

Coming out of lockdown – key issues for businesses

COVID-19 Guide
June 2020





CONTENTS

- 4 Corporate and commercial considerations
- 5 Your people – key things to consider
- 9 Intellectual property – action points
- 10 Real Estate – adapting to new ways of working
- 11 Dispute resolution – maintaining cashflow is crucial

For advice and support on any of the issues raised in this guide please email enquiries@stephens-scown.co.uk

For advice and support on any of the issues raised in this guide, please email enquiries@stephens-scown.co.uk

As the UK emerges from lockdown, what are the key issues businesses should consider?

None of us has experienced anything like this before, and there are many uncertainties. However, Stephens Scown's legal advisors have been busy helping clients with advice for practical ways forward in this challenging time.

Experts from our corporate, employment, intellectual property, dispute resolution and real estate teams share their suggestions in the latest Covid-19 guide from Stephens Scown.

The advice given in this article is correct as of 22 June 2020. The situation with COVID-19 is developing rapidly, so please do check our COVID-19 [Insights Hub page](#) for the latest updates.



**COVID-19 Insights
Hub page**



CORPORATE AND COMMERCIAL CONSIDERATIONS

Whilst businesses have gone through a tough time and are likely to continue to do so for the remainder of 2020 the indications are that investors are confident that good businesses will recover with investment markets showing remarkable resilience in recent months.

Perhaps as a result of this longer term confidence, funding is still available for businesses with good business plans and strong management teams, particularly in high growth areas such as technology.

Wherever you are in the business cycle, experts from our corporate and commercial team suggest spending time thinking about these issues:

- *Consider your business plan for the next 3 to 5 years. How has this been impacted by the coronavirus pandemic? Are growth or exit plans being put on hold or delayed? As businesses move out of survival mode and look to the future these areas will need to be considered.*
- *Are there acquisition or investment opportunities in the current environment? Those businesses looking to expand may see opportunities to achieve growth through acquisition whereas others may feel that now is the right time to plan for an exit.*
- *If you have obtained emergency finance either through the Coronavirus Business Interruption Loan Scheme or elsewhere, do you need to consider how to refinance in the longer term? Consider whether giving up equity in the business to investors is a viable alternative to traditional lending.*
- *How will you incentivise your key people whilst cash flow is tighter for many businesses? Are share incentives a cost effective means of incentivising key staff and management teams? Options can be granted over shares in a company allowing option holders to benefit from any growth in value of the company. EMI options remain a popular means of offering equity to employees in a tax efficient manner.*
- *Are there growth opportunities that your business may be able to take advantage of? How can you take advantage of these when there may be little spare cash to spend on potential opportunities? Consider whether there is scope to enter into joint ventures with other businesses to share costs or to obtain funding to support a potential growth area.*



Funding is still available for businesses with good business plans and strong management teams



YOUR PEOPLE – KEY THINGS TO CONSIDER

One of the most significant issues for businesses coming out of lockdown will be their people. Experts from our employment team suggest spending time thinking about these issues:

Making the most of the furlough scheme

This has provided a really helpful buffer for most businesses, although the lack of initial flexibility has caused some issues and left small numbers of people not furloughed covering a lot of the remaining work and planning the re-launch.

Thankfully there will be a lot more flexibility from 1 July, with employees being able to agree with the employee the hours and shifts that they need them to work, with the balance of their normal working hours being paid at the usual furlough rate. For the hours that the employee is working, they should be paid their usual hourly rate and you cannot claim those hours back from the Government.

One key area to be aware of: from 1 July the number of employees an employer can claim for in any claim period cannot exceed the maximum number they have claimed for under any previous claim under the current Scheme. This may impact if you have been doing rolling furlough, so check your Job Retention scheme records so you know the maximum number of people you can claim for in the months going forward. For more details of flexible furlough scheme is available [here](#).



Flexible furlough



Bringing staff back from furlough

Practically this can be as simple as asking someone to return. But what essential aspects should you consider before you do this? We recommend considering the following:

- *Do you have a sound business case to un-furlough?*
- *Has the person been on furlough for the minimum period of three weeks (21 calendar days)?*
- *If you are not bringing all employees in a team back, you will need to ensure that you use a fair selection process as the Government has flagged that equality and discrimination laws would apply in the usual way.*
- *Speak to the employee to discuss your plans and explain why the decision has been made, when you would want them to return and reassure them of the measures you have taken to keep them safe, including any PPE to be provided.*
- *Agree with them any flexible furlough arrangements and put into place a written agreement with the employee that records that arrangement. These can last for any period of time (up to 31 October) and you can change that again with the employee's agreement. Contact us if you need a template.*
- *Issue a letter to the employee to confirm when the employee's furlough will end, that their pay will return to 100% and the practical arrangements for their return.*

For more information including what to do if your employee refuses to return from furlough see [here](#) for our more detailed guide on un-furloughing.

The shape of your business going forward?

Many employers are considering whether their operation will shrink for a period, meaning redundancies are necessary, either now or towards the end of the Job Retention Scheme, which finishes on 31 October.

