

Covid-19
What is the impact
for your business?



Foreword

As you read this article you are likely to have been impacted by Covid-19 in some way, whether personally or professionally. It is clear that the outbreak, now officially classed as a pandemic, is having real and significant affects on businesses and the people working in them.

We have summarised some of the key issues that we have been providing guidance and advice on to our clients across various sectors, in order to mitigate the impact of the virus for them, for their staff and their businesses across the globe.

The situation is constantly evolving with new information and daily announcements from the Government. We will be updating this document to keep you up to date with the guidance and advice as things change and develop.

Our teams are working to guide you through this challenging time, so please do not hesitate to contact us.



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Employment

Coronavirus has now gone from being an abstract threat to a daily reality, and employers are experiencing many challenges when it comes to managing the situation.

It's essential that employers keep on top of the latest government advice and adapt it to the practicalities of running their workplace. Taking a flexible approach has now become a necessity with the majority of the workforce who can do so working from home.

The employment team are updating information on our website as the situation evolves and in the latest update [here](#), you can find advice on the following key points:

- The new Job Retention Scheme (JRS);
- What are “furloughed workers”;
- Introducing new “furloughed worker” arrangements;
- Payment practicalities under the JRS;
- Redundancy v furlough leave and other tricky issues; and
- The introduction of Emergency Volunteering Leave.

For details on the new statutory sick pay rules, and guidance on payment for those self-isolating please refer to last week's update [here](#) and further discussion on our podcasts.

Contractual obligations

A key concern for some businesses is the impact of Covid-19 on contractual obligations. We provide some practical pointers for managers to consider when looking for ways to deal with suppliers, customers and employees fairly but also have a need to protect the business from supply problems and cash flow issues. We have summarised some of the key points below, but for more detail on this please refer to [this article](#) on our website.

Force majeure

The pandemic is having a variety of adverse consequences for business including interruption in supplies, rising costs and unforeseen changes in demand. If your customers or suppliers are experiencing difficulties in meeting contractual obligations they may have mentioned ‘force majeure’ to you. Of course this may also be relevant to you if your business is struggling to meet a contractual obligation. Force majeure does not have a particular meaning in English law and its scope and effect depends on how it is drafted in a contract (if indeed it is included at all).

Force majeure provisions usually excuse a party from delay or failure to perform any of its obligations where it is unable to do so due to an event outside of its control.

Changes to pricing

If a contract is possible to perform but has become more expensive it is worth checking any pricing clause to see whether it is possible to increase the price to take account of the unforeseen costs. This will not always be the case but sometimes price increases can be passed on if there is an increase in underlying costs of materials or shipping costs.

Frustration

If the contract lacks a force majeure clause, or if the situation falls outside of the force majeure clause, then it may be possible to say that the contract has been ‘frustrated’. This applies in certain restricted circumstances where performance has become impossible.

Change in law / material adverse change

While not as common as force majeure clauses, some contracts contain a similar provision which provides for the effects of a change in law. The relief is usually to allow either a variation or renegotiation of the price or to allow one of both parties to terminate the agreement.

Now is the time to look at any contracts which your business is party to if you have any concerns that you or your counterparty might experience difficulty in performing the contract. In many cases the parties will come to a commercial arrangement rather than jump to termination or initiate a formal dispute, but those discussions are much easier to prepare for once you understand your contractual options.

Planning

Against the backdrop of national efforts to improve water efficiency, water use is set to rise due to increased hand washing to combat the coronavirus outbreak.

Achieving clean and plentiful water, minimising water lost through leakage and using water more sustainably are some of the objectives in the Government's 25 year environment plan – 'A Green Future: Our 25 Year Plan to Improve the Environment'. In its recent policy paper 'Meeting our Future Water Needs: National Framework for Water Resources', the Environment Agency (EA) sets out the scale of action needed to ensure resilient water supplies are available to meet the needs of all users in the future. The paper states that 14,000 million litres of water is provided by water companies for public water supply every day and that if no action is taken between 2025 and 2050, around 3,435 million extra litres of water per day will be needed for public water supply to address future pressures.

In addition, the paper addresses issues of global temperature increase and population growth, and puts forward proposals for improving water efficiency through to 2050. These include plans to reduce long term water usage, including by reducing the 2018 level of 143 litres of water used per person per day to 110 litres by 2050.

