



Chartered
Governance
Institute
UK & Ireland



Guidance note

Governance in Absentia: managing leave from statutory office

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GOVERNANCE IN ABSENTIA: MANAGING LEAVE FROM STATUTORY OFFICE

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Purpose and Legal Context of this Guidance

This guidance note is intended as an operational instrument all office holders. It translates established legal principles into practical governance application, rather than restating the law in isolation.

It recognises that governance roles may arise through both **contractual employment** and **statutory office**, and that these frameworks operate concurrently rather than interchangeably. Where a role is held under an employment contract (for example, an executive director or company secretary), absence is governed by employment law, including statutory entitlements under the Employment Rights Act 1996. However, these provisions regulate the employment relationship, not the legal responsibilities attached to office.

The governing legal position is settled. Statutory and fiduciary liability attaches to the **holding of office**, not to participation in day-to-day management. Individuals defined as “officers” under section 1173 of the Companies Act 2006, including directors and company secretaries, remain legally responsible for the duties of that office for the duration of their appointment unless they resign or are formally removed.

This creates a structural governance condition. Absence from operational activity does not suspend legal responsibility. A director, company secretary, or trustee on maternity leave, sickness absence, or any other extended leave remains in office and continues to be subject to the full scope of statutory duties.

In practice, organisations frequently respond to absence through informal constructs such as “non-participating status” or “covered by others”. These arrangements have no legal effect. Where no formal delegation or temporary appointment is put in place, responsibility remains fixed to the officeholder, while operational authority is redistributed in practice without legal alignment.

This misalignment produces three predictable governance outcomes: regulatory non-compliance, operational disruption, and continued exposure to personal liability for oversight failures during periods of non-participation.

This guidance note addresses that structural gap by setting out a controlled governance approach to managing continuity of statutory office during extended absence.

Core Legal Principle: Office-Based Continuous Liability

For the purposes of this guidance note, liability refers to the continuing statutory and fiduciary responsibilities attached to holding office as a director, company secretary, or trustee for the duration of appointment.

UK governance law is structured on a single principle: responsibility attaches to office-holding, not participation.

Section 174(1) of the Companies Act 2006 requires directors to exercise reasonable care, skill and diligence. This duty applies continuously throughout appointment and is not suspended by absence from management activity.

This is reinforced by sections 171 to 177 of the Companies Act 2006, which establish an integrated and ongoing framework of directors' duties governing conduct, decision-making, and oversight.

In *Lexi Holdings plc v Luqman* [2009] EWCA Civ 117, the Court of Appeal confirmed that directors may remain liable for failures of oversight notwithstanding limited or absent participation in management. The decision confirms that non-engagement does not displace responsibility arising from office.

In the charitable context, trustees are subject to equivalent ongoing duties under the Charities Act 2011 and Trustee Act 2000. The Charity Commission in CC3: *The Essential Trustee* confirms that trustees are jointly and individually responsible for the administration of their charity and retain ultimate accountability even where functions are delegated. Accordingly, absence affects participation but not legal responsibility.

Governance Tension: Employment Absence vs Legal Continuity

UK governance operates through two parallel legal regimes that frequently apply to the same individual but operate on fundamentally different principles.

Employment law recognises lawful absence from work, including maternity leave, shared parental leave, adoption leave, and sickness absence. It preserves employment status during non-attendance.

Governance law does not recognise absence from duty. It recognises only appointment to office. Statutory and fiduciary obligations continue for the duration of appointment regardless of participation. This creates a structural divergence:

- employment law governs attendance and permits absence from work
- governance law governs office and maintains continuous responsibility

Where both apply to the same individual, they do not automatically reconcile. The result is a governance gap in which responsibility remains legally fixed to the officeholder while operational authority may be exercised elsewhere without formal legal transfer.

Role-Specific Continuity of Duty

UK governance operates across three distinct capacities that must be separated when managing extended absence from statutory office:

- statutory office-holding
- employment status
- operational function

Each is governed by a different legal framework, operates independently, and responds differently to absence. Failure to distinguish between them creates structural governance risk, particularly where individuals simultaneously occupy statutory office and employment roles.

Directors

Directors remain subject throughout their appointment to the statutory duties set out in sections 171 to 177 of the Companies Act 2006, including duties of care, skill, diligence, loyalty, and proper purpose.

Section 174 confirms that the duty of care, skill and diligence applies continuously and is not contingent on participation in board activity.

Where a director is absent from operational activity, governance continuity must be maintained through constitutionally valid mechanisms, including board resolutions and authority structures set out in the company's articles. Without formal delegation, there is a risk of breakdown in lawful decision-making, particularly in relation to statutory filings, financial approvals, and regulatory compliance.

Where a director also holds employee status, employment rights such as maternity leave or sickness absence may apply under the Employment Rights Act 1996. These govern contractual arrangements only and do not suspend statutory duties arising from directorship. The Equality Act 2010 further prohibits unfavourable treatment arising from pregnancy or maternity in governance contexts.

