

Are you Second Lockdown ready?

COVID-19 Guide
November 2020





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

With Christmas just around the corner, and with concern over the dramatic rise in the Covid-19 infection rate across the country, the government announced on 31 October 2020 that it would be necessary to enter a second lockdown in an effort to get the virus under control.

It is hoped that keeping the restrictions in place until 2 December will prove successful in holding the virus at bay and avoid the NHS being overwhelmed. With an eye firmly on keeping the negative impact of the virus on the economy to a minimum, the government has also announced further financial support for businesses that have to close during this period through the furlough scheme.

Experts from Stephens Scown's legal teams highlight the key points that employers and business owners should consider as we adjust from the 3 Tier system and move into this second national lockdown.

The advice given in this article is correct as of 5th November 2020. The situation with COVID-19 is developing rapidly, so please do check our COVID-19 [Insights Hub page](#) for the latest updates.



IMPACT ON YOUR PEOPLE

There are some significant differences between the national lockdown in spring and the restrictions this time around. Not only will the schools not close but hopefully some businesses are now better equipped to deal with the requirement for all of its staff to work from home where they can. Also this lockdown will not require the courts to close, meaning any tribunal hearings should still be going ahead as planned and this will hopefully mean the backlog in claims will not get any worse than it already is – although we appreciate the Tribunals are doing all they can in this very difficult time with the resources available to them.

The thought of another lockdown is daunting, but there are things you can put in place to mitigate the impact it can have on your business and your staff.

Consider the following:

- *If your business has to close down due to the new restrictions, you may need to use the extended Coronavirus Job Retention Scheme (CJRS) and designate some, or all, of your staff as furloughed workers. We understand the scheme will be available until 31 March 2021, although the amount of the grant may be reviewed for February and March. It is also, helpfully, available to the staff who had not previously been furloughed (subject to eligibility criteria) which is great news if you have had some new starters since the last lockdown. Here is what we know [so far](#) regarding eligibility and the terms of the scheme. Please remember you need to get the agreement of your staff to being designated as a furloughed worker and you need to keep those records for five years!*
- *Lockdown will inevitably increase home working again for a lot of businesses. We would recommend you revisit your lone working and working from home policies. You will also need to check your employees have all the equipment they need to safely work from home and see if they need a home work station risk assessment (or to do it again if their situation has changed since the last lockdown i.e. new house or equipment).*
- *Consider the emotional impact another lockdown and potential period of isolation could have on your teams – especially a lockdown where we have swapped a long summer heatwave with rainy days and dark evenings. Dust down your wellbeing initiatives, make sure you have a process in place that every employee has contact from someone every day and prepare your team leaders. You may want to send out communications now re-flagging any support you can offer staff at this time – such as counselling, peer support or coaching.*



- *If your business is still open and employees cannot work from home:*
 - *Where possible (we understand times are tough) consider what additional support you can offer staff who are asked by the test and trace system to self-isolate or have to self-isolate because they have symptoms themselves. Statutory Sick Pay (SSP) would be payable from day one if the employee meets the criteria, which can be claimed back under the Coronavirus SSP Rebate Scheme (to a maximum of 14 days) for employers with fewer than 250 employees. But consider if you can afford to offer enhanced sick pay during this time so employees aren't motivated to attend the workplace anyway to avoid the cut in pay.*
 - *Make your premises as safe as possible for staff and customers. Consider changing shift patterns to reduce the amount of staff in the workplace at any one time and adhere to social distancing at all times (where safe to do so).*
 - *Consider restrictions on business travel, for example restriction on travelling between offices or visiting clients. You may wish to put in place a system where permission for any business travel must be sought prior to it taking place.*
- *Your business may not have to close down under the new restrictions but operations could still be affected and furloughing your staff may just not be the right long-term solution for your business. If that is the case you may want to consider:*
 - *Temporary lay-off and/or short time working for your staff if you have these clauses in your contracts*
 - *Ask staff to agree to reduce their pay and hours temporarily through consultation*
 - *Ask employees if they can take unpaid leave*
 - *Give employees notice to take their annual leave over this period (although be aware you need to give twice the period of notice as the period of leave you want them to take)*
 - *Redundancy consultation.*

