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Directors and Officers: Key Considerations for Continued Response to COVID-19

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July 14, 2020

As COVID-19 cases spike in many jurisdictions throughout the Southeast, corporations are forced to quickly adapt to an ever-changing environment. Despite the need to act quickly, corporate boards must remain mindful of, and diligently adhere to, their legal duties owed to the corporation and its shareholders. As discussed below, boards should ensure that they fulfill their duties in approving the corporation's continued response to the COVID-19 pandemic.

Overview of Directors' Duties to a Corporation and its Shareholders

Directors of a corporation owe certain fiduciary duties to shareholders as a result of their status as agents of the shareholders who oversee the business and affairs of the corporation. These duties arise out of a combination of statutory law, common law, and contract. Under Delaware law, courts recognize two primary fiduciary duties of the board to its shareholders: the duty of care and the duty of loyalty. Breach of these duties can result in personal liability to the directors. The remainder of this article will discuss each of these duties and provide best practices for adhering to these duties in determining the corporation's response to COVID-19.

Duty of Care

The duty of care generally requires directors to take steps to inform themselves regarding matters significant to the company with all material information that is reasonably available to them and act or refrain from acting using the amount of care that an ordinarily careful and prudent person would use in similar circumstances based on that information. Many corporations launched an initial response to the pandemic more than four months ago. It is important that boards continue to monitor and adjust the corporation's response based on newly provided information. Where directors fulfill these obligations and act in good faith in the best interest of the corporation, they will be shielded from liability by the business judgment rule. In light of COVID-19, directors should consider the following significant risk areas and implement the best practices provided.

- **Employee Health and Safety**
  - Talk with internal and external counsel regularly to ensure the corporation remains compliant with all federal and state health regulations.
  - Consult with physicians or other health care experts to ensure that protocols are established to prevent transmission of COVID-19.
  - Ensure that clear guidance is provided to employees regarding measures to prevent the transmission of COVID-19.
  - Consider continuing remote work for employees for as long as possible.
- **Data Security**
  - Due to the increased number of employees working remotely, work with cybersecurity experts to assess security threats created by the virtual platform and to ensure internal controls are functioning properly.

- Consider additional training to confirm that employees understand how to use and implement cybersecurity measures.

- **Business Continuity**

  - Review financial forecasts that track best- and worst-case scenarios surrounding COVID-19's impact on operations. Use those forecasts to assess the corporation's need for capital.
  - Conduct ongoing discussions with management regarding supply-chain impacts and relationships with major customers and vendors.
  - Monitor changes in the market, including significant changes in ownership of competitors, customers, and vendors, and the corporation itself.

- **Governmental Assistance and Opportunities**

  - Talk with internal and external counsel regarding federal and state relief that may be available to the corporation, the implications of each, and that all appropriate opportunities are taken.
  - Consult with tax planning professionals, including external counsel and accountants, to ensure that the corporation is aware of all tax law changes and makes decisions now to take advantage of those changes

Duty of Loyalty

The duty of loyalty requires directors to act in good faith for the benefit of the corporation and its stockholders, not for their own personal interests. Directors have an obligation to avoid actions that would harm the corporation, including taking opportunities from the corporation and having conflicts of interest. COVID-19 does not change much regarding the duty of loyalty.

However, one best practice related to this duty that directors should observe in light of the pandemic is to regularly review their holdings and affiliations for conflicts of interest that may have been created due to a rapidly changing market. This includes direct financial interests or serving as a director on multiple boards. For example, as a result of COVID-19, some auto manufacturers have become manufacturers of health care equipment, restaurants have become grocers, and even distilleries have become hand sanitizer manufacturers. The rate of operational change in the market is unprecedented, so directors should constantly reevaluate their financial interests and directorships to ensure that entities they are involved with have not become competitors overnight.

Final Observations

This alert is meant to provide a high-level overview of fiduciary duties for board members to ensure that they comply with the law and serve their corporation well. Every corporation faces a different set of pandemic-related challenges based on its industry and structure. Based on those differences, there may be additional unique considerations that will require the board's attention.

If you are a board member who would like to discuss the impact of COVID-19 on your corporation, please contact one of the authors or any member of our Directors and Officers Litigation Team. Also, you can visit our Coronavirus: Navigating the Path Ahead page for additional resources.