Company Secretaries

Company secretaries perform a governance function responsible for supporting statutory compliance, including maintenance of statutory registers, Companies House filings, and procedural governance administration.

Where appointed under section 270 of the Companies Act 2006 (or under the company's articles), the role forms part of the organisation's compliance infrastructure.

Where the company secretary is also an employee, employment law governs contractual absence and working arrangements. However, operational governance functions do not automatically continue during absence unless formally reassigned.

Continuity of statutory compliance therefore requires formal delegation through board resolution, appointment of an alternative officer, or engagement of an external provider. Informal redistribution of tasks does not constitute a legally effective mechanism for transferring governance responsibility.

Trustees

Trustees operate exclusively as holders of statutory office under the Charities Act 2011 and Trustee Act 2000. They are generally not employees unless separately engaged under a distinct contract.

Trustees remain subject to ongoing duties to act in the best interests of the charity, manage resources responsibly, and exercise reasonable care and skill.

The Charity Commission in CC3: *The Essential Trustee* confirms that trustees are jointly and individually responsible for the administration of their charity. Delegation is permitted but does not remove ultimate accountability.

Where a trustee is absent, governance continuity must be maintained through properly documented interim arrangements. Absence does not suspend trustee status or fiduciary responsibility.

Where a trustee is also employed by the charity, employment law applies only to that separate employment relationship and does not affect duties arising from trusteeship.

Three-Capacity Governance Model

Governance continuity during absence must be understood through the interaction of three distinct capacities:

- employment relationship: governs contractual duties and absence from work
- statutory office-holding: governs legal responsibility attached to appointment
- operational function: governs internal allocation of tasks and authority

These capacities operate independently and are not automatically aligned during absence.

An individual may therefore simultaneously be absent from employment duties, remain fully bound by statutory obligations, and have operational responsibilities reassigned through internal governance mechanisms.

Capacity Comparison Matrix

Capacity	Governing Legal Framework	Nature of Status	Effect of Absence	Effect on Liability
Employment Relationship	Employment Rights Act 1996	Contractual relationship	May be lawfully suspended or modified during protected leave or sickness absence	Employment obligations adjusted or suspended
Statutory Office-Holding	Companies Act 2006 / Charities Act 2011 / Trustee Act 2000	Legal appointment	Not suspended unless resignation or removal occurs	Liability continues for duration of appointment
Operational Function	Internal governance (articles, board resolutions, policies)	Internal allocation of authority	May be reassigned or suspended through formal governance mechanisms	No inherent liability; depends on valid delegation

Structural Interpretation

Governance continuity does not depend on a single legal relationship but on the controlled interaction between these three capacities.

Where properly managed, this structure preserves both operational continuity and legal accountability. Where unmanaged, it creates divergence between responsibility and authority.

Governance Implication

Where organisations fail to distinguish between these capacities, three risks arise:

- legal responsibility remains fixed to the officeholder
- operational authority is exercised through informal or unvalidated mechanisms
- employment status is incorrectly treated as a proxy for governance disengagement

This misalignment is the core structural risk in managing extended absence from statutory office.

Accordingly, absence management must be based on explicit separation of capacities and controlled reconciliation through formal delegation and board-approved governance mechanisms.

Key Governance Risks Where Delegation Is Absent

Where extended absence is not supported by formal governance arrangements, three structural risks arise:

- regulatory risk: failure of statutory filings, approvals, or compliance obligations

- operational risk: unclear authority leading to delay, duplication, or paralysis
- personal liability risk: continuing legal responsibility despite non-participation

These risks arise from misalignment between legal responsibility and operational authority.

A Governance Continuity Framework

The following Governance Continuity Framework operationalises the principles set out above. It treats absence not as an HR event, but as a structured governance condition requiring controlled management across three sequential phases: Pre-Leave, Leave Period, and Reintegration.

Absence is first categorised according to predictability, as this directly determines the appropriate governance response. Planned absence, including maternity leave, shared parental leave, adoption leave, and disability leave enables structured transition planning and advance delegation. Unplanned absence, including illness, bereavement, or incapacity, requires immediate activation of emergency governance controls to maintain continuity of authority and decision-making capacity.

Across both categories, governance continuity depends on formal delegation of authority rather than informal substitution of responsibility.

However, the design of the governance response must also reflect a more fundamental distinction within UK governance structures: the existence of two materially different protection regimes depending on whether the officeholder is also an employee.

Not all individuals holding governance roles are exposed to the same structural conditions during periods of absence.

Where governance roles are held alongside an employment contract (for example, company secretary or executive director), absence is governed by an established legal framework under employment law. This includes statutory entitlements relating to maternity leave, sickness absence, and associated protections under the Employment Rights Act 1996. These provisions create a structured basis for the lawful suspension, continuation, and reinstatement of employment-related duties.

