

Guidance Note – Directors:

Appointment, Termination and So

This Guidance Note provides an overview of the role of a director within a private company and looks in particular at the process for appointing and removing a director.

Introduction

A company acts through two groups of people: its shareholders and its board of directors. The general role of directors is to manage the company for the benefit of the shareholders. Although a company is a separate legal entity, it can only act through those authorised for that purpose, usually its directors.

The directors are basically the agents of the company for its day to day affairs. Directors have the ultimate decision-making authority for the company but not necessarily employ staff. The effectiveness of a company's management and its long term success is critical to its long term success. Their appointment and role must be understood by any new business.

Types of Directors

All companies are required to have at least one director (a public company must have two). This is because companies are "artificial" legal entities that can only act through other persons. A company's directors are the persons to whom the law looks to manage the affairs of a company on behalf of the shareholders (in the case of small private companies with only one or two shareholders, the director and shareholder is in fact the same person). The law does make a distinction between the role of an owner of a company and a director who manages the company.

The term "director" is not actually defined in the Companies Act 2006. Section 250 states that the term, "director", includes, "any person in whatever name called". Therefore any person exercising the role of a director in relation to a company (whether or not they are formally appointed as a director) will be regarded as a director.

Whilst the Companies Act 2006 does not define the term "director", here are some of the more common types of directors:-

Executive and Non-executive – 'Executive directors' are not terms derived from the Companies Act 2006.

However, the term 'executive director' is used to refer to those who are involved in the day-to-day running of the company, and who directs its affairs. In contrast, the term 'non-executive director' is used to refer to those who do not act in an advisory function.

Executive Directors perform operational functions such as managing the company's day-to-day running, people, looking after assets, hiring and firing staff, etc. Executive Directors will

of a director within a private company (including sole directors), as well as the process for appointing and removing a director.

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be paid a salary, so they are protected as you earn) system.

Non-executive directors do not get involved in the day-to-day running of the business. They use their experience and expertise to provide advice and objectivity, and they usually have a role in monitoring executive management. They may be employed by the business but more likely they will be treated as self-employed and contract for services. Non-executive directors usually work part-time, attending meetings and providing mentoring or strategic capacity.

Shadow – Under the Companies Act 2006, a shadow director is defined as “a person in accordance with whose directions or instructions the directors of the company are accustomed to act.” Therefore even a person not formally appointed as a director might be deemed a director if they exercise influence over the company. Note that following on from the Enterprise & Employment Bill 2014, it is expected that legislation will be introduced to put shadow directors under the same duties as individual directors.

Corporate – The Companies Act 2006 requires that at least one director is a natural person. However, it is proposed going forward that legislation will be introduced (following the Enterprise & Employment Bill 2014) to prohibit corporate directorships with limited liability companies. It is therefore suggested that new companies think carefully before introducing corporate directors, and existing companies think whether this is something that they should try to phase out.

Associate – An associate director is defined in the Companies Act 2006. Generally the term is used to cover a director who is not a director in their own right but is appointed to the role. The letter appointing them should clearly state that they are not a director, and they must not hold themselves out as directors in their dealings with the company.

Alternate - A company's articles may allow a director to appoint an alternate to represent them when they are unable to perform their duties as directors. Note that the Companies Act 2006 do not give directors the right to appoint alternates. A company's articles may not appoint alternates. A company's articles may provide for alternates if they are deemed to be likely to be necessary.

Our sub-folder on [non-executive, alternate and shadow directors](#) has the documents to appoint these categories of directors in letter and template form.

Number of Directors and Sole Director

It is common for small private companies to have one director, and sometimes that person will also be the only shareholder (called a sole director or sole shareholder).

The sole director must be a natural person, and not a company.

As stated above, it is important to remember that a company is a distinct legal entity to its owner. The company can enter into contracts, sue and be sued. The fact that the company is a separate legal entity from its owner is that all the company's liabilities are the responsibility of the company - not the shareholder(s).

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The only exception is if a director of guarantee to repay the company's debt if the company is not able to.

Is a Sole Director permitted by the Act?

A company can have a sole director by the 2006 Model Articles recognise this, by nothing in the articles requires it to have decisions without regard to anything in other words, the sole director can ignore unanimous decisions of directors).

If the articles of association are based on directors are required, and the article resolution (held in a general meeting of the company could adopt new articles Articles.

