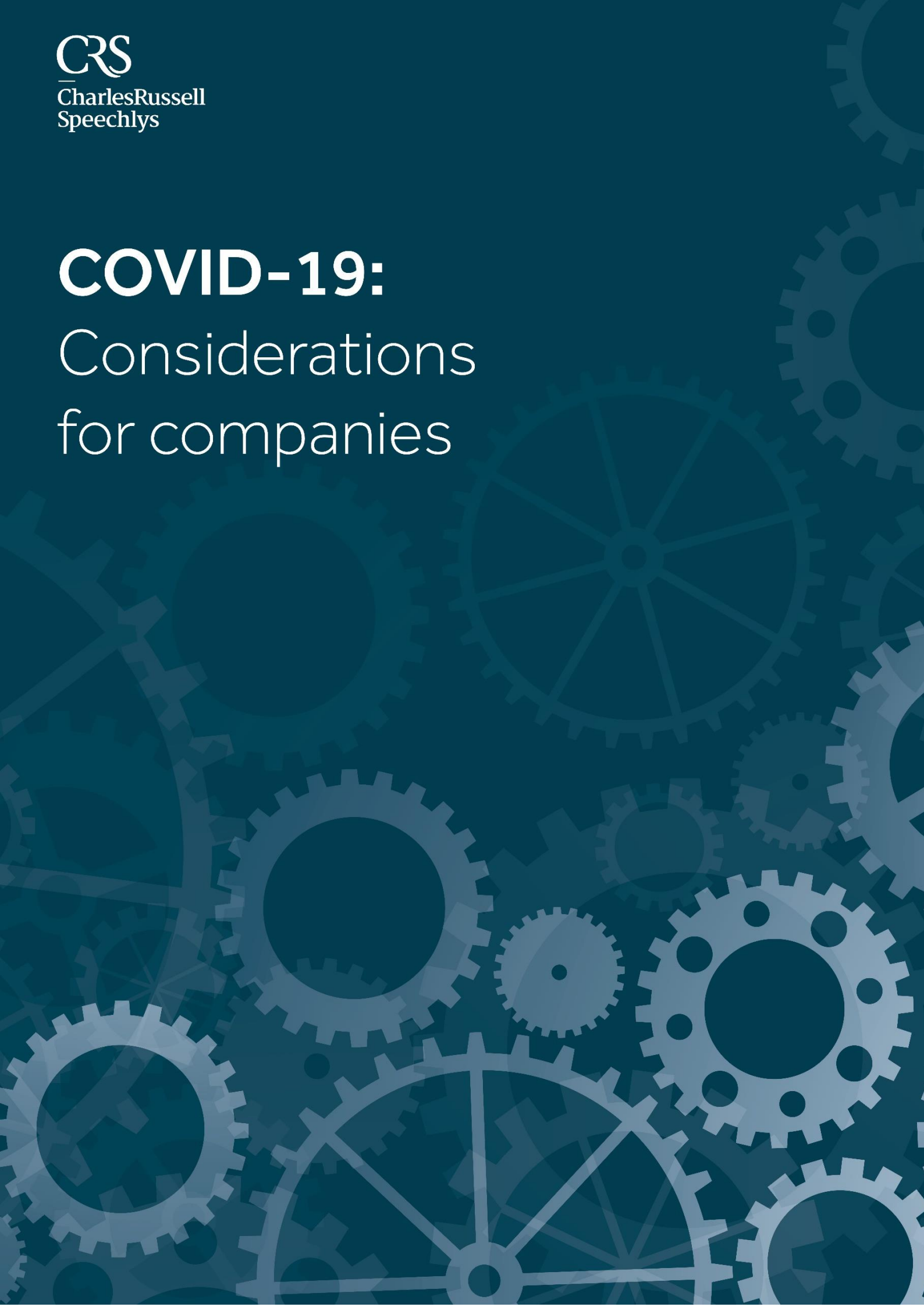
CharlesRussell Speechlys

COVID-19:
Considerations for companies



Contents

Contents

COVID-19: considerations for companies

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The COVID-19 pandemic is causing disruption to businesses of all sizes across the UK.

With an uncertain economic outlook, reviewing how a company can deal with and adapt to the evolving business environment is critical. Understanding the legal rights and responsibilities of the company, and its directors, is also a vital part of this task.

In this toolkit we have set out some of the key issues for companies and directors, focusing on supporting employees, protecting company finances and commercial relationships and dealing with real estate issues.

Please note that the information contained in this toolkit is correct as of 10/08/20. It has been prepared as a general guide only and does not constitute advice on any specific matter.

Our team has been working with clients on a broad range of issues relating to the COVID-19 pandemic. For more information on how we can help please get in touch with the listed key contacts or your usual contact at Charles Russell Speechlys.

Running the company

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Effective company management is crucial in these unprecedented circumstances.