For the avoidance of doubt, this employment-based framework operates alongside, but does not replace, obligations attaching to **statutory office**. Individuals holding roles defined as “officers” under section 1173 of the Companies Act 2006 (including directors and company secretaries) remain subject to the duties and accountability associated with that office. In practice, organisations must therefore consider both regimes in parallel: the **employment relationship**, where applicable, and the **legal responsibilities attached to the governance role itself**.

Maybe we could expand the opening material under the Purpose section at the start to encapsulate that

By contrast, non-employed officeholders, including independent non-executive directors and charity trustees, operate outside any employment-based absence framework. Their position is defined solely by statutory office-holding, under which legal responsibility continues uninterrupted for the duration of appointment. There is no parallel employment structure to manage disengagement, substitution, or reintegration.

This creates a structural asymmetry in governance design.

- Employed officeholders operate within pre-existing legal systems that regulate absence and provide structured reinstatement pathways.
- Non-employed officeholders remain governed entirely by continuous statutory responsibility, without any embedded mechanism for managing absence as a governance condition.

The governance risk therefore does not arise from absence itself, but from the unequal availability of legal and structural tools to manage that absence safely in practice.

Accordingly, extended absence must be addressed through two distinct governance pathways:

- a contained governance pathway for employed governance professionals, where employment law already regulates absence, continuity, and return;
- a high-risk governance pathway for independent directors and trustees, where absence must be actively engineered through formal delegation, constitutional authority, and board-approved control mechanisms.

The remainder of this guidance is therefore structured on a two-tier model that reflects this divergence in structural protection and governance exposure.

The framework that follows operationalises these principles. It translates the continuous nature of statutory responsibility into a structured lifecycle model governing how authority is prepared, managed, and restored across periods of absence. It should be read as the implementation layer of the principles set out in this section, moving from legal structure to applied governance control.

Phase 1 – Pre-Leave Architecture

Objective

Boards must eliminate legal ambiguity before leave begins, reconciling the tension between continuous statutory duties under governance law and the right to a clean break under employment frameworks.

Tier 1: Employed Governance Professionals

Organisations must formally separate an individual's employment role from their statutory office-holding position prior to the commencement of extended leave.

- **Pass formal board resolutions to:**
 - **Transfer statutory authority:** Formally delegate independent statutory functions, such as maintaining registers, executing filings, and authenticating documents, to an explicitly named interim officer or qualified internal resource. This ensures that administrative filings are not executed without valid legal authorisation.
 - **Appoint interim officeholders:** Execute a board resolution to appoint an interim Company Secretary, avoiding casual handovers that leave the absent professional de jure responsible for actions they cannot control.
- **Ensure contracts include:**
 - **Right of reinstatement to subsidiary boards:** Guarantee a contractual right of return to all subsidiary board positions held alongside the main employment role. In group structures where individuals hold multiple directorships, safeguarding this right prevents permanent role dilution or career detriment upon return.
- **Define:**
 - **Clear start and end dates for role transitions:** Establish explicit timelines for the handoff and reclamation of statutory powers, ensuring a structured operational boundary between active duty and the protected leave period.

Tier 2: Independent Directors & Trustees

Action 1: Review Constitutional Authority

Boards must perform an early assessment of their governing documents to identify structural limitations regarding temporary absences.

- **Permit alternate directors/trustees:** Verify whether the Articles of Association or charity governing documents allow for the appointment of alternate directors or the temporary co-option of additional trustees.
- **Allow temporary absence or sabbaticals:** Evaluate whether the constitution contains provisions to authorise a temporary leave of absence without triggering a vacancy or automatic removal.
- **Amendments prior to leave:** If the constitutional documents do not explicitly support temporary governance cover or authorised absences, formal amendments must be passed and filed with regulators before the leave period begins.

Action 2: Establish Delegation Mechanisms

Fiduciary and statutory duties apply continuously and cannot be informally paused. Formal mechanisms must be documented to shift functional oversight.

- **Pre-authorise alternate appointments:** Approve alternate directors or interim committee representatives via formal board approval before the active director steps away.
- **Define trigger events:** Establish clear, objective milestones (e.g., specific dates, medical leave commencement, or formal operational sign-off) that automatically activate temporary delegations.
- **Document delegation arrangements formally:** Utilise formal board minutes or written resolutions to document the redistribution of specific functions to active committees or fellow board members.

Action 3: Validate D&O Insurance

Directors and trustees remain personally liable for collective board decisions taken in their absence unless they formally resign from office.

- **Cover remains effective during absence:** Obtain explicit, written confirmation from insurers that Directors and Officers (D&O) liability insurance remains fully active for the individual throughout the entire duration of their non-attendance.
- **Passive negligence exposure is addressed:** Ensure the policy explicitly covers "passive negligence" or omissions, safeguarding the inactive director against liability for board decisions executed while they are away and unaware.

Action 4: Define Remuneration Policy

Boards must establish an explicit, transparent position regarding board fees during extended absences to balance corporate fairness with governance responsibilities.

