Coronavirus (Covid-19)

Post-lockdown guides to help UK business

WRIGHT
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Our Covid-19 response team

Employment considerations for Business

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Now that the Government has taken some steps to ease the "lockdown" restrictions, and with the full reversal plan due to be revealed imminently, employers must start to think about the employment law implications of asking their workforce to return to the workplace.

Ending furlough leave

It is likely that the whole workforce will not be required, and in most cases will not be able, to return to the workplace at once. Employers are therefore faced with having to select which employees should return and which should continue to be designated as Furloughed Workers.

When selecting who should return to the workplace, an employer must:

- consider which roles and skills are needed in the workplace as well as any "shielding" or caring requirements of certain employees, which would support their continued Furloughed Worker status; and
- must ensure that no discriminatory criteria are applied in the selection process as the usual employment law considerations in relation discrimination apply. In this situation the risk of sex discrimination and age discrimination are heightened. An employer must also bear in mind the requirement to make reasonable adjustments for disabled employees.

An employer needs to consider its procedure for ending Furlough Leave. Was any form of procedure depicted in the furlough agreement signed by the employee? If a return to work procedure was not agreed at the outset, the employer should serve notice to end the Furlough Leave in writing. There is no specific length of notice required, but this must be reasonable in the circumstances.

As well as informing the employee of the date that they are required to return to work, it is likely that other information will need to be provided such as the steps the employer has taken to ensure it is safe to return to the workplace, any temporary contractual changes such as changes in start and finish times in order to stagger the number of people concentrating in the workplace at peak times, and any policy changes such as changes to annual leave entitlements.

Health and safety

Employers have a duty to provide a safe system of working for their workforce. Therefore, an employer requiring its workforce to return to the workplace needs to ensure it has conducted a thorough risk assessment and is confident, in the light of this, that it can make the necessary adjustments to appropriately manage any identified risks. If an identified risk cannot be managed to acceptable levels, employees should not be permitted to return to the workplace.

The Government has released eight Guides covering health and safety considerations for different types of workplace such as construction sites, factories and vehicles. These guides include workplace specific considerations, but the central themes from each guide are increasing the frequency of handwashing and surface cleaning, complying with social distancing guidelines by ensuring employees can remain two meters apart at all times where possible, and if a particular activity will not lend itself to employees being two meters apart, taking mitigating actions to reduce the risk of virus transmission between staff.

Some employers have been considering whether temperature testing can take place within the workplace. An employee's temperature is considered to be a special category of personal data under the General Data Protection Regulation ("GDPR"). Therefore, in order for an employer to be able to collect such information, it needs to demonstrate that there is a lawful basis for this processing. In this case,

the data could arguably be processed on the basis of it being in the substantial public interest to do so.

Employers also needs to ensure the collection of this data is necessary and have relevant safeguards in place for its storage. Employees must be told in clear terms why the employer needs to take such a course of action, and if the temperature is to be taken by a physical contact check (as opposed to thermal imaging) the employees must consent to this contact.

Employers should fully consider their options prior to embarking on temperature checks in the workplace and should note that workplace temperature checking is not one of the measures recommended by the Government at this stage.

PPE and discrimination

Some employees may be required to wear facial masks or face coverings in the workplace to protect themselves and also to protect other people that they come into contact with. This may be a stipulation arising from Government recommended advice, or a specific requirement of a professional body.

The existence of facial hair, such as that required for religious reasons, can potentially affect the way a facial mask fits and therefore mean it is not effective at meeting the employer's health and safety objectives. In the light of this, if an employer wishes to enforce a blanket policy of requiring all employees to be cleanshaven, it needs to ensure this is a proportionate means of achieving a legitimate aim as this request could potentially indirectly discriminate against members of certain religious groups.

It is almost certain that protecting the health and safety of employees and members of the public will amount to a legitimate aim. However, in order for the request to be cleanshaven to be deemed a proportionate means of achieving this aim, the employer will need to show that the objective could not be achieved by alternative means, such as the provision of different masks.

Data protection

Once back in the workplace, it is clear that an employer who becomes aware that one of its workforce has contracted the virus, must notify the rest of the employees of the risk of them being potentially infected as soon as possible. However, employers must keep in mind that the Data Protection Act 2018 defines information about an employee's health as a "special category of personal data." With this in mind, the employer must not disclose the identity of the infected employee if possible, and it should not provide any more information than necessary.