We have set out below some considerations to aid effective decision-making and company management:

1. **Appointing alternate directors to ensure a functioning board** – this contingency measure is advisable in case a director becomes unavailable to attend a board meeting or act as a director. By appointing the alternate director ahead of time, the alternate director will have the approval and support of the full board and meetings will remain quorate.

   Appointments need to be consistent with the provisions of the company's articles of association and D&O insurance policies. Boards should also be aware of any conflicts of interest a proposed alternate director may have before appointing the alternate (in addition to those of the appointing director). Any necessary qualifications or approvals should also be considered. The company's articles of association will need to provide for the appointment of an alternate, and those provisions followed. Shareholders can approve a change to the articles of association to increase flexibility for the board and both original and alternate directors should be aware of their responsibilities as directors and of the related personal liabilities.

2. **Holding regular meetings and documenting decisions –** decisions taken now may be subject to greater scrutiny in future. It is important that directors continue to observe and demonstrate their duties to the company, and to creditors, when applicable. It is also important that directors are 'present' and attend board meetings as far as possible. Given the flexibility most companies have as to how they hold board meetings (which are not subject to the same statutory requirements as shareholder meetings), necessary absences should in practice be limited to ill-health. A failure to keep apprised of relevant matters and participate in decision-making may amount to a breach of directors' duties.

   Regular, minuted board meetings should be held, including consideration of factors such as the state of the business, company and group liquidity and future funding considerations. The commercial rationale for decisions should be documented and professional financial or legal advice sought to clarify any "grey areas" to demonstrate the directors' awareness of their obligations. Directors should also be considering whether the skills at a senior management level are adequate for the "new" trading environment and that governance arrangements are robust and appropriate.

   Companies should maintain engagement with shareholders and may wish to

amend their articles of association to permit hybrid shareholder meetings (part physical, part-virtual), and explain to stakeholders how the process will be run, and how they can participate in any meetings. Legal advice should be sought to ensure formal shareholder meetings and the resolutions passed at them are valid, but less formal Q&A sessions and stakeholder engagement can also be considered.

3. **Raising debt or equity finance** – Directors should review the provisions of the company's articles of association (and any shareholder arrangements – see below) to check that access to debt finance would not be limited, for example by borrowings in excess of a certain amount needing shareholder approval. Directors should also consider the logistics of raising equity finance, whether they have current general authorities to allot shares and dis-apply statutory pre-emption rights and any restrictions in the company's articles of association including bespoke pre-emption rights. Debt finance may, for example, only be available contingent on a company simultaneously raising equity finance. Continuous dialogue with auditors and financial advisers will help maintain access to good financial data, which can potentially be shared with providers of capital.

4. **Reviewing shareholder agreements** – a business may be subject to constraints under shareholder agreements that require the consent of certain specific shareholders (for example, granting security over the business). It is advisable to consider whether some such restrictions should or could be waived temporarily to enable companies to take action more quickly, whether various actions can be pre-approved by the specific shareholders as a form of contingency planning, and/or if the specific shareholders should grant powers of attorney as a contingency measure. Any variations should be documented to protect both directors and shareholders.

5. **Using IT software to execute documents** – electronic platforms can enable two directors to execute deeds in different locations, removing the need for a director to sign in the physical presence of a witness. Where a document needs to be executed with a witness, the witness cannot be a party to the relevant document (which can include someone named within the document who is not a signatory). The witness should also be physically present. Additionally, we would not typically recommend a family member acts as a witness. If this seems to be the only option, or there are any other doubts, please discuss this with us so we can consider the risks before the document is signed. We can also help with electronic signing logistics, if needed. Note there are in addition specific requirements for certain types of document.

6. **Reviewing the company structure** – we recommend reviewing the company's structure and the relationships with subsidiaries. This may include documenting intra-group loans between subsidiaries to ensure that any debts can be identified if a borrower gets into financial difficulty. It may also mean considering whether the group has satisfactory levels of management information across the group, whether the subsidiaries are run by directors in whom the parent company (and ultimate shareholders) have confidence and that internal controls are adequate. The position of directors on subsidiary boards should be considered carefully, especially where authorising group arrangements such as intra-group loans and guarantees; in respect of both their duties as a director of that subsidiary and the legal and accounting requirements for such intra-group arrangements.

7. **Companies House filings** – there is now general relief extending certain Companies House filing deadlines which are required by law. Directors will still need to plan ahead to ensure that the audit of the company or group's accounts can be achieved to meet the new deadlines (which in many circumstances have been extended by three months). All same day services have been suspended until further notice and we anticipate a delay in the processing times for paper forms. Online filing is still available and forms filed electronically can be processed and available on the register within hours. Companies which are not already registered for the Companies House web-filing service should consider doing so in advance of any filing deadlines to allow time for receipt of log-in details to be received at the Company's registered office. The options for filing documents at Companies House continues to develop, so please do feel free to get in touch with us to discuss the available options at the relevant time.