- **Fee continuation, reduction, or suspension:** Adopt a formal, documented stance on whether non-executive fees will be maintained, scaled back, or suspended, distinguishing between employment-based pay and fees linked purely to office-holding.
- **Policies must be transparent:** Ensure all remuneration adjustments are documented clearly in committee records to satisfy internal audit and regulatory scrutiny.
- **Align with shareholder expectations:** Maintain alignment with institutional investor guidelines regarding pay for non-performing or absent board members.
- **Support diversity objectives:** Design the policy to ensure financial arrangements do not penalise individuals taking protected family or medical leave, thereby supporting long-term board diversity and retention.

Action 5: Assess Regulatory Disclosure

For listed, financial, or heavily regulated entities, an extended absence cannot be treated as a private personnel matter.

- **Determine material events:** Evaluate whether the prolonged absence of a key director, trustee, or governance professional constitutes a material event or a significant change in board capacity under sectoral rules.
- **Define triggers for RNS announcements:** For listed issuers, establish clear thresholds (such as length of absence or role criticality) that trigger an announcement to a Regulatory Information Service (RIS/RNS).

- **Define triggers for regulatory notifications:** For regulated sectors (e.g., FCA/PRA or Charity Commission), map out necessary notifications regarding changes to senior management functions or temporary cover arrangements.

Practice Insight

Many organisations rely on informal leave arrangements without reviewing constitutional authority, creating unenforceable governance structures and severe residual liability risk. Statutory obligations do not pause automatically because an individual is on leave; without formal board-led delegation, the absent individual remains legally exposed for actions taken in their name, and the organisation risks executing invalid corporate acts.

Phase 2 – The Leave Period

Objective

Maintain seamless governance continuity and protect organisational decision-making while legally shielding the absent officeholder from ongoing operational exposure.

Tier 1: Employed Governance Professionals

To honour statutory employment protections and maintain compliance, organisations must institute a strict operational firewall between the employee and the post-holder responsibilities.

- **Enforce full operational separation:** Ensure the individual is granted a complete break from daily corporate tasks, protecting them from employment detriment while respecting health, safety, and leave entitlements.
- **Transfer all statutory responsibilities:** Ensure that all filing, record-keeping, and compliance duties are executed exclusively by the designated interim officer or internal senior staff (such as finance, tax, or treasury teams) who have been formally trained and authorised.
- **Restrict system access where appropriate:** Pause direct access to live governance portals, corporate registries, and internal management workflows to prevent accidental automated assignment of tasks or legal sign-offs to the absent professional.

Tier 2: Independent Directors & Trustees

Action 1: Implement a “Minimum Viable Update” Protocol

To avoid the risk of total disengagement while protecting statutory leave rights, boards should design a controlled information flow.

Update Core Element	Scope Boundaries	Governance Purpose
Strategy	High-level shifts or major structural proposals.	Maintains baseline strategic awareness.
Financial Position	Material changes in solvency or capitalisation.	Protects against structural duty failures.
Key Risks	Red-flag regulatory exposures or systemic crises.	Prevents blind-spot liability while on leave.

- **Avoid operational detail:** Exclude routine management papers, granular operational reviews, and non-essential committee tracking to respect the individual's protected leave status.
- **Prevent disengagement:** Provide structured summaries periodically so the individual does not feel completely alienated from the organisational trajectory.
- **Support baseline awareness:** Satisfy the necessary contextual baseline required for ultimate return without pressuring the individual to actively manage issues.

Action 2: Establish Shadow Director Boundaries

Clear boundaries must govern all communications during the leave period to prevent the absent director from inadvertently operating as a shadow or de facto director.

- **Permitted - Passive receipt of structured updates:** Allow the director to receive pre-vetted, high-level structural reports or to optionally utilise formal Keeping in Touch (KIT) days for specific, time-limited interactions.
- **Prohibited - Influencing decisions:** The absent member must not give informal feedback on pending board votes or signal non-public directions to executives.
- **Prohibited - Informal instructions:** The individual cannot provide ad-hoc directions to management or deputies regarding operational execution.
- **Prohibited - Participation in deliberations:** The absent member must recuse themselves from real-time board discussions, debate strings, and casual alignment sessions.

Practice Insight

Informal communications (e.g., WhatsApp messages, ad-hoc text chains, or off-the-record emails) can unintentionally create shadow director liability. They blur accountability for organisational decisions and can lead courts or regulators to conclude that an individual was still exercising active, undocumented direction over the entity, thereby destroying their protected leave status and expanding their liability exposure.

Action 3: Manage Data Access

Unchecked access to real-time corporate data platforms creates a conflict between continuous knowledge and actual capacity to act.

- **Transition absent members to read-only or summary-only access:** Modify user permissions within the board portal to limit interaction to finalised documents and official updates, disabling active editing or voting tools.
- **Restrict exposure to price-sensitive or confidential real-time data:** Shield the absent director from real-time data rooms, live transaction feeds, or granular financial tools where lack of immediate response or active oversight could be construed as a failure of reasonable care.

