

Returning to Work Safely – The Roles and Responsibilities of Directors and Senior Management

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Introduction

In the current climate of COVID-19, managing a business has never in recent history been more challenging.

Whilst for some companies, the onset of COVID-19 has had a positive impact on their business, the reality for most companies, is that it has been hugely damaging and unfortunately will result in some businesses not recovering. There have already been some high profile casualties in sectors such as high street retail.

Directors have clearly been challenged and continue to be challenged as they seek to keep their business afloat and endeavour to reopen as the lockdown restrictions ease.

At the beginning of May, the Government published a Roadmap for Reopening Society and Business to ease the COVID-19 restrictions and reopen Ireland's economy and society in a phased manner.

As we continue through the phases of the Government's roadmap, more and more people will be returning to their workplaces, which in itself, brings new challenges for directors in terms of managing that process.

In doing so, directors will (in addition to their obligations under employment and health and safety law, which are discussed below) need to be mindful of their fiduciary duties under company law, which are stated in Section 228 of the Companies Act 2014 (the "**2014 Act**"). There are eight principal fiduciary duties with which directors must comply, however, in the context of managing the process of returning to the workplace, one in particular comes into sharp focus, being the duty to have regard to the interests of the company's employees. Directors are of course subject to their overall duty to act in good faith in what they consider to be the best interests of the Company. For many directors there will be difficult judgement calls to protect the business and manage its finances whilst having regard to the interests of employees (including their physical and mental health and safety), and ensuring compliance with all applicable health and safety legislation and regulations.

In order to remain compliant with their fiduciary duty of having regard to the interests of the company's employees, directors will need to ensure that, upon their return to the workplace, employees are provided with a safe place to work and in this regard, directors should ensure that, amongst any other measures they deem appropriate for their company to implement, their company implements the measures prescribed by the Government's *"Return to Work Safely Protocol"* (*"the Protocol"*), the objective of which (as stated therein) is to *"support employers and workers to put measures in place that will prevent the spread of COVID-19 in the workplace"*.

The Protocol sets out a significant number of mandatory measures to be taken by organisations in light of the significant health and safety threats posed by COVID-19. The Health and Safety Authority is monitoring compliance with the Protocol and has conducted approximately 800 workplace inspections to date. The Protocol is applicable to all industry sectors and describes itself as being a *"living document"*, which incorporates the current advice issued by the National Public Health Emergency Team so that as that advice continues to evolve, the Protocol and the measures employers and workers are obliged to take to prevent the spread of COVID-19 may also change. The Protocol makes clear that the workers' representative(s) and the *"COVID-19 response management team"* should support the implementation of the measures set out in the Protocol. Whilst the Protocol does not stipulate who should sit on the response management team, given that compliance with the Protocol and managing the risks posed by the COVID-19 crisis is very likely to involve significant expenditure of resources, companies should ensure that the management team includes individuals with sufficient decision making authority to sanction any required expenditure and to make any necessary decisions.

The Protocol does not obviate the necessity for employers to continue to comply with their extensive existing obligations to employees at common law and under legislation regarding occupational health and safety. The Safety, Health and Welfare at Work Act 2005 (the **"2005 Act"**) (as amended) imposes a general obligation on an employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of employees. A significant range of other specific duties are imposed by the 2005 Act in relation to occupational health and safety matters including specific duties in relation to equipment, processes and procedures, emergencies, risk assessments, safety statements and many other matters.

Where an employer fails to comply with its duties regarding occupational health and safety, the employing entity may be prosecuted. However, the potential for prosecution does not stop at the employing entity. In preparing for and managing the return to the workplace of employees, it is essential for directors and managers to be cognisant of the provisions of section 80 of the 2005 Act which allows personal criminal liability to be imposed on them in certain circumstances where the employing undertaking has committed an offence under health and safety legislation. The objective of the relevant statutory provision, according to the parliamentary debates concerning the legislation, is to *"send a clear message to decision makers at board and management levels who carry a special responsibility for safety and health."* The message sent by the relevant legislative section is not only a clear one; it is also an extremely significant message for directors and managers, as discussed more fully below.