8. **Going concern and material uncertainty** – remain very much in focus for discussions between boards and companies' auditors. As set out in the Financial Reporting Council's letter review of "going concern policies and procedures" for the seven largest audit firms[1], the board is responsible for the going concern assessment, however the auditors still have certain responsibilities relating to the "going concern basis of accounting". As such, we expect continued stress-testing and scenario analysis discussions between boards and the companies' auditors to take significant management time. The FRC has provided useful guidance[2] around disclosure relating to going concern in the current circumstances, including explaining the going concern position and the factors supportive of such a

[1] https://www.frc.org.uk/getattachment/953261bc-b4cb-44fa-8566-868be0ff48dc/FRC-going-concern-review-letter.pdf

[2] https://www.frc.org.uk/getattachment/ef564f3f-d37b-4469-aa30-cc36f0343708/COVID-19-Going-concern-risk-and-viabilityFinal.pdf

view (e.g. cash position and current business activity) and examples of the types of uncertainties, such as the "timing of resumption of operations" and the "outcome of discussions with landlords" which should be disclosed.

9. **Delaying AGMs** - in addition to the challenges of holding shareholder meetings during 'lockdown', the logistical challenges of conducting an audit and lengthy discussions around going concern and material uncertainty are likely to extend the audit period and so the timing for producing accounts. The Corporate Insolvency and Governance Act (the CIGA), which came into effect on 26 June, gives companies which were required to hold an annual general meeting between 26 March 2020 and 30 September 2020 until 30 September 2020 to do so. In the event there is a mismatch between the CIGA AGM deadline and the accounts filing deadline (taking into account the extensions to the statutory deadlines), a company should consider holding two general meetings. The first, being the annual general meeting but not including accounts to meet its other obligations under the Companies Act and its articles (as relevant) and the second a general meeting to approve the accounts. Under the CIGA, during the relevant period shareholder meetings do not need to be held in a particular location or enable shareholder participation beyond voting. Additionally, the meeting may be held by electronic or other means. The provisions of the CIGA prevail where there is a conflict with a company's articles, relating to general meetings. The ICSA: The Governance Institute has released various guidance notes on how to hold meetings during the pandemic[3].

10. **Changes in UK Insolvency Law to protect businesses and directors** – if directors allow a company to trade after the point at which they know, or ought to know, that the company has no reasonable prospect of avoiding insolvency, then they could be held personally liable for the losses of creditors and ordered to compensate the insolvent estate.

    Although (as has been widely misreported) section 214 Insolvency Act 1986 in relation to "wrongful trading" has not been suspended, when assessing what contribution a director is to make to the company's assets when considering liability for wrongful trading, the Court is to assume that the director(s) have not been responsible for any deterioration in the company's finances during the period of 1 March 2020 – 30 September 2020.

[3] https://www.icsa.org.uk/knowledge/resources/agms-and-impact-of-covid-19 https://www.icsa.org.uk/knowledge/resources/share-meet-insolvency-govact2020

Interestingly, COVID-19 is not specifically referred to and the duty on directors to minimise loses to creditors still exists.

This is a welcome development but we strongly advise against any substantive change in approach by directors. The duty to act in the best interests of the company's creditors remains, as does potential personal liability for any breach of that or any other fiduciary duty. The potential for disqualification as a director is also unaffected.

In the circumstances and irrespective of whether potential personal liability of directors for wrongful trading between 1 March and 30 September has been mitigated, directors should constantly keep the question as to the company's future viability under close consideration. We appreciate that is extremely difficult given the uncertainty that every business is facing but this highlights the need for regular board meetings, and to carefully minute decisions throughout the process and professional advice received.

11. **Tax: making payments** – companies in the retail, hospitality and leisure sector will benefit from 100% relief from business rates for 2020 – 2021. These rates will not become payable in the future. Such companies can also, from 15 July 2020 to 12 January 2021, apply a temporary 5% reduced rate of VAT to certain supplies.

    In addition, any UK registered companies with VAT payments that were due between 20 March 2020 and 30 June 2020 had the option to defer the payment until a later date without being penalised by penalties nor interest for doing so. Any deferred payment must be paid on or before 31 March 2021. In addition, businesses must continue to submit VAT returns as normal.

    The March 2020 Budget expanded existing "Time to Pay" arrangements, which is intended to assist businesses with cash flow difficulties to defer tax liabilities for a period of time. Arrangements will be agreed on a case-by-case basis. There is a specific helpline to call for any businesses interested in making use of this facility.

    Further information:
    Covid-19 pushes the government to gift time, lend money and provide clarity

12. **LLPs, authorised/regulated businesses and PLCs**– Please note that this is a general guide only, and additional and different considerations and requirements will apply to particular types of businesses, such as limited liability partnerships, charities, listed companies and those which are subject to particular regulation (such as by the Financial Conduct Authority). For example, the position of members of a limited liability partnership is very different from a director of a company, and additional considerations apply to

appointing a director (alternate or otherwise) to the board of a business admitted to trading on a public market or regulated by the Financial Conduct Authority. Please do let us know if you have any specific queries in relation to your own business.

