NED Resource

Guide to Academy Trust Directors/Trustees Liabilities

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Academy Ambassadors
A NEW SCHOOLS NETWORK PROGRAMME

This guide is for trustees/non-executive directors of academy trusts, to help them understand their personal liabilities alongside the obligations which stem from being a public body/charitable organisation.

Under company law, the trustees/directors of an academy trust as company directors will have no personal liability for wrongdoing by the academy trust company if they act honestly, reasonably, in good faith, and within the scope of their duties.

As an academy trust is also a charity, the trustees/directors are subject to charity law. The directors will not incur personal liability as charity trustees as long as they act honestly, reasonably, lawfully, and in accordance with the trust's governing documents (the articles of association and decisions under these).

Directors will be personally liable as charity trustees if they commit a breach of trust which results in financial loss to the academy trust. As charity trustees are collectively responsible for running a charity, liability will usually be shared between all directors. Directors can be protected by "errors and omissions" insurance such as commercially available policies or the government's RPA scheme. However, this is unlikely to cover losses caused by an intentional or reckless breach of trust.

Trustees are prohibited from profiting from their trusteeship, and guidance on circumstances where this might occur (a conflict of interest) appears in the Department for Education Academies Financial Handbook.

Obligation to act independently and in the best interest of the company

Directors of any company are obliged to act in the best interests of the company, those best interests being determined by the **objects** of that company set out in its **articles of association**. Each director must act independently in the interests of the trust, regardless of the body which made the appointment. If a director acts in a way which the appointing body considers inappropriate, it is open to that body to remove them as a director, not to give instructions as to how to act as a director (which would make that appointing body a 'Shadow Director').

In an academy trust the objects relate to the operation of academies and an academy trust can only operate academies so long as it has the relevant funding agreement(s). Once an academy trust has entered into a funding agreement, to breach that agreement would jeopardise its ability to fulfil its objects as well as the solvency of the company. Consequently, it can never be in the interests of any academy trust to breach the terms of its Funding Agreement(s).

Potential personal liability

One of the main benefits of the limited company structure is that Members have limited liability.

The general rule is that a company incurs liability only for itself – to the outside world the company alone is responsible for its debts – its liability is limited to the assets it has, and in the case of an academy trust the £10 guarantee given by the trust's Members. Limited liability is a fundamental principle of companies, each Member is personally liable for up to £10 of their own money, but no more.

The limited exceptions which might allow a third party to pin liability on one or more directors share common factors: a lack of probity and/or "good faith". By following the rules in your trust's articles of association, your funding agreement(s) and the Academies Financial Handbook and taking professional advice, directors will avoid personal liability.

Fraud

If a director perpetrates a fraud through a company, then the company is regarded as a sham by the courts and the director(s) will be personally liable for any losses suffered by the person against whom the fraud was committed.

Wrongful Trading

If directors allow a company to continue to trade beyond the point where a reasonable person would realise that the company was insolvent, then a court may find those directors personally liable for the debts of the company incurred after that 'point of no return' – hence the importance of accounting, auditing, and staying in touch with the Education and Skills Funding Agency (ESFA). Complying with the Academies Financial Handbook, following professional advice, and making the ESFA aware of any potential deficit quickly and complying with any conditions they might impose is essential.

Health and Safety, and Corporate Manslaughter

With its own legal personality, a company is capable of criminal liability. Aside from fraud, this would usually relate to breaches of Health and Safety regulation.

In circumstances where there has been a serious breach, a court will look for the 'controlling mind' of the company, usually the directors, who may also be found guilty along with the company.

To avoid this, ensure that your academy trust's policies and procedures relating to Health and Safety (and Safeguarding) are not only adequate but that they are actually followed in your academies, which would usually involve conducting or commissioning a regular audit.

Concealment, Evasion etc., and Third Party Costs Orders

These areas are complex, but essentially all involve circumstances where directors have not acted in good faith in the best interests of the company. In an academy trust where, for example directors have deliberately sought to avoid paying a third party, those directors may find themselves liable for legal costs or an increase in a debt owned by the company due to their having held out against paying (even if holding out on a point of principle).

Factors specific to Charitable Companies and Public Bodies

The fact that your academy trust is publicly funded means that, unlike a commercial company, your decisions as directors are potentially subject to judicial review, you must follow the rules on public procurement, you are subject to freedom of information requests, and you have a public sector equality duty.

Judicial Review

Judicial review is the process by which any individual with an interest in a decision made by a publically funded body may challenge the validity of that decision in the high court. The court has the power to reverse that decision.

The most successful grounds for judicial review is that the publically funded body did not have the power to make that particular decision, or to make it in the way that it did. This is often referred to as "Ultra Vires".

As directors you do not have the power to make a decision which is outside the objects of your academy trust's article of association, nor to make a decision which breaches legislation or your funding agreement, and you will need to be able to show that the relevant decision was made by a person or persons with the authority to do so – i.e. that authority is delegated whether specifically, or through a person's job description, or through your published policies and procedures.

Judicial review is only available where there is no other appropriate remedy – it is not available as a further line of appeal in any decision, nor is it the appropriate forum for a complaint about exclusion, dismissal etc. It must be brought quickly (within weeks not months), and the complainant must first seek leave from the court to bring their case. Most threats of judicial review are empty, nonetheless it exists as a risk and dealing with complaints according to your trust's published policies fairly, rationally and reasonably should alert you to any potential danger.

Public Procurement

Breach of the public procurement rules would amount to a breach of your trust's funding agreement and therefore your ability to further your trust's objects. It would also be outside of your powers as an academy trust director to make a decision on procurement outside of those rules.

If a decision is challenged, and you are forced to repeat the process, the academy trust would be vulnerable to a contractual claim from the bidder whose contract is frustrated by the challenge, as well as costs from the bidder who challenged the decision.

Freedom of Information

As a public body, you as directors of your academy trust have an obligation to provide information in accordance with the Freedom of Information Act.

Public Sector Equality Duty

As a public body, you as directors of your academy trust have a duty, not merely to ensure that you do not directly or indirectly discriminate on the protected grounds listed in the Equalities Act, but to actively seek ways to improve inclusivity among people with those characteristics.

Dealing with Assets (including Settling Claims)

Being a charity means you cannot be as free with your trust's assets as you could if you were a private limited company with commercial objects. As directors you cannot dispose of land without the consent of the Secretary of State and/or the Charity Commission, you cannot award your staff non-contractual bonuses, and cannot make ex-gratia payments.

The Education and Skills Funding Agency has guidelines on making payments under settlement agreements which are in line with the Charity Commission rules. You are limited to what that person would be entitled to contractually (essentially their notice entitlement).

If a claim is brought or threatened against you/the trust, charity law permits making a payment in order to avoid the risk of greater liability though you would still need approval from the ESFA and evidence of legal advice as to the reasonableness of the settlement.

Further information may be found in the Charity Commission guidance for charity trustees.