

Companies Act Fundamentals

Director's Appointment, Resignation, Removal et al



2020 MHA Legal

Applicable Law

- Chapter XI - Appointment and qualifications of directors (Section 149-172) of the Companies Act 2013
- Companies (Appointment and Qualification of Directors) Rules 2014

Appointment of Director

Who is a Director?

- A Company, being a legal entity is an artificial person which needs to be represented by the individuals who are elected to run the operations of the Company smoothly and are responsible for a company's corporate policy. Hence the persons who is in charge of the management of the affairs of a company are termed as directors. Collectively all the directors appointed by in the company are referred as Board of Directors of the Company They are collectively known as Board
- The Board of Directors take the decision regarding the management and operation of the Company in their meetings known as meeting of the Board of Directors.
- Section 2(34) of the Companies Act, 2013 defines a director as – “director” means a director appointed to the Board of a company.

Minimum / Maximum Number of directors

- Section 149 provides that every company to have a Board of Directors consisting of individuals as directors in the following manner

| Company | Minimum | Maximum |
|--------------------|----------------|----------------|
| Public Company | 3 | 15 |
| Private Company | 2 | 15 |
| One Person company | 1 | 15 |

- However a company may appoint more than fifteen directors after passing a special resolution.
- All listed Companies and public company having paid up share capital of Rs. 100 crores or more or turnover of Rs. 300 crore or more as on the last date of latest audited financial statements also appoint at least one woman director . within one year from the commencement of the second proviso to Section 149(1) of the Act. Every other, shall also appoint at least one woman director within 1 years have at least one woman director.

Maximum no. of Directorships

- Section 165 of the Companies Act provide that a person can hold office as a director, including any alternate directorship, in not more than twenty companies at the same time and the maximum number of public companies in which a person can be appointed as a director cannot not exceed ten.
- The members of a company may restrict the limit of Directors abovementioned limit by passing a special resolution.
- If any person accepts an appointment as a director in contravention of above mentioned provisions, he can be punishable with fine which shall not be less than Rs. 5,000 but which may extend to Rs. 25,000 for every day after the first day during which the contravention continues.

Women director

- All listed Companies and public company having paid up share capital of Rs. 100 crores or more or turnover of Rs. 300 crore or more as on the last date of latest audited financial statements also appoint at least one woman director with in six months from the date of company's incorporation,
- As per Rule 3 Companies (Appointment and Qualification of Directors) Rules, 2014 in the event of intermittent vacancy of a woman director then it needs to be filled up by the board of directors within 3 months from the date of such vacancy or not later than immediate next board meeting, whichever is later.

Resident Director

- Section 149 (3) of the Act provides for compulsory appointment of a resident director in India i.e. every company need to appoint at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year.

Independent Directors

- Section 2(47) of the Act prescribed that “Independent director” to mean an independent director referred to in sub section (5) of section 149 of the Act.

- Every listed public company needs to appoint at least one-third of the total number of directors as independent directors

- Rule 4 provides that a public companies complying with the following limits as on the last date of latest audited financial statements also needs to appoint 2 independent directors:-
 - paid up share capital of Rs. 10 crore or more; or
 - turnover of Rs. 100 crore or more; or
 - in aggregate, outstanding loans/borrowings/ debentures/
deposits/ exceeding Rs. 50 crore or more.

Independent Directors

- Intermittent vacancy of an independent director needs to then it shall be filled up by the board of directors within 3 months from the date of such vacancy or not later than immediate next board meeting, whichever is later.

- Once the company comply with the requirements to appoint Independent Director and thereafter ceases to fulfil any of three conditions for three consecutive years then it will not be required to comply these provisions until such time as it meets any of the conditions.

Appointment of Alternate Director-

- Section 161(2) of the Act allowed the followings:
 - (i) The Board of Directors of a company must be authorised by its articles or by a resolution passed by the company in general meeting for appointment of alternate director.
 - (ii) The person in whose place the Alternate Director is being appointed should be absent for a period of not less than 3 months from India.
 - (iii) The person to be appointed as the Alternate Director shall be the person other than the person holding any alternate directorship for any other Director in the Company.
 - (iv) If it is proposed to appoint an Alternate Director to an Independent Director, it must be ensured that the proposed appointee also satisfies the criteria for Independent Directors.
 - (v) An alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.
 - (vi) If the term of office of the original director is determined before he so returns to India, any provision for the automatic reappointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

Appointment of Directors by Nomination

Section 161(3) provides for appointment of Nominee Directors.:

- Section 161 (3) provides that subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government Company.

Appointment of Directors in causal vacancy

- Section 161 provides that if any vacancy is caused by death or resignation of a director appointed by the shareholders in General meeting, before expiry of his term, the Board of directors can appoint a director to fill up such vacancy. The appointed director shall hold office only up to the term of the director in whose place he is appointed.

Proportional representation for appointment of directors

Section 163 provides for the Proportional representation for appointment of directors-

- The articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a company in accordance with the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise and such appointments may be made once in every three years and casual vacancies of such directors shall be filled as provided in sub-section (4) of section 161.

