

CONSIDERATIONS FOR UK BUSINESSES AND DIRECTORS BEFORE, DURING AND AFTER RESTARTING OPERATIONS

It is unlikely that many businesses will be able to simply press a button and resume their pre-Covid 19 business model. Global society has had to abruptly adjust to restrictions on movement, revisit ideas around health and lifestyle and change its attitude to working styles – none of which was seriously envisaged at the start of 2020, but all of which directly impacts global and local economies and businesses. Emerging from lockdown will not be a linear process. It is likely to be unpredictable. There may be further outbreaks of the virus and lockdowns until an effective vaccine is found and business responses will vary widely by sector and geography.

This note explores, high-level, some of the legal and practical considerations at this time for UK directors during the move out of lockdown, grouped under the headings 'Business Review', 'Employees', 'Supply Chain and Operations' and 'Legal Considerations':

BUSINESS REVIEW

Holistic review of business – The 'new normal' may mean fundamental changes for clients/ customers, employees, suppliers and stakeholders. Consider the current and future position on all areas of the business. Build in flexibility to enable rapid response to changes (eg government guidance or public health).

Demand – Demand for certain products and services may change after lockdown for a variety of reasons, notwithstanding household spending and confidence are understandably low. Directors need to ensure that there is a viable business to restart and that customers or counterparties up the supply chain still require specific products and services.

Government advice – Government advice and guidelines are updated and change regularly. Keep these under constant review as well as related changes to legislation. Careful consideration should be given to government support reducing / ceasing in relation to various aspects (eg furlough scheme), as this will inevitably create new pressure points for businesses and individuals alike.

New liabilities – Many businesses have taken the benefit of various government finance schemes, obtained further debt or extended their overdrafts to provide critical day-to-day working capital. Manage these new liabilities carefully and consider if and when they need to be formally restructured.

Deferral of liabilities – Many creditors have deferred or amended obligations and liabilities over the last few months. Be aware of legal and contractual obligations, especially future repayment dates and ensure there is sufficient cash to meet liabilities as they fall due.

Real estate – Where the business operates from a diverse real estate portfolio (eg retail or restaurants), consider how to reopen while observing social distancing, updated government guidelines and associated additional costs. Consider whether revenue from specific sites will be sufficient going forward to justify reopening.

Cost-cutting – Review cost-cutting measures taken during lockdown (eg furloughed staff, reduced staff pay/hours, reduced cleaning of empty offices) to ensure the business can trade effectively and safely going forward.

Communication – Ensure there are clear communication channels regarding the business with all relevant parties regarding the business, both internally and externally. Ensure the ability to communicate quickly in response to government, media and other announcements to safeguard continuity and confidence.

M&A – For businesses that have retained cash and want to expand, consider opportunities for acquisitions. Establishing robust valuations and undertaking suitable diligence will be key factors.

EMPLOYEES

The workplace – On 11 May the government published guidance on working safely following lockdown (see [link](#)). We expect this to be further updated in the coming weeks. Employers have a duty of care to their employees – they must do all they reasonably can to support their health, safety and wellbeing. Key considerations include:

- before reopening the workplace, a COVID-19 risk assessment must be undertaken in line with the HSE guidance;
- employers will need to engage with their staff and any union representatives as to their restart plans;
- workplaces must, where possible, maintain social distancing. Consider how the workspace can be adapted to keep employees two meters apart, including shared areas such as kitchens, bathrooms or lifts. Although PPE is not a legal obligation for UK employers, consider whether it is appropriate for employees in specific situations;
- there must be increased daily cleaning, hygiene and hand washing procedures; and
- government guidance currently discourages travelling to work by public transport. Consider where the workforce is based and whether assistance can be provided to help employees avoid public transport.

Remote working – Ensure that employees working remotely have all the necessary equipment, that IT systems are sufficient and secure, and that the physical and mental health of all employees continues to be considered.

Staged return – Government guidelines on social distancing must be followed and many employees may not be able or feel confident enough to return to the workplace. Consider a rota or a mixture of office working and home working. For furloughed employees or employees who have had their working hours cut, consider a staged return to manage costs.

Remuneration / benefits – Many employees will have had their pay and/or benefits reduced or deferred over the lockdown period, or have been put on furlough. Be mindful of this in order to ensure an engaged workforce.

Communication and support – Make COVID-19 risk assessments available to employees and put in place clear guidelines around the use of the workplace and new working practices. Ensure sufficient support is in place for employees who have to manage dependents. Establish efficient communication with remote workers to ensure engagement and effectiveness.

Data – In light of on-site physical health testing, 'track and trace' and information requests to ensure the safety of the workforce, directors will need to consider obligations under the GDPR and Data Protection Act 2018 in relation to any personal data processed, and endeavour to only act in a proportionate and necessary manner.

SUPPLY CHAIN AND OPERATIONS

Supply chain – COVID-19 has caused a collapse in the trade of intermediary products due to restrictions on travel and transport. This may have an impact on the ability to obtain products due to travel restrictions or due to businesses in the supply chain having shut down. Directors must identify key suppliers (or alternatives), re-engage in communication and establish whether contracts need to be amended to practically manage the updated situation – flexibility should be built in and timing of supply against potentially unpredictable consumer demand will be a key factor whilst restrictions remain.

Real estate portfolio – Careful consideration should be made with regard to financial liabilities and legal obligations in respect to real estate and landlords. Various new legislation (eg the Coronavirus Act 2020 and the proposed Corporate Insolvency and Governance Bill) now affects landlords' rights against tenants, but some of these only apply for specific periods and, unless formally waived, liabilities will remain outstanding to be paid in the future. Consider whether formally restructuring liabilities with landlords is appropriate (eg through a company voluntary arrangement (CVA)).

Online platform – With freedom of movement still restricted and the high-street severely limited, the need for businesses to provide products and services from online platforms will continue to increase. Ensure that IT systems are suitable for customers and your workforce. Be vigilant for cyber-threats and manage data securely. Consider whether there is a requirement for increased / updated logistics.

Hygiene and cleaning standards – New policies will be required and must be rigorously enforced for human dependent workforces and products that are supplied directly to consumers. This may include providing a clear route map for all products supplied to consumers as to where products have come from and who has been involved in their manufacture / supply. It may be that safety measures implemented that are not apparent to customers are publicised.

LEGAL CONSIDERATIONS

Corporate governance – The statutory obligations of directors arising under the Companies Act 2006 remain effective. Critically, directors should be considering their duties in respect of the company's stakeholders and ensuring that they act with reasonable care, skill and diligence. Actions should be clearly minuted to mitigate the risk of future challenge and, whilst taking costs into account, external professional advice should potentially be sought to ensure the directors have full visibility when making decisions. Notwithstanding the proposed relaxation of wrongful trading rules under the Insolvency Act 1986, directors should be constantly evaluating the financial stability of the business to avoid insolvency. Consider whether formal restructuring is required and reduce potential personal liability.

Contract review – A review of key customer and supply contracts should be undertaken to establish potential breaches and the resultant consequences, both by the business or by counterparties. Parties should look to reserve their rights as soon as possible by contacting the counterparty to avoid potentially losing the right to claim. Have any material adverse change provisions or force majeure clauses been triggered by COVID-19? These may give rise to termination rights, although directors should bear in mind government guidance on responsible contractual behaviour in the performance and enforcement of contracts during COVID-19 (see [link](#)).

Restructuring – Utilising legislative tools to manage liabilities will be a route for many businesses in order to continue trading as a going concern. CVAs and schemes of arrangement help package up creditors in order that 'grouped' liabilities can be dealt with rather than negotiating with individual creditors, although reputation and expense need to be borne in mind. Once enacted, it is likely that the Corporate Insolvency and Governance Bill will bring into effect additional protections for businesses in financial difficulties (eg a moratorium on claims) and allow for a restructuring plan to be implemented to regulate liabilities to all creditors (secured and unsecured).

Insurance – Liaise with brokers and consider whether claims may be made as a result of COVID-19 or its effect on a business (both for and against the company). Check or take out directors' and officers' insurance and ensure it provides adequate protection for directors to manage the business in such financially unstable times.

Litigation – Notwithstanding the current government stance at this time, history has taught us that litigation almost inevitably follows a crisis (eg the 2008 financial crisis and the dot.com bubble). Areas prone to litigation in the coming months and years include: employees (eg wrongful termination, health and safety); holiday and flight cancellation; the leisure sector (given the mass closures there have been across this sector); real estate (particularly defaults on rent); supply chain disruption and insurance claims. Many of the courts have not been operating at full capacity during lockdown so there will be a huge backlog of cases to be cleared, as well as a new flood of litigation. Consider potential sources of litigation and the impact on the business (eg cashflow, director time required). Take advice and establish whether other methods of resolving disputes may be more effective.

HOW WE CAN HELP YOU

We understand the issues that businesses are facing due to the unprecedented situation and are here to help you navigate your way through them. We offer a full legal service to SME and mid-market businesses including corporate, finance, restructuring, employment, property and health and safety legal advice and can advise you on all aspects of managing your current and future financial and legal positions.

Please contact us to discuss any legal matters you are facing. Either get in touch with your current BDB Pitmans contact, call us on 0345 222 9222 or email us on enquiries@bdbpitmans.com. You can find more details about our services at www.bdbpitmans.com and more information about the issues facing businesses on our dedicated [COVID-19 hub](#).

This publication is not meant as a substitute for advice on particular issues and action should not be taken on the basis of the information in this document alone.

This firm is not authorised by the Financial Conduct Authority (the FCA). However, we are included on the register maintained by the FCA (www.register.fca.org.uk) so that we can offer a limited range of investment services (including insurance distribution activities) because we are authorised and regulated by the Solicitors Regulation Authority (the SRA). We can provide these services if they are an incidental part of the professional services we have been engaged to provide. Mechanisms for complaints and redress if something goes wrong are provided through the SRA and the Legal Ombudsman.

BDB Pitmans LLP processes your personal data in connection with the operation and marketing of a legal practice and in accordance with our privacy policy at www.bdbpitmans.com/privacy. We will occasionally send you information relating to the firm however if you would prefer not to receive this information or would like us to amend your contact details and/or mailing preferences, please notify us by email: briefings@bdbpitmans.com.

BDB Pitmans LLP is a member of Lexwork International and Interact Law, both associations of independent law firms. www.lexwork.net | www.interactlaw.com. Printed on sustainable paper.