

A Toolkit for Directors & Officers of US Companies Amid COVID-19

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The current COVID-19 crisis has rapidly re-shaped everyday life around the world, and our understanding of the impact this disruption to daily interactions and routines has had on business is constantly evolving. While much attention has been given to the effects on the economy and the stock markets, as well as to the very human toll the COVID-19 virus is taking, there is also a need for directors and officers of U.S. corporations to understand their responsibilities during this time and the practical impact of COVID-19 on their workforce, business viability and supply chains.

The goal of this article is to parse the responsibilities directors of U.S. corporations may be expected to bear in order to assess and address the changes arising from the COVID-19 crisis, specifically with respect to their fiduciary duties to the corporation and its shareholders. We will consider what the fiduciary duties of the directors are and how these fiduciary duties can be fulfilled from a practical perspective. Ultimately, the toolkit provided below intends to provide directors of U.S. corporations with the information they need to be proactive in addressing the potential or anticipated impact of COVID-19 on their businesses and to demonstrate that they are fulfilling their fiduciary duties.

Directors owe their corporations and stockholders the duties of care and loyalty. The duty of care requires directors to be fully and adequately informed and to act with care when making decisions. The duty of loyalty requires directors to make their decisions in the best interest of the corporation. Directors must apply these standards both in decision making and in exercising oversight over the business.

Of particular importance in the current situation, the courts have made it clear that directors have a duty to exercise oversight and to monitor their corporation's operational viability, legal compliance, and financial performance. The controlling precedent for this duty in Delaware is *Caremark*,^[1] which held that a board of director's "utter failure to attempt to assure a reasonable information and reporting system exists" is an act of bad faith in breach of the duty of loyalty. A breach of a fiduciary duty exposes officers and directors to liability for their actions (or inactions).

The best guidance for directors seeking to assess their fiduciary duties in light of COVID-19 is *Marchand vs. Barnhill*.^[2] In this case, the Delaware Supreme Court, overturning a ruling by the Chancery Court, found that the shareholders had stated sufficient facts to bring a *Caremark* claim against the directors of Blue Bell Creameries USA, Inc. The basis for the claim revolved around a listeria outbreak that caused Blue Bell Creameries to recall all of its products and shut down production at all of its plants, which in turn led to massive layoffs that affected over one-third of its workforce. In overturning the lower court's decision, the Delaware Supreme Court found that the

plaintiff “alleges specific facts that create a reasonable inference that the directors consciously failed to attempt to assure a reasonable information and reporting system existed”[3] and went on to say that under the *Caremark* standard “directors must make a good faith effort to implement an oversight system and then monitor it.”[4]

Applying the *Caremark* and *Marchand* decisions to the current global COVID-19 crisis, it is reasonable to expect that directors of corporations will be expected to implement a system of oversight and to monitor it to determine how their businesses are affected and to take steps to address these effects. Failure to proactively take such steps could be a basis for claims of breach of the duties of care and loyalty by directors and officers of U.S. corporations.

There are many ways for directors to preempt any such claim of breach of fiduciary duty, and to provide important protections to corporations and their workforces. In response to the changes to everyday life resulting from the COVID-19 crisis, directors and officers will need to proactively take steps to, among other things, enable their employees to work remotely, to implement systems to ensure cybersecurity when working remotely, to implement policies with respect to employee healthcare and paid leave time, and to identify and address issues that may arise with respect to the corporation’s supply chain.

There has been a plethora of guidance on these topics issued by government regulatory and oversight bodies, as well as by private advisors. In our toolkit below you will find some helpful links to relevant guidance, which should provide you with useful tools to put in place appropriate policies and procedures to help your business navigate the unique challenges that we face as a result of the COVID-19 virus.

- 1. Employee Matters: Protecting your corporation’s employees during the COVID-19 pandemic.**

While a corporation’s management is typically responsible for the day-to-day management of its affairs, including with respect to its employees, during the ever-changing time of the COVID-19 crisis, it is imperative for directors to maintain regular communication with the managers to stay well informed of the risks and changes to the corporation’s business. Directors can assess whether their corporation’s management team is ready to appropriately respond to the COVID-19 crisis by using this quick [checklist](#)[5] established by the National Association of Corporate Directors.

In maintaining regular communication with its management, directors should also be keenly aware of what is happening with its workforce. As most corporations already know, employees and a sustainable culture are essential assets to a corporation and it can be challenging to transition a workforce to remote work. Directors, in connection with the corporation’s management, will want to consider how to implement the appropriate policies and procedures to protect employees while limiting the economic impact and interruption to the corporation’s usual business activities.