Not only will the schools not close but hopefully some businesses are now better equipped to deal with the requirement for all of its staff to work from home where they can



Changing employment contracts and redundancies can be a tricky area and something it is important to get right to reduce the risk of a Tribunal claim from one of your employees, so please do not hesitate to get in touch if you have any concerns in relation to this or the process to be followed. Further key information on redundancy is [here](#).

You may also want to consider [this article](#) on the wider issues of putting your business into hibernation.

- *If the schools close again, consider what flexible working arrangements you can put in place to support parents who will need to be available to home-school their children again. We understand this is a last resort for the Government but it could happen and you should be prepared. Starting that dialogue early means you won't have as much panic or production loss if this happens.*
- *In light of a national lockdown employees may wish to cancel annual leave that they have booked because they cannot go on holiday or visit their relatives like they had originally planned. Although you may sympathise with your staff, having them building up holiday may have an impact on your business later if all your employees wish to take their annual leave at the same time once restrictions are lifted. Consider whether you will permit your employees to cancel annual leave that they have booked over lockdown – although first check your contracts to see if the employees do have the right to cancel before seeking to enforce this. This may not, however, help with staff relations and could result in some disgruntled employees.*

There is a lot to consider from an employment perspective at the moment so please get in contact with our employment team if you have any concerns about what your business should be doing to navigate these challenging times. We appreciate difficult decisions are having to be made and we are on hand to assist.



IP AND TECHNOLOGY CHALLENGES & OPPORTUNITIES

Businesses are preparing for a pattern of repeating lockdowns. During the first lockdown, many businesses were not prepared and consumers were forgiving of any delays or issues which resulted from the pandemic. As the pandemic draws on, consumers are becoming less patient and are demanding more from the businesses they deal with. At the same time, those businesses are starting to realise that the short-term stopgap measures they may have taken in response to the first lockdown will not see them through the long term.

For example, as online trading (including click-and-collect) become ever more prominent, businesses need to ensure (and customers will expect) that they are doing so sustainably. This means ensuring that the decisions they make comply with the relevant legislation, helping to secure a positive reputation, not creating cash flow problems and building for the long term. As digital delivery becomes a larger part of their revenue, many businesses are starting to recognise that the law when trading digitally is different. More direct dealing with consumers and more online interaction means businesses also need to think about how they control their reputation. Businesses need to make sure their Trade Mark protection reflects their new ways of working and gives them control of their reputation online. Now more than ever it is important that making sustainable, lawful decisions about how to operate forms part of your businesses planning if online consumer trust is to grow.

Whereas before, the above may have seemed short term and the legal considerations would be overlooked, as they become more long term that attitude needs to change. Regulators won't allow Covid-19 to be an excuse for non-compliance and consumers also expect high standards. GDPR compliance is also becoming more relevant as delivery at a distance means more companies have more data about their customers.

Businesses need to make sure their Trade Mark protection reflects their new ways of working and gives them control of their reputation online



The three tiers of trade

Trading under lockdown and under varying levels of government restriction has led to businesses operating in limbo. Many have adopted their own tiers of trade:

Open

Where national guidelines allow businesses to remain open, this is under the new normal – observing social distancing, enabling Covid-19 secure trade to take place is the position most businesses will take in order to keep afloat. Features of “open” include:

- Limited numbers of individuals
- Onsite services
- Service levels remain the same or similar to “old trade”

Half-Open

Where additional restrictions are applied, businesses will need to find ways to continue to trade – even if it isn’t making profit, it means the business may benefit from positive goodwill in the marketplace and support from government/other sources by continuing to trade. Typically half open involves:

- Different opening/operating hours and revised service levels
- Reduced or restricted services
- Reduced or limited onsite services

Closed

Closed trade seems an oxymoronic term and is often a situation where a business may be trading in insolvency (specialist advice needs to be taken). Closed trade often applies to businesses who are most effected by government restriction, and their limited options include:

- Online/distanced service/goods delivery
- Mothballing
- Immediate diversification of offering (“pivot”)

Regardless of which tier a business fits in, there are key considerations around service levels, the knock-on effect this has on contractual obligations and the reputational risk to the business in the marketplace that all need to be considered.