Water UK, a trade body representing the water industry, urged the Government to update the Environment Bill to provide clarity on the possibility for introducing personal water budgets. Water UK stated in November 2019 that the Bill as it reads, lacks ambition on empowering the public to become more water efficient. Water UK also called on the Department for Food, Environment and Rural Affairs (Defra) to require minimum evidence-based water-efficiency standards to be applied to appliances such as washing machines and dishwashers. In its previous research, Water UK recommended water labelling schemes to reduce per capita water consumption in homes and offices.

Although it is still too early to speculate on the longer term impacts on water usage as a result of the current pandemic, we consider that it is likely that the population will place a greater focus on handwashing well into the future and that the domestic water usage predictions used to guide the policy paper will need to be updated to take this into account. It will be interesting to see how this consideration is factored into water efficiency policies going forward.

Source: <https://www.edie.net/news/4/UK-water-industry-slams-Government-approach-to-efficiency/>

Local Authorities

Local authorities are at the forefront of the nation's response to Covid-19 being the first responders in many areas of the public realm from education, leisure and social care to housing, social services and burials. In addition, as a major employer in the UK, the local government sector itself will be heavily impacted as sickness and the policy of social isolation take hold.

Some key issues currently apparent are:

- Understanding the rapidly evolving [response from central government](#) and tapping into [additional resources being made available](#);
- Planning and up-scaling resources in the social care sector to cope with an increase in patients requiring residential or in-the-community care;
- Managing [absences in the workforce, sick pay](#) and other [HR matters](#) to ensure essential services, such as waste collection, carry on;
- Ensuring the welfare of vulnerable and at-risk children when schools are closed, cutting off access to free school meals, SEN support and safeguarding oversight;
- Keeping the wheels of [governance](#) turning in the absence of key decision-makers at senior officer and Member level and amending governance processes to promote efficiency;
- Considering rent free periods and other means of economic support for social housing tenants;
- Managing [commercial and contractual arrangements](#) with key service providers who themselves are impacted by a collapse in demand throughout the economy – is this a force majeure event?
- The possibility of insourcing services where service providers are becoming insolvent and dealing with procurement, TUPE and pensions implications;
- [Entering into contracts](#) for the provision of services during the crisis period without following the usual OJEU procedures;
- Resourcing and maintaining Local Resilience Forum measures over several months;
- Mitigating and responding to an increase in homelessness as the economic shock of the outbreak impacts on individuals' incomes.

A decade of austerity has turned local government into one of the most innovative and resilient sectors of the UK economy and Covid-19 will put both of those qualities to the test in finding solutions. Whether those solutions involve new governance arrangements, joint working between authorities, commercial contract management, housing innovations or other novel approaches, we have the experts in public sector law to give councils the support they need at this difficult time

Procurement

In response to the Covid-19 outbreak, the Cabinet Office has published PPN 01/20 which sets out information and guidance on how the public procurement regime can be used to address potential supply-chain challenges arising. The PPN takes effect immediately and applies to all contracting authorities.

The PPN sets out five options that contracting authorities might consider when there is an urgent need for supplies, services and/or works.

- Use of the negotiated procedure without prior publication for reasons of extreme urgency (regulation 32(2)(c));
- Use of the negotiated procedure without prior publication where there is an absence of competition or protection of exclusive rights (regulation 32(2)(b));
- Call-off from an existing framework agreement or DPS;
- Accelerated procurement procedure; and
- An extension or modification of an existing public contract during its term (regulation 72).

It should be noted that the PPN does not suspend any requirements on contracting authorities to comply with the full scope of the procurement regime. Instead, it reminds contracting authorities of some exemptions that they may seek to rely on (but these will still be strictly interpreted) and of pre-existing procurement solutions (eg framework agreements) that they can use.

Overall, the message seems to be that unless a contracting authority can say that its procurement need has been created by the Covid-19 outbreak (eg the need to purchase additional quantities of hand-sanitiser or other requirements to respond to public health risks) – it is business as usual.

