

Coronavirus update

13 March 2020

BACKHOUSE
JONES

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Coronavirus: Taking care of your employees and your business

There is lots of information in the press at the moment regarding Coronavirus and whilst this is useful, as an employer in the transport sector, it can be difficult to know what is relevant to you and what to do next. This article looks at five key areas which we feel are naturally intertwined and which we are getting the most questions on from clients:

- your health and safety duties as an employer;
- the situation if this means there is less work to give your employees;
- your starting point as regards the businesses with whom you contract; and
- Some practical things operators can do.

Introduction

What is Coronavirus?

Severe acute respiratory syndrome coronavirus 2 (also known as SARS-CoV-2) is a virus which causes the coronavirus disease (also known as COVID-19). We refer to it as Coronavirus in this article.

The main symptoms are respiratory symptoms, fever, cough, shortness of breath and breathing difficulties. In more severe cases, infection can cause pneumonia, severe acute respiratory syndrome, kidney failure and even death.

Whilst Coronavirus has not yet reached the status of a pandemic in the eyes of the World Health Organisation, it has been urged that we should be in a phase of preparedness as more and more cases of the virus come to light. Initially, the majority of these cases are of

course in China, however, this situation is changing and new positive cases are being confirmed daily across the globe. Based on the World Health Organisation's current declaration that this is a public health emergency of international concern, the UK Chief Medical Officers raised the risk to the UK from low to moderate.

Your Health and safety responsibilities regarding Coronavirus as an employer

Who does the health and safety responsibility for my employees lie with?

In the event of a pandemic, a duty to protect the health and safety of employees is imposed upon the employer. As employers you are expected to take steps that are reasonably necessary to ensure the health and safety of your employees, as well as for your own welfare and those who you work with.

What can I do practically?

Part of this duty will include ensuring that both you as the employer and your employees are kept up to date and informed about health risks during a pandemic or crisis. Such steps may include having systems in place to keep in touch with and follow government advice on the virus i.e. regularly checking the government website (updated at 2pm every day currently) and ensuring that you have in place reliable and effective systems for communicating with staff. The latter is important particularly with driving staff who cover long distances in and outside of the UK. Some practical steps include:

- ensuring good hygiene in the workplace both personal (washing hands, hand sanitiser etc) and in terms of the building and contents themselves (wiping down surfaces,

phones, cabs, keyboards or anything else that could be touched by an employee);

- carrying out risk assessments to identify any areas whereby you or your employees may be at particular risk; and
- generally educating your staff about the risks and the importance of all of these steps to be taken.

Other practical steps particularly for the transport sector include:

- providing staff with masks, sanitiser and hand gel;
- monitoring locations of travel for coach drivers or HGV drivers who undertake this work; and
- monitoring holiday locations of all staff to ensure they are not travelling to known countries with the virus and who might then pose a risk to others on their return to the workplace.

What is the current advice?

This is changing regularly, and you need to check the government website. However, the Department for Transport and Public Health England published some specific information for staff in the transport sector which can be found [here](https://www.gov.uk/government/publication/s/covid-19-guidance-for-staff-in-the-transport-sector/covid-19-guidance-for-staff-in-the-transport-sector):

<https://www.gov.uk/government/publication/s/covid-19-guidance-for-staff-in-the-transport-sector/covid-19-guidance-for-staff-in-the-transport-sector>

What did the Budget say about helping us on 11 March 2020?

Key point which came out of the recent budget and which will be relevant to transport operators include (many relevant to Coronavirus generally but also, the financial knock-on effect) :

- those advised to self-isolate will apparently be entitled to statutory sick pay, even if they have not presented with symptoms;
- self-employed workers who are not eligible should be able to claim contributory Employment Support Allowance;
- the ESA benefit will be available from day one;
- firms with fewer than 250 staff will be refunded for sick pay for two weeks (and we expect there to be legislation going through Parliament for this in the next few weeks);
- small firms will be able to access business interruption loans of up to £1.2m;
- business rates in England will be abolished for firms in the leisure, retail, and hospitality with a rateable value below £51,000;
- fuel duty will be frozen for the 10th consecutive year;
- firms eligible for small business rates relief will get £3,000 cash grant;
- subsidies for fuel used in off-road vehicles - known as red diesel - will be scrapped for most sectors in two years' time;
- by the middle of 2025, more than £600bn is set to be spent on roads, rail, broadband and housing;
- £27bn is being earmarked for motorways and other arterial roads, including new tunnel for the A303 near Stonehenge;
- over five years, £2.5bn will be available to fix potholes and resurface roads in England.

What about employees returning to work?

When your employee is returning from a potentially high-risk area, or any of the areas set out above or advised by the Government in due course, there are two obvious and separate issues to consider immediately. First, is consideration as to whether the employee should return to work, and the second being whether that employee is entitled to be paid during that period.

An issue that stems from these questions and which employers may equally need to face is the conflict between the need to keep genuinely sick employees away from the workplace and the need to prevent unauthorised absence to ensure the business is operating. Whilst this would be assessed on a case by case basis, the need to prevent the spread of the disease would almost certainly trump the employer's concerns regarding malingering and those taking advantage of the situation.

In determining whether an employee should return to work if there is an identified risk that they may have been exposed to Coronavirus, and taking into consideration the health and safety obligation on employers identified, the first port of call is to check the contract of employment to see if there is an express right to require the employee to stay at home. This is not usually a common term in employment contracts.

In the absence of the contractual right to do so, you may regard the risk of keeping the employee at home to prevent risk of further infection, outweighs any risks of suspending them. If you take the business decision to suspend an employee, they are entitled to be paid. As such it is advised that where you can identify any work that can be done at home,

this is agreed to minimise the disruption for the incubation period of 14 days.

Any decision taken to suspend an employee must be on the basis of reasonable and non-discriminatory grounds for concern, and must be dealt with sensitively, appropriately and have regard to proportionality. Whilst suspension itself in these circumstances is unlikely to amount to a breach of the implied duty of trust and confidence, a failure to deal with the suspension in the appropriate manner could and as such it is important to be consistent, apply to all equally where the circumstances mirror and ensure you have the information documented to demonstrate why suspension was advanced.

Do I have to pay employees affected/at risk?

In a nutshell, yes. If at the point of suspension, the employee is not symptomatic and therefore not unfit to work, they should be paid as they are on the face of it willing and able to work. The Social Security, Contributions and Benefits Act 1992 refers to a day of incapacity for statutory sick pay ("SSP") purposes as "*a day on which the employee concerned is, or is deemed in accordance with regulations to be, incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do under that contract*". It is clear from this that if an employee is not incapable under this definition and poses a risk only based on the information you have, SSP would not be payable.

However, if the employee was suspended for the recommended period of incubation and during that period, they developed symptoms and were ultimately diagnosed with Coronavirus, the employee would then be

entitled to sick pay and you would require a sick note to cover the absence going forwards.

In the event an employee travels from a high-risk area and has symptoms immediately, usual sickness procedure and SSP (unless you operate company sick pay) would then apply for which you would require a sick note.

Is there other relevant information regarding statutory sick pay?

On 4 March 2020, it was announced by the Prime Minister, Boris Johnson, that emergency measures are to be introduced to increase statutory sick pay for individuals by providing payments from the first day off work rather than the fourth during the Coronavirus issue.

The aim is to ensure that people self-isolating are protected financially. At present, under the existing system, those off work due to illness can claim £94.25 per week for up to 28 weeks, but only once an individual has been off work for four or more days in a row.



On 11 March, the Chancellor of the Exchequer, Rishi Sunak, announced that the government will reimburse small employers (employers

with less than 250 employees) any statutory sick pay they pay to employees, for the first 14 days of sickness. This is likely to be a temporary measure to help insulate businesses against the impact of coronavirus.

Update 12 March 2020

The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 have been made and are now in force. These provide that SSP will be available to anyone isolating themselves from other people in such a manner as to prevent infection or contamination with coronavirus, in accordance with guidance published by Public Health England, NHS Scotland or Public Health Wales.

The situation if this means there is less work to give your employees

Over the last few weeks we have become increasingly aware of operators in the transport sector being informed by their customers or contractors that there is no work

for them for the foreseeable future. This is usually where links to overseas deliveries are in the supply chain or driving overseas is concerned.

Some operators have noticed a decline in the amount of work whilst others have been ground to a dramatic and rather immediate

halt, particularly within the container shipping and freight community. This inevitably has a knock-on effect however.

So, what do you do if there is no work for some or all of your employees?

Firstly, check your contracts of employment to see if there is an express right to “lay off” or place your employees on “short time working”. If you have the contractual right to lay an employee off, you can essentially ask them to stay at home or take unpaid leave if there is no work for them. The statutory guarantee pay for eligible employees who have been laid off is currently £29 per day for 5 days in any 3-month period, the rest of the time spent laid off would be unpaid unless the contract stipulated differently.

Alternatively, if there is some work but not enough for all employees, you can seek to agree a proportionate reduction in pay and working hours following consultation with staff.

If the employee is laid off or placed on short time working for 4 weeks or more, or 6 weeks in a 13-week period, they may be entitled to apply for redundancy and claim redundancy pay calculated in the usual way.

If your contract does not permit lay off or short time working, but you do it anyway, it is likely to amount to a fundamental breach of contract potentially entitling the employee to resign and claim constructive dismissal. In this event, an employee may choose to:

1. affirm the breach and continue to be employed whilst claiming statutory guarantee pay;
2. bring a claim for breach of contract in the civil court or employment tribunal;
3. bring a wages claim in an employment tribunal for their contracted hours guaranteed by their contract;

4. resign and bring a constructive unfair dismissal claim/redundancy pay.

If the situation continues, the employer will need to deal with any potential redundancy requests and or resignations accordingly.

What if an employee refuses to do the work?

Whether it is reasonable to deal with this issue as failing to follow a reasonable work instruction will depend on the circumstances and up to date information available at the relevant time. This will determine if the request is indeed reasonable or whether the employee has a legitimate concern to refuse to go to a particular location for work for example. As the Coronavirus spreads, asking a driver to drive to that country as a reasonable work instruction will need to be considered day by day. Likewise sending a driver to a delivery where the customer confirms they have recently travelled to a country that has known cases of the diseases, may give rise to them leaving the premises without permission and completing the work. A fact find meeting will be required to determine the merit of progressing what would ordinarily be a more straight forward disciplinary matter.

In summary there are obligations to be reminded of in an effort to minimise the spread of the disease among your workforce and processes to follow depending on the information that comes to light daily concerning your staff and their potential exposure to the Coronavirus.

Please note that this update is based upon the most up to date information available. However, the available information changes on a daily basis and so advice and guidance may therefore be subject to change. We therefore strongly recommend that you

regularly check on the current situation using the Government website and World Health Organisation as your reference points and make being alive to updates as and when they are released.

Other useful information can also be found here: <https://www.acas.org.uk/coronavirus>

What if I need help with how to deal with my employees?

We have a team of specialists who can help you, so please get in touch.

Your starting point as regards the businesses with whom you contract

A recent study by Dun & Bradstreet has identified that the Coronavirus outbreak and the resulting closure of large parts of China could impact more than 5 million businesses worldwide. So, in addition to the obvious



serious health concerns, the ripple effect of this is likely to be disruptions due to staff shortages and subsequent supply chain breakdowns. In particular, the transport and manufacturing industries, and their supporting supply chains may feel the effect of restrictions constraining the movement and supply of goods and services. Road transport is expected to experience limitations due to the lockdown of numerous cities in Northern Italy and the

fact that countries are considering the closure of borders with Italy for all human movement.

The knock-on effect is that many businesses may experience problems fulfilling their contractual obligations to one another. Subsequently, they will be looking at contractual rights for relief from the performance of certain obligations they may have contracted to carry out due to the impact of the Coronavirus.

What is my starting point?

Obviously, communication is always key and keeping everyone up to date is important. However, from a legal perspective, the first thing you need to do is check your trading terms. Particularly any commercial contracts you have with a connection with industries or countries affected by Coronavirus or the response to the virus. You need to consider if you or your counterparty's rights may be affected.

You are looking for provisions which deal with delays or non-performance, for example because of restrictions on international travel.

There will often be a "force majeure" clause in the contract. This will deal specifically with how the parties' obligations may be affected by an event (usually unforeseen events outside the control or influence of either party) that affects a party's ability to perform the contract.

Force majeure clauses are all different, but are common place in commercial contracts. They usually list certain defined circumstances which might prevent performance of contractual obligations such as "acts of god" (e.g. earthquakes) and certain acts of man of a disruptive and unforeseeable nature (e.g. industrial action). The clause will usually also

prescribe what the parties must do next, e.g. notify the other party and possibly take certain reasonable steps to mitigate the effect of the event impacting performance. In England and Wales, force majeure is not implied as a matter of law, and express clauses are interpreted strictly. If there isn't a clause in the contract, you won't be able to rely on it.

If force majeure clauses have been included, consider whether the clauses might be triggered by or against you and call us for advice.

Will a force majeure clause protect me from a claim related to Coronavirus?

Force majeure clauses vary, but it is unlikely at this stage that the Coronavirus outbreak will be dealt with specifically in the contract and therefore operators need to think laterally and consider whether events linked to the Coronavirus would fall within the force majeure clause. Possible events that could be used are "epidemics" or "work shortages" depending on the circumstances and if these are included in the clause. It could be argued that, where the Coronavirus prevents a party from performing the contract, now that we are all aware that the Coronavirus is an ongoing epidemic, it would no longer be regarded as a force majeure event as it could reasonably have been foreseen by the operator.

Coronavirus is a new phenomenon and therefore we don't know yet how the Courts will deal with the impacts of it. There is case law from the Chinese courts indicating that SARS was held to be a force majeure event in certain circumstances and whilst this does not impact English law, it is an indicator that it is not beyond the realms of possibility that Coronavirus could also be interpreted in a similar manner. At this point though, careful

consideration of the precise wording in the agreement will need to be carried out.

What else might I need to do?

Depending on the wording of the force majeure clause, operators may also be obliged to take reasonable steps to mitigate or avoid the effects of the Coronavirus in order to rely on it.

Also, if any of your contracts come under the jurisdiction of or are governed by the laws of other countries, the law may be different, so contact us so we can refer you to a specialist in the correct jurisdiction.

What if there is no force majeure clause?

Usually, the aim of a force majeure clause is to provide for the termination or adaption of a contract if an event affects its performance. In the absence of a force majeure clause, or if the impact of Coronavirus is outside such clause's scope, the parties to the contract would have to rely on the common law principle of frustration which allows a party to be discharged from its contractual obligations where a change in circumstances makes it physically or commercially impossible to perform the contract. The circumstances where frustration can be applied are narrow and therefore operators should not seek to rely on this and must instead ensure that their contracts deal with situations arising from the Coronavirus.

What if I don't have time or need help with interpreting the contract?

We have a team of specialists who can help interpret your trading contracts and also suggest amendments to assist you if anything like Coronavirus happens again, so please get in touch.

What if a customer cancels a holiday with us?

According to the Association of British Travel Agents (ABTA), and the Air Travel Organiser's Licence (ATOL), and under the Package Travel and Linked Travel Arrangements Regulations 2018, whether a customer can cancel a holiday and be entitled to a full refund will depend on the advice given by the Foreign and Commonwealth Office (FCO) at the time of travel. If the FCO says it is unsafe to travel to a certain destination or by a particular route, the tour operator will be obliged to cancel the trip and find a suitable alternative for the customer, or offer a refund.

As long as your business, as a travel operator, can provide a safe, secure and enjoyable holiday for your customers then they are not obliged to find customers an alternative trip or refund them. If the FCO has not advised against all but essential travel to the area, neither your business insurance, nor the customer's insurance company is likely to pay out if you decide to cancel or curtail the trip because of safety fears.

Customers will only be entitled to refunds or alternative arrangements for travel advised against by the FCO for imminent departures, meaning within the next few days. Tour operators are therefore permitted to decide on an ongoing basis how far in advance they will offer alternative arrangements or refunds to customers.

If a customer contacts you for a refund or requesting alternative arrangements following FCO advice not to travel to their destination, you should refer to your business terms and conditions with that customer to establish your rights and obligations under those terms. The likelihood is that you will be required to provide the customer with a suitable

alternative arrangement or a refund, and you should then look to recover any losses suffered by you under your business insurance policy.



Some practical things operators can do

Some of the practical things you can do to minimise disruption to your business include:

- keeping informed generally of the global and local position regarding your business;
- subject to the point below, continuing to communicate with suppliers and customers regarding the impact of the outbreak to enable you to prepare for potential disruptions;
- seeking legal advice about your specific contracts your organisation is a party to before sending or acting on communications;
- thinking about which existing contracts may be impacted by closures or delays, or where a counterparty may seek to terminate or suspend a contract with you or others you deal with;
- considering how the risks associated with similar future outbreaks could be reduced and contact us to advise on extra protection in your key commercial contracts.
- Check your business insurance policy to determine whether you are covered for any losses due to an epidemic, pandemic, natural disaster, or unforeseen circumstance.

- Submit your invoice to the customer for payment and let the customer explain why the invoice is not payable and if disputed ask that they claim under their insurance to cover your invoice.
- Mitigate your loss – redeploy any vehicle/employees to other assignments if they are prevented from carrying out a particular assignment due to travel/area restrictions, or due to a customer cancellation, and perform any parts of the contract which can still be performed. The business should also start or continue to perform the contract after the coronavirus related challenges are alleviated.
- Offer an alternative where possible eg. If travel is not permitted to Northern Italy for a customer's ski trip, offer that customer a comparable ski trip in another part of Europe – the customer is entitled to reject the alternative but it may save having to provide the refund they are entitled to.
- Document the circumstances in writing all the circumstances leading up to the current situation. If both parties still want the contract to proceed, explore all potential options through good faith negotiations, including example time extensions, contractual amendments, or waivers of certain obligations. If you reach agreement on any variations to the contract, ensure that they are agreed in writing.

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