Action 4: Maintain Quorum and Voting Capacity

An officeholder's absence must not paralyze the board's formal decision-making capacity or cause procedural invalidity.

- **Activate alternate directors/trustees where permitted:** Formally seat pre-authorised alternate directors or temporary co-opted trustees at the start of meetings to step into voting slots.
- **Ensure quorum requirements are met:** Recalculate required attendance thresholds in advance of every meeting, accounting for absent members to prevent constitutional deadlocks.
- **Ensure decision-making authority remains valid:** Document every proxy vote, recusal, and alternate activation clearly in the official minutes to guarantee all board resolutions withstand external legal challenge.

Phase 3 – Reintegration

Objective

Restore the officeholder to their full statutory and organisational capacity smoothly, ensuring they face no legal, structural, or career disadvantage because of their protected absence.

Tier 1: Employed Governance Professionals

Organisations must carefully manage the return-to-work process to ensure full compliance with statutory employment rights, preventing any post-leave role erosion.

- **Automatically reinstate individuals to:**
 - **Board seats:** Restore the returning professional to all subsidiary board positions from which they were temporarily removed during their leave.
 - **Governance roles:** Fully return the core title, responsibilities, and operational influence of the company secretary or head of governance, reversing all interim

assignments. The role must be handed back intact, rather than permanently retaining workarounds implemented during the absence.

Tier 2: Independent Directors & Trustees

Action 1: Conduct Structured Re-Onboarding

Upon return, the board must execute a formal re-onboarding protocol to ensure the individual's legal duty of care is re-established on an informed basis.

- **Strategic decisions briefing:** Provide a comprehensive review of all strategic changes, long-term commitments, and major joint ventures approved by the board during the absence period.
- **Financial developments briefing:** Deliver an in-depth financial summary detailing capital expenditure, cash flow shifts, and any material budgetary changes over the leave period.
- **Governance changes briefing:** Outline changes made to board composition, committee structures, risk registers, or internal schemes of delegation.
- **Re-establishes the duty of care baseline:** This structured transfer of knowledge ensures that the returning director shares the exact same information base as the rest of the board, allowing them to safely resume personal liability for future collective decisions.

Action 2: Restore Roles and Responsibilities

The board must return the individual to their previous standing within the governance architecture.

- **Reinstate prior committee memberships:** Restore the director to their designated seats on committees (e.g., audit, risk, or remuneration).
- **Reinstate prior chair positions:** Return the individual to any committee chair or lead independent roles they held prior to taking leave.
- **Exception for pre-agreed term limits:** The original seats and chair leadership must be restored completely unless formal, independent term limits specified in the constitutional documents naturally expired during the absence interval.

Action 3: Normalise Access and Remuneration

All operational and financial boundaries implemented for the leave period must be systematically deactivated.

- **Restore full system access:** Re-elevate permissions within board portals, dynamic data environments, and sensitive communications channels to full active/write status.
- **Restore standard remuneration arrangements:** Reinstate the standard, pre-absence non-executive fee structure or trustee expense protocols immediately upon the formal date of return, eliminating any temporary suspension or reduction mechanisms.

Practice Insight

Returning directors are often informally sidelined, with boards leaving temporary workarounds in place under the assumption that it supports a gentler return. In practice, this creates significant long-term diversity, inclusion, and executive retention risks. Diluting an individual's strategic scope or delaying their return to core committees undermines protected rights and deprives the board of diverse leadership capability.

Horizon Scanning: International Frameworks & Future Code Reforms

This final section is directed at civil servants, policy leads, and governance code regulators. It translates the structural findings of this guidance note into a forward-looking regulatory roadmap designed to address a systemic design gap in UK governance architecture.

As established in the Three-Capacity Governance Model, UK governance law fixes liability to statutory office-holding rather than active participation. Where an individual remains recorded at Companies House or the Charity Commission, fiduciary and statutory duties continue for the duration of the appointment unless resignation or formal removal occurs. This creates a persistent structural conflict: governance liability is continuous, but governance participation is intermittent in practice.

Existing organisational responses attempt to bridge this gap through informal arrangements: such as temporary cover, delegated working assumptions, or employment-based leave analogies.

However, these mechanisms operate at the level of administration rather than liability architecture; they operationally manage absence without legally designing it.

To resolve this tension permanently, the UK must shift from internal organisational workarounds toward a codified, registry-aware governance framework.

Testing Policy Proposals Against the Legal Defensibility Filter

During roundtables with members of the Institute, it was consistently highlighted the urgent need for structural mechanisms to support board equity, parental leave, and modern workforce realities. A recurring, well-intentioned proposal was the creation of a unified "universal leave framework" designed to temporarily pause governance liability during an extended absence.

While this proposal stems from a clear desire to improve board diversity and accessibility, testing a generic, un-codified "blanket pause" against the foundations of UK company, common, and insolvency law reveals three structural friction points that any successful regulatory solution must resolve.

