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Overview

As the UK government begins to lift restrictions, for many there will be a shift in the operational, financial and legal issues that need to be addressed. Every business will be concentrating on the issues that are having the most immediate and significant impact on their people, ability to trade and financial standing. This guide is intended to help you take a step back and look at some of the most pressing considerations businesses are having to address as they look to protect the business and to plan for the future.



People and workforces

Have you furloughed or are you intending to furlough workers?

- The Job Retention Scheme allows any business with a UK payroll to furlough employees and apply for a grant that covers 80% of the employees' usual monthly wage (subject to any modifications of the scheme from August 2020). The scheme runs until 31 October 2020. Employers can use the scheme at any time during this period, using HMRC's online portal.

Have you calculated your claim for furloughed workers correctly?

- HMRC has provided detailed guidance on how to calculate 80% of regular wages (plus national insurance and pensions contributions), including the types of payments that should or should not be included and rules on holiday or sick pay, pensions contributions and the maximum wage that can be claimed. Ensure you retain all records and calculations, as HMRC has the right to retrospectively audit claims.

Do you have a plan for bringing furloughed workers back into the business? What are your longer term staffing needs?

- The Job Retention Scheme will apply in a modified form from August 2020, with the intention of encouraging more employees back into work.

Some businesses are already rotating employees in and out of furlough to ensure they are not out of the business for too long.

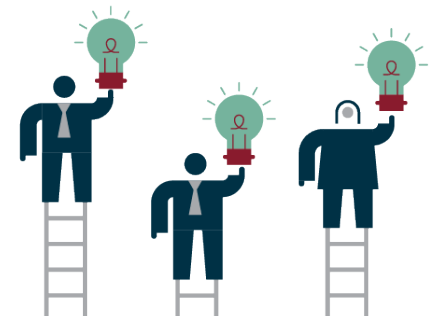
- Can any adjustments be made to employment terms and operational practices to save costs?
- Are your staffing requirements subject to third party contracts or customer/client demand? What is the impact of COVID-19 on these arrangements?
- Consider whether longer term changes to working arrangements or redundancies may be required.

What adjustments do you need to make to allow a return to the workplace?

- For workforces substantially or entirely working from home, once workers are allowed to return to the workplace, to what extent will this be encouraged or required? Continued social distancing may require adjustments to workplaces, the provision of personal protective equipment and reducing the numbers in at any given time. If working arrangements are changing permanently, this should be agreed and documented properly.
- Employers looking to implement their own testing procedures for COVID-19 or looking to require employees to take advantage of the government testing programme should take legal advice to understand the employment law and data protection implications of doing so.

What other permanent changes might be needed?

- The impact of the coronavirus will accelerate the existing trend of more employees working remotely. Do you need to revisit or remind employees of policies and procedures around working hours, cyber security and protection of confidential or personal data?
- Do risk assessments need to be carried out, and are line managers able to performance manage effectively and spot and respond to concerns around mental health?
- Employers with sponsored workers will also to ensure that any relevant notifications are made to the Home Office.



Read our latest insights on **people and workforce** issues in relation to COVID-19

Financing and funding

Do you know which funding scheme(s) your business can apply for?

- The UK government has introduced a range of funding schemes, aimed at different types of business and with different terms and eligibility criteria. The schemes include: the Future Fund for early stage businesses, the Coronavirus Business Interruption Loan Scheme (CBILS) and the Bounce Back Loan Scheme for SMEs, the Coronavirus Large Business Interruption Loan Scheme (CLBILS) for larger business and the Covid Corporate Financing Facility (CCFF) for the largest businesses.

Would your business satisfy the eligibility criteria?

- Each scheme has its own criteria but common factors are that the business must be UK-based (or must "make a material contribution to the UK economy" for the CCFF), and for the CBILS and CLBILS the business must be viable if it were not for the pandemic.

Are you able to defer tax bills?