What if an employee refuses to return to work because of a health and safety concern?

Despite an employer taking all the necessary steps to risk assess the workplace and as a result putting in place appropriate mitigating measures, some employees may still refuse to return to the workplace due to fears about the risk to their health.

If an employee can perform their duties from home, allowing the employee to continue to do this should be the employers first response.

If this is not possible, the employer needs to take the time to understand the employee's fears and concerns – talking to the employee about the measures the employer has put in place to protect the health and safety of its workforce may alleviate the employee's

concerns and resolve the issue.

However, if an employee still refuses to attend the workplace, the employer needs to carefully consider whether it would be discriminatory to take disciplinary action against the employee for misconduct based on their refusal to follow a reasonable management instruction to attend work, and whether it would be discriminatory to refuse to pay the employee in relation to the period of "unauthorised" absence.

Employers need to remember that an employee's refusal to attend work on the basis that they believe they are at risk of imminent danger, could afford them protection from suffering any form of detriment in consequence of their actions, or from being dismissed. In fact, a dismissal/constructive dismissal in these circumstances may amount to an Automatically Unfair Dismissal, which does not require an employee to have two years' service.

Should an employer take any steps to manage the risk to the workforce caused by their commute to and from work?

This is a tricky area given that an employer has no control over the public transport environment. However, an employee who believes they are at risk of imminent danger by using public transport due the lack of social distancing, may be entitled to rely on this as a reason for refusing to return to the workplace. The employee can then potentially rely on the legal protection preventing them from being subjected to a detriment or from being dismissed in consequence of raising a serious and imminent health and safety concern.

However, in order for an employee to rely on this protection, the danger needs to be one that the employee could not reasonably be expected to avert. Employers should therefore consider highlighting alternative options of transport to employees, allowing flexibility to employees to travel at off peak times and purchasing more car parking spaces to enable employees to drive to work.

Delaying bonus payments

Given the detrimental economic impact caused by the current pandemic, employers are considering delaying the payment of bonuses as part of measures designed to ensure their long-term sustainability of the business.

Whether an employer can do this will depend on whether the bonus scheme is contractual or discretionary, and on the precise terms of the scheme.

If the bonus is contractual, its terms will dictate whether it can be deferred or not, no matter what the circumstances are. If the terms do not permit deferral, an employer can only delay payment with the employee's express consent.

If the bonus is discretionary, an employer may be more able to defer payment given the unprecedented context of the pandemic. However, consideration still needs to be given to the implied term of trust and confidence between employer and employee necessary to sustain the employment relationship, and whether the employer's actions in deferring payment may breach this. Again, an employer may be better protected by trying to obtain the employee's consent to the deferral. In these unprecedented times where employees are conscious of the real possibility of lay off and redundancy, they are more likely to agree to a deferral than they would in normal circumstances.

Annual leave

The Government has passed emergency legislation allowing employees to carryover up to 20 days of annual leave into the next two holiday leave years, if this leave cannot reasonably be taken due to the impact of the current pandemic.

Arguably, those employees that have been placed on a period of Furlough Leave could have taken annual leave during this period (noting of course that the employer would need to top up the furlough pay to full salary), and thus it may not be reasonable for a Furloughed Worker to seek to carry over their untaken annual leave. However, this will be case specific; for example, an employee may have been discouraged from taking annual leave during their period of Furlough Leave due to the employer not being in a financial position to top up their salary to 100%.

Employers should do everything reasonably practicable to ensure that employees are able to take as much of their annual leave in the year to which it relates. It is therefore vital that employers communicate with the workforce about expectations in relation to annual leave, and if it is not possible for this to be taken, the amount of days carried forward should be made expressly clear to the employee in order to ensure the employer cannot be criticised for failing to allow the employee the opportunity to take the leave.

The good work plan

Understandably, many employers have put the mandatory changes to Contracts of Employment implemented on 6 April 2020 following the Good Work Plan, on the back burner. However, it must not be forgotten that employees and now workers (including agency workers, casual workers and zero hours contract workers) must receive a written statement of employment particulars on or before their first day of engagement, this replaces the previous legislation which permitted the statement to be provided within two months of the start date.

In addition, since 6 April 2020, the written statements of particulars must contain any training entitlement provided by an employer, including whether any training is mandatory and/or must be paid for by the employee, and all of the benefits that an employee is entitled to receive as part of their employment.