Supporting employees

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For many companies the main concerns in respect of employees are how to support them and access the Government schemes available to help with staff costs and, as lockdown eases, what steps are needed to ensure a safe return to work.

Coronavirus Job Retention Scheme

Since the Chancellor's announcement on 20 March that the Coronavirus Job Retention Scheme (the Scheme) would be introduced to help support business and protect jobs during the COVID-19 pandemic, there have been several updates to the various guidance notes the government has produced (together the Guidance) which is available here, as well as three Treasury Directions. This has been an evolving Scheme, but it is now clear it will close on 31 October 2020.

The Scheme was modified from 1 July onwards, including new flexibility to bring furloughed staff back to work on a part time basis, whilst allowing employers to claim under the Scheme for hours not worked. To qualify for the Scheme, in addition to the eligibility requirements below, the employee must have been furloughed for at least 3 consecutive weeks between 1 March and 30 June.

Key points

- The Scheme is open to all UK employers (including charities, recruitment agencies and public authorities) which had created and started a PAYE payroll scheme on or before 19 March 2020, have submitted a report under the Real Time Information (RTI) reporting system for employees claimed for and have a UK bank account.
- It is also open to employers of employees transferred to them under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) after 28 February 2020.
- The Scheme offers temporary contributions to the wages of workers payable by employers affected by the COVID-19 pandemic. It operates from 1 March 2020, with a modified version of the scheme in place from 1 July 2020 until the end of October 2020.
- To be considered furloughed up to the end of June, the employees must not have worked at all for the organisation whilst on furlough, or any linked organisation, but will remain 'on the books'. This means they must not provide services or generate revenue for or on behalf of the employer (or any connected organisation).
- To be eligible for the grant the employers must have confirmed to their employee (or reached a collective agreement with a trade union) in writing

that they have been furloughed and keep a written record of the agreement for 5 years. There are slightly different requirements for the agreements for fully furloughed employees and flexibly furloughed employees.

- Up until 30 June, the minimum length of time an employee could be furloughed for was 3 weeks and therefore the last date which an employee could be furloughed for the first time was 10 June 2020. Furlough leave can be rotated and employees can be furloughed multiple times, provided that prior to the end of June this was always for a minimum of 3 weeks.
- Where a previously furloughed employee starts a new furlough period before 1 July, this must be for a minimum of 3 consecutive weeks.
- From 1 July employers can bring furloughed employees back to work for any amount of time, on any work pattern while still being able to claim the grant for the hours not worked that they would normally have worked.
- Furloughed employees retain the same employment rights as non-furloughed employees, including in respect of unfair dismissal, discrimination, redundancy payments and statutory payments such as statutory sick pay and maternity rights and other parental rights.
- Up until the end of July 2020 HMRC will pay 80% of a furloughed worker's gross monthly wages directly to employers by way of a grant subject to a cap of £2,500 per month. Employers can choose to top up the grant, but have no obligation to do so (although they must validly vary the employees' contracts if they do not top up the pay).
- From 1 August 2020, employers will be required to pay all employer NICs and pension contributions, then from 1 September 2020 employers will also be required to contribute 10% of furloughed employees' wages increasing to 20% of furloughed wages from October 2020.
- Employees on all categories of visa can be furloughed and the grants under the Scheme will not be classed as "public funds".
- When the Scheme ends, the employer will need to assess at that point whether to bring the employee back to work to their full hours or, depending on the circumstances, make them redundant. Grants cannot be used to subsidise redundancy payments.
- HMRC states that it retains the right to retrospectively audit all aspects of any claim. It will also withhold payments or require them to be paid back if a claim is found to be fraudulent or based on incorrect information

Further information: Coronavirus Job Retention Scheme Briefing for Employers

Returning to work

Whilst the current Government advice is still to work from home where possible, more workplaces are beginning to open, or are planning a return to work. Many employees are going to have some concerns about returning and we look at some issues employers may face.

The Government has produced fourteen guidance notes (the Guidance) on working safely during coronavirus in different types of work environment. These have been produced following consultation with 250 stakeholders including unions, PHE and the HSE and need to be read in full by those operating businesses during the pandemic. They set out detailed steps and recommendations for employers to take. Whilst the Guidance does not have legal status, it is likely to be seen as the minimum steps an employer should take to be compliant with the law. Communication and reassurance will be key to a successful re-opening of the workplace.