It is vitally important that your business rationale is well thought out and recorded and that you follow a fair process. If you don't do this you may face expensive Employment Tribunal claims.

Other factors to consider are set out in [here](#) in our employment focused 'After Lockdown' article.

Be aware that you can make a person redundant and have their notice and accrued holiday be served while they are on furlough, so if this is a reality for you, you should take legal advice ideally in the next month to make the most of this opportunity. Depending on the number of employees affected, you may also need to undertake collective consultation with minimum time periods – which again needs a fair amount of planning in advance to get right.

Our specialist employment team can assist and have fixed priced packages of support.



Guide to furloughs



Business survival and building for success

Changing your working patterns?

With buying and work habits changing, some employers are looking at permanently changing the terms and conditions of staff to enable a better service or to reduce the need for redundancies.

Certainly, this is worth considering at a time when colleagues are used to change and expecting more to come, as the world does not appear to be simply returning to how it was pre-lockdown.

Where you can consult, explain the reasons and get engagement from your staff, you are more likely to get their voluntary agreement to these changes. It is also possible, again through appropriate internal processes, to make changes even in the face of opposition. For more information see [here](#).

How do you create a safe workplace?

Employers will be well aware that they have legal responsibility for the health and safety of staff at work. Drafting Covid-19 risk assessments, which once was the remit of health and safety professionals is now often falling on HR Teams or Directors who are scouring the Government guidance webpages for assistance.

Key factors to consider are:

- *Your document will need updating as the guidance changes, so it is best to be clear on who is responsible for this.*
- *You should consult with staff on the key points on your risk assessment, so they can flag up areas of concern and be involved in actively ensuring that the steps proposed (such as social distancing) are adhered to.*
- *You need to respect people's concerns about safety and take any grievances raised in this respect sensitively and seriously.*

The law provides a great deal of protection to employees who whistle blow or raise health and safety concerns, so ensure they are not treated detrimentally.

It is also really important to make sure your employees are properly briefed about returning, the company's expectations, safety and hygiene rules and provided with reassurance of appropriate support.

It is advisable also to make your staff aware that it is a lawful management instruction which is therefore backed by disciplinary sanctions that anyone who is unwell with symptoms of coronavirus should not travel to or attend the workplace under any circumstances. For more details on the legal issues surrounding staff returning to work see [here](#).



How to reduce pay and hours

The law provides a great deal of protection to employees who whistle blow or raise health and safety concerns



Legal issues of returning to work





Think about how your staff are doing

It is likely that employees operating away from the workplace or returning from furlough will have different needs from when they simply worked at the business premises. Their fears and anxieties may arise from a number of factors and offering support and reassurance will be key to retaining them, meeting the business needs and ensuring they are engaged and productive. Make sure that you or your managers have spent time to understand how their team are doing and have asked questions specifically around health and wellbeing, so you understand where they are and what support they may need. You may also want to consider an anonymous survey to get a picture of your team's overall wellbeing.

Don't underestimate the emotional impact that this situation will have brought, with tensions between furloughed and un-furloughed staff likely. You will need to acknowledge those feelings and work with teams to rebuild trust and respect. Get external help from specialists if you need to work through this, as although your staff will probably understand why you had to make the difficult decisions you did, they will remember how you supported them through these issues and doing this well will increase loyalty and enable you to resolve issues quickly.

A whole new world?

Many businesses now understand that the old ways of working may have changed forever. Previous fears about flexible or home working may have been overcome, given that many staff have worked successfully in this way now for three months.

Be aware that many of your staff will now want to remain working in this flexible way and consider how you could accommodate and maximise this while still meeting your customer requirements.

Consider how you have kept community, maintained trust and measured outputs through this period and what good things from this period you might want to keep. It is likely that those businesses that do evolve through this period and enable staff to remain flexibility will have a competitive advantage when it comes to recruitment and retention post lockdown.

Don't underestimate the emotional impact that this situation will have brought

INTELLECTUAL PROPERTY – ACTION POINTS

Our intellectual property and IT team has been busy advising clients who have pivoted their business online during the coronavirus lockdown. Here is their advice for issues to think about as lockdown eases:

- *Customers' expectations about services levels are starting to rise. Patience with delays or poor service linked to the lockdown are starting to wear thin. Businesses will need to ensure they are prepared to face demand. This is particularly true when selling online where consumer protection provisions mean businesses need to have strong back office functions to manage stock, customer dialogues and returns/faulty products.*
- *Businesses will need to reassess the position for those working remotely. As we settle in for the long term of working distant from our colleagues, the cyber security and GDPR risks continue to grow. Businesses will need to reassess the quick decisions made to get themselves up and running remotely to ensure that their set up is sustainable for the business goals and compliant. Now more than ever, customer trust is going to be key. How you look after customers, including their data, will govern how those customers view your business.*
- *Many businesses have adopted digital solutions or increased their digital offering, perhaps for example, seeing more online sales than previously. These trends look set to continue. Businesses must reassess the steps they have taken, including their legal compliance when it comes to selling online or otherwise offering or adopting digital solutions. Many decisions made in haste at the beginning of lockdown will not be sustainable in the long term, and may need to be unpicked. For example, those businesses selling online without meeting their legal obligations are potentially storing up big cash flow issues when they find themselves vulnerable to returns processes which favour their consumers.*
- *Businesses will be judged on how they deal with the pandemic, both in the immediate aftermath of lockdown but also in the long term. Looking after your reputation is going to be important as businesses and customers flex the ways they interact with each other. Ensuring your trade mark protection is fit for purpose and monitoring how it is used online is essential.*