Other issues for Sole Directors

A sole director is subject to the same advantage of being a sole director is the board of directors. There is no need decision making. Sole directors are not decisions of a sole director must still be governance to keep records of decisions ([CO.CA.MM.02](#))).

First meeting of the sole director: director will need to make a number of his or her requirements. The issues a shelf (whether there is to be one director appropriate), appointment of company adopting new articles etc.

Conflicts of interest: the Companies coverage of conflicts of interest. Sole contract to themselves or to anyone else

Where a limited company has only one enter into a contract with that person, memorandum or recorded in the minutes the contract.

Executing documents: a disadvantage a document on behalf of the company deed can also be validly executed by signs).

Employers' liability insurance: if a purchase employers' liability insurance

bank or other creditor a personal times personally liable to repay the

by the Articles of Association. The company has only one director, and or, then the sole director may take decision making by directors (in articles that refer to majorities and

es Act 1985), a minimum of two ended by a shareholders' special to reduce that number to one, OR s the Companies Act 2006 Model

any other director. However, the rate in a more flexible way than a s, or to obtain consensus in any es of any meetings (although the s also a matter of good corporate [articles – resolution of sole director](#)

purchased 'off the shelf', the sole t in order to tailor the company to any company purchased off-the-resignation of the first directors (if to be one), changing the name,

prevalence of sole directors in its to declare their interest in any

e sole director, the company can ttract must be set out in a written of director following the making of

r is that he or she cannot execute have his signature witnessed. A presence of a witness (who also

ees, it is required under law to his rule is that if the company has

only one employee, who owns 50 per cent of the company, and share capital, employers' liability insurance is not required.

An individual who works for the company for more than 12 weeks is counted as an employee for these purposes, even if they call themselves a director.

Salary and dividends: a sole director will be subject to PAYE and NI contributions (above certain thresholds). Dividends are not subject to tax (above certain thresholds). Advise on the best way to structure payments to the director.

Our sub-folder on [Paying Dividends](#) also contains information on the paying out of dividends.

Appointment of a Director

On incorporation of a new company, the directors (and secretaries, if any) who have consented to be named in the incorporation documents - and are named in the incorporation documents - will automatically become the first directors (and secretaries). The Registrar - will automatically enter the names of the directors (and secretaries) into the Register of Directors (and secretaries). See [Register of Directors' Residential Addresses](#).

Subsequently, the methods of appointing and removing directors are determined by the company's articles of association, which should be consulted. There are basically two ways to appoint a director of a company:

- appointment by the board of directors (See: [Board Minutes – Appointment of Directors \(CO.DAR.04\)](#)); or
- appointment by the shareholders, to be passed as a resolution (See: [Shareholders' Ordinary Resolution – Appointment of Directors \(CO.DAR.05\)](#)).

The appointment of a director must be recorded in the company's minutes. Form AP01 (for an individual) or Form AP02 (for a corporate entity). (See: [Companies House Forms – Appointment of a Director \(CH01\)](#)).

Companies Incorporated prior to 1st October 2009

Unless they have adopted new articles, companies incorporated prior to 1st October 2009 will have articles based on the old Table A.

Table A requires the directors to retire and be replaced at a General Meeting under articles 73-80. This process is outside the scope of this guidance note.

New Director - Checklist of Practical Steps

1.	Organise approval of necessary documents by the board of directors (or by the shareholders if the company has only one director).
2.	Prepare a service contract for the director (if applicable).

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1.	Organise approval of necessary documents by the board of directors (or by the shareholders if the company has only one director).
2.	Prepare a service contract for the director (if applicable).

3.	File form AP01/AP02 with Companies House within 14 days of the appointment.
4.	Update the Register of Directors.
5.	Amend the bank mandate(s), if appropriate.
6.	Check the directors' and officers' insurance policy covers new appointees.

Directors' Service Contracts

Being a director does not, of itself, make that person an employee of the company. A directorship is an office, not necessarily an employment. If, however, the company enters into a service contract with the director, the terms of which make the director an employee, then the director becomes an employee. Many company directors are in this position. In these circumstances, relevant aspects of employment law (including statutory protection as to unfair dismissal and redundancy) apply in addition to the law relating to directors.

Most executive directors will be employees of the company however most non-executive directors will not. Non-executives will have a contract for services which is *not* an employment contract.

Simply-docs offers four Director's Service Contracts. There are two fixed salary contracts (one with 'payment in lieu of notice' or 'PILON' provisions, and one without PILON provisions), and there are two contracts containing bonus share option provisions (again one with and one without PILON provisions). These are intended to be used by executive directors who are employed. See [Directors' Service Contracts](#).