- **Communication.**

Throughout all of the uncertainty COVID-19 has created, directors may find themselves questioning how and to what extent the corporation should be communicating with its employees. There is a fine line between easing the anxieties of your workforce and divulging too much information. The National Association of Corporate Directors (“NACD”) partnered with law firms to co-host a meeting

of the NACD Nominating and Governance Committee Chair Advisory Council to gather information and advise on communicating in times of crisis. The resulting [report](#)[6] provides an overview of several takeaways to inform directors' oversight of crisis communications, including the importance of maintaining a careful balance when choosing to communicate with employees and how to navigate the tension between limiting liability and conveying the right message. Of particular importance is one participant's insight that "it is important to slow down for a second during a crisis and really think through what do we want to have happened as a result of this crisis? What is our story? Many boards and management teams just immediately react to the crisis rather than thinking through it strategically".

- **Workplace Cleanliness.**

For those corporations who are remaining open during this time, directors should ensure that the corporation has policies in place to comply with the Centers for Disease Control and Prevention's ("CDC") Guidelines, which can be found [here](#). [7] The CDC's Guidelines include information about the symptoms of the virus, how to slow the spread of the virus, and what to do if you are sick. It is important to maintain open lines of communication with your workforce and to demonstrate that the corporation is monitoring developments and implementing policies and procedures to protect the workforce.

The Occupational Safety and Health Administration ("OSHA") has also published its guidance on the control and prevention of the virus. Its [guidelines](#)[8], similar to those of the CDC, provide general guidance for all U.S. employees and employers and detail certain measures employers should take to protect workers from exposure to the COVID-19 virus, including ways to train all employees in using personal protective equipment.

- **Successful Remote Working Policies and Practices and Certain Risks.**

As previously mentioned, and as many are quickly learning, it is challenging to completely shift to remote work. It imposes demands on both management and employees and can interrupt the natural flow of a corporation's operations, all of which have the potential to impact employee morale and business viability. Deloitte has explored these challenges and provides in its article, "[Future of Work: Ways of working in uncertain times](#)"[9], thoughtful insights into exploring new ways of working, all of which are aimed at sustaining and even thriving throughout this time of uncertainty. The report highlights different aspects of remote work including the importance of digitizing workflows, utilizing virtual meetings and video conferencing, and managing expectations.

Although it is very possible to implement a successful remote working environment, there are additional risks that are inherent in having employees working remotely. Directors must consider how to protect against increased cybersecurity risks, such as phishing attacks because an attack has the potential to lead to notable issues including financial and reputational damage. It can be a valuable exercise to review the corporation's cybersecurity policies and controls and consider how they may need to be supplemented in light of the number of employees working from home. The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA") is monitoring developments associated with COVID-19 and has released [guidance](#)[10] on the potential risk areas and provides different ways to ensure a corporation is protected against

cyberattacks. CISA recently released an [alert](#)^[11] reminding individuals to be aware of cybersecurity risks and included certain precautions to take to avoid falling victim to scams. Directors and management teams should consider whether to issue a similar alert to its workforce, to the extent that it hasn't already.

- **Employee Pay and Medical Leave.**

Many measures have been put in place to protect employees throughout the COVID-19 pandemic. One such protection directors should be aware of is that, among other things, effective as of April 1, 2020, the [Families First Coronavirus Response Act](#)^[12] (the "FFCRA") requires certain employers to provide their employees with paid sick leave and extended family and medical leave for reasons related to COVID-19. Employers who are covered under the FFCRA must provide their employees up to two weeks of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage paid based on certain standards described in the following [advisory](#).^[13] The impacted corporations may, however, be able to take advantage of two new refundable payroll tax credits, which are designed to immediately and fully reimburse them for the cost of providing COVID-19-related leave to their employees. To learn more about the FFCRA and the related tax credits, please see the U.S. Department of Labor guidance on both [here](#).^[14] Even if the FFCRA does not apply to your corporation, directors should make themselves aware of state-specific wage and hour requirements as they determine how to handle paying employees who may be out of work (voluntarily or involuntarily) because of COVID-19.

There are a wide variety of concerns corporations are facing with respect to their employees, and the topics discussed above only touch on some of the questions corporations and their directors may have. To watch an in-depth webinar presentation from the Goulston & Storrs employment law team exploring commonly asked questions, including some of the topics discussed above, please visit [here](#).^[15]

1. **Business Operations: Managing the inevitable changes to your corporation's day-to-day operations.**

Directors need to be at the forefront of assessing, identifying and managing risk areas for their corporations' operations and viability. As described in more detail above, directors are responsible for making a good faith effort to implement an oversight system and then to monitor the system as circumstances change.