Persons standing for directorship

Right of persons other than retiring directors to stand for directorship

- Section 160 provides that a person who is not a retiring director shall be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to propose him as a director, has, not less than fourteen days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of such member to propose him as a candidate for that office, along with the deposit of one lakh rupees or such higher amount as may be prescribed which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than 25% of total valid votes cast either on show of hands or on poll on such resolution.

Appointment of directors to be voted individually

- Section 162(1) provides that a single resolution shall not be moved for the appointment of two or more persons as directors of the company unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.
- A resolution moved in contravention of aforesaid provision shall be void, whether or not any objection was taken when it was moved.
- A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

Notice of candidature of a person for directorship

- Section 160(2) and Rule 13 of the Act provides that the company shall inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office, at least seven days before the general meeting by serving individual notices to members through e-mail and where no e-mail address is available then in writing and by placing notice of such candidature or intention on the website of the company, if any.
- If the company advertises such candidature/intention, not less than 7 days before the meeting at least once in a vernacular newspaper in the principal vernacular language of the registered office's district and at least once in English language in an English newspaper circulating in that district in which the registered office of the company is situated, then it shall not be required to serve individual notices upon the members as aforesaid.

Legal Position of a Director

LEGAL POSITION OF DIRECTOR

- **Directors are Agents of the Company:** Directors are elected representatives of the shareholders who execute decision making for the benefit of shareholders.

Directors as employee: can also be an employees when the director is appointed as whole time director of the company.

Directors as officers: Director treated as officers of an company. They can be liable to certain penalties if the provisions of the companies act are not strictly complied with.

- **Director as trustees:** Director are treated as trustees of the company, money and property: and of the powers entrusted to and vested in them only as trustee.
- **Director as “Officer” :** “officer” includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act.
- **Director as “Key Managerial Personnel”:** “key managerial personnel”, in relation to a company, means-

LEGAL POSITION OF DIRECTOR

- i. the Chief Executive Officer or the managing director or the manager;
 - ii. the company secretary;
 - iii. the whole-time director;
 - iv. the Chief Financial Officer; and
 - v. such other officer as may be prescribed;
- Director as “Officer in default”: “officer who is in default”, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:—
 - i. whole-time director;
 - ii. key managerial personnel;
 - iii. where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

LEGAL POSITION OF DIRECTOR

- iv. any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
- v. any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
- vi. every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
- vii. in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer

Vacation, Removal , Resignation of a Director

Vacation of office of director-

- Section 167 of the Act provides that the office of a director shall become vacant in case:
- He incurs any of the disqualifications specified in section 164;
- He absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;
- He acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;
- He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested
- He becomes disqualified by an order of a court or the Tribunal;
- He is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months;

Vacation of office of director-

- Provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;
- He is removed in pursuance of the provisions of this Act;
- He, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.
- If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified above, he shall be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than Rs. 1,00,000 but which may extend to Rs. 5,00,000 or with both.
- Where all the directors of a company vacate their offices under any of the disqualifications specified above the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.
- A private company can provide additional grounds through its AOA.

Resignation of director

Section 168 & Rule 15, 16 contains provision with regard to resignation of Director:

- A director may resign from his office by giving notice in writing.
- The Board shall, on receipt of such notice within 30 days intimate the Registrar in Form DIR-12 and also place the fact of such resignation in the Directors' Report of subsequent general meeting of the company and post the information on its website.
- The director shall also forward a copy of resignation alongwith detailed reasons for the resignation to the Registrar in Form DIR-11 within 30 days from the date of resignation.
- The notice shall become effective from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

Resignation of director

- Director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.
- If all the directors of a company resign from their office or vacate their office, the promoter or in his absence the Central Government shall appoint the required number of directors to hold office till the directors are appointed by the company in General Meeting

Removal of directors

Section 169 contains provision with regard to removal of directors and provide as under:

- A company may, remove a director except the director appointed by National Company Law Tribunal u/s 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard after passing the ordinary resolution.
- Provided that nothing contained in this sub-section shall apply where the company has availed itself of the option given to it under section 163 to appoint not less than two thirds of the total number of directors according to the principle of proportional representation.
- A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.
- On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.

Removal of directors

- Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so,—
 - (a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and
 - (b) send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company), and if a copy of the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting.

Removal of directors

- A vacancy created by the removal of a director under this section may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given under sub-section 164 (2).
- A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.
- If the vacancy is not filled under section 164 (5), it may be filled as a casual vacancy in accordance with the provisions of this Act. Provided that the director who was removed from office shall not be re-appointed as a director by the Board of Directors.

Removal of directors

- Nothing in this section shall be taken—
 - (a) as depriving a person removed under this section of any compensation or damages payable to him in respect of the termination of his appointment as director as per the terms of contract or terms of his appointment as director, or of any other appointment terminating with that as director; or
 - (b) as derogating from any power to remove a director under other provisions of this Act.