The changes also specify that a Privacy Notice must be attached to each contract issued to an employee or worker. A Privacy Notice provides information about how the employer will processes an employee or worker’s personal data.

One area not covered by the April changes is short time working and short-term lay off clauses. However, employers should not disregard the importance of these clauses as their absence in many contracts caused havoc at the start of the current pandemic prior to the Government stepping in and introducing the Furlough Scheme. A short-time working clause allows an employer to temporarily reduce an employee or worker’s hours of work and reduce their pay accordingly without being deemed to be in breach of contract. Similarly, a short-term lay off clause allows employers to temporarily not provide employees and workers with any work or pay without facing breach of contract and/or dismissal related claims. The pandemic has demonstrated why these clauses should feature in all contracts.

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Contractual considerations for Business

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Supply chain

Vital to any business is its supply chain and with the impact of Covid-19 this is an area of significant focus.

To understand the potential exposures to your business you should undertake a supply chain mapping of your existing services in order to ascertain any potential vulnerabilities. With this in mind, you should consider the following:

Impact upon your business: Consider what is critical to the provision of your services and/or supplies and what do you need to ensure you can deliver them. In particular, identify whether there are any gaps or potential points of failure within your supply chain and what you may need to put in place to overcome them or mitigate against failures or delays. For example, do any performance or other assurances apply and do you have any alternative options (whether short or long terms) you could consider? Do consider your obligations as to notifying any claims (as time for notification can be critical).

Location of your suppliers: If any of your suppliers are located in an area significantly impacted by Covid-19, supplies may be severely disrupted. In complex supply chains, seek assurances from your suppliers / service providers.

Lead Times: Identify the lead times that apply within your supply chain. Whilst longer lead times may, in the immediate term, pose less risk do consider the impact and how it may best be mitigated.

Alternatives: Consider the extent to which supplies could be obtained from / services could be provided by other providers (including those outside of the locations most heavily impacted). Consider whether, in particular following stockpiling for Brexit, there are alternative suppliers who hold increased supplies. Of course, do consider your current contractual arrangements (including as to exclusivity and/or minimum volumes).

Regulatory: Where gaps are identified and supplies are substituted, these could affect regulatory obligations (e.g. as to traceability of country of origin). Consider who should bear the administrative burden and the additional costs that may arise.

Increasing/Decreasing Supply: Customers may wish to reduce / increase supplies. This requires consideration of existing contract terms as to the flexibility permitted within these and the likely impact on cost to both parties.

Notice: Contractual obligations may include a requirement for suppliers to inform their customers of certain delays or potential risks to supply, including new proposed terms which may or may not be incorporated into the contract, depending on whether they are ‘deemed to apply’. Remaining alert to these and responsive to any such communications may avoid the potential for deemed acceptance of such terms and associated cost.

- Where gaps are identified in the supply chain, or where any elements are substituted, these could affect a party’s regulatory obligations and may therefore require communication with a regulator.
- Consider alternative solutions as to mitigating losses. Can a new arrangement be agreed with the supplier / customer as to any goods no longer required (of course at all times bearing in mind the potential for change in contract terms as detailed further below).

Contracts

Any communication which involves a change in performance by either party must be managed extremely carefully in order to avoid a

situation where a party inadvertently waives its rights or unintentionally varies the terms of the contract. The impact of Covid-19 on businesses provides a breeding ground for contractual disputes, many of which can be anticipated and dealt with through good communication and detailed contract governance procedures. However, where these issues threaten to escalate, the following areas are those most likely to require detailed advice:

- **Frustration**: Where a party attempts to claim that the performance of their obligations under the contract have become impossible (or radically different) due to events resulting from Covid-19 which were both beyond their contemplation and control. If successful, frustration will result in termination of the contract, however the threshold is high and therefore not easily met.
- **Force majeure**: A clause found in many contracts that enables one or both parties to be relieved from their contractual obligations, either temporarily or permanently, as a result of specific circumstances or circumstances outside their reasonable control (depending on the drafting of the clause).
- **Material adverse change**: Contract terms may allow for renegotiation of certain terms (e.g. charges) and/or termination of the contract in the event of a material adverse change. This will very depend on the particular circumstance and the drafting of the relevant clause as to whether or not the change will be caught.
- **Notice**: Notice requirements are often included within contract terms which require notice to be given (or received) in certain situations. These are rarely subject to extension or delay and so parties should ensure the relevant notice can be given via the required method and within the required timescale.

