

COVID-19: Business Briefing

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DAC Beachcroft is receiving an increasing number of client requests on Covid-19 issues. With the NHS and most of the leading insurers as clients (including in relation to Covid-19), we are particularly well placed to advise on the appropriate measures in relation to, and possible consequences of, Covid-19. The situation is fast developing, and there are already instances of companies closing their offices, and reporting impact on profits as a result of operations being affected. Government guidance, including advice on self-quarantine after travel to affected areas, is being updated daily. Our health sector clients face particular challenges but many of these - in particular around staff, supply chain and contingency planning - are of general application.

This briefing note sets out some of our most frequently asked questions. The answers have been kept to a very brief overview, so please use the contact details provided below, or approach any of your usual DAC Beachcroft contacts should you have specific questions.

Dealing with a suspected case within your organisation

Can I ask staff to remain at home following travel to or via a particular country?

Employers have a duty to protect the health and safety of their employees and to provide a safe place to work. It is important to monitor and highlight to employees the Government guidance on “lockdown” countries and to take a risk-based and proportionate response to those who have travelled to those countries or have been in close contact with those who have. In order to protect the rest of their workforce, many employers may wish to go beyond the Government guidance and ask those returning from the other affected areas to remain at home too. Other than in exceptional cases, and as long as it is paid and not done on a discriminatory basis, this is unlikely to count as a breach of the employee’s contract.

What if an employee refuses to attend the workplace because of fears of infection?

You should offer reassurance and advise them where to find further support. It may be possible to allow employees who wish to do so to work from home or to take holiday or unpaid leave. In particular, more flexibility may be required for employees who are pregnant or otherwise at high risk for medical reasons. However, you should reserve the right to require attendance at work on short notice, making it clear that disciplinary action could be taken if a refusal to attend work is unreasonable.

What pay are employees entitled to?

This depends on a number of factors such as whether the person is displaying symptoms (in which case absence can be treated as sick leave) or whether they are fit to work but are being asked to stay at home because of Government medical advice or preference of the business. If an employee can work from home, they should be paid as normal but the situation becomes more complicated where they cannot perform their usual role at home. The Government advice is that employees staying at home because of medical advice should receive any statutory sick pay (SSP) due to them. The Government announced on 4 March that emergency measures were being taken so that SSP will now be due from the first day off work, rather than the fourth day (effectively removing the 3 day waiting period for SSP). The concern is that if an employee receives no sick pay, they may try to come into work or work elsewhere which poses a risk to the spread of the virus. If s/he turns up for work and is turned away s/he can say s/he has fulfilled his/her part of the wage/work bargain so should be paid. Acas have also advised that if the employer offers contractual sick pay it is good practice to pay this. Employers therefore need to consider the wider health and employee relations implications of what to pay in these circumstances, particularly in view of the Government’s advice.

Employers will need to keep their approach to payment under review in case the situation escalates.

What else should I consider?

- **Minimise disease transmission** - Consider restricting non-essential travel to high risk areas and increase the use of video conferencing to avoid face to face contact. Any travel to overseas meetings or conferences should be subject to a full risk assessment. Further consideration should be given to restricting visitors such as suppliers to the workplace who have recently travelled to countries which have experienced a virus outbreak.

In the workplace consider installing hygiene facilities such as hand sanitisers and enhancing cleaning services. Educate staff on symptoms to look out for, and remind them about frequent hand washing and maintaining good cough and sneeze etiquette.

- **Be aware of discrimination** - There have been reports of racial abuse in connection with the outbreak. It may be appropriate to remind people about their obligations to treat people with respect and your Bullying and Harassment policy. Any policy not to attend work should be related to potential exposure to the virus and should apply to everyone regardless of nationality or ethnicity.
- **Develop a contingency plan** - The plan should include liaising with landlords as to their policies (in the event of a building needing to be vacated), facilitating remote working and strategies which deal with possible scenarios such as a reduction in business or staff shortages. Employers may have to consider temporary solutions such as voluntary leave where employees could opt to take paid or unpaid leave, or in extreme cases options such as redundancies or lay-offs.

