

ADVICE AND GOVERNMENT ASSISTANCE TO BUSINESSES ON THE IMPACT OF COVID-19

A guide to the government packages available to businesses and employees and how to access them, together with considerations that should be made by directors in a time of uncertain trading.

GOVERNMENT ASSISTANCE

The government have provided assistance to support workers under the coronavirus job retention scheme, under which the government will repay 80% of 'furloughed' workers' wages, subject to a cap of £2,500. As this is only a rebate, the company is responsible for paying their employees at first instance. This will have knock-on effects on the company's cash flow, especially now that the majority of businesses have had to shut and therefore are receiving no revenue. To address this cash-flow issue the government has set out a package of grants, loans and tax holidays to assist business.

We set out below a summary of the current provisions below:

Scheme	Assistance offered	Who is eligible and qualification criteria	How to apply
Coronavirus job retention scheme	<ul style="list-style-type: none"> A rebate of up to 80% of 'furloughed' employees' wages subject to a £2,500 per month cap; The company has to designate employees furloughed – ie they cannot work in any capacity for the company; Appears to only include employees paid through PAYE; Assistance backdated to 1 March 2020 and is currently set to last for three months; Rebate is likely to be paid at the end of April; and The purpose is to avoid mass redundancies. 	<ul style="list-style-type: none"> All UK companies are eligible; All companies qualify, but for an employee to be furloughed without this assistance they would otherwise have to be laid off or made redundant; It includes agency workers and those on zero-hour contracts; and Employees made redundant after 28 February 2020 can be re-hired and furloughed. 	<ul style="list-style-type: none"> HMRC need to be notified of furloughed employees through their website (which is still to be set up).

Scheme	Assistance offered	Who is eligible and qualification criteria	How to apply
Coronavirus Business Interruption Loan scheme (CBIL)	<ul style="list-style-type: none"> • Access to government-backed finance of up to £5 million to assist in cash flow; • For the company – the government agrees to pay for an initial period of 12 months' interest and fees (if any) of a credit facility; • For the lender – a government guarantee of 80% of the value of the facility to encourage lending; • The finance is available for the following facilities: term loans; overdrafts; asset finance and invoice finance; • Term loans can be for up to six years, with overdrafts and asset / invoice financing for only three years; and • The purpose of this loan is to alleviate short-term cash-flow issues. 	<ul style="list-style-type: none"> • Small / medium UK companies with a turnover of up to £45 million a year; • Certain sectors are excluded; • The company has to show that it does not meet the lender's normal commercial lending criteria, but is also a viable business after the effects of coronavirus. This may require cash-flow projections etc; • Lenders can lend up to £250,000 unsecured, but will have to show 'an absence of security' for sums of £250,000 to £5 million; and • There have been issues with banks still requesting guarantees from directors, but this is likely to be limited to 20% of the loan. 	<ul style="list-style-type: none"> • There are 40 accredited lenders (full list here); • The company should approach their usual provider / bank. If they cannot assist then they can approach one of the other accredited lenders; and • Available from Monday 23 March 2020 via an application to an accredited lender.
Covid Corporate Financing Facility (CCFF)	<ul style="list-style-type: none"> • Primarily for supporting the liquidity of larger companies; • The Bank of England are assisting with the purchase of short-term debt in the form of a commercial paper, which lasts up to one year; • Designed to help with the payment of employees' wages and suppliers; • The loan will still be on commercial rates ie will attract interest; and • Directors should be mindful that they are looking after the interests of creditors, if there is concern as to the solvency of the company either at the time or in the future. 	<ul style="list-style-type: none"> • The company has to make a contribution to the UK economy ie incorporated here (but can have foreign subsidiaries), have a HQ in the UK and customers / revenue in the UK; • The company doesn't have to have already issued commercial papers, but must have the ability to; • The company has to show they were in sound financial health prior to the coronavirus shock, based on credit rating from major credit rating agencies (Fitch / Moody / S&P); and • If you do not have a credit rating a bank can arrange this for you. 	<ul style="list-style-type: none"> • Thus must be set up through limited banks, building societies or insurance companies; and • Companies should contact their banks at first instance.