Working Safely – key steps

The Guidance sets out steps employers must work through to reduce workplace risks. Each business will need to translate this into specific actions it needs to take, depending on the nature of their business, how it is organised, operated, managed and regulated. The Guidance is focused on 5 key points:

- **Work from home** if possible, but those who cannot and whose workplace has not been told to close should go to work.
- **Carry out a COVID-19 risk assessment** in consultation with workers or trade unions to establish what guidelines to put in place. If possible publish the results on your website, businesses with more than 50 employees are expected to do this.
- **Maintain social distancing where possible** by re-designing workspaces e.g. staggering start times, creating one way walk-throughs, opening more exits and entrances and changing seating layouts.
- **Manage transmission risk** where social distancing is not possible e.g. by staggering start times, putting barriers in shared spaces or having fixed teams minimising the number of people in contact with each other.
- **Reinforcing cleaning processes** paying close attention to high contact objects like door handles and keyboards, providing handwashing facilities or hand sanitisers at entry and exit points.

Further information:
Return to Work Ready

Other employment considerations

1. **Changes to Statutory Sick Pay (SSP)** – SSP now covers employees who are not ill but have been advised to self-isolate and those who are shielding (although for those shielding the right to SSP is likely to come to an end when the government are no longer advising shielding from August). SSP is payable from day 1 instead of day 4 for affected individuals and online isolation notes will be available from the NHS 111 helpline as well as doctors. The government will refund companies with less than 250 employees for the cost of up to two weeks per eligible employee who has been off work because of COVID-19.

2. **Quarantine** – whilst from 8 June, most individuals arriving in the UK (with a few exceptions) had to self-isolate for 14 days, this was changed in relation to arrivals from 10 July. The requirement to self-isolate was removed where the arrival is from one of the "travel corridor countries". Where an individual arrives from a non-travel corridor country, or has made a transit stop in a non-travel corridor country in the 14 days before entering the UK, quarantine rules still apply. For more information see government guidance.

3. **Test and Trace** – the government has published workplace guidance asking employers to encourage staff to act on any notification to self-isolate after being contacted through the test and trace system. Staff who are well can work from home where possible. Otherwise they are entitled to SSP and the guidance suggests they should be given the opportunity to take paid annual leave or receive sick pay.

4. **Gender pay gap reporting** – this has been suspended in view of COVID-19 and the Equalities and Human Rights Commission is not intending to take enforcement action effectively meaning there was no requirement to report by 4 April 2020.

5. **IR35 –** the changes to off-payroll working in the private sector have been delayed for 12 months to April 2021 due to the uncertainty for businesses surrounding the COVID-19 pandemic.

6. **Employees working from home** – employers should make sure that health and safety policies, data protection and confidentiality are considered when staff are working from home.

7. **Redundancy payments and statutory notice** - New provisions came into force on 31 July to ensure furloughed employees who are made redundant receive statutory redundancy payments and statutory notice based on their pay levels disregarding any reduction as a result of being furloughed. Whilst the legislation is complex and subject to various qualifications, the key

general points are that the statutory cap on a week's pay still applies to statutory redundancy payments and the notice provisions do not apply where the employee is entitled to contractual notice of at least one week more than the statutory minimum entitlement.

8. **Job retention bonus** - The Government's Job Retention Bonus[4] is intended to provide additional support to employers who keep their furloughed employees in meaningful employment after the Coronavirus Job Retention Scheme ends on 31 October 2020. It is a one-off payment to employers of £1,000 for every employee claimed for under the Scheme who remains continuously employed through to 31 January 2021. Eligible employees must earn at least £520 a month on average between 1 November 2020 and 31 January 2021. The Government will be publishing full guidance by the end of September 2020.

[4] https://www.gov.uk/government/publications/job-retention-bonus/job-retention-bonus

Financial planning

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Significant alterations to a company's cash flow and revenue, historic or ongoing, may continue to have an impact even after the immediate liquidity crunch is survived.

The backward looking financial covenants will continue to be triggered in any debt finance documents long after normal trading resumes. Where trading does not return to normal levels as quickly as borrowers expect, driving a change to financial projections, forward looking financial covenants may also be a cause for concern.

Many companies have already availed themselves of bank-provided, government-backed funding and this should continue to be the first port of call.

Having weathered the initial liquidity storm, companies should now be looking to the short to medium-term and ensure that they have addressed any defaults (existing or anticipated) and are in constant communication with any debt provider particularly around the need to waive any covenant breaches (financial or otherwise) or to reset any existing tests.

Liquidity and cash flow

Liquidity and cash flow are likely remain as the critical focus for some time yet and ensuring the availability of credit to see the company through any difficult trading period (perhaps through revolving credit facilities or overdrafts) together with the rescheduling of any planned amortisation are steps that should be addressed.

Where there are existing facilities in place other potential short-term solutions (which will require amendment of any existing finance documents) may be discussed with lenders. These include:

Where there are existing facilities in place other potential short-term solutions (which will require amendment of any existing finance documents) may be discussed with lenders. These include:

- Deferral of interest payments for a fixed period of time.
- A switch to PIK interest if there are sufficient term loan commitments available to be drawn.
- Accrual of interest payments.
- Deferral of scheduled amortisations of loans.
- Holidays from certain mandatory prepayments.

- Amendments to equity cure provisions (if there are projected financial covenant issues or to change the way in which equity injected into the business is to be used).

Covid-19 may have driven significant changes to the manner in which the company is operating or trading (for example the launch of an online service) and debt documentation should be checked to ensure that all relevant consents have been obtained. Any failure to fulfil undertakings in key contracts are likely to cause an Event of Default under finance documents, and will need to be raised and discussed with lenders in order that solutions can be found.

It is very important for companies to fully review their financing arrangements and agreements to identify what, if any, disclosures they will need to make to their lenders and to ensure that the agreed changes are properly documented in case the lender's appetite to make credit available changes in the forthcoming months.

Accessing Government funding schemes

In addition to all VAT payments being deferred for 3 months from 20 March 2020 to 30 June 2020 the Government has also announced funding schemes that companies may apply for:

COVID Corporate Financing Facility Scheme (CCFF)[5]

The scheme is open to firms that can demonstrate they were in sound financial health prior to the pandemic. This means companies that had a short or long-term rating of investment grade, as at 1 March 2020, or equivalent.

The Bank of England will purchase commercially issued paper by eligible companies subject to individual issuer limits, including an issuer's credit rating. The facility will operate for at least 12 months.

Eligible companies will be UK incorporated companies, including those with foreign-incorporated parents and with a genuine business in the UK; companies with significant employment in the UK; and firms with their headquarters in the UK. The scheme will also consider whether the company generates significant revenues in the UK, serves a large number of customers in the UK or has a number of operating sites in the UK.

Coronavirus Business Interruption Loan Scheme (CBILS)[6]

This scheme provides facilities of up to £5 million for smaller businesses across the UK who are experiencing lost or deferred revenues, leading to disruptions to their cash flow. CBILS supports a wide range of business finance products, including term loans, overdrafts, invoice finance and asset finance facilities.

CBILS guarantees facilities up to a maximum of £5 million available on repayment terms up to six years for term loans and asset finance. For overdrafts and invoice finance facilities, terms will be up to three years. The scheme provides the lender with a Government-backed guarantee against the outstanding facility balance.

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5 https://www.bankofengland.co.uk/news/2020/march/the-covid-corporate-financing-facility

6 https://www.british-business-bank.co.uk/wp-content/uploads/2020/03/British-Business-Bank-CBILS-FAQs-for-SMEs-v11-270320.pdf

Future Fund[7]

On 20 April the Treasury announced a £250m fund to support high growth companies who may not be eligible for funding under other Government schemes.

The Future Fund is being delivered in partnership with the British Business Bank and is open for applications on a 'first come, first served' basis. Due to popular uptake, the Government has provided more funding than the £250m promised initially and it remains to be seen what new limits are placed on this scheme until it closes for applications in September. Investments will vary between £125,000 and £5 million and take the form of an unsecured convertible loan note.

The main eligibility conditions include:

- The business must be an unlisted UK registered company which was incorporated on or before 31 December 2019 (but certain non-UK companies may be eligible if they have participated in accelerator programmes requiring them to incorporate overseas);
- At least half or more of the business's employees must be based in the UK and/or at least half or more of its revenues must be derived from UK sales;
- The business must have raised at least £250,000 in equity investment from private third party investors in the last 5 years, prior to 20 April 2020; and
- The business is able to attract match funding from third party investors and institutions – so the Government contribution shall comprise no more than 50% of the total funding.

Further information:
The Future Fund – good news for growth companies?
The Future Fund – FAQs

Bounce Back Loan scheme

This scheme launched on 4 May 2020 and is being delivered through accredited lenders to help SMEs borrow between £2,000 and £50,000. The government will guarantee 100% of the loan with a term up to 6 years. There won't be any fees, repayments or interest due for the first 12 months. The government will work with lenders to agree a low rate of interest for the remaining period of the loan. Businesses cannot claim if they are already making a claim under the CBILS scheme although a CBILS loan can be transferred to the Bounce Bank Loan scheme. To be eligible claimants need to be:

- based in the UK;
- negatively affected by coronavirus; and
- not an 'undertaking in difficulty' on 31 December 2019.

[7] https://www.gov.uk/guidance/future-fund

Small Business Grant Fund and Retail, Hospitality and Leisure Grant Fund[8]

Under these two funds eligible businesses will be entitled to payments and cash grants of at least £10,000. The schemes will be delivered by Local Authorities – if you are eligible, your Local Authority will be in touch with you to arrange payment.

8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878082/small-business-grant-and-retail-leisure-hospitality-grant-guidance-for-businesses-v2.pdf

Insolvency of customers and suppliers

Companies should be careful about the level of credit extended to customers and clients and may also want to review the basis upon which goods are supplied to customers including, specifically, the strength of retention of title clauses (or the insertion of such clauses if they do not already exist). This will improve a company's position in the event a customer enters into difficulties or an insolvency process.

