring to continue to aim for prompt payment of invoices and opt for high ESG performance standards in the supply chain where possible, even when under the relevant contract there might be room to take advantage of delay, cost-cutting, or termination. The directors will need to continue to pursue the company's purposes, balancing the interests of its stakeholders, but ensuring the viability of business.

Ultimately, if the business experiences severe financial difficulties, the directors are not required to preserve the company at all costs, or to continue operating as before. If they conclude that the business or particular activities are no longer viable, they may bring them to an end. In some circumstances, it may be necessary to do this in order to prevent the company going into insolvent liquidation and, potentially, creating personal liability for the directors.

What if the company cannot be sustained?

If a company is insolvent or close to becoming insolvent, the directors have an overarching duty to act in the interests of the creditors of the company. Liability can arise for directors under the rules on wrongful trading, if it were clear that administration or winding up could not be avoided but trading activity continued, resulting in a loss to the company. However, in the current fast-changing circumstances, and with new government support schemes for business arising, it may be more difficult to determine a business' solvency status and what steps are 'reasonable' for directors to take to protect creditors' interests.

The government is planning emergency legislation to enable companies undergoing a rescue or restructure process to continue trading, giving them breathing space that could help them avoid insolvent liquidation, and to temporarily suspend wrongful trading provisions for a period of three months. This suspension will apply retrospectively from 1 March 2020, but we do not know when these new provisions will be introduced.

This suspension should temporarily suspend the threat of personal liability for directors of a company if it eventually falls into insolvency. The aim is to encourage companies to continue trading and keep people employed during this time.

The government has not yet announced any Covid-19 specific amendments to the directors' duty regime in the UK and it is expected that the existing laws on fraudulent trading and director disqualification will continue.

We recommend that directors increase their focus on their governance practices, including good record keeping, and seek professional advice quickly if the business begins to struggle.

You can read more about what to consider when a company is in financial difficulty, and its director's need to think about restructuring or insolvency procedures, in our Solvency considerations for social enterprises, B Corporations and profit-with-purpose businesses: A Coronavirus Guide.

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