Business Impact

Directors' duties in relation to employees

It is worth remembering that whilst directors owe their duties to the company, and not employees, the Companies Act 2006 requires that a director act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and, in so doing, the director must have regard (among other matters) to the interests of the company's employees. Therefore, were directors to (for example) be reckless as to the impact of Covid-19, there is a risk of liability. As a practical matter, the board of a company will want to be able to demonstrate that it has considered an appropriate response to Covid-19 issues were they to impact on employees (for example, what should be done if an employee chooses to visit a high risk area?). Ensuring that points such as this and those raised above have been considered at the appropriate level will assist in demonstrating that the directors have discharged their duties.

If I am a listed company, do I have to disclose anything?

Companies will need to monitor developments and ensure they are providing up-to-date and appropriate disclosures to their shareholders both generally and when preparing their year-end reports.

The Financial Reporting Council (FRC) has published [guidance for companies](#) on disclosure of risks and other reporting consequences arising from Covid-19. Their guidance currently states that companies should consider whether to refer to the possible impact of Covid-19 on their business in their reporting of principal risks and uncertainties. Where mitigating actions can be taken, these should also be reported alongside the description of the risk itself.

Article 17(1) of the Market Abuse Regulations and the Disclosure Guidance in DTR2 may also be relevant, as will the usual "significant effect on price" and "reasonable investor" tests. There may well be issues in not being able to ascertain the extent of the impact on trading, and advice may need to be sought as to how long an announcement can be delayed (which is often a difficult judgment), should a trading update or other statement be required.

Am I liable under a specific contract?

This will depend on the terms of the contract. If there is a force majeure clause, the question will be whether Covid-19 is covered. Words such as "disease" and "epidemic" will be helpful. Failing that, phrases such as "act of God", or "supervening illegality" (such as inability to move due to a lock down) will assist, but as ever the devil is in the detail and specific facts.

Absent force majeure, parties may seek to rely on frustration of the contract. Whilst any instance will be fact specific, proving frustration is notoriously difficult, and examples where contracts were held not to be frustrated include where the event should have been foreseen (arguably given previous outbreaks), and where an alternative method of performance is possible. That said, cancellation of an expected event (as may be the case for sporting events or conferences) has in the past successfully been used as a reason to argue that a contract has been frustrated.

What if I am organising a conference or sporting event? Should I cancel it?

There have been plenty of examples of events outside the United Kingdom being delayed or cancelled. Liability can arise for an organising company under tortious principles at common law and / or statute if an outbreak is traced to an event organised by that company and, broadly, the company fails to exercise the appropriate duty of care. Clearly, context will be extremely important - first and foremost being an understanding of likely attendees.

Do I have insurance cover?

There may be insurance cover available for some of the impacts on business. These are likely to be complex issues and will require specialist consideration of the available insurance policies. Some of the more common areas of concern are set out below.

- **Employees and Directors** - there may be Employers Liability cover, and for any potential breach of an obligation on the part of Directors, there may be cover under a suitable Directors & Officers Policy.
- **Travel** - where travel has been impacted, a distinction will need to be drawn between travel to destinations where there is FCO advice not to travel and a more general reluctance to travel due to the situation as a whole. Where there is advice not to travel a key factor will be the date on which the warning against travel was made, and when reviewing any travel policy care will need to be taken to consider whether there are any extensions (or exclusions) dealing with “epidemics”.
- **Cancellation / Business Interruption** - where an event has been cancelled e.g. a sporting event or conference, there may be event cancellation and/or disruption insurance available. Care will need to be taken in reviewing any exclusions or extensions relating to infectious diseases. It will be difficult to buy new cover now given that Covid-19 will almost certainly be specifically excluded.

Perhaps the largest impact on business will be loss of profit suffered by both global and local businesses e.g. in the hospitality industry where the absence of travellers will affect businesses like airlines, restaurants, hotels etc. and although it is possible that cover will be available under Business Interruption and Contingent Business Interruption policies there may be limitations. Although these are commonly only applicable where loss is consequent on damage to property that is not always the case, but it is probable that there will be exclusions dealing with disease related losses.

Businesses are also likely to have difficulties with supply chain arrangements which may be covered by Contingent Business Interruption cover even where the loss is as a result of a problem with a supplier or customer rather than within the business itself.

This article is restricted to matters under the laws of England and Wales, and should not be relied on in place of detailed advice on any specific issue.

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