Signs of insolvency are all too often ignored. By way of example, these can include:

1. a sudden change in employees or management structure of a customer or supplier;
2. suppliers seeking extended credit terms; or
3. erratic payments or partial payments of debts.

Companies should regularly check the payment profile of customers and act quickly where possible. Various public sources can provide further information on a company's financial position including the London Gazette (which publishes all public notices relating to corporate and personal insolvency in England and Wales) and Companies House (for accounting and directorship information as well as registration of new security).

Protecting commercial relationships

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The commercial contracts that companies have in place with suppliers, customers and service providers form the backbone of a business. Some companies may struggle to meet their contractual obligations and different scenarios need to be planned for.

Can contracts be terminated or suspended?

Companies should not assume that contractual agreements entered into before the pandemic was declared will automatically terminate or be capable of suspension because of the prohibitions and restrictions currently in place.

There is no implied *force majeure* clause in English law. The effect of this is that if the contract does not contain a force majeure clause then the parties will be unable to rely on force majeure as an incident, despite the indisputable impact of COVID-19.

Assuming there is a force majeure clause, the scope is very important, for instance does it include; a pandemic, an epidemic, a global health emergency or circumstances where there is a Government restriction or prohibition? One of the above is key and very likely to apply to the circumstances caused by COVID-19.

However, the consequences of the force majeure clause will depend on how it is drafted - just because it is less profitable (or indeed unprofitable) or more difficult to perform the contract, this will not necessarily release the parties from their obligations.

If there is no force majeure clause, a party may seek to rely on the doctrine of *frustration* but the test is a strict one. The party would have to show that the consequences of COVID-19 as supervening event indisputably prevents the parties from performing their obligations under the contract.

What is the process to terminate a contract?

Companies should check the termination provisions of their commercial contracts carefully. Simply because performance seems at the very least not commercially viable and, at worst, impossible this will not result in automatic termination. For instance, a force majeure clause should contain a specific procedure for the parties to follow, and may not permit a party to rely on the clause unless that procedure has been followed. This is likely to include provisions around delivering a notice to terminate.

Whether seeking to rely on force majeure or another right to terminate, when any notice of termination is served, the reason for termination must be clear and correct. Furthermore, the mechanism by which the notice is served must comply with the contract. If either the reason for termination or the service of the notice are incorrect, there is a risk of the notice being invalid. The effect of this is that the party seeking to terminate could face an expensive claim for damages for breach of the contract. Such a claim could and should be avoided with careful analysis of the terms agreed and how to extricate the parties in the most commercial way possible.

Further information:
Is terminating a contract for insolvency about to get harder?

Considering data protection issues

Government and regulatory guidance on data protection issues for businesses seeking to reopen venues and offices was initially fairly limited. The privacy regulator (the Information Commissioner's Office or "**ICO**") had been fairly clear that data protection law should not prove a hindrance, but other than that businesses were expected to rely on existing tools and measures (or their own prior experience). For some larger businesses, this was just about enough, especially if they had existing in-house privacy expertise. For others, with less experience and more pressing concerns, specific guidance would have been welcome. Thankfully, there are now some useful resources available, including guidance from both the DHSC and the ICO, primarily directed at the hospitality sector, but which may provide reassurance (and inspiration) for other sectors.[9]

Whilst no regulatory advice can provide for ever eventuality, one of the key lessons to remember is to respect the security of the data you are processing and be transparent about what you are doing. Taking the specific example of collecting visitor data for contact tracing purposes (for which the ICO has produced some digestible advice in the form of five step guidance[10]), simple measures such keeping records secure (password protected or simply locked away), destroying data as soon as you can (likely after 21 days) and not trying to illegitimately capitalise on the data (this is not an excuse to send marketing emails) is likely to go a long way.

[9] https://www.gov.uk/guidance/maintaining-records-of-staff-customers-and-visitors-to-support-nhs-test-and-trace.
[10] https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/contact-tracing-protecting-customer-and-visitor-details/

Insurance reviews

Your key contacts

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The UK insurance industry accepts that it faces a liability to pay out on COVID-19 claims for the following classes of business: event cancellation, other contingency risks, entertainment risks, sports risks and travel insurance.

Most prudent insurers will have posted reserves for these anticipated losses but they are relatively modest and will not impair insurers' balance sheets. Financial Lines insurers are also anticipating some exposure in relation to D&O liability where derivative claims may be brought alleging mismanagement by management in the wake of the pandemic. Again any exposures are not likely to impair balance sheets.

What concerns property and casualty insurers is the avalanche of business interruption claims made the SME sector. There is simply not enough money in the insurance sector to meet these claims if they were held to be covered under Business Interruption policies. Insurers are relying upon two defences to defeat such business interruption claims. First, they point to a term in the insurance policy which requires that property has to be damaged in order to trigger business interruption cover. If that is not applicable, then insurers rely upon virus and communicable disease exclusions.