For more detail please see <https://www.towers.com/insights/2020/march/procurement-policy---responding-to-covid-19-ppn-0120>

Construction

Whilst there has been some confusion since the Prime Minister's announcement on 23 March 2020 severely restricting movement, central government's position currently seems to be that they expect work on construction sites to be able continue within the current restrictions. We discuss this issue in more detail in this legal update: <https://www.towers.com/insights/2020/march/coronavirus-should-construction-sites-close>

Notwithstanding that works can, in theory, continue within the restrictions, in practice there are already claims of shortages of labour and materials and this is only likely to worsen. Parties are therefore reviewing their contractual terms to see where the risk lies for these delays and whether works can be suspended (or terminated). We have a legal update which considers the position under the JCT 2016 Design and Build Contract and the NEC4 ECC <https://www.towers.com/insights/2020/march/covid-19-force-majeure-and-construction-contracts>

In respect of live projects we are advising clients to:

- review their contractual provisions carefully;
- ensure they follow all the contractual processes (especially any notification requirements);
- consider agreeing a commercial solution to give certainty and share the risk. This would hopefully ensure project teams remain viable and projects can be restarted as soon as this crisis is over. Such agreements would need to be carefully drafted and adapted to the particular contract.
- if an agreement cannot be reached:
 - keep detailed records to substantiate or refute any claim; and
 - be aware of termination triggers.

In respect of contracts currently being negotiated we are advising clients to expressly provide for Covid-19 and its possible effects under the contract.

Directors Duties

Pursuant to Sections 171 – 177 of the Companies Act, a director's "general duties" include an obligation to promote the success of the company; exercise independent judgment, reasonable care and skill; and to avoid conflicts of interest.

However, once a company becomes insolvent, a director's primary duty is then to act in the best interest of the Company's creditors. Further, when there is no reasonable prospect of avoiding insolvency, the wrongful trading duty is engaged and directors must then take every step to minimise losses for creditors ("Creditor Duties").

The Court can order a director to personally contribute to a company's assets if they are held to be in breach of their duties to creditors. However, it can be difficult for directors to identify when the transition from solvency to insolvency takes place – and with it the requirement to consider mitigating losses for the benefit of creditors. This is likely to be even more challenging in light of the uncertainty caused by the Covid-19 pandemic which is putting huge and unprecedented pressure on a broad range of sectors from retail to aviation.

To mitigate risk of personal criticism or liability, our advice to all company directors is to:

- maintain accurate financial reports about the performance of the business, its debtors and its liabilities;
- hold regular meetings, daily if necessary, with fellow directors so that the financial position (and the threat of insolvency) is monitored and assessed;
- carefully consider and evaluate any significant transactions (including any lending facility sought from the bank) and ensure that any board decisions can be justified at a later date as having been in the best interest of the Company or its Creditors (as applicable); and
- seek professional advice if you are concerned that the Company has become insolvent, or that it cannot reasonably be avoided in the future.

Commercial Landlord & Tenant issues

Over the last few days we have been helping both landlords and tenants to respond to the Covid-19 crisis. We have summarised some of the questions that have come up. Click [here](#) to view the full Q&A, which covers the following issues:

- Liability in the case of visitors to premises;
- Government orders to close premises and impact on collecting rent?
- Frustration: Is the lease frustrated?
- Breach of the covenant for quiet enjoyment or derogation from grant;
- Who pays for the extra costs?
- Will insurance step in?
- Will this affect a turnover rent?
- Effect on rent reviews; and
- If the premises are closed down, what should I do about security?

Emergency coronavirus legislation for commercial landlords and tenants

The government has enacted the Coronavirus Act 2020 which includes temporary measures to protect commercial tenants from eviction for unpaid rent.

It came into force on 25 March 2020, has immediate effect and imposes a moratorium on forfeiture action that will last until 30 June (“the Relevant Period”). There is an option for the government to extend this date if needed.

We summarise the main points below. As the situation is rapidly changing, we are providing further updates on this topic on the insights section of our website.

Moratorium on forfeiture

- Whilst many landlords and tenants are already having discussions about rental payments, the legislation will provide greater protection to businesses worried about eviction as a result of the impact of the current coronavirus crisis.

Extension of the period for possession in ongoing possession claims for non-payment of rent

- For any forfeiture proceedings commenced before the Act came into force, the Courts must not make an Order for the tenant to give possession to the landlord before the expiry of the Relevant Period. If such an Order has been made, it is to be treated as extended.

Limiting grounds of opposition under the Landlord and Tenant Act 1954

- For the purpose of opposing the grant of a renewal lease under the Landlord and Tenant Act 1954, any failure to pay rent during the Relevant Period is to be disregarded if a landlord is seeking to rely on the statutory ground of persistent delay in paying rent.

Practice in brief

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- Nine offices located in Abu Dhabi, Bahrain, Birmingham, Dubai, Exeter, London, Malaysia, Manchester, Oman.
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