Scope Classification Distortion and Moral Hazard

The primary architectural flaw of a single, undifferentiated leave model is classification. It collapses fundamentally distinct categories of non-attendance into a single regulatory bucket:

- Protected Social Absence: Maternity, adoption, shared parental leave, and sudden medical or caregiving incapacity.
- Discretionary Absence: Voluntary career breaks, extended sabbaticals, and elective professional development.

Employment law deliberately separates these categories because they carry entirely different socio-economic and human rights justifications. Governance law currently does not. If a regulatory framework extends liability suspension across both categories indiscriminately, it ceases to be protective and becomes permissive. This introduces a moral hazard: the potential for fiduciary responsibility to be paused for general professional convenience, severely weakening baseline corporate accountability standards.

Doctrinal Conflict with Continuous Duty and Insolvency Exposure

The second constraint arises from established insolvency doctrine. Under Section 174 of the Companies Act 2006, directors owe a continuous, unremitting duty of care, skill, and diligence. This statutory expectation intensifies under Section 214 of the Insolvency Act 1986 (Wrongful Trading) as a company approaches financial distress, where a director's conduct is evaluated against a dual objective-subjective standard of reasonable diligence.

The landmark ruling in *BHS Group Ltd v Chappell* [2024] reconfirmed a bedrock common law principle: passivity or operational non-participation does not neutralise fiduciary exposure. When financial distress is reasonably foreseeable, non-intervention or silent acquiescence is treated by UK courts as an active breach of duty, not a valid legal defence. A generic, private "paused liability" arrangement operating outside a formal statutory safe harbour would directly collide with these established insolvency doctrines.

Fragility Within the SME Sector

Because small and medium-sized enterprises (SMEs) constitute over 99% of all UK corporate entities, governance architectures must be structurally resilient within micro-board environments (typically comprising only 2 to 3 directors).

In a compressed board structure, simply removing one director from active liability without a formal, legally verified substitution mechanism introduces immediate systemic hazards:

- **Quorum Instability:** Paralyzing routine statutory approvals and formal corporate actions.
- **Decision Bottlenecks:** Stalling strategic execution during highly volatile trading periods.
- **Risk Concentration:** Disproportionately concentrating remaining fiduciary and operational exposure onto the surviving co-directors.

Within micro-boards, a generic suspension of liability does not safely distribute risk, it amplifies it for the remaining board members.

Deconstructing the Alternate Mechanism (The "Proxy Trap")

To resolve these three important issues, our roundtable discussions frequently pointed to alternate or proxy director models, such as those permitted under the Companies (Guernsey) Law 2008, as an attractive template for UK adoption. On an operational level, these models are highly efficient: they permit alternate directors, preserve quorum, and maintain board functionality without requiring formal resignation.

However, evaluating an alternate-based framework as a direct blueprint for UK policy export reveals a structural "proxy trap" that obscures liability rather than resolving it.

The Illusion of Clean Substitution

While alternate director mechanisms offer short-term operational flexibility, they do not create a clean, complete transfer of statutory liability. Instead, two parallel positions emerge:

- The appointed alternate, exercising active operational authority and casting votes.
- The original, absent director, who retains residual fiduciary exposure for the broader, collective decisions of the board unless a formal resignation has been filed.

This results in a dual-liability architecture characterised by accountability layering rather than a true legal transfer. Responsibility is duplicated and blurred, leaving the absent director exposed to actions they did not directly shape.

The Judicial Rejection of Passive Directorship

This structural ambiguity is further reinforced by Guernsey appellate jurisprudence, which adopts a rigorous conception of director responsibility that mirrors English common law developments. The courts have consistently closed off any conceptual space for an "inactive but insulated" directorship, establishing clear boundaries:

- Directors cannot adopt a passive or detached oversight position.

- Non-executive or non-resident status does not lower baseline compliance expectations.
- Operational disengagement or authorised absence does not mitigate personal statutory liability.

Direct Incompatibility with the UK Regulatory Direction of Travel

Introducing an un-tracked proxy or alternate substitution model runs counter to the explicit direction of travel established by the Economic Crime and Corporate Transparency Act 2023 (ECCTA). The UK framework is actively moving toward the intensification and localisation of personal accountability through:

- Strict natural-person directorship mandates.
- Mandatory, robust identity verification protocols managed directly via Companies House.
- Absolute, traceable attribution of individual office-holder responsibility.

Proxy-based solutions solve an operational attendance problem by creating a transparency problem. To be effective and legally defensible, any UK mechanism for temporary absence must prioritise explicit, public tracking of liability at the registry level, rather than obscuring it through informal proxy substitution.

Codified Precedents: Drawing from Structured Frameworks

Given the constraints and issue highlighted, rather than starting from first principles, UK regulators can look to international frameworks that have successfully isolated and resolved these exact classification and proxy pitfalls. These models demonstrate that it is legally possible to design structured absence without diluting statutory accountability.