Duration of Directors' Service Contracts

Under section 188 of the Companies Act 2006, Directors' Service Contracts with a guaranteed term, which is (or may be) longer than 2 years, must be approved in advance by an ordinary resolution of the shareholders of the company.

Determining the length of the guaranteed period is subject to complex rules. The guaranteed term of a director's employment is either:

- (a) the period during which the director's employment continues (whether under the original agreement or a new agreement pursuant to the original agreement), and it cannot be terminated by the company by notice, or it can be terminated only in specified circumstances, or
- (b) in the case of employment which can be terminated by the company by notice, the guaranteed term is the period of notice required to be given.

If the employment has a period within paragraph (a) and a period within paragraph (b), the aggregate of those periods will be the guaranteed term.

If the company enters into a further service contract more than six months before the end of the guaranteed term of a director's employment (except where the original contract gives the other

party that right), then the unexpired period will be added to the guaranteed term of the contract.

How to Obtain Shareholder Approval of Director's Contracts

Where the proposed director's contract is for longer than two years, a general meeting must be convened (or a written resolution must be passed) to vote on the proposed contract. Prior to the meeting, shareholders must be provided with a copy of the proposed contract.

Inspection of Directors' Service Contracts

A copy of every Director's Service Contract must be made available for inspection under section 228 of the Companies Act 2006 ('single alternative inspection location').

Shareholders are entitled to request a copy of the contract.

The copies must be retained by the company until the date of termination or expiry of the Service Contract.

Tax Status of Company Directors

HMRC requires directors to complete a Self Assessment tax return and is classed as 'office holders' for the purpose of National Insurance Contributions (NICs). An office holder's earnings are automatically subject to Class 1 NICs. There is also a liability for Class 1 NICs.

The rules for calculating NICs for directors are the same as for other employees. Class 1 NICs must still be paid on earnings over the primary threshold, but unlike employees, directors are taxed on their earnings for the year. This means that their NICs have to be recalculated every time they are paid. For more detail in relation to this on HMRC's website.

Termination of Appointment of Directors

General Position

A director who is a full time employee of the company is also a senior employee of the company. The contract of employment will be governed by his service agreement.

Secondly, as a director, he is an office holder. His appointment is governed by the articles of association and his duties as director are governed by the Companies Act 2006. He also has fiduciary duties imposed on a director by the common law.

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Termination of employment: if the agreement, the options for termination. Sometimes the service agreement will include a clause stating that either party can terminate the agreement on certain provisions, if the director has been employed for a certain period. For new employees who start work with the company on or after 1 April 2012, the company must have a fair reason for dismissal, and must act reasonably.

Even if the director has been employed on a permanent (open-ended) basis, the expiry of that agreement without renewal constitutes a dismissal for purposes of the 'statutory redundancy payment' provision, it cannot be used to terminate the agreement, and the employer will become liable for loss of office compensation until the end of the fixed term.

Automatic Termination of Directorship

The Model Articles (Article 18) and the company's articles of association specify circumstances in which a director's appointment will terminate automatically.

These circumstances include:

- the director is disqualified from being a director under the Companies Act 2006;
- the director is bankrupt;
- a composition being made with the director's creditors;
- the director is admitted to hospital in pursuance of a medical treatment order under the Mental Health Act 1983 (Table A of the Model Articles only);
- where a registered medical practitioner gives a written opinion to the company stating that the director is incapable of acting as a director for more than three months (Model Articles only);
- a court makes an order that wholly or partly prevents that person from acting as a director, or that the person would otherwise have been disqualified from acting as a director (Model Articles only); or
- the director resigns.

Resignation

A director may tender his resignation, and the company should be convened to accept the resignation (See: [Board Minute – Resignation](#) (CO.DAR.07)).

The director's letter of resignation should state that the director has no claim for compensation for loss of office against the company (CO.DAR.08)). The letter should be properly recorded in the minutes of the meeting for loss of office, this should be properly recorded in the minutes of the meeting.

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or six consecutive months without the director's written consent that his office be vacated (Table A of the Model Articles only);

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The termination of a director's appointment must be made at Companies House within 14 days using Form TM01, (See: [Companies House Guidance Note Appointment of Director \(CO.DAR.09\)](#))).

Procedure for Replacement/Removal of Directors

By passing an ordinary resolution at a general meeting *before* the expiry of his term of office. The procedure is found in Sections 168 and 169 of the Companies Act 2006.

This shareholders' right takes precedence over any director's service agreement, or any other contract, which endeavours to restrict the company's Articles, which endeavour to restrict the company's Articles.

The shareholders' ordinary resolution must be given to both the director concerned and the company at the meeting where the shareholders will vote on the resolution.

A shareholders' written resolution cannot be used to remove a director from office.

A shareholder or shareholders wishing to remove a director should follow the steps laid out below. This mechanism is most often used where the board of directors does not support the removal of a director. The shareholder will request a general meeting of the shareholders, which will then vote to remove / replace the director.

The board is then obliged to convene a general meeting at which the resolution to remove the director will be put to a vote of the shareholders.

This method can be used to remove a director if the articles of association do not otherwise provide for the removal of a director by ordinary resolution of the shareholders.

Step 1 - Shareholders require the directors to call a general meeting

The directors are required to call a general meeting if shareholders with voting rights holding 10% of the paid-up capital (unless it has been 12 months since the last meeting where shareholders have exercised their right to circulate resolutions) have requested them to do so in advance, in which case the required notice must be given.

This means that if the shareholder wishes to remove a director, they must find other shareholders who are prepared to join the request until the required percentage of the paid-up capital of the company is reached.

The notice:

- must state the general nature of the business to be dealt with at the meeting;
- should include the text of the resolution to remove the director which is to be moved at the meeting;
- may be in hard copy form or by electronic means;
- must be authenticated by the shareholder(s) submitting it.

(See: [Shareholder Notice – Replacement/Removal of Director \(CO.DAR.10\)](#))).

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Step 2 - The directors must hold a board meeting

The directors must hold a board meeting to pass an ordinary resolution(s), and to call a general meeting to be held. If the directors fail to call a general meeting, the shareholders may hold one at the expense of the company within three months of the date when the directors should have done so. (See: [Minutes – Replacement/Removal of Directors](#) (CO.CA.DIR.07)).

Step 3 – A copy of the shareholders' notice must be sent immediately to the director concerned

A copy of the shareholders' notice must be sent to the director concerned immediately because he or she will be entitled to be heard at the meeting, regardless of whether the director is a shareholder or not.

The director concerned may also make representations to the company. Provided that they are a reasonable length, the directors must ensure that the representations are notified of the representations to the company. The company must send a copy of the representations to the shareholders. If the 'Special Notice of General Meeting' has already been sent out, the company must send out the statements of representations separately.

Step 4 - Special notice must be given to the shareholders

The shareholders should receive the terms of the ordinary resolution(s) at the same time as they receive notice of the meeting. (See: [Special Notice of General Meeting](#) (CO.DAR.11)).

Step 5 - General meeting of the company

A general meeting of the shareholders must be held to pass an ordinary resolution(s).

As specified in step 3 above, the director's representations have not been received or because the company failed to do so. The representations must be read out at the meeting (in addition to the ordinary resolution(s)).

If the director is removed at the general meeting, the director's entitlement to compensation and damages is not affected simply because they were received too late. (See: [General Meeting Minutes – Replacement or Removal of a Director](#) (CO.DAR.12)).

Step 6 - The board of directors must hold a board meeting

Following the general meeting, the directors must hold a board meeting to acknowledge that the ordinary resolution has been passed and to call a general meeting to make the necessary filings at Companies House.

Where a director is appointed at the general meeting to replace an existing director, he or she is treated as having been appointed on the day on which the general meeting was convened to remove an existing director on the day on which the general meeting was convened to remove an existing director.

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holders' request and the proposed ordinary resolution(s) will be passed. The shareholders who requested the general meeting must ensure that it takes place within three months of the date when the directors should have done so. (See: [Board Minutes](#) (CO.CA.DIR.07)).

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he or she is due to retire).

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vacancy can be filled as a casual vacancy
or she must also be replaced at the same time.
2006 requirement that all private companies
be natural persons, not corporations.

Step 7 – Filing with Companies House

1. Form TM01, which records the removal
and (if applicable) Form AP01, which appoints
Companies House, along with the minutes of the
shareholder's meeting. (See: [Removal/Replacement of Director](#) (CO.CA.DIR.22)).

the purposes of determining when

at the general meeting, then the
a sole director is removed, then he
to comply with the Companies Act
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[Companies House - Removal/Replacement of](#)