Looking after your reputation is going to be important



REAL ESTATE – ADAPTING TO NEW WAYS OF WORKING

The commercial property market is in uncharted territory and businesses and individuals are globally having to adapt to new ways of working and living. Occupiers are adapting to new ways of delivering their services and there will be a continued focus on assessing property requirements, with an even sharper focus on profitable sites.

Whilst the retail sector faces particular challenges as social distancing remains normal practice, there continues to be strong demand for warehouse and industrial space, particularly from businesses that have a strong online element to their business.

Here are some of the issues that the commercial property experts from our real estate team think businesses should be thinking about:

- *Flexibility will be key, particularly with the threat of a potential second wave of infection requiring the brakes to economies having to be re-applied.*
- *Option agreements can be used to buy some time and may help to save deals. An option agreement has saved a leisure related deal our real estate team have been working on during the current pandemic. The purchaser was still very keen to proceed with the acquisition, but needed to display some contractual commitment to the vendor and buy themselves some time to see how the tourism sector hopefully opens up later this summer.*
- *Don't forget about communal spaces. Landlords of communal spaces, such as shopping centres or even communal spaces in offices, will be under some pressure to manage common areas safely.*
- *Consider if your business can make the most of temporary licences. For example, Devon County Council has introduced temporary "street café" licences to help hospitality businesses to re-open in the coming weeks, as coronavirus lockdown restrictions continue to ease. The Council's new informal temporary licence for street cafes will now speed up the application process and the temporary licence will enable businesses to provide outdoor seating while the 12-week consultation is being carried out. Café businesses can apply on the Council's website via the Street Café webpage.*

There continues to be strong demand for warehouse and industrial space



DISPUTE RESOLUTION – MAINTAINING CASHFLOW IS CRUCIAL

The challenging economic outlook means that maintaining cash flow is going to be all important. We can also expect to see more news of company insolvencies. Government grants and bank loans are going to slowly dry up which will place a further squeeze on businesses.

Our dispute resolution team has identified these issues for businesses to think about:

Credit control

It is vital that the 'back end' of a business is carefully managed. This will require businesses to ensure their credit control process is tight. Communication is key and if a debtor is not prepared to agree (and keep) to a payment programme then proceedings should be issued quickly to keep pressure on.

Early dispute resolution

If proceedings are unavoidable in major disputes, finding a route to a rapid resolution is vital. This is separated between non-binding or binding processes. Mediation is the most popular of the non-binding methods, but there is also non-binding neutral evaluation.

Of the binding processes arbitration is a traditional model but binding expert determination is becoming increasingly popular as it can be quick and cost effective with a final decision being given within a few weeks, compared to potentially several years for court proceedings.

Directors' duties

Many companies will be concerned about their solvency and duties of its directors in such situations. Whilst legislation (that is currently being passed) has relaxed some of the responsibility on directors regarding wrongful trading and currently suspended the ability to bring a winding up petition against companies, directors must still comply with their other duties codified in the Companies Act 2006, so need to tread carefully in such situations.



Moratorium on forfeitures due to end?

The measures put in place to protect commercial occupiers from enforcement action by landlords have evolved since the start of the lockdown. However, the current moratorium on forfeitures for arrears of rent is due to end on 30 June. Although we can speculate that this moratorium will be extended, we are approaching the 24 June quarter day.

Temporary protection to commercial tenants

The Enterprise and Insolvency Bill should be enacted by 30 June, which will give a temporary protection to commercial tenants from landlords using the threat of statutory demands and winding up petitions to recover rents. It is intended to be a temporary measure. The main thrust of the new Bill will be to allow viable companies to engage a new insolvency procedure to gain short protection from creditors.

Responsible contractual behaviour

The Cabinet Office has issued non statutory 'Guidance in responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency', which strongly encourages responsible and fair behaviour in negotiating time for payment and in making arguments that contracts, including leases, are frustrated. More guidance in the form of a Code of Practice for the commercial sector in the high street is expected to be published imminently. This Code is intended to give clarity and reassurance to both landlords and tenants of commercial 'high street' business.

Although this means that the impact of the June quarter day for enforcement will be more limited, we have to have a weather eye on the September quarter day, which is likely to have a bigger impact. Although, landlords and tenants may have reached agreement on the March and June payments, tenants will come under increasing financial pressure if they have deferred rent payments, the furlough scheme has been scaled back and we have an ongoing recession.

More guidance in the form of a Code of Practice for the commercial sector in the high street is expected to be published imminently

For advice and support on any of the issues raised in this guide please email enquiries@stephens-scown.co.uk