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Track and Trace

Whilst many businesses are forced to close for lockdown, if your business is allowed to remain open but you are required to use the Track and Trace initiative, you will need to keep your Track and Trace system in place.

The Track and Trace government guidance asks that businesses keep the names and contact details of anyone who visits their venue for a period of 21 days. This should be done in a way that works for the business.

An issue arises because the guidance makes it clear that this obligation does not supersede an organisation’s other legal responsibilities, including to comply with data protection legislation.

How to follow the guidance whilst meeting your Data Protection obligations

The situation will be different for all businesses, but the following key points will be universal:

- Whenever you implement a scheme that has an impact on personal data, you need to carry out a Privacy Impact Assessment (PIA). You will need to complete this before collecting visitor details, including the legal basis on which you are collecting the data;
- You will need to have a retention policy that mandates the destruction of the relevant data after 21 days and you will need to make sure the data is destroyed securely after this period;
- You will need to make sure the data is stored securely, whether electronically or in paper format;
- Where data is stored electronically, you will need to check the terms of the providers you are using and ensure that these are reflected in your privacy policy (as well as conducting a PIA for such use);
- Your privacy policy (as indicated above) will need to be updated. You may want to consider posting a copy on your website and making it available before people visit your venue;
- Individuals will be able to request copies of the data you hold about them. Make sure you have a structure in place to enable you to respond to these requests. You will also need to make sure that you are supplying the information to the correct individual and not just to anyone who may ask for the data.

For further information, including support on the documents and actions required to help you meet your obligations, please contact our specialist IP and IT team.

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CORPORATE LAW CONSIDERATIONS

Maintaining good governance

Annual General Meetings (AGM) – if previously delayed, your AGM will now be due. Public companies and private traded companies have statutory requirements to hold their AGM within a certain period of their financial year end. The Corporate Insolvency and Governance Act 2020 (CIGA) postponed this requirement but this relaxation has now expired. As such companies will have to comply with their duties to hold AGMs within the statutory period following their financial year end, which may prove difficult with parts of the country in lockdown. Such companies should plan well ahead to take advantage of the provisions within CIGA allowing companies to hold fully virtual or hybrid meetings until 30 December 2020. Going forward those companies holding AGMs should consider amending their articles of association to allow as much flexibility as possible.

Remote board meetings. Companies with Model Articles are likely to be able to hold board meetings remotely – for example by telephone. However, companies with older style articles are less likely to have these provisions, casting some doubt on their ability to hold remote board meetings. Those companies needing to conduct business remotely should review and update their articles if necessary to allow for board meetings to take place remotely and follow best practice when holding meetings by:

- *Ensuring all directors expressly consent to the meeting taking place remotely;*
- *Making arrangements to allow directors to communicate clearly;*
- *Keeping minutes of all board meetings and resolutions.*

Use of electronic signatures and witnessing. Invariably, corporate transactions will require execution of documents by shareholders and directors, often remotely. On 18 June 2020 the Law Society published an updated statement of position confirming the law on electronic signatures has not changed as a result of the pandemic. In fact, this area was under scrutiny before March 2020 and legal practitioners are well versed in dealing with remote completions. Under lockdown, remote completions are likely to be more common than before and witnesses still need to be physically present when documents are signed, providing yet more logistical challenges. It will be important to ensure that arrangements are made well in advance for signature of important legal documents and legal guