



COVID19 Briefing

Responding to Challenges Caused by Covid-19

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INTRODUCTION

1. INTRODUCTION

- 1.1 We are facing unparalleled times where the situation surrounding COVID-19 is creating challenges that most charities, social purpose and public service organisations have never anticipated. As answers emerge and the government responds (most recently announcing its £330bn financial package), we have attempted to capture in this note some of the main themes from the immediate enquiries we have received. However, in a rapidly-moving situation with daily updates from the Government and the Chief Medical Officer, we would always suggest seeking specific and up to date advice when making decisions on these issues.
- 1.2 We hope this note helps you with some of your issues in the days ahead but if you come across others that are not addressed then please let us know and we would be happy to help and/or develop answers for wider sharing.

2. REGULATORY GUIDANCE VS STATUTORY OBLIGATIONS

- 2.1 We are entering a period where it is likely to become difficult for organisations in all sectors to meet their regulatory requirements whilst also fulfilling their legal duties to ensure their staff, service users and wider members of the public remain safe.
- 2.2 With some obligations remain absolute and others require organisations to act so far as reasonably practicable, balancing and ranking the importance of complying with certain obligations can be very complex.
- 2.3 Organisations in the Health and Social Care Sector will need to consider how they can meet their obligations to provide safe care to the people they support, who may be in a designated vulnerable group and/or have a confirmed diagnosis with COVID-19, whilst also ensuring that their staff are fully protected. This could become increasingly difficult with the possible future shortage of Personal Protective Equipment (PPE). Employers of peripatetic carers face a doubly challenging scenario where the very way in which they provide the service may put vulnerable service users more at risk as workers move from one home to another. The CQC's view that it will take a "pragmatic and flexible approach to how and when we regulate" is little comfort when service providers consider their staff could be spreading the virus.
- 2.4 Housing associations will have to navigate how to, or indeed whether they can, satisfy their obligations in relation to, for example, gas safety or electrical safety in the homes of those who are self-isolating. This is separate from the risk that they will not have enough qualified staff who are not self-isolating to undertake the statutory checks. Whilst the Regulator of Social Housing has acknowledged it will take account of the circumstances in considering non-compliance with the standards, housing associations

could still be in breach of the 12 month statutory limits, policed by the Health and Safety Executive.

- 2.5 With wider and more stringent “social-distancing” measures being introduced, all organisations from charities to businesses to local government are going to have to learn how to adapt their services and how they interact with their staff. At a time when fears relate to individuals’ physical health, organisations should also remember their duties to protect the mental health of their employees and service users. Those risks will be even greater when services are likely to be stretched and normal methods of supervision and support cannot be used.
- 2.6 Whilst schools remain open (at the time of writing), there is a need for them to consider how to respond to children and/or staff who are showing symptoms, have been to high risk areas or who have underlying health conditions.
- 2.7 If schools are ordered to close, provision of education through technology may create additional safeguarding risks that we are already seeing are being managed.
- 2.8 With the possibility that individuals may refuse to follow government advice and with some regulators holding off from providing definitive guidance, organisations will have to ensure they form a strategy in relation to each of their key regulatory challenges which can be quickly varied should the position change.
- 2.9 For further advice and support on health & safety regulatory matters, **please contact Tim Coolican or another member of the regulatory team on 0121 214 3479.**

3. EMPLOYMENT ISSUES

Service Delivery Roles

- 3.1 As mentioned above, employers have a duty to protect the Health and Safety of its employees. A fundamental requirement is to take steps to ensure that there is good hygiene in the workplace and that working practices do not pose undue risks to employees and they are given adequate protection. These steps will range from assessing whether employees need PPE when carrying out their roles, especially when caring for individuals with symptoms, through to ensuring thorough cleaning of premises and reviewing hand washing facilities and practices. A further key requirement is to ensure effective communication with employees to update them on Government guidelines and any key changes that may need to be implemented in a short time frame. Effective and regular communication with employees can also help employees feel safer in the workplace if they trust their employer to keep them updated and informed.

Sick Employees

3.2 Employees who are absent from work and have been diagnosed with coronavirus or are suffering from symptoms are entitled to statutory sick pay and/or contractual sick pay. Employers, however, are advised by the Government to be flexible regards notification of the illness, as sufferers have been told not to attend GP surgeries and so will not be able to obtain their normal sickness certification.

Do employees who are self-isolating get sick pay?

3.3 Employees who are not ill but are self-isolating are entitled to statutory sick pay and/or contractual sick pay depending on the circumstances. The Statutory Sick Pay Regulations have been updated so that anyone in self isolation is deemed incapable for work and so entitled to SSP. In more 'normal circumstances' it is only those who receive a written notice of this sort who will be entitled to SSP. In current circumstances, employers may want to take a pragmatic view about whether they are going to request this written notice and whether that is reasonable or whether verbal confirmation from an employee that they been told to self-isolate by a medical practitioner or NHS 111 or Government guidance is acceptable.

3.4 Contractual sick pay is, of course, dependent on the contents of the contract or policy. Where the wording in the contract or policy closely follows the SSP regulations, an employee might be entitled to contractual sick pay even if they are asymptomatic and have self-isolated. Where the wording doesn't follow the regulations, then it seems less likely that the employee would be entitled to contractual sick pay. Should they wish to do so, employers can use their discretion and pay contractual sick pay, even when the employee is not entitled. We suggest that, where this happens, it is made clear this exercise of discretion is not a change to the policy or contract.

What happens if an employer requests that an employee self-isolates?

3.5 This situation may be different where the employee is willing to work and has not been told by health professionals to self-isolate but the employer has told them to remain away from work. In these situations, the employer should again look to see whether there are any options for working from home. If that this is not possible, we would advise the employee be paid their full pay.

3.6 Employers may want to be careful about drawing distinctions on pay between those who remain away from work following instruction from a health professional and those who have not been instructed to stay away but make their own decision to stay away from work following Government guidance. If employers pay full pay to employees who have been requested to place themselves in isolation by medical practitioners but not to those who self-isolate, this might lead to employees who are self-isolating coming back to work. Not only might this put other employees in danger but, if the employee is

then requested to stay away from work by the employer, they would be entitled to full pay in any event.

What about employees who have an underlying health condition and self-isolate?

3.7 Employees who have underlying health conditions or who may be more susceptible to the virus may be more anxious at this time. Government guidance on social distancing [here](#) gives a list of those considered most at risk. If possible, it is advisable that employees who have any of these conditions work at home or very much limit their time in work. If home working is not possible, then an employer can decide whether the employee is entitled to SSP - i.e. whether this medical advice constitutes a written notice justifying SSP or possibly contractual sick pay. Employers should also be aware of possible discrimination issues if employees cite their disability as a reason they are not attending the workplace.

What about employees who refuse to come into work because of their fear of exposure?

3.8 Given the current fears surrounding the virus, employees who have no reason to self-isolate under current guidance might feel nervous about attending the workplace. As noted above, all employers have a duty of care to provide a safe environment for employees and this includes taking all measures, as advised by Government, to minimise exposure and contagion. If an employer has done this and an employee still refuses to attend work, then the employee must either demonstrate they can work from wherever they are currently based or they may need to take unpaid leave or holiday. Employers will need to be wary when an employee who suffers from mental health issues, such as anxiety etc. refuses to attend the workplace. If they are disabled, then it may be necessary to make reasonable adjustments. This might include helping the employee address their anxieties and/or giving them paid sick leave until they feel able to return to work. This will obviously need to be kept under review.

Do employers have the right to request details as to why an employee is self-isolating?

3.9 All employees must inform their employers of any reason why they are not attending work, usually in accordance with their contract of employment. Failure to do so is unauthorised absence and employees may be subject to action under the employer's disciplinary policy. It is reasonable for an employer to request details as to why an employee is absent and to clarify the period of their absence. In these circumstances, it is appropriate to request that employees confirm on their first day of absence the reason they are self-isolating and the relevant advice they have followed from NHS111 or Public Health England.

Downturn in Business

- 3.10 The economic impact of the virus will be widespread. This inevitably will have an impact on employers suffering the double blow of paying SSP and a loss of business. The Government will reimburse small to medium sized businesses eligible SSP costs for two weeks for each employee but that may not be enough. We advise employers who are anticipating reducing staff costs to look to their contracts to see whether they include lay off provisions. Many will not. A unilateral reduction in hours will be a breach of contract. As a result, employers may wish to seek to agree a period of reduced or unpaid leave as an alternative to redundancies. Other options to consider include requiring employees to take annual leave (which can be done in certain circumstances) or asking people to cover other roles or exploring seconding them to another employer with a shortage of workers.
- 3.11 For further advice and support on employment matters, **please contact Matthew Gregson, Matthew Wort or another member of the employment team on 0121 214 3615.**

4. FORCE MAJEURE

- 4.1 The concept of contracts that are legally enforceable against parties with greater power and influence and the underlying rule of law has often been quoted as the bedrock of the development of western culture and capitalism. This means that parties cannot walk away from a “bad deal” and those who worked through the financial crisis of 2008 will each have a high profile example of this. The concept of *force majeure* is the most significant exception to this which enables parties to a contract to suspend, vary or terminate their contractual obligations as a result of an event which is beyond their reasonable control. Used appropriately, it can save an organisation from certain calamity but it must be proven in each and every case on the facts.
- 4.2 In our view, force majeure could be argued due to the unavailability of a workforce due to a global pandemic but, if the government’s public health strategy limits the extreme impacts, a marginal loss of workforce in social care or construction could have easily been anticipated over the last two years due to Brexit risks. In 12 months’ time, it may be difficult to differentiate between contractors looking to renegotiate genuinely due to Coronavirus issues and others wanting to walk away from “bad deals”.
- 4.3 A party to a contract (governed by English law) will only be able to claim force majeure if there is an express force majeure clause in the contract. If such a clause exists, its scope is likely to vary between contracts so it is important to review the specific wording.
- 4.4 Even if a force majeure clause exists, it may not automatically apply and whichever party wants to rely on it will need to be able to prove its applicability based on evidence. Before seeking to rely on a force majeure clause, they should also take all

reasonable steps to mitigate their ability to perform the contract. At a very basic level, this is why we are seeing so many key and larger events being postponed rather than cancelled; just because they cannot take place on a selected date does not mean they cannot go ahead in three months' time. You can expect to see such arguments run and run.

Frustration – the Alternative

- 4.5 Where there is no force majeure clause, or it does not apply in the circumstances, then an option open to organisations may be to consider the alternative, albeit more difficult, principle of frustration.
- 4.6 In this situation, the party looking to rely on frustration must prove that it has become impossible to perform a fundamental obligation or that the fundamental obligation has become radically different to what was originally entered into. This is unlikely to be proved where steps could have been taken to sustain the contract, the event in question was foreseeable or the contract pre-empts the event and includes it in a force majeure clause.
- 4.7 If successfully proved, the outcome of the principle of frustration is that the contract is automatically terminated.

Points to note

- 4.8 An invalid force majeure or frustration claim may result in a counter-claim being issued for breach of contract against the in alleged breach. Given the legal complexity surrounding these claims and their novel application to the COVID-19 situation, we strongly advise you seek out legal advice and potentially wait to assess the full impact of COVID-19.
- 4.9 For further advice and support on dispute resolution matters, **please contact Phil Scully or another member of the dispute resolution team on 0121 214 3565.**

5. CONSTRUCTION

- 5.1 Many construction contracts contain a completion date by which the works must be completed. The completion date will usually be extended in only very limited circumstances, which may include delays caused by an event neither party could have foreseen at the time the contract was entered into ("force majeure" as above). Whether COVID-19 constitutes a force majeure event on specific construction projects will depend on how the current situation continues to evolve and the impact of the government's response. For instance, a partial reduction in workforce which causes a contractor to complete the works late may not be a force majeure event, but a mandatory lock down (as seen in some affected countries recently) is likely to constitute a force majeure event.

- 5.2 While a force majeure event may entitle a contractor to an extension of time (and relief from liquidated damages), not all construction contracts approach the cost consequences of force majeure in the same way. Some contracts may entitle the contractor to claim additional costs arising from the delay, while other forms of contract will exclude any right to additional costs. The costs associated with prolonged delay can be significant (including site security, extended hire periods for plant, and site maintenance such as pumping or mechanical drainage), and this has the potential to become a flash point for some projects if works are delayed by an extended period.
- 5.3 For further advice and support on construction matters, **please contact Emma Riley or another member of the construction team on 0121 214 3505.**

6. CONTRACTING QUICKLY

- 6.1 If you need extra services (like additional cleaning) due to the COVID-19, look first at existing contracts. Contracting authorities can vary existing contracts by up to 50% for “unforeseeable circumstances” provided this does not alter the “overall nature of the contract”. For new procurements, the current unparalleled circumstances mean contracting authorities should be able to use the negotiated procedure without advertisement (where you negotiate a contract directly with one supplier) if there isn’t time for a full procurement process.
- 6.2 Beyond the reach of EU procurement rules, there is still a need for organisations to consider their financial regulations and scopes of delegated authority to make sure urgent actions contractually bind both parties. Setting aside these delegations and regulations in their totality would be unwise but scenario planning particular absences across an executive team starts to show how quickly a decision making framework may break down.
- 6.3 For further advice and support on procurement matters, **please contact Beulah Allaway, Gayle Monk or another member of the procurement team on 0121 214 3614.**

7. GOVERNANCE – DECISION MAKING

- 7.1 A key issue for organisations in the midst of the COVID-19 outbreak is how to hold quorate meetings when people may be self-isolating or ill. Boards will clearly still need to “meet” to remain in charge of their strategy and operations in such a fast changing environment. Shareholding membership organisations will also need to decide whether to postpone any upcoming Annual General Meetings (“AGM”) whilst local authorities have their own distinct corporate governance issues.
- 7.2 **Board meetings:** The Board of your organisation will need to think about how they can continue to meet during this period and continue to make decisions validly and efficiently. This will be dictated by the nature of the decision and the urgency with which

it needs to be made. There are some decisions that can be made by written resolution whilst others should properly be made at a constituted Board meeting which may become an issue where directors are unable to gather in person. Most new model rules and Articles allow for “electronic” meetings but developing good practice for how to manage this is crucial to maintain good governance.

- 7.3 **AGMs:** The requirement to hold an AGM will most likely arise from the organisation’s governing document. Neither the Co-operative and Community Benefit Society Act 2014 nor the Companies Act 2006 make AGMs mandatory. Therefore, it is important to review your organisation’s governing document to establish whether holding an AGM is in fact a requirement of the organisation.
- 7.4 Assuming it is a requirement, your organisation will need to consider whether there are alternative ways of holding an AGM. You should consider whether your governing document provides for alternative ways to hold meetings, the most obvious being through electronic means. For organisations with a small membership, it may be possible to discuss the various options with the membership directly to ensure their voices are heard and they are happy with the chosen way forward. This may also reduce the risk of challenge should the governing document be unavoidably breached.
- 7.5 Where there is no requirement for an AGM but decisions need to be made by members at a general meeting, the organisation may need to consider alternative ways of making those decisions if they cannot wait. Some organisations will need to ensure their governing document gives them the power to use written resolutions. Additionally, the alternative options for holding an AGM can also be applied to general meetings if a decision needs to be made urgently.
- 7.6 **Local Government:** one of the key issues for local authority governance is that the current legislation requires members to be present at meetings in order to vote. There is now a suggestion that central government is considering changing this - but it hasn’t done so yet. All councils will be facing their Annual Meeting over the next few weeks to elect the new Mayor or Chairman and to set membership of committees; sometimes to elect the Leader, with a minimum quorum as required by the Local Government Act 1972. Where authorities operate an executive model, the Leader can decide how the Executive functions are to be decided and can, should they wish, delegate individual decision making to portfolio holders. The council functions, particularly planning and licensing, are more difficult; especially where applications are contentious. There are very few functions, however, that can’t be delegated to officers, and it is wise to check the constitution to see the extent of delegated powers to the Head of Paid Service.
- 7.7 For further advice and support on governance matters, **please contact David Alcock (social business & charities), Olwen Brown (local government), Phil Watts (education) or Peter Hubbard (housing sector) or another member of the governance team on 0121 212 7431.**

8. EXECUTION OF DOCUMENTS

- 8.1 With the increasing likelihood that the majority of staff and office holders will be working from home or potentially in self isolation, it is important to consider how organisations will execute legal documents.
- 8.2 The method of execution will depend on the structure of the organisation that is signing it and the type of document being executed. Where the general protocol is for contracts to be signed by certain authorised individuals, your organisation should be thinking about whether the authorised individuals are going to be able to sign documents or whether the pool of authorised individuals needs to be widened to account for people in self isolation or who are ill. Depending on the type of organisation you are and the document being executed, there are various ways to widen the pool of authorised signatories.
- 8.3 The failure of the legislation to develop around electronic signatures means, for land transactions, we are still reliant on Regulations dating back to 2008. The Land Registry therefore continues to operate in a way which does not reflect modern internet age expectations (just ask your company secretary!).
- 8.4 Some organisations execute deeds by affixing a seal. This may be an issue if the seal is kept at the organisation's premises and is not accessible by any individuals during this period. You may already have in place measures to allow for deeds and contracts to be executed by certain individuals who have power of attorney but this is relatively rare beyond very standard transactions (eg. such as the Right To Buy). If you do not have a power of attorney in place then this should be a number one priority for the governing body - but the scope of the power, length of term and mechanisms for reporting back on when and how it has been used need to be clearly specified. If you already have powers of attorney in place then you should consider widening the pool of attorneys to address the risks associated with social distancing and self-isolation.
- 8.5 It may still be possible to rely on electronic signatures to execute some documents not relating to land. Whilst they are widely used for some contracts, electronic signatures are still the subject of some legal uncertainty and you should seek advice on the appropriateness of this method for the particular document being executed because there are some situations in which a wet ink signature is still advisable.
- 8.6 For further advice and support on commercial matters, **please contact Mark Cook, John Wearing, Victoria Jardine or another member of the commercial team on 0121 212 7472.**

9. HOUSING OPERATIONS

- 9.1 For those housing staff dealing with tenants face to face, COVID-19 brings its own challenges. If a tenant is required to self-isolate, what services might be affected?

Rent Arrears

9.2 The impact of a significant decline in economic activity across the country means many working tenants will see a drop in their incomes, either through redundancy, reduction in hours or the further casualisation of informal labour practices. If schools also close down for significant periods then carers of children will not be able to work for several weeks. Rent arrears will no doubt increase and may put additional pressure on liquidity for some housing associations (see below). Whilst most income recovery activities can take place remotely to tenants, supporting them to apply for welfare benefits and assisting with debt advice becomes very difficult at a distance.

Repairs and maintenance

9.3 Very little can be done to avoid face to face contact with the tenant and/or members of the household when delivering essential repairs – what can an employer do to ensure the health and safety of their employees and/or contractors if someone in the household is self-isolating and emergency repairs are required? Whilst some employees may be prepared to use PPE, it is unlikely they will have been fully trained in its use and the chances of clean washing facilities away from the home are small. Grading the category of repair and acting accordingly may be the only viable short term solution.

9.4 In addition, could there be a breach of the Gas Safety regulations if checks are not carried out within the prescribed period due to self-isolating tenants or lack of Gas safe engineers? As we have mentioned above, the Regulator of Social Housing is willing to consider surrounding circumstances but this does not negate the duty to self-report and the breach of the Regulations in the first place.

9.5 In relation to disrepair compensation claims, will there be an increased liability period for landlords who can't meet timescales as published within their policies? What will be the overall impact on the condition of properties? Agreeing delayed access may be an obvious answer to this but this again depends on the category of disrepair and the likely length of self-isolation.

Court Proceedings

9.6 How the Court Service react to the current situation will no doubt have a huge impact on the ability to deal with serious incidents of ASB and perhaps the ability to take emergency injunctions. This could flow out into more mainstream Court actions.

9.7 The Court Service is currently assessing what should happen to existing proceedings already issued and those cases already listed for Trial. We expect Court consideration where a tenant or a witness is required to self-isolate and can no longer attend a hearing.

- 9.8 Bearing in mind the pressures on local authorities looking to rehouse people, there may well need to be a different approach to evictions. If they, along with Court hearings, are suspended, it is unclear how the already overstretched Court Service will deal with the massive backlog created and how landlords can continue to effectively manage these issues. These could exacerbate rent arrears levels and the fabric of some communities.
- 9.9 For further advice and support on housing operational matters, **please contact Helen Tucker, Baljit Basra or another member of the housing litigation team on 0121 212 7400.**

10. FINANCIAL RISK MANAGEMENT

- 10.1 It will be important for all organisations to review their existing finance agreements and to continue to communicate with the funders if there are any potential issues with compliance which may be caused as a result of the COVID-19 threat. Many organisations will have various sources of funding available to them but some may find that there will be some impact on these sources. Corporates and not for profits may, if there are potential liquidity issues foreseeable, need to work with their funders to address any potential breaches of financial covenants or undertakings. Any requests for waivers for any relevant breaches should be addressed as early as possible.
- 10.2 Above all, organisations need to be managing potential financial risks and to be making contact with both funders, commissioners and any Regulator as soon as potential issues are identified. Although some may not feel the impact of COVID-19 on their liquidity positions immediately, they should be exploring and reviewing risks and considering any options open to them to ensure they have the funds to get through this extraordinary period.
- 10.3 The government announcement of a £330bn+ financial measures package represents 15% of the UK economy but it is too early to assess the relevance of these measures for social businesses, charities and not for profits. Key aspects are aimed at the retail and leisure and travel industries, as well as the SME sector, such as the business rates relief. However, much of it is predicated on a loan basis rather than a grant basis at a time when many organisations will be wary of increasing debt. This package will need to be kept under review alongside likely future announcements.

Liquidity Issues

- 10.4 For organisations with material assets such as housing associations and residential care organisations, they will be carefully reviewing their business continuity plans and stress-testing their current Business Plans due to the liquidity impact of COVID-19. Stress-testing should include scenarios ranging anywhere from income slowing down steadily to the worst case, 'Pandemic Plan' scenario with income slowing more abruptly and bad debts increasing rapidly and significantly for an uncertain period of time.

Overall receipts (eg. from the completion of market-sale properties) are very likely to slow and development programmes may pause. In addition to this, organisations may be considering offering additional services to service users which again could impact on liquidity.

- 10.5 In terms of bolstering cash reserves, consideration should be given to being 'market ready' to raise further finance, if required, at short notice where there are scenarios in which organisations need to react quickly. Whilst markets are more volatile, there do appear to be opportunities for new funding.
- 10.6 Volatile financial markets may cause movements in swap rates affecting mark to market exposures for more complex organisations which will need to be carefully managed and considered as part of liquidity plans.
- 10.7 As part of their planning, organisations will also be considering carefully other expenditure, for example, hardship fund donations or additional funding needed for commercial subsidiaries that may be more adversely affected. This will be a very important consideration where mainstream long term funding agreements prohibit the making of donations or onward lending of funds without prior consent from funders. If permissions are likely to be required, it would be worth considering an early approach to funders to discuss this.
- 10.8 For further advice and support on funding & finance matters, **please contact Natalie Singh, Jon Coane or another member of the funding team on 0121 214 3718.**

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