Scheme	Assistance offered	Who is eligible and qualification criteria	How to apply
Grant relief from business rates	<ul style="list-style-type: none"> The government is providing further support to local authorities to assist small businesses that benefit from either the small business rate relief (SBBR) or rural rate relief (RRR), paying little or no business rates; This enables local authorities to provide a one-off grant of up to £10,000 to meet ongoing costs whilst the companies are unable to trade; and This is designed to assist with company's cash flow. 	<ul style="list-style-type: none"> Only available to companies in receipt of or entitled to SBBR and RRR; and <p>An explanation of rateable value can be found here.</p>	<ul style="list-style-type: none"> Qualifying companies will be contacted by the local authorities, likely to be the middle of April 2020; and Further guidance should be published shortly.
Relief from business rates	<ul style="list-style-type: none"> An extension of the grant relief for business rates for retail, hospitality and leisure industries, who will be provided with a business rate holiday; and A one-off grant of £25,000 is also offered to companies operating from smaller premises with a rateable value of between £15,000 to £51,000. <p>If you do not satisfy this criteria or still need further support and have either outstanding tax or likely to miss a tax payment you should call 0800 0159 559 to discuss time to pay arrangements.</p>	<ul style="list-style-type: none"> UK businesses that are in the retail, hospitality and leisure industries, which will include cafes, shops, pubs, hairdressers, cinemas that occupy premises; and The grant is only available for businesses in those sectors with rateable values of between £15,000 and £51,000. 	<ul style="list-style-type: none"> No application process; Qualifying companies will be contacted by the local authorities, likely to be the middle of April 2020; For a grant it would be best to enquire with your local authority; and Further guidance should be published shortly.
VAT payments	<ul style="list-style-type: none"> VAT payments are to be deferred for three months; These will still have to be paid after three months, but no interest or penalties will be added; Directors should still be mindful of their directors' duties – see below; and Refunds and rebates will still be paid by HMRC at this time. 	<ul style="list-style-type: none"> All UK businesses. 	<ul style="list-style-type: none"> There is no need to apply to HMRC, this will be automatic.

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Statutory Sick Pay (SSP)	<ul style="list-style-type: none"> UK SMEs can claim a rebate for two weeks of SSP for employees who have been off work due to coronavirus; and SSP is £94.20 a week. 	<p>An SME has to satisfy two of the following criteria:</p> <ul style="list-style-type: none"> a turnover of less than £25 million; fewer than 250 employees as at 28 February 2020; and gross assets of less than £12.5 million. <p>The company has to keep a record of the employee's absence, but does not require a GP letter.</p>	<ul style="list-style-type: none"> A claim process is being set up, but no further details have been released; and It is likely the rebate will be in late April at the earliest.
Self-employed – income tax	<ul style="list-style-type: none"> The government has extended the coronavirus job retention scheme to include self-employed workers; This enables self-employed workers to claim up to 80% of their income based on past trading, up to a maximum of £2,500 per month; and The self-assessment of self-employed workers has been deferred until 31 January 2021 and no fees / interest will be incurred until that time. 	<ul style="list-style-type: none"> All self-employed workers. 	<ul style="list-style-type: none"> No sign up required as self-assessment has been automatically applied; and It is likely to be June until payments are received. This may cause cashflow problems for the vast majority of self-employed workers.
Mortgage payments for individuals, rental payments and landlord's mortgages	<ul style="list-style-type: none"> Mortgage lenders have announced that they will not commence repossession proceedings for three months; They have also committed to providing payment holidays of up to three months and / or lower interest rates for lenders struggling to meet payments. This may result in higher repayments once the three month period has elapsed; The government has introduced draft legislation to prevent landlords from starting eviction processes for three months; and In turn landlords with tenants who are not paying rent due to coronavirus can benefit from the payment holiday from mortgage lenders. <p>For lease payments for businesses please see my colleague's article here.</p>	<ul style="list-style-type: none"> All individuals struggling with rental or mortgage payments in the UK 	<ul style="list-style-type: none"> You should contact your mortgage provider or landlord.

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Insurance	<ul style="list-style-type: none"> Some companies may have insurance to cover business interruption in the case of pandemics and government-ordered closure, although this is unlikely. <p>My colleague expands further on this here.</p>	<ul style="list-style-type: none"> Only companies that have specific clauses in their policies that cover pandemics and government-ordered closures. Most will exclude a pandemic. 	<ul style="list-style-type: none"> You will need to contact your insurance provider; If you are able to claim you can claim for damages from now; and For example pubs should be able to claim from 17 March 2020.
Winding up petitions / administration applications (apart from by directors)	<ul style="list-style-type: none"> The courts are not issuing winding up petitions for three months. Statutory demands (often the precursor to a petition) can still be issued. This effectively is giving a 12-week unofficial moratorium to companies; A winding up petition can be issued against a company who has failed to pay its debt; If successful the company will be wound up and a liquidator appointed to investigate the company and realise its assets for the benefit of the company's creditors; It should not be used as a debt collection tool; Similarly, secured lenders cannot force a company into administration for three months; and It is still available for director to enter creditors' voluntary liquidation or place the company into administration. Directors should be considering what is in the best interests of creditors. 	<ul style="list-style-type: none"> All businesses can issue a winding up petition. 	<ul style="list-style-type: none"> It is best for advice to be taken from a solicitor before issuing a winding up petition.