Germany: Statutory Mandate Suspension (FüPoG II)

Germany approaches the problem at the level of the constitutional status of office itself, rather than attempting to manage behaviour or participation. The reforms associated with the Second Act on Equal Participation of Women in Leadership Positions (*FüPoG II*) emerged to solve a specific corporate paradox: senior management board members (Vorstand) were disproportionately forced to resign permanently to take parental leave because corporate law lacked a mechanism for temporary withdrawal.

Germany's intervention reordered the relationship between office, authority, and liability:

- **Mandate Suspension:** A management board member can formally suspend their active mandate under highly restricted, objective statutory grounds (maternity, parental leave, serious illness, or caregiving), eliminating classification distortion and moral hazard.

- **Registry-Level Deactivation:** The suspension is formally recorded in the corporate commercial register (Handelsregister), providing absolute transparency to external creditors and markets.
- **Fiduciary Safe Harbour:** During the approved suspension period, the individual's active rights, duties, and liabilities are paused. Upon their return, the mandate is restored automatically without requiring reappointment or re-entry into a selection process.

Australia: Registered Alternate Director Mechanism (Corporations Act 2001)

Australia resolves the proxy transparency trap by embedding the substitution mechanism directly into its national regulatory disclosure infrastructure managed by the Australian Securities and Investments Commission (ASIC).

- **Registry-Mapped Traceability:** Under the Corporations Act 2001, the appointment of an alternate director is not an informal, internal board arrangement. It requires formal notification and registration via ASIC Form 484.
- **Temporal and Authority Bounding:** The registry explicitly maps the operational authority to a specific timeline and links the alternate directly to the appointing principal.
- **Clear Duty Allocation:** The alternate assumes full fiduciary duties during the active interval, ensuring that any transfer of function remains legally traceable and visible to external stakeholders rather than operating behind closed doors.

The Domestic Evolution: The SMCR Continuity Shift

Another important proof of concept for this regulatory roadmap is not external but domestic, located within the UK financial services architecture itself. Through the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) Senior Managers and Certification Regime (SMCR), UK regulators have already been required, by operational necessity rather than abstract design, to separate the concept of continuous accountability from the physical continuity of role occupancy.

The significance of the SMCR lies in the way it has evolved under pressure from precisely the same structural problem that this guidance note identifies: the legal requirement for continuous accountability sitting alongside the practical reality of temporary absence from office. In its earlier configuration, the regime was built on an implicit assumption that senior management functions would be continuously and personally occupied, with limited tolerance for interruption. Within that architecture, firms were effectively required to secure regulatory approval for replacement Senior Management Function (SMF) holders within a constrained timeframe, commonly operationalised in practice through a short interim window (often understood as approximately 12 weeks) during which continuity had to be regularised. The consequence was not enhanced accountability, but a predictable fragility in governance continuity during periods of sudden absence: whether arising from illness, maternity leave, or other unforeseen interruption.

The underlying structural issue was not the principle of accountability itself, which remained coherent, but the coupling of that accountability to uninterrupted physical presence in post. Governance continuity was treated as synonymous with continuous occupancy of the individual officeholder, such that absence was implicitly framed as a disruption requiring rapid correction rather than a normal condition to be managed.

The revised SMCR approach represents a controlled departure from that assumption. Rather than treating absence as a governance anomaly requiring prior restoration of the same individual or pre-authorised substitution in all cases, the regime decouples the allocation of accountability from continuous physical presence. This allows regulated firms to appoint interim or covering SMF holders immediately when a senior manager becomes unavailable, ensuring that regulated functions continue to operate without interruption, while the underlying accountability structure remains intact and traceable.

Importantly, this is not a dilution of responsibility. The regulatory logic remains firmly anchored in individual accountability. What changes is the mechanism through which continuity is achieved. Regulatory assurance is no longer dependent on uninterrupted occupancy of a single named individual but is instead maintained through a combination of immediate operational substitution and subsequent supervisory oversight, including retrospective validation of fitness, propriety, and control arrangements.

The effect is a shift in the locus of regulatory control. Rather than requiring pre-authorisation as a condition of continuity, the framework permits continuity as a matter of operational necessity, subject to ongoing regulatory supervision. Continuity is therefore preserved through structured substitution, while accountability is preserved through continuous allocation to the relevant senior manager function.

Seen in this way, the SMCR does not merely adjust procedural rules for absence management. It reflects a more fundamental recalibration in regulatory thinking: from equating governance stability with uninterrupted occupancy, to recognising that stability can be maintained through managed transitions in occupancy provided that responsibility remains continuously and unambiguously allocated.

The insight is therefore conceptual rather than administrative. The SMCR demonstrates, within an existing UK statutory and regulatory framework, that governance systems do not require the uninterrupted physical presence of the same individual to preserve fiduciary and regulatory integrity. They require, instead, that accountability is never left unallocated, even when occupancy of office is temporarily and lawfully interrupted.

