



## **Guidelines to avoid directors' liability**

In these uncertain times it is important for (de facto) directors to not only take care of the health of their employees and the continuity of their company, but also take into consideration their private position as a director to avoid being held personally liable. Without pretending to be exhaustive, below are some important guidelines we believe could be important to you as a (de facto) director.

## 1 Accounting

- The budgets and liquidity forecasts could be outdated. In view of all recent (market) developments, you cannot rely on these figures. Therefore, it is important to identify and list all short-term installment payments, prospective orders and foreseeable market developments as soon as possible.
- Pay attention when publishing the interim (monthly/quarterly) figures. When these figures are outdated, you may be held liable because you created a deceptive (financial) representation of your company.
- If your company has been granted a (bank) loan, we recommend you contact your lender and (if necessary) discuss the possibilities of suspending interest payments, and repayments and/or additional financing.
- Be sure to timely seek support from the Dutch government. If you do not timely apply for government support measures, you can be held accountable for not acting in the future. In connection with the corona crisis, various emergency support measures were taken by the Dutch government, such as Guarantee Enterprise Financing Regulation (GO), the Temporary Emergency Bridging Measure (NOW) and the possibility to apply for an exceptional suspension regarding the payment of tax liabilities.

## 2 Payments

- Do not enter into (payment) obligations which you might not be able to fulfil. Anticipate approximately one year ahead. When you have to enter into certain payment obligations be transparent about the financial situation of your company.
- Be very cautious with paying dividends to shareholders. Verify whether your company will still be able to pay its due debts after the contemplated dividend distribution(s).

- Be cautious with making (re)payments. For instance, with (re)payments under intercompany loans or other outstanding loans (which are not yet due) of directors or friendly relations. Avoid selective payments.
- Be critical of paying management fees. Are these proportional taking into account the current financial uncertainties?

## 3 Decision-making

- It is essential to record all of your decisions. Clearly record your considerations and decisions in the minutes of board meetings and board resolutions. Include foreseen market developments, any external advice and up-to-date liquidity forecasts in your decision making.
- Keep in touch with your stakeholders, such as your suppliers, employees and shareholders.

## 4 Administration

- Keep proper records of your company's rights and duties on hand.
- Your debtors might also face financial problems. To reduce the debtors' risk for your company, it is important that your debtors' administration is accurate.
- Be sure to timely prepare and publish your annual accounts with the Dutch Chamber of Commerce.

## 5 Insurance

- Check your directors' (and supervisory directors') liability insurance. Have all premiums been paid? Does your insurance provide sufficient coverage? In case of any doubt, it is recommended you carefully check all conditions.

## 6 Notification of the inability to pay

- If tax debts and/or (pension) premiums can no longer be paid, the management of the company is obliged to immediately report this to the Dutch Tax Authorities and/or the applicable industry-wide pension fund. Timely reporting is crucial to prevent that you, as director, will be held personally liable for these debts. Please note that the application for exceptional suspension of payment of tax liabilities (one of the Dutch governmental corona measures) does not automatically qualify as a notification of inability to pay. This should be done separately.

### What can HVG Law do for you

The new Coronavirus hits the Netherlands hard. We are ready to help you in meeting all challenges during these drastic and intense times. We understand what is happening to you and are involved. With practical advice and solutions we relieve you in legal matters.

### COVID-19 helpdesk

Our helpdesk can be reached via:  
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