Title and risk

In many contracts, risk in the goods passes on delivery whereas title is reserved until payment. You should consider your contracts to assess whether that is the case and whether any mitigations should apply. For example, if you are paying for goods in advance, what protections do you have in place if the supplier becomes insolvent (e.g. can you take steps to take possession of the goods). As part of your assessment of suppliers, you should also consider their financial strength.

Insurance

Whether or not an insurance policy will extend to losses suffered due to events arising from Covid-19 will depend on its terms and could result in dispute. Standard business interruption cover usually requires damage to property, such as storms or fires, in order to be triggered, which means the majority of SMEs may not be covered for losses suffered either directly or indirectly from a pandemic. Careful scrutiny of policy terms will determine whether such exclusions apply as well as any related requirements such as the timing of notification of losses to an insurance provider.

Data protection

Security of information, whether personal data or confidential business information, can be challenging to maintain within a home working environment. Suppliers may be particularly vulnerable when considering their contractual obligations to customers and the potential extent of their liability (often unlimited) under a contract.

Equally, when contracts terminate, or companies go insolvent, vital information can be lost. Early consideration as to whether valuable data about products, services or customers could become irretrievable once a supplier has ceased trading or terminated a contract can help to identify processes to mitigate such a result.

Contract review

Contracts are the lifeblood of business. In the good times, everything works smoothly and you take them for granted. Few, if any, of us would call the present time a good one. As businesses of all sizes feel the strain of trading within the constraints of lockdown, their contracts are being severely tested.

Knowing what protections and potential pitfalls there are in your contacts has rarely if ever been more important. Using your contractual rights and remedies to your best advantage can make a crucial difference to your business.

It's a rare business that likes spending money on lawyers (...if you know any that do, please let us know...). But, just as there are times when you should go to the doctors, so there are times when you ought to seek advice on your contracts.

In those circumstances, we are here to help.

There is much that you can do yourself, such as identifying:

- The relationships where difficulties have arisen;
- The document or documents that set out what the terms of the contract for each of those relationships;
- What the problems you are having are, and what the contract says about the rights and obligations of each party in those problem areas; and
- How long the contract run for, and how much longer has it got run.

You can then work out, if you have not already, what you want to achieve.

Once you have this general information, and a clear idea of what you want to achieve, you will need to look into the detail of the contract to see what you can and cannot realistically achieve.

The sort of details you may look at here include:

- The key contact obligations;
- Whether there are any requirements relating to exclusivity and/or minimum volume commitments;
- If the contract has a variation clause allowing you to agree changes to the contract and, if so, how the clause works;
- Whether the contract limits liability;
- Whether you may terminate it early even if there has been no fault on either side ;
- If it has a force majeure clause;
- If it has services levels and/or KPIs, and the remedies for breach;
- Whether there have been other breaches of contract; and
- If the contract has a clause allowing termination for breach.

One you get into the realms of enforcing terms of the contract, force majeure, terminating for breach or serving notice, you are likely to need to need assistance. The consequences of getting it wrong – including failing to comply with any notice requirements, can be substantial.

An independent view on the strengths and weaknesses of your position, can also help you to negotiate a better and swifter resolution.

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Real Estate considerations for Business

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The physical location(s) for any businesses have faced unprecedented scrutiny during the Covid-19 lockdown. Many offices have been shut down during the outbreak whilst other properties have been updated to reflect the need to implement and observe social distancing rules.

A review of a businesses' property portfolio will always form an important part of any corporate strategy but in current times this is particularly key.

With many well placed commentators foreseeing a change in working habits both as we come out of lockdown but into the future, we give some thought to the options:

For those business with leases:

Re-gears

For many companies, along with staff costs, rent represents their largest overhead in terms of costs. The Government has offered some short term options to avoid companies' losing the right to occupy their properties whilst they struggle to pay rent up to the end of June but beyond this deals will need to be struck with landlord to change commercial terms. Some options can include:

- **Changes to frequency of rent payments.** Many leases express the rent as payable quarterly in advance and often on the usual quarter days (25 March, 24 June, 29 September and 25 December). During these times landlords may agree, often by way of side letter, that rent can be paid monthly in advance. This has significant cash flow savings for tenants who do not then need to finance three months' worth of rent in one go. Landlord's will not always agree to this though as it can put them in a worse position if a tenant gets into difficulty.
- **Look out for break options.** Many leases will contain break options and careful advice is needed where tenant's wishes to exercise the same. These provide opportunities for the tenant to vacate the premises but in some cases could be used as bargaining tools with landlords. For example, a tenant may agree to vary a lease to remove a break clause (as this can notionally improve the value of the lease to the landlord by guaranteeing a longer term) in return for a period of time where no rent needs to be paid.
- Extend the term in return for a rent free period. Many tenants are approaching their landlords and asking to add additional time onto the end of their current leases in return for a rent-free period now. Careful drafting and advice is needed to ensure this agreement does not result in an unwanted SDLT charge.

Assignments and Sub-lettings

The idea of asking someone else to step in and take on the lease or property is appealing but needs to be balanced against the backdrop of trying to find tenants at a time when many businesses are reluctant to take on new costs. In summary:

- **Assignments -** these involve assigning the lease to a new tenant who then takes on the tenant's responsibilities in the lease. Many landlords will attach conditions to such a deal which may include a requirement for the exiting tenant to 'guarantee' the obligations of the new tenant.
- **Sub-letting** – this involves the lease staying in place but the tenant grants an 'under-lease' to a third party. The tenant retains responsibility for paying the landlord but has someone paying them (subject to their continuing financial position). Some leases will prohibit sub-letting 'part' only of the property and some properties will not necessarily lend themselves to this. This option may be more appealing to tenants who lease whole buildings or multiple floors as they are more likely to have the ability to underlet part only as it should be theoretically easier to sub-divide

the property.

Surrender the lease

This may involve the landlord and tenant reaching a commercial agreement for the tenant to pay a sum to 'get out' of the remainder of the lease. The length of time left on the lease and the confidence of the landlord in securing a replacement in good time will impact on the considerations behind these discussions.

For those businesses who own their premises they might consider letting out part of the property to another business as a means of securing a new income stream /help with the running costs or they may look to use the 'asset' as a means to raise cash either by:

- **A sale and leaseback** – this involves selling the property to a third party (typically an investor) who then grants a lease back to the company. This can be a good way to raise cash quickly whilst retaining the opportunity to continue to trade from the same location. Obviously over time the company will become responsible for the rent which it was not previously paying.
- **Seek a bank loan** – the business premises might act as useful collateral to secure bank borrowing.

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Health and Safety considerations for business

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As employers, you owe a duty to your employees to ensure that you can provide a safe environment for them to work in. This has never been more prevalent than now during the global Covid-19 pandemic. Some of the key considerations are set out below.

Social distancing

If you have staff returning to the workplace you need to assess whether it is possible for staff to observe the 2m rule. You should conduct a risk assessment to ascertain whether this possible, whether any one-way systems or divisional measures need to be put in place and consider whether they create any health and safety issues (such as impacting upon fire escape routes or restricting wheelchair access).

You should also consider whether you need to introduce shift work to reduce the number of employees in the workplace at any one time and how that may impact employee traffic through entrances and exits. For audit purposes, you should also complete a risk assessment and retain a copy for your records.

Ensuring safe hygiene standards

In addition to enabling social distancing, you will need to ensure that that increased hygiene standards are implemented. In particular:

- Is a thorough deep clean of the workplace required before any employees return?
- Do you need to increase and/or change the cleaning operations?
- Are there sufficient washing facilities in place?

You will also need to ensure that your staff have access to PPE equipment if required (and to take appropriate steps including sanitising such equipment in accordance with regulatory guidelines).

Returning to unoccupied buildings

There is an increased risk that Legionnaires Disease could spring up as a result of the lockdown period. You should ensure that if your business is at risk that this is addressed in a Risk Assessment and if necessary that you arrange for your water systems to be tested / treated. For audit purposes, you should also complete a risk assessment and retain a copy for your records.

The utilities in your premises may have been turned off during lockdown. You should ensure that you are using qualified and approved engineers and electricians when re-establishing power and/ or plumbing supplies to your buildings.

If you have plant and machinery which has been dormant for a number of months, you will need to carry out an assessment of the safety checks that are required, ensure the safety tests are carried out by an appropriately qualified person, log when the tests are carried out and retain a copy of any test certificates for your records. You will need to be satisfied that the equipment has been thoroughly tested and is safe for employees to use before their return to work.

Site working

If your employees will be working on other sites, you will need to make sure that you have made the appropriate enquiries and, where necessary, carried out your own risk assessment to ensure that the site-locations also satisfy the requirements for a safe working environment for your employees.

You will also need to consider that if you are carrying out any shift work that you have adequate First Aiders in the building if you are planning on re-opening on a skeleton staff basis. If additional staff are trained, make sure that they are added to your list of first aiders, their names

are communicated to the workforce and retain a copy of their training certificates for your records.

Open a dialogue with your employees. Enquire as to whether they are classified as high-risk individuals with reference to the Government Guidelines, and ensure that any additional measures required are taken to keep them safe.

If any of your employees fall ill following their return to work, they will need to self-isolate if they are displaying symptoms related to Covid-19 in accordance with the Government Guidelines. You should ensure that you have a clear policy and procedure for the steps your employees should take if they experience any symptoms so that they know how to notify you and what action they should take.

Liability

Infection

Covid-19 presents an infection risk to employees, therefore as employers you must ensure that you are approaching this risk sensibly and taking all reasonable steps necessary to ensure that you are discharging the duty of care that you owe to your employees. Conducting a Risk Assessment as to whether your business can re-open during these times is going to be essential.

If you cannot safely open your business due to the risk that infection presents, it is advisable not to re-open the business. Damages could be awarded to individuals where the employer has not taken steps to adequately protect staff from the risk of infection.

Stress

The consequences of the pandemic may result in a skeleton workforce returning to the office. You may have employees who are currently suffering with Covid-19 or those who are displaying symptoms and are therefore self-isolating. You may also have individuals who are currently on the Government's furloughing scheme. This contributes to the skeleton staff being more susceptible to stress and being overworked.

As an employer, you will need to ensure that your staff are coping, that any stress is not resulting in pressure being put on their mental health and/or that any work is re-distributed and allocated fairly amongst your employees to ensure that they are not susceptible to any physical injury as a result of having to take on further work.

Additionally, as an employer you will need to ensure that those who are tasked with operating machines have had the relevant training to safely use the machine and that the appropriate rest periods are still adhered to. In this regard a Risk Assessment would need to be conducted and if necessary, training provided to an individual so that they could cover the work of an absent colleague.

Working from home

Working from home may seem attractive to an employer, however your duties in connection to your employees do not alter. They are entitled to the same level of care even though they are working from home. Considerations that employers should take into account are:

- That your employees have the appropriate equipment in order to enable them to work from home.
- That their workstations at home are set up in an ergonomic manner to avoid any muscular skeletal issues.
- That you are checking in with your employees to ensure that they are not unduly burdening themselves or experiencing highly stressful situations which have been exacerbated whilst having to work from home.

As an employer, you are vicariously liable for any negligence that your

employees cause. Therefore, if your business involves your employees in a customer facing arena, you could face prosecution if your employee is infected with Covid-19 and passes it to a customer as a result of contravening Government guidance and/or you have failed to provide your employee with adequate PPE.

There are also additional issues which arise as a result of the different points raised above. For example, if an employee is negligent in delivering a service due to undue stress and/or fatigue from their working environment, you as the employer could be held vicariously liable.

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Corporate considerations for Business

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Transacting private company board meetings during lockdown

The strain of Covid-19 is causing untold difficulties on the life of many businesses. Such difficulties are asking many unexpected questions of directors. Details of commercial contracts, employment and HR related issues and the financing of a business are all high on the agenda. Companies tackling such issues need to ensure that the decisions that a board of directors are making are properly recorded and will not later be undone or challenged once this pandemic has passed.

Check the articles

The company's articles of association are the document that outline the way in which directors' decisions can be made correctly. It is therefore paramount that directors review their company's articles to ensure that there are no restrictions on holding meetings electronically. If a company has bespoke articles there may be restrictions. If a company has model articles, then there is no restriction on holding meetings electronically.

On a practical note, the board needs to satisfy itself that all directors present can hear the business of the meeting as well as be heard at the meeting. You should minute that all directors present were in attendance, could hear and be heard correctly, and that the meeting can be held electronically to protect a company from any potential disputes and scrutiny after the passing of the pandemic.

Now that the board has determined that electronic meetings are permissible, it needs to ensure that it continues to meet other company law requirements. This checklist helps companies consider what needs to be done before calling a board meeting.