Proposed UK Code Reforms: The Regulatory Ask

Civil servants, policy leads, and governance code regulators must scale these domestic and international insights across the wider economy through explicit codification within existing frameworks. This must be structured through a clear **Tiered Risk & Accountability Matrix** that

respects the fundamental legal distinction between employment-backed roles and pure statutory office-holding.

UK Corporate Governance Code (Financial Reporting Council)

The FRC should introduce provisions requiring listed and large corporate entities to adopt formal Board Diversity Leave Policies that explicitly differentiate between Tier 1 and Tier 2 roles.

The Contractual Matrix

The Code must establish clear, separate compliance pathways for differing board capacities:

1. **Tier 1 (Executive Directors & Employed Governance Professionals):** Governed by an intersection of employment contracts and statutory protections, requiring explicit contractual right-of-return clauses to all core and subsidiary seats.
2. **Tier 2 (Non-Executive Directors):** Governed solely by statutory office-holding, requiring a structured pathway for formal, board-sanctioned temporary disengagement that prevents absence from defaulting into forced resignation or informal deactivation.

SME Scalability Frameworks

For smaller companies and micro-boards (2–3 directors) where absence creates immediate structural risk, the Code must mandate the implementation of **Predefined Continuity Frameworks** as a condition for authorised leave. These frameworks must strictly prohibit informal, unrecorded "desk-cover" arrangements, requiring instead pre-drafted delegation matrixes or temporary non-executive co-option protocols to maintain quorum stability and prevent unfair risk concentration on remaining board members.

Resolving the Subsidiary Directorship Dilemma

In complex group structures where an individual holds multiple concurrent directorships, the Code should standardise two clear operational models to manage absence safely:

- **Temporary Structural Removal:** Executing formal removal from subsidiary boards during leave via registry-level deactivation, ensuring clean liability separation during absence, followed by automated registry-level reinstatement upon return.
- **Internal Responsibility Pooling:** Utilising formal board resolutions to temporarily redistribute specific statutory duties across internal governance specialists (legal, tax, or treasury teams), avoiding the need for unvetted external interim appointments.

Defining Safe Harbour Thresholds

To eliminate the risk of accidental shadow directorship, the Code must establish an absolute operational boundary governing contact during an authorised leave period:

- **Permitted Activity:** Passive, read-only access to high-level strategic summaries and the optional use of up to 10 formal Keeping-In-Touch (KIT) days for structured re-onboarding briefings.
- **Prohibited Activity:** Any active participation in real-time board deliberations, informal messaging channels (e.g., WhatsApp or text strings regarding corporate acts), or influencing pending votes.
- **The Boundary Rule:** Fiduciary liability cannot be partially or informally reactivated. Any breach of this communication boundary voids the safe harbour protection, exposing the absent director to full collective liability.

Charity Governance Code (Charity Commission & Steering Group)

Charity trustees operate under full fiduciary exposure without the backstop of corporate employment protections, making them the highest-risk category for passive negligence breaches.

Dismantling the Section 25 Liability Trap

A widespread and dangerous misconception within the voluntary sector is that trustees can safely manage extended absences by utilising Section 25 of the Trustee Act 1925 to execute a temporary general Power of Attorney. Regulators must issue explicit code guidance clarifying that Section 25 does not create a safe harbour. In fact, the statute explicitly preserves full personal liability within the appointing trustee for all acts, omissions, and defaults of the appointed attorney. Section 25 operates as a mechanism for delegating administrative power, not a mechanism for transferring fiduciary responsibility.

Correcting the Reality Gap

The Charity Governance Code must explicitly dismantle the cultural assumption that a trustee can simply step away "on leave" via an informal handshake. The revised code text should state clearly that:

- Trustee duties and personal liabilities continue completely uninterrupted during absence.
- Passive non-participation or non-attendance at meetings does not pause exposure; instead, it amplifies the risk of a breach of the duty of care.
- Only a formal, documented change in governance status can alter personal responsibility.

Constitutional Leave Clauses and Collective Devolution

The Charity Commission should publish model constitutional clauses enabling charities to formalise Trustee Sabbaticals via a structured Collective Devolution Framework:

- Active oversight and specific portfolio functions are formally redistributed across the remaining active trustees as a collective body via an official board resolution.
- The active board explicitly re-verifies that its remaining members retain the absolute capacity to safeguard the "irreducible core" accountability of the charity (as defined in Charity Commission Guidance CC3).

This clean, collective re-allocation formally insulates the absent trustee from passive negligence claims arising from decisions made during their authorised period of leave, while maintaining continuity of governance authority.

Conclusion

Ultimately, managing extended leave from statutory office is not an administrative challenge to be smoothed over with human resources policies; it is a structural constitutional paradox within UK corporate and charity law. By transitioning from informal internal workarounds to a codified, registry-aware architecture, organisations can align operational reality with legal liability. Implementing the phased lifecycle controls and targeted code reforms outlined in this note ensures that boards can meaningfully advance diversity and equity initiatives without exposing officeholders or organisations to unmanaged, systemic fiduciary risks.

