

Directors and officers need to stay focused and diligent during COVID-19 health emergency

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With the COVID-19 health emergency continuing for a least another month in Ontario and non-essential businesses remaining closed, directors and officers must continue to remain focused of their duties and to protect the companies they serve as a director or officer and themselves from potential liability.

Proper Discharge of Fiduciary Duties by Directors and Officers

While the COVID-19 crisis is unprecedented, Canadian law is well established in requiring directors and officers to properly discharge their fiduciary duties to act in good faith and honestly *vis-a-vis* their corporation and to make reasonable business decisions in light of all the circumstances. If they do not do so, then they will be exposed to potential claims from disgruntled shareholders who may have suffered significant losses while stock prices plunged at the outset of the global pandemic, and potentially other failed actions by the directors and officers during the pandemic.

Financial Reporting to Shareholders

For example, the adequacy and accuracy of a corporation's financial reporting to its shareholders might suddenly come under greater scrutiny as investors who may have lost significant sums of money explore securities class action lawsuits and contemplate seeking remedies against directors and officers personally. Securities regulatory authorities have extended deadlines for both filing of financial disclosure and holding annual meetings but there are certain criteria such as issuing a press release if a company will be delaying its financial reporting that must be met.

Accordingly, directors and officers ought to be doing as much as reasonably possible to keep shareholders informed about how the current emergency and government announcements are impacting their respective businesses and avoid making any kind of material misrepresentations or for publicly listed issuers, a failure to file a material change report where required when a significant change has been experienced due to the pandemic.

Failure to Pay Statutory Deductions, HST/GST and Other Similar Payments

On 18 March 2020, the Government of Canada announced reductions in payroll tax remittances by employers and deferrals of HST/GST and customs duty remittances until 30 June 2020. Provincial governments have also announced similar tax relief /deferral measures.

While these tax relief measures are welcome relief to many businesses, many of the relief measures announced by the Government of Canada, the provinces and municipalities primarily include a deferral of taxes and not a permanent reduction in taxes. This distinction between deferral of tax and reduction of tax is particularly germane to directors and officers of companies.

Various statutes, including the *Income Tax Act* (Canada) with respect to statutory deductions and remittances for income tax from payroll and other associated payroll taxes, such as CPP premiums, employment insurance premiums collected and remitted by Canada Revenue Agency (CRA) and the *Excise Tax Act* (HST and GST) with respect to HST, GST and customs duties impose personal liability on the directors of a company for the failure of their companies to make those deductions and remittances to government. The personal liability also attaches to all such remittances owed to the applicable provincial government. Given the multiple government announcements that have been made to protect businesses and individuals, directors and officers must stay focused on ensuring that any deductions and remittances that must be made are still paid on time (where no deferral is permitted) and that any deferred payments are remitted by the

deferred due date. More importantly, directors and officers must be diligent in ensuring that any and all such amounts (including any deferred amounts) are not used for other business purposes or misapplied. Notwithstanding any government relief relating to deferral of tax, directors and officers should ensure that any deferred payments can be paid, and need to diligently safeguard and take appropriate steps to ensure that any government programs are not be abused in any manner whatsoever because of the severe consequences and personal liability that can result from non-compliance. It is also important to be aware that personal liability incurred by a director and officer for statutory remittances and certain other debts or liabilities of the company on which they serve is not extinguished on the bankruptcy, insolvency or other liquidation event of the company.

Directors and Officers Insurance Coverage and Exclusions

In addition, even though many directors and officers are typically safeguarded under private directors and officers liability policies against personal liability for debts and liabilities of the company on which they serve, there is no guaranty that a policy will respond to all potential claims. Like any other insurance, directors and officers liability policies contain a multitude of exclusion clauses, including, in general, exclusions for misconduct and deliberate acts and violations of statutory requirements. A breach of the law, including failure to pay taxes as and when required under the various tax statutes, absent a due diligence defence, is a common exclusion to such policies. While not all directors and officers liability policies are necessarily the same, given the personal liability of directors associated with a failure to remit federal and provincial payroll taxes, HST, GST and other remittances as and when required by CRA (as may be extended) it is prudent in this time of crisis to review coverage and exclusions.

Conclusion

Whether you are a director or officer of a public or a private company, it is important that you remain diligent about your responsibilities to the company, its stakeholders and relevant taxing authorities. Deferral of taxes does not mean forgiveness of taxes. You also need to be mindful of your personal liability for any such debts and liabilities. If there is non-compliance, directors and officers insurance may not protect you.

If you have any questions about your duties and responsibilities during the current COVID-19 health emergency or need some help with directors and officers liability insurance, our corporate team at Gardiner Roberts LLP is ready to provide their expert advice. Please contact the head of our corporate department, **Arlene O'Neill** or the head of our public securities practice group, **Kathleen Skerrett**, with any questions.

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