Disqualifications

Disqualifications for appointment as director

Section 164 of the Act provides that a person shall not be eligible for appointment as a director of a company, if —

- He is of unsound mind and stands so declared by a competent court
- He is an undischarged insolvent
- He has applied to be adjudicated as an insolvent and his application is pending
- He has been convicted and sentenced to imprisonment for at least 6 months and 5 years from expiry of sentence have not got over
- He has been convicted and sentenced for a period of 7 years or more
- An order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force
- He has not paid any calls in respect of any shares of the company held by him & 6 months have elapsed from the last day fixed for the payment of the call

Disqualifications for appointment as director

- He has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years
- He has not obtained DIN
- A person who is director of a company which has not filed financial statements or annual returns for 5 continuous yrs, till expiry of 5 yrs from date of default
- A person who is director of company which has failed to repay deposits, debentures or distribute dividend for a period of one year, till expiry of 5 years from date of default
- Private Companies can provide for additional disqualifications in their Articles

Disqualifications for appointment as director

- An additional disqualification is provided in sub section (2) of Section 164 relating to consequences of non filing of financial statements or annual returns. Any person who is or has been director of Directors of any company which has not filed any financial statements and Annual Return for 3 continuous financial year or has defaulted in payment of debentures/deposit/dividend etc, shall also not be eligible for appointment as director of any public company and for reappointment in the same company for a period of five years from the date on which the said company fails to do so.
- Rule 14 prescribed that every director who disqualified u/s 164 (2), shall inform to the company concerned in Form DIR-8 (Intimation by Director) before he is appointed or re-appointed. Whenever a company fails to file the financial statements/annual returns/fails to repay any deposit, interest, dividend/fails to redeem its debentures as specified u/s 164 (2), the company shall immediately file Form DIR-9 (Report by the company to Registrar), to the Registrar furnishing therein the names and addresses of all the directors of the company during the relevant financial years. But when a company fails to file the Form DIR-9 within a period of 30 days of the failure it would attract the disqualification u/s 164(2), officers of the company as specified u/s 2(60) shall be the officers in default. Upon receipt of the Form DIR-9 the Registrar shall immediately register the document and place it in the document file for public inspection. Any application for removal of disqualification of directors shall be made in Form DIR-10.

Liabilities of the Director

LIABILITIES OF DIRECTORS

Liability of non-executive / Independent Directors

An independent director and a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

Liability as “Officer”

Section 66 (Reduction of Capital) provides that if any officer of the company:

- knowingly conceals the name of any creditor entitled to object to the reduction;
- knowingly misrepresents the nature or amount of the debt or claim of any creditor; or
- abets or is privy to any such concealment or misrepresentation as aforesaid, he shall be liable under section 447.

LIABILITIES OF DIRECTORS

Liability under Section 105 (Proxies)

If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who knowingly issues the invitations as aforesaid or wilfully authorises or permits their issue shall be punishable with fine which may extend to one lakh rupees.

Provided that an officer shall not be punishable under this sub-section by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.

LIABILITIES OF DIRECTORS



Liability under section 173 (Meetings of Board)

Every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of twenty-five thousand rupees.

Liability under section 204 (Secretarial Audit)

If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the company secretary in practice, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

LIABILITIES OF DIRECTORS

Liability under section Section 207 (Conduct of Inspection and Enquiry)

If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

LIABILITIES OF DIRECTORS

Liability under section 212 (Inspection by SFIO)

On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs.

Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973 of the company.

LIABILITIES OF DIRECTORS

Liability for “Fraud”

“Fraud” in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

Any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

LIABILITIES OF DIRECTORS

Liability under section 274 (Directions for filing statement of Affairs – Winding Up by Tribunal)

If any director or officer of the company contravenes the provisions of this section, the director or the officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

Liability as “Officer in Default”

Directors are liable as officers in default under all sections where specific penalty is provided for each officer in default.

Where no specific penalty is provided under the Act, they are liable under Section 450.

LIABILITIES OF DIRECTORS



Personal Liability

Directors can be made personally liable if

- When the directors enter into contract in their own name.
- When they enter into contracts on behalf of company but fails to use “LTD. Or PVT LTD.”
- When directors exceeds their powers
- The BOD should act an agent of company, not of a single director. Therefore a single director cannot enter into a contract on behalf of company unless the BOD authorises.

LIABILITIES OF DIRECTORS

Liability under section 35 – Civil Liability for mis-statement in prospectus

Where it is proved that a prospectus has been issued with intent to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every person concerned shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.

Liability under section 75 – Damages for Fraud

Where a company fails to repay the deposit or part thereof or any interest thereon referred to in section 74 within the time specified in sub-section (1) of that section or such further time as may be allowed by the Tribunal under sub-section (2) of that section, and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to the provisions contained in subsection (3) of that section and liability under section 447, be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors.

LIABILITIES OF DIRECTORS

Liability under section 75 – Damages for Fraud

Where a company fails to repay the deposit or part thereof or any interest thereon referred to in section 74 within the time specified in sub-section (1) of that section or such further time as may be allowed by the Tribunal under sub-section (2) of that section, and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to the provisions contained in subsection (3) of that section and liability under section 447, be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors.

Thank you



**Mind, Heart, Aspiration =
Passion, Integrity, Excellence**

Thank You

Please feel free to contact, if you need any further information or clarification:

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