

Guidance for the removal of a director from office under section 168 of the Companies Act 2006

Guidance for the removal of a director from office under section 168 of the Companies Act 2006

In many companies, the power to remove a director is granted to the board of directors or to a majority shareholder. For these companies, removing a director is a straightforward matter, usually requiring the board or majority shareholder to pass a resolution on the director in question.

In many companies, the power to remove a director is granted to the board of directors or to a majority shareholder. For these companies, removing a director is a straightforward matter, usually requiring the board or majority shareholder to pass a resolution on the director in question.

However, the powers granted under the Companies Act 2006 provide additional mechanisms for removing a director. These mechanisms cannot exclude a shareholder's statutory right to remove a director. The Companies Act 2006 provides a statutory procedure to allow shareholders to remove a director by passing an ordinary resolution at a general meeting of the company. **This guidance will focus on this statutory procedure to remove a director.**

However, the powers granted under the Companies Act 2006 provide additional mechanisms for removing a director. These mechanisms cannot exclude a shareholder's statutory right to remove a director. The Companies Act 2006 provides a statutory procedure to allow shareholders to remove a director by passing an ordinary resolution at a general meeting of the company. **This guidance will focus on this statutory procedure to remove a director.**

Note that a director may also be removed from office under a service contract and whilst the procedure under the Companies Act 2006 is in place, any agreement in place, removal from office may amount to constructive dismissal therefore of the former director bringing a claim for wrongful and/or unfair dismissal. In these circumstances, legal advice may need to be sought in relation to the director's claim.

Note that a director may also be removed from office under a service contract and whilst the procedure under the Companies Act 2006 is in place, any agreement in place, removal from office may amount to constructive dismissal therefore of the former director bringing a claim for wrongful and/or unfair dismissal. In these circumstances, legal advice may need to be sought in relation to the director's claim.

The Statutory Procedure

If the members of a company wish to remove a director from office, the statutory procedure is set out under sections 168 and 169 of the Companies Act 2006. Section 168 concerns the right to remove a director from office by ordinary resolution at a general meeting of the company and section 169 concerns the director's right to protest against such removal.

If the members of a company wish to remove a director from office, the statutory procedure is set out under sections 168 and 169 of the Companies Act 2006. Section 168 concerns the right to remove a director from office by ordinary resolution at a general meeting of the company and section 169 concerns the director's right to protest against such removal.

A shareholder wishing to remove a director from office using this mechanism is most often applying for a resolution at a general meeting of the company, in which case the shareholder will need to request a general meeting of the company to remove/replace the director in question.

A shareholder wishing to remove a director from office using this mechanism is most often applying for a resolution at a general meeting of the company, in which case the shareholder will need to request a general meeting of the company to remove/replace the director in question.

1. Shareholders can require the directors to call a general meeting by giving special notice of the proposed resolution

1. Shareholders can require the directors to call a general meeting by giving special notice of the proposed resolution

The directors are only required to call a general meeting once the company has received a request from shareholders holding at least the required percentage of the company's shares.

The directors are only required to call a general meeting once the company has received a request from shareholders holding at least the required percentage of the company's shares.

Shareholders with 5% of the company's shares can require the directors to call a general meeting (s.303 Companies Act 2006).

Shareholders with 5% of the company's shares can require the directors to call a general meeting (s.303 Companies Act 2006).

This means that if the shareholder does not individually hold the required 5% of the company's shares, he/she must find other shareholders who together hold the required 5%.

This means that if the shareholder does not individually hold the required 5% of the company's shares, he/she must find other shareholders who together hold the required 5%.

Special notice of 28 clear days must be given to the director must be given to the relevant shareholder(s). Note that special notice is also required under section 168 to appoint somebody instead of the director which he/she is expected to be removed.

A resolution requiring special notice under the Companies Act 2006 to remove the director (and possibly appoint a new director) must be given to the company by the shareholder(s) who propose the resolution in the special notice. The company must then give its members notice of the proposed resolution in the special notice at the same time as it gives notice of the general meeting. If this is not practicable, the company must give members notice at least 14 days before the meeting by any other means set out in the company's articles. Section 312(4) of the Companies Act 2006 provides that if the special notice has been given, the notice of the general meeting is deemed to have been given in the time frame required.

The request to call a general meeting must:

- must state the general meeting is to be dealt with at the meeting;
- should include the resolution to remove the director which is intended to be made;
- may be in hard copy or electronic form; and
- must be authenticated by the person(s) making it.

2. Notice must be sent to the director and the company in writing to the company provided the director concerned (section 169(1) of the Companies Act 2006).

On receipt of the special notice, the company must send a copy of the notice to the director concerned (section 169(1) of the Companies Act 2006).

The director then has a right to make representations against removal before the general meeting is held.

The director concerned may make representations if they are of a "reasonable belief" that the director is abusing his or her position. The director concerned may then apply to court for an injunction to prevent the removal. If the director concerned believes that the director is abusing his or her position, the company must seek to prevent the removal by making representations at the general meeting.

If the company is required to call a general meeting and the special notice is received too late and there is not sufficient time to call a general meeting, the company must still call a general meeting and send a copy of the special notice to the members of the company before the general meeting. If the company does not do so or due to the director's representations are read out at the general meeting.

¹ Clear days means that the day on which the notice is given is excluded from the notice period calculation.

resolution intending to remove the relevant shareholder(s). Note that special notice is also required under section 168 to appoint somebody instead of the director which he/she is expected to be removed.

A resolution requiring special notice under the Companies Act 2006 to remove the director (and possibly appoint a new director) must be given to the company by the shareholder(s) who propose the resolution in the special notice. The company must then give its members notice of the proposed resolution in the special notice at the same time as it gives notice of the general meeting. If this is not practicable, the company must give members notice at least 14 days before the meeting by any other means set out in the company's articles. Section 312(4) of the Companies Act 2006 provides that if the special notice has been given, the notice of the general meeting is deemed to have been given in the time frame required.

The request to call a general meeting must:

- must state the general meeting is to be dealt with at the meeting;
- should include the resolution to remove the director which is intended to be made;
- may be in hard copy or electronic form; and
- must be authenticated by the person(s) making it.

2. Notice must be sent to the director and the company in writing to the company provided the director concerned (section 169(1) of the Companies Act 2006).

On receipt of the special notice, the company must send a copy of the notice to the director concerned (section 169(1) of the Companies Act 2006).

The director then has a right to make representations against removal before the general meeting is held.

The director concerned may make representations if they are of a "reasonable belief" that the director is abusing his or her position. The director concerned may then apply to court for an injunction to prevent the removal. If the director concerned believes that the director is abusing his or her position, the company must seek to prevent the removal by making representations at the general meeting.

If the company is required to call a general meeting and the special notice is received too late and there is not sufficient time to call a general meeting, the company must still call a general meeting and send a copy of the special notice to the members of the company before the general meeting. If the company does not do so or due to the director's representations are read out at the general meeting.

¹ Clear days means that the day on which the notice is given is excluded from the notice period calculation.

3. The Directors must call a

The directors should hold a general meeting on the basis of special notice and the proposed resolution(s), and then must call a general meeting at which the ordinary resolution(s) may be moved. The procedure for convening the general meeting is set out in the Companies Act 2006.

The written resolution procedure is only available for a private limited company to pass an ordinary resolution and must be passed at a general meeting.

4. General Meeting of the Company

The general meeting must be called to pass an ordinary resolution(s).

As specified in step 2 above, the resolution(s) may be heard at the meeting.

The resolutions are ordinary resolutions and require a simple majority of those present at the meeting.

If the director is removed, then his or her entitlement to compensation and damages may be claimed in this way.

5. The Directors may choose to hold a second meeting

Following the general meeting, the directors may choose to hold a second board meeting to consider any ordinary resolution(s) that have been passed and make the necessary arrangements.

A director appointed at the general meeting is treated as if he or she had been appointed on the day on which the director he or she replaced was removed. This is for the purposes of determining when he or she is entitled to compensation and damages as stated above, a person appointed to fill the vacancy arising from the removal of the director at the general meeting must be appointed by special notice of the resolution to appoint the new director has to be given.

If a director is not appointed to fill the vacancy arising from the removal of the director at the general meeting, then the vacancy can be filled by the directors. Please note that if a sole director is removed, then he or she must be replaced at the same meeting in order to comply with the Companies Act 2006. It is important to note that all private companies must have at least one director.

6. Conflict with Articles

The statutory procedure for removing a director even if a company's articles of association contain provisions that purport to exclude the relevant provisions of the Companies Act 2006. The articles cannot exclude a shareholder's right to remove a director.

7. Bushell v Faith clause

In respect of point 6 above, the statutory mechanisms built into the articles of association to protect the rights of shareholders to remove a director. The case of Bushell v Faith

S

A

M

P

L

E

consider the request set out in the resolution(s), and then must call a general meeting at which the ordinary resolution(s) may be moved. The procedure for convening the general meeting is set out in the Companies Act 2006.

The written resolution procedure is only available for a private limited company to pass an ordinary resolution and must be passed at a general meeting.

ordinary resolution(s).

may be heard at the meeting.

before require a simple majority of those present at the meeting.

g, then his or her entitlement to compensation and damages may be claimed because they have been removed.

General Meeting

Following the general meeting, the directors may choose to hold a second board meeting to consider any ordinary resolution(s) that have been passed and make the necessary arrangements.

A director appointed at the general meeting is treated as if he or she had been appointed on the day on which the director he or she replaced was removed. This is for the purposes of determining when he or she is entitled to compensation and damages as stated above, a person appointed to fill the vacancy arising from the removal of the director at the general meeting must be appointed by special notice of the resolution to appoint the new director has to be given.

r removed at the general meeting, then the vacancy can be filled by the directors. Please note that if a sole director is removed, then he or she must be replaced at the same meeting in order to comply with the Companies Act 2006. It is important to note that all private companies must have at least one director.

a director even if a company's articles of association contain provisions that purport to exclude the relevant provisions of the Companies Act 2006. The articles cannot exclude a shareholder's right to remove a director.

mechanisms built into the articles of association to protect the rights of shareholders to remove a director. The case of Bushell v Faith

established that a clause was not valid for the director whose removal was proposed. The Companies Act 2006 has not sought to change this. Companies need to consider whether to include such a clause in their articles.

A shareholders' agreement may be used to protect directors/shareholders from removal. A term of such an agreement is that the parties agree not to use their voting rights to remove one another from office.

If a director is a shareholder, removal of itself be unfairly prejudicial. This is prohibited by section 994 of the Companies Act 2006.

8. Compensation for loss of office

The director (whether a shareholder or not) may have a service contract. Whilst this will not prevent the director from being removed, it may provide compensation if he/she is removed. The provisions of the service contract may or may not be sufficient to discourage removal. It is not possible to remove the director in the first place.

9. Notification to Companies House

Companies House must be notified of the date the director is removed from office on form TM01.

Companies need to consider whether to include such a clause in their articles.

A shareholders' agreement may be used to protect directors/shareholders from removal. A term of such an agreement is that the parties agree not to use their voting rights to remove one another from office.

If a director is a shareholder, removal of itself be unfairly prejudicial. This is prohibited by section 994 of the Companies Act 2006.

The director (whether a shareholder or not) may have a service contract. Whilst this will not prevent the director from being removed, it may provide compensation if he/she is removed. The provisions of the service contract may or may not be sufficient to discourage removal. It is not possible to remove the director in the first place.

Companies House must be notified of the date the director is removed from office on form TM01.