- The government has deferred VAT payments due between 20 March and 30 June 2020 and has relaxed the criteria for 'time to pay' arrangements for outstanding tax liabilities. There is no specific relief relating to corporation tax liabilities (although it may be possible to apply for time to pay).



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Contracts

Does the pandemic trigger force majeure clauses in your contracts?

- For contracts governed by English law (unlike some other jurisdictions), force majeure will only apply if there is a specific force majeure clause. If so, whether that clause is triggered will depend entirely on the wording of the contract.

What is the effect if force majeure is triggered?

- Some force majeure clauses will merely suspend an obligation to perform contractual obligations, while others will give a right to terminate and may require refunds to be paid on services that have not been delivered. Check carefully what your clause says.

Has a material adverse change clause been triggered?

- In corporate and finance agreements, a MAC clause may give the buyer the right to walk away from the deal or give the lender the ability to call in the loan and enforce security if the company has been materially and adversely. There is no single test as to what is "material". Check the wording of your clauses carefully and consider both the magnitude and the duration of the disruption caused.

Are you able to execute your contracts using e-signatures?

- Electronic signatures can be a legally valid method of executing documents in England and Wales, but there may be limitations, imposed either by regulators or registries such as the Land Registry, or in a company's articles of association. Where a deed requires a signature to be witnessed, the witness must be physically present, rather than observing by video link.

If you are raising a dispute, are you able to comply with limitation and notice provisions?

- Check whether your contract requires disputes to be raised within a certain period, or prescribes a particular method for serving a notice of dispute. You may want to agree with your counterparty to accept service of contractual notices or legal proceedings by email.

What is the effect on any existing litigation?

- The English courts are conducting hearings and even full trials remotely. Do not assume that proceedings will be delayed: the courts are keen to ensure that existing deadlines and hearing dates are respected. You should also consider the impact of electronic communication methods being used by remote workers on your disclosure obligations for existing or pending disputes.



Read our latest insights on **contract and disputes** issues in relation to COVID-19.

Corporate

What is the impact on any on-going or intended corporate activities?

- As well as market conditions affecting the levels of any corporate activity, parties to transactions will be seeking to allocate risks associate with the impact of coronavirus, through warranties and indemnities and price-adjustment mechanisms. A MAC clause (see [contracts section above](#)) may be triggered in on-going transactions, enabling the purchaser or investor to walk away in certain circumstances.
- Increased control on foreign direct investments in many jurisdictions (to protect domestic industries and supplies) may preclude some cross-border transactions or require them to be restructured.
- Plans to return capital to shareholders/investors (e.g. by way of dividend or buy back) may need to be reviewed if profits levels can no longer support them. Ensure eligibility for any government grant payments has been appropriately documented to minimise clawback risks.

Are you worried about insolvency?

- Directors' duties switch from promoting the success of the company for its shareholders to acting in the best interest of the creditors as a whole. The board should hold regular minuted meetings, seek professional advice, obtain robust financial information and monitor compliance with financial covenants. Consider options with lenders and/or seek additional equity finance to bridge cash flow concerns.

- Wrongful trading provisions are being suspended for three months retrospectively from 1 March 2020, to allow directors to keep trading without the threat of personal liability if the company ultimately fails. The government is also introducing a short moratorium to give companies in financial difficulty breathing space, and introducing a new restructuring procedure that would bind all creditors to an arrangement in certain circumstances. The legislation required to do this has not yet been passed.

What is the impact on company meetings and reporting?

- Consider whether to postpone your AGM or hold a virtual/hybrid AGM..
- Publicly traded companies need to be mindful of their responsibilities in respect of inside information and make timely announcements to the market, for example about changes to a company's trading performance or dividend plans.
- Companies must make appropriate and meaningful disclosures about the impact of COVID-19 in their annual report and accounts: consider whether to make specific balance sheet adjustments (including impairments) or post-balance sheet event disclosures, depending on when the relevant year-end falls.

Are you furloughing a director?