The difficulty for many SME businesses is that although many business interruption policies do grant cover for communicable disease under a "Public Authority" clause, insurers argue that the current Government enforced lock-down does not meet the specific criteria laid down in that clause. There is likely to be litigation in relation to this issue and, as the contractual arguments are finely balanced, they will ultimately have to be resolved by the higher courts.

However, there is hope for those SME and other businesses who have the benefit of the "25 mile radius" clause under the communicable disease section of their business interruption policies. In those circumstances, the businesses have the better argument.

The U.S. has taken a different route and draft legislation is being proposed in New York and New Jersey retrospectively changing the law so that insurers have to pay out on business interruption claims even where they have the benefit of the property damage trigger defence and the communicable disease exclusion. The UK traditionally does not enact retrospective legislation and it is unlikely that it will follow the American route. However, there is a groundswell of public opinion which rightly or wrongly believes that some insurers are not honouring the spirit of their insurance contracts. Insurers are keen to try to repair the damage to their public reputation.

The Financial Conduct Authority (FCA) has intervened and is in the process of bringing a ‘test case’ against insurers to resolve doubt for businesses who are facing uncertainty on their claims. However, the FCA has confirmed from the outset that its intended action is not intended to encompass all possible disputes, but to resolve some key contractual uncertainties. The test case will not determine how much is payable under individual policies, but will provide the basis for doing so. The FCA has stressed that its action should not prevent individuals from pursuing claims independently, or taking eligible complaints to the Financial Ombudsman.

As a consequence now may be a good time to bring valid claims against insurers in all classes of business as they will be keen to include them in statistics to demonstrate to their governing body and to the Government that they are doing their bit in this crisis and are paying claims.

Managing real estate matters

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The disruption caused by COVID-19 may impact a company's revenue and cash flow, which in turn may affect its ability to meet rent payments due and other real estate costs. There are also health and safety and insurance considerations.

We have set out some answers to initial questions that companies may have below:

1. **Can a lease be terminated by frustration as a result of COVID-19 or if there is a 'force majeure' clause?**

   Both scenarios seem unlikely on the basis of existing case-law. Unless there is express wording in a lease then a successful claim of force majeure or for rent suspension will be particularly difficult.

   If a landlord or tenant wishes to consider terminating a lease as a result of issues arising from COVID-19, it should review whether there is a break clause in the lease which can be operated.

   If the tenant is in breach of lease (other than non-payment of rent), a landlord can still pursue termination through forfeiture – although there is currently a stay under the Court rules in respect of possession proceedings until 23 August 2020. (The current moratorium on forfeiture only applies to non-payment of rent.) Where the market allows, tenants should also look to use the provisions available in most leases which allow them to assign or sublet their premises.

   Further information:
   "Give us a break....."
   Update: A further stay on business tenancy terminations

2. **What action can landlords take if tenants cannot afford to pay rents due to business interruption as a result of COVID-19?**
   With regard to non-payment of rent, the Government has temporarily altered certain rules which usually apply to the landlord and tenant relationship, including:

   - Removing forfeiture as a remedy for arrears owed under business tenancies protected under the Landlord and Tenant Act 1954 ("LTA 1954"). The Government also intends the measures to apply to leases where the protection of the LTA 1954 has been excluded.

- Other “breathing space” measures such as delaying the availability of Commercial Rent Arrears Recovery (“CRAR”)
- A ban on winding-up petitions being presented on the basis of coronavirus-related debts, which has already been applied by the courts.

The Government has also published a voluntary Code of Practice for commercial property relationships during the COVID-19 pandemic which is intended to reinforce and promote good practice amongst landlord and tenant relationships.

Further information:
Need to Know: Dealing with 2020's June Quarter Day
Government code published for commercial property arrears during COVID-19

3. Is there any Government advice available on the impact of COVID-19 on premises?

There are a number of specific health and safety obligations on landlords relating to legionella risks and gas safety. However, dealing with COVID-19 is different in that it is not linked directly to a building. The Government has guidance for employers and businesses generally, which is likely to be applicable to most landlords. The Government has also updated its published “Guidance for landlords and tenants” which includes advice on accessing properties and health and safety obligations in the context of coronavirus restrictions.

4. What actions can tenants take if they are struggling to pay rent?

A tenant can seek to open a dialogue with its landlord to discuss a rent concession such as a rent reduction or a change to the frequency of rent payments. The Government’s voluntary Code of Practice for commercial property relationships during the COVID-19 pandemic sets out some examples of new arrangements which could be agreed by both of the parties.

Tenants should also check relevant insurance policies which they hold for business interruption to ascertain what cover they have and may wish to seek advice on the scope of the policy.

In addition, if premises are to be left unoccupied for a period of time, tenants of any premises should consider their insurance policies as to whether or not they are obliged to notify insurers of the closure of premises or their absence from them.