Notice	Reasonable notice must be given to the directors which must include date, time, place and method of communication for the meeting.
Declarations	Directors must make known any interest that they have in the business of the meeting.
Quorum	All directors' meetings must be quorate before decisions are made and acted upon
Resolutions	Considering the current lockdown, the use of the written resolution procedure should be used more widely if possible.
Voting	Most board decisions can be made by simple majority but consider whether the chairperson has a casting vote.
Administration	Even though board meetings may not be held in their normal locations, it is important that minutes are taken and these are kept safe.

Dividend payments during the Covid-19 pandemic

The payment of dividends is generally a good indicator of the financial health of a business. Most companies in the UK are SMEs, a significant proportion of which are owner managed. In such companies, the payment of dividends is used as a supplement to a nominal salary. Under UK company law there are specific requirements to allow for the payment of dividends. In this time of Covid-19, where there is an almighty strain on cashflow, it is critical that companies are not found to be falling foul of these requirements or such dividends might subsequently be declared unlawful.

This article assesses the law concerning the payment of dividends in SMEs and what considerations should be at the forefront of director and shareholder thinking.

Can you make a distribution?

There are two central tenets of making distribution to the shareholders of a company.

1. Is there enough cash?
2. Can the payment be justified?

In answer to the first question, the directors need to consider the company's distributable reserves/profits. The legislation calculates this as being realised profits that have not already been distributed less the company's realised losses that have not been written off. If this calculation is positive, then a dividend might be possible. This is only the first step however.

The second step is that the dividend needs to be justified by reference to the relevant accounts ie the individual company accounts, not group accounts. Generally, the relevant accounts are the most recent set of annual accounts, but there are instances in which management accounts can be used. A further key point concerning the justification of the payment of a dividend connects to events following the production of the accounts at the time that the dividend is being declared and then paid. Points of consideration are as follows:

- Are the profits stated still relevant?
- Have any profits been depleted by subsequent losses due to the pandemic?
- Will the dividend payment jeopardise the solvency of the company?

Given the current pandemic, directors will need to consider thoroughly the legitimacy of making a distribution, the effect of the Covid-19 restrictions on future cashflow and expenditure requirements may mean that the accounts are no longer accurate and should not be relied upon. Where directors decide that a distribution is appropriate, make sure that their decision making process is accurately and thoroughly minuted.

Directors are subject to several duties of which they must take heed. Safeguarding company assets and having regard for the success of the company are two significant duties concerning dividends. Where directors fail to exercise these duties, they could be held personally liable for distributions made unlawfully (e.g. where there weren't enough distributable profits).

Dividend process

Where directors decide that a distribution is appropriate there are other considerations that need to be considered.

Articles of association:

- Prior to any recommendation or declaration being made the directors should consider the company's articles to see whether there are specific restrictions on the payment of dividends.
- If a final dividend, articles for private companies normally provide that this can be declared using a written resolution of the members.
- If an interim dividend the articles may provide that the directors can resolve to pay the dividends.

Owner-directors pay

The above details instances where the directors and shareholders are different persons. Where the director and the shareholder are the same person and the payment of a dividend is used to supplement an owner-director's salary, the owner-director must determine that the company has enough distributable reserves and the director can justify the payment. This is particularly important at the moment with consideration also needed to be given to the current economic downturn as a result of the pandemic, and up to date cashflow forecasts and management accounts must be considered by the director.

If a dividend proves to be unlawful, a shareholder may be liable to repay it if the shareholder knows, or had reasonable grounds to know, that a dividend would be in breach of the requirements set out above. Similarly, in the event of an insolvency, claims may be brought against the directors and whilst the Government has announced that it will suspend the "wrongful trading" laws, that may not affect the directors' liability for potential claims for breach of their statutory duties and common law duties by permitting the payment of the dividend and they may be at risk of a claim for damages as a result of any unlawful dividend being paid.

Companies House

Please note that certain of the strict filing deadlines at Companies House have been relaxed due to Covid-19, this includes making an application to delay filing of a company's accounts and obtain a three month extension

All same day services have been suspended until further notice and there is delay in processing paper and online submissions. Companies House has introduced an emergency filing service to aid companies during the Covid-19 pandemic, for example to change a registered office, rectify the register, change the director's details, it has also temporarily pause the strike off process to prevent companies being dissolved as they deal with the impact of the Covid-19 outbreak.

Mergers and Acquisitions

With political certainty towards the end of 2019 and into 2020, M&A activity was at a healthy level and looked as if it would increase during 2020, this was abruptly bought to an end with the arrival of Covid-19 and very few deals completed in April and May given the disruptive nature of the pandemic. That said, we are now noticing that investors are now beginning to re- enter the market with an upturn in instructions.

Funding for growth is available, directors may believe that the company qualifies for the Government's Coronavirus Business Interruption Loan Scheme (CBILS), the Covid Commercial Financing Facility Scheme (CCFF) or the Future Fund. The directors need to decide which form of finance is best for the company bearing in mind their statutory duties, including the duty to promote the success of the company for the benefit of its shareholders as a whole, and strictly on the basis that current liabilities and creditors are fully covered but they may wish to consider the funding which is available to grow their business through acquisitions.

Whilst carrying out thorough accountancy and legal due diligence is important in any acquisition, it is particularly crucial for buyers now given the uncertainty created by the pandemic. Buyers should consider the pandemic's impact on a target's revenues and cashflow, the ability of workers to work remotely, now and in the future, what are their travel plans for accessing the office, what is the impact on any staff who have been furloughed and any redundancies which have been made – is there a risk that employee claims may arise in the future. Are their any considerations which should be taken into account with material contracts that the company has entered into. The list is endless.

Such issues may give rise to a buyer seeking specific indemnities in the purchase agreement to cover off Covid-19 related liabilities irrespective of whether specific risks have been identified. This should be raised at an early stage of the negotiations, when heads of agreement are being discussed so that it does not come as a surprise to a seller and its advisers as the actual terms of the purchase agreement are negotiated and due diligence enquiries undertaken. If the price is to be adjusted on account of any such liabilities this should be raised to save unnecessary time and costs being incurred by either party.

There are evident challenges to acquiring a company at the moment, not least the fact that a buyer is unable to properly visit and inspect a

business which itself may not yet be open and fully functioning, but this doesn't to mean that opportunities should not be considered as long as both parties are fully aware of the risks associated with the impact of Covid-19 and factor this into account at the earliest opportunity in their discussions.

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Covid-19: the economic implications for businesses

The outbreak of Covid-19 is continuing to present significant challenges to our everyday lives. Furthermore, the implications for many businesses will be profound for many months to come. The damage to the economy is apparent and businesses are increasingly dealing with the breakdown of supply chains, cash flow issues, labour shortages and disruption to manufacturing.

The Government's package of financial support via the Coronavirus Business Interruption Loan Scheme and the Coronavirus Bounce Back Loan has been welcome but only time will tell whether this will be sufficient to prevent many businesses tipping into insolvency. In a further measure to protect the economy, the Corporate Governance and Insolvency Bill (CIGB) has now been published and is expected to become law in the next few weeks.

Among other provisions, the CIGB prohibits suppliers relying on termination clauses in supply contracts triggered when a customer has entered into a formal insolvency procedure. This measure has been introduced in order to allow a distressed company to continue to trade and to prevent suppliers from insisting on the payment of outstanding charges as a condition of future supply. There are exceptions, including to those suppliers likely to suffer financial hardship as a result and where the court officeholder/company consents. Small suppliers are also temporarily exempted and these are defined as meeting two out of three criteria relating to turnover, headcount and balance sheet.

Directors are under a duty to act in the best interests of the company and its shareholders. Once a director forms the view that the company is insolvent, on a cash flow and/or balance sheet basis, his/her duty is to act primarily in the interests of the company's creditors. If there is no reasonable prospect of avoiding an insolvent liquidation or insolvent administration, a director's obligation is to manage the affairs of the company with a view to minimising the potential losses to creditors. As the uncertainty of the impact on the economy continues, we advise directors to:

- Maintain accurate and up-to-date company financial records and consider the potential impact on creditors of the decisions they take.
- Continually monitor and review the financial state of the company. Directors should review the company's balance sheet and cash flow position and also consider the need to increase the frequency of management accounting and internal financial reporting.
- Consider ways to reduce expenditure, if necessary.
- Hold frequent board meetings convened specifically for the purpose of reviewing the company's financial position and keep proper minutes of those meetings, noting any decisions made and the reasons for them. Any contingency plans that are implemented and/or steps taken to mitigate the effects of Coronavirus should be carefully documented so that it is clear how and why those

decisions were taken.

- Continually monitor market developments and set up alerts in order to keep appraised of such developments.
- Take professional advice aimed at reviewing whether an insolvency process is inevitable or whether there is some way of resolving or mitigating the company's financial difficulties.

Please contact us, we can advise and guide you through what may be an extremely challenging time for you and your business.

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