- Any company officeholder can be furloughed, but the Job Retention Scheme grant can only be claimed if they are paid via PAYE. Consider the decision-making requirements, including whether a director concerned is able to vote on the decision.
- Directors' statutory duties remain while they are under furlough, but they cannot do any more than is reasonably necessary to discharge this duty.



Read our latest insights on **corporate** issues in relation to COVID-19.

Real estate

If you are a commercial landlord, are your tenants behind in their rent?

- The government has imposed a temporary ban on landlords forfeiting commercial leases for non-payment of rent, and has also restricted landlords' ability to exercise rights under the 'commercial rent arrears recovery' procedure and issuing statutory demands on tenants who cannot pay.
- You may still be able to draw down against a rent deposit, pursue guarantors, or bring a debt claim in court.

If you are a commercial tenant, are you locked into long-term commitments?

- While tenants are protected against forfeiture or aggressive debt recovery actions in the short-term, will the longer-term financial impact or changes in working practices mean that long leases are no longer economic?
- Review leases for any break options and take advice to ensure that any conditions of the break can be met.
- Enter into dialogue with your landlord to discuss building flexibility into current arrangements. While there are no guarantees, some landlords may be prepared to negotiate rent reductions or break clauses, perhaps in return for extending the term.

As properties re-open, what do you need to consider?

- Before reopening, businesses will need to carry out a risk assessment and implement appropriate measures to minimise the risks to those who will use the building. The changes that will need to be made will of course vary with the circumstances but may include re-configuring space to allow for social distancing, reviewing the use of lifts and non-automatic doors and making arrangements for additional cleaning.
- Landlords may be able to recover additional costs incurred in managing Covid-19 risks via the service charge but the specific terms of the lease and any tenant service charge caps will need to be considered.



Read our latest insights on **real estate** issues in relation to COVID-19.

Regulation and compliance

Are you continuing to comply with consumer protection law?

- The Competition and Markets Authority has established a COVID-19 taskforce, which is investigating complaints that businesses are failing to respect consumers' rights in relation to cancellations.
- Other areas of focus include misleading claims and excessive pricing. The CMA has been actively seeking enhanced powers to enforce any breaches of consumer protection law.

Has the pandemic changed the competitive landscape in your market?

- Economic effects on competitors, shifting supply chains and the acceleration of consumption trends are leading to changes in the competitive landscape. If your business enjoys a strong market position, consider whether this impacts your ability to take certain action, particularly around price increases or cooperating with competitors.

How robust are your cyber security systems?

- Targeted phishing attacks and the rapid shift to remote working pose significant data protection and cyber security challenges. Home networks often involve poorly-secured devices and WiFi networks. As well as technical measures, good communication is essential around security practices and handling personal data.
- Consider the security of your supply chains. What are your suppliers and contractors doing to bolster their own cyber defences?

Are your pre-coronavirus compliance programmes still adequate?

- Direct health and safety risks, the impact of home working and an inevitable sharpening of focus by regulators in the aftermath of a crisis mean that compliance programmes may need to be revisited and strengthened.
- Now is a good time to evaluate how effective your crisis management plans were and what lessons the business can learn.

If you supply to the public sector, are you able to benefit from increased flexibility in procurement rules?

- Although the Public Contracts Regulations 2015 remain in full force, authorities may be able to rely on various exceptions in order to extend or vary existing contracts and put in place new contracts more swiftly. Authorities have also been directed to continue paying suppliers temporarily even where those suppliers are unable to deliver due to coronavirus-related disruption.



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About Osborne Clarke

Osborne Clarke is an international legal practice with over 270 expert Partners and more than 900 talented lawyers in 26* locations.

Our sector-based approach enables us to help our clients tackle the issues they are facing today, and prepare for the ones that they will face tomorrow. Advising them both comprehensively and commercially. We love working closely with our clients on new deals, products and solutions which will transform their businesses, markets and even sectors.

We have always been happy to embrace change and the opportunities it creates – because it's those opportunities which enable us to help our clients succeed.

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