ADVICE – DIRECTORS' DUTIES

The coronavirus pandemic has caused significant cash flow issues for companies in all sectors. Companies being unable to trade has caused revenue to dry up, whilst they are still responsible for certain fixed costs.

As seen above the government has provided an extensive package of help to assist businesses. However, there is likely to be some time before this support reaches the companies in need, meaning that they cannot pay their debts as they fall due. Further, it is likely that some assets are less valuable now than they would have been prior to the coronavirus outbreak.

Directors of companies need to be mindful that they may be insolvent during this time. A company can be insolvent on both a cash-flow and a balance sheet test. Cash-flow insolvency is when there are insufficient funds to pay debts as they fall due, whereas balance sheet insolvency occurs when the company's assets are exceeded by its liabilities.

When a company is insolvent on either basis, the directors cease to owe their duties to the shareholders but to the creditors of that company. In essence they have to ensure that they do not worsen the company's financial position. This is known as the zone of insolvency.

THE ZONE OF INSOLVENCY

The 'zone of insolvency' is a fairly nebulous concept and refers to the period which starts when a solvent company becomes (or may become) insolvent. Often, a company does not enter a formal insolvency process but when a company is in the 'zone of insolvency', a director's duties are heightened so that they are required to give paramount importance to the interests of creditors to whom they owe a duty of care in order to minimise any loss to creditors (alongside the ordinary duties prescribed under the companies act 2006, which includes, amongst others, to act in the best interest of the company, avoid conflict of interest and to exercise reasonable skill and care).

DIRECTORS' DUTIES IN THE ZONE OF INSOLVENCY

The primary question in directors' minds when they are in the zone of insolvency should be 'whether the company should cease trading'.

A director can be made personally liable for all or part of the company's debts if:

- they knew or ought reasonably to have known that there was no reasonable prospect that the company would avoid insolvent liquidation; and
- they nevertheless allowed to company to continue trading to the ultimate detriment of the company's creditors.

HOW TO AVOID DIRECTORS' LIABILITY

The directors should continually take analysis of the company's financial health, including cash flow requirements, and only continue to trade if there is a good prospect of avoiding insolvent liquidation. They should take the following steps:

- seek professional legal and accounting advice;
- hold and minute regular board minutes, setting out what decisions were made and why;
- maintain up-to-date management accounts; and
- maintain cash-flow by chasing debts.

POTENTIAL ACTIONS AGAINST DIRECTORS

Under the insolvency act 1986 a director can be held personally liable and be ordered to make a contribution to the company's assets and can face criminal or civil penalties. In brief we set out some of the potential actions that a director can face:

- **an action for misfeasance** – this can either be by becoming accountable for money or property of company or breaching their fiduciary duties under the companies act 2006;
- **wrongful trading** – this is when a director allows the company to continue to trade when 'he knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation'. The government have suspended wrongful trading for the period

where the company is affected by coronavirus. However, this should not be seen as a free for all directors to commit acts that they wouldn't usually be able to. The provisions for misfeasance still apply and therefore directors should be considering whether their actions worsen the position of creditors, together with other stakeholders;

- **fraudulent trading** – similar to wrongful trading, but the trading has to occur with an intent to defraud creditors of the company;
- **transactions at an undervalue** – if the director initiates or allows the company to gift or receive less than market value for an asset of the company. There are presumptions of wrongdoing when that gift or transaction is with a connected person to the director; and
- **preference** – when the company does something that puts a creditor in a better position than it would have been in an insolvent liquidation. There is a presumption of preference if the creditor is connected to the director, but this can be rebutted if it is shown to have been for the benefit of the company.

If a director commits any of the above offences (and others) they could be liable for directors' disqualification, which can involve fines, imprisonment and disqualification from being a director for up to 15 years.

HOW BDB PITMANS CAN ASSIST

At BDB Pitmans, our restructuring and insolvency team are here to assist businesses who are either approaching or in the zone of insolvency. Our aim is to help companies avoid insolvency liquidation where possible, but also to advise directors individually and the wider board in order to avoid personal liability should the company enter a formal insolvency regime.

We have an extensive network of lenders, accountants and insolvency practitioners to assist in advising on how to exit the zone of insolvency or, if appropriate, the most appropriate insolvency regime for that company.

It is essential that advice is taken as early as possible to protect directors and to help turn around the company.

For more information on this topic, please contact James Roberts, Senior Associate

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