Where an offence under health and safety legislation has been committed by an undertaking and the acts making up that offence have been authorised, or consented to by, or are attributable to connivance or neglect on the part of a director, manager or other similar officer (or a person who purports to act in any such capacity), that director, manager or other similar officer will be guilty of an offence and may be prosecuted and punished accordingly. The legislative language is very broad and, as such, a director may be held personally criminally liable where, for instance, the offence which the undertaking committed was not solely or mainly a result of a director's neglect. For a director to be prosecuted, it is sufficient for the director to have played some role in the undertaking's commission of the offence in question.

The necessity for directors and management to be proactive in relation to occupational health and safety matters is underlined by a significant presumption set out in section 80 of the 2005 Act. If an individual is being prosecuted and it is proved that, at the material time, she or he was a director of the undertaking in question (or a person employed by the undertaking whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking), or a person who purported to act in any such capacity, it will be presumed that such person authorised or consented to the acts making up the offence, or that they were attributable to her or his connivance or neglect, unless she or he can disprove this. As such, crucially the section shifts the burden of proof to the director to prove her or his innocence and directors are, in essence, guilty until proven innocent.

A broad range of criminal penalties are prescribed by the 2005 Act ranging from a fine of up to €5,000 or imprisonment for a term of up to 12 months (or both) where there is a summary conviction to a fine of up to €3,000,000 or imprisonment for a term of up to two years (or both) where there is a conviction on indictment.

In view of the substantial criminal penalties set out above, the reputational issues which would be engendered by a prosecution and the potential implications which a conviction could have on a director's ability to continue as a director of a company (a sentence of imprisonment would result in vacation of the office of a director under Section 148 of the 2014 Act and could also make a restriction or disqualification order more likely in an insolvency), it is extremely important that directors ensure that they take a proactive approach to the management of occupational health and safety matters.

Directors should also note that the fiduciary duties stated in Section 228 of the 2014 Act are owed to the company of which they are a director. Where a director is found to be in breach of any of their fiduciary duties, they can be required to:

- (i) account to the company for any personal gain they make arising from the said breach; or
- (ii) indemnify the company for any loss or damage the company incurs arising from the director having breached their fiduciary duties.

The latter is probably the more likely consequence for a director who is found to have been in breach of their fiduciary duties in the context of managing the return to work process. Directors should note however, that the High Court is empowered to relieve a director from any personal liability in the case of a proven breach of fiduciary duties, where it is satisfied that despite such breach, the director acted honestly and reasonably and in the specific circumstances, the director ought fairly to be excused (from personal liability).

To assist directors in proving that their actions were honest and reasonable, and to assist in the defence of any prosecution for an alleged offence under the 2005 Act, directors should be ensuring that meetings of their company's board of directors are being held on a regular basis, thus providing the directors with the opportunity to discuss, rationalise and make decisions regarding their company including their back to work protocols and procedures.

Furthermore directors should be ensuring that detailed minutes are taken at all such meetings, recording the discussions which have taken place and the rationale for the decisions that are being taken. Indeed, it is a legal requirement under the 2014 Act that minutes be taken in respect of all board meetings (and a fiduciary duty of directors under Section 228 of the 2014 Act to comply with the law). The 2014 Act permits board meetings to be held electronically, so that subject to anything to the contrary which may be stated in a company's own constitution (regarding the convening of electronic board meetings), the inability (in the current climate) for many directors to meet face to face, should not of itself prevent meetings of a company's board of directors from taking place.

Whilst many employees will return to their workplaces over the coming months, for so long as employees continue to work remotely, directors should be cognisant of two of their other fiduciary duties under Section 228 of the 2014 Act being:

- (i) to act in good faith in what they consider to be the interests of the company; and
- (ii) to act honestly and responsibly in relation to the conduct of the affairs of the company.

Directors therefore need to remain cognisant of threats to the company associated with remote working.

In this regard, directors should remain alert to matters such as cyber crime, obligations of confidentiality and obligations existing under data protection legislation, and be cognisant of the greater risk of being exposed to or falling foul of such matters when employees are working remotely. With this in mind, directors should ensure that controls/policies are maintained (and complied with) to protect the company against exposure to any such matters.

Contact Us

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