- **Business Continuity and Supply Chain Disruptions.**

One question directors should consider is whether their corporation has an emergency and business continuity plan in place, and if so, whether the plan is sufficient. For example, will the COVID-19 virus's grip on the world disrupt the corporation's supply chain? If so, will the disruption impede the corporation from meeting certain of its contractual obligations? There are a number of commercial and contract law implications of the pandemic and many corporations will be looking for a way to be released from contractual obligations. Some of these ways include the concepts of force majeure, impossibility, impracticability, and frustration of purpose. Similarly, of particular interest to many is the ways in which a force majeure clause may be interpreted to excuse obligations. An overview presented by Goulston & Storrs of the things to know about force majeure, including the

ways in which the clause which has otherwise been known as “boilerplate” is now being treated and key drafting tips, can be found in this [article](#)[16] and in this [webinar](#)[17].

- **Interruption Insurance.**

In addition to looking for ways to excuse contractual obligations, directors and corporation’s management teams may also look to insurers for relief. Whether or not your corporation’s insurance policies will provide coverage for the disruption caused by the COVID-19 pandemic depends on the terms of the policies. Directors should oversee their management’s review of the policies to determine whether any relief is available. However, directors should be aware that insurance is not the solution to the problem. An in-depth explanation prepared by Goulston & Storrs as to why it is not the solution and what you should be doing instead is [here](#)[18].

1. **Potential Financial Support Options: Your corporation may be eligible to take advantage of certain assistance programs.**

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) is designed to provide relief from the hardships associated with the COVID-19 pandemic to small businesses, nonprofits, sole practitioners, corporations, and individuals. A detailed summary prepared by Goulston & Storrs outlining the main provisions of the CARES Act and the available resources it provides can be found [here](#)[19].

One of the main focuses of the CARES Act is to provide financial assistance to help businesses keep workers on the payroll during the physical and economic shutdown. The financial assistance provisions include the [Paycheck Protection Program](#)[20] (“PPP”) which provides loans to eligible entities to cover the costs of payroll, benefits, rent, utilities, mortgage interest, and other obligations, provided that certain conditions are met. The Department of the Treasury and the U.S. Small Business Administration (“SBA”) released a [sample application](#)[21] form for the PPP and related guidance[22]. The SBA is currently accepting PPP loan applications on a first-come, first-served basis so time is of the essence.

The SBA is committed to helping bring relief to small businesses and nonprofit organizations impacted by the COVID-19 pandemic. The SBA’s website allows corporations to search for local assistance with the following [tool](#).[23]

[1] In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

[2] 212 A. 3d 805 (2019).

[3] Ibid, 809.

[4] Ibid, 821.

[5] <https://www.nacdonline.org/files/Coronavirus%20Checklist%2017x11.pdf>

[6] <https://www.nacdonline.org/files/NACD%20Nominating%20and%20Governance%20Committee%20AC%20Brief%20Communicating%20in%20Times%20of%20Crisis.pdf>

[7] <https://www.cdc.gov/coronavirus/2019-ncov/index.html>

[8] <https://www.osha.gov/SLTC/covid-19/controlprevention.html>

- [9] <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/ways-of-working-to-sustain-and-thrive-in-uncertain-times.html>
- [10] <https://www.cisa.gov/coronavirus>
- [11] <https://www.us-cert.gov/ncas/current-activity/2020/03/06/defending-against-covid-19-cyber-scams>
- [12] <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>
- [13] https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- [14] <https://www.dol.gov/newsroom/releases/osec/osec20200320>
- [15] https://goulstonstorrs.zoom.us/rec/share/24t5PvbTqIJJEs_E7WTbXKgZILn9eaa8hHcc-_ZfxEsQQuJz1wt8dgYUxPvIhOB4
- [16] <https://www.goulstonstorrs.com/covid-19-knowledge-resources/advisories/ten-things-you-need-to-know-about-force-majeure-now/>
- [17] <https://vimeo.com/403114608>
- [18] <https://www.goulstonstorrs.com/covid-19-knowledge-resources/advisories/no-insurance-is-not-the-solution-to-the-problem/>
- [19] <https://www.goulstonstorrs.com/covid-19-knowledge-resources/advisories/summary-of-cares-act/>
- [20] <https://www.goulstonstorrs.com/covid-19-knowledge-resources/advisories/treasury-sba-release-ppp-sample-application-form-related-guidance/>
- [21] <https://home.treasury.gov/policy-issues/top-priorities/cares-act/assistance-for-small-businesses>
- [22] <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program-ppp>
- [23] <https://www.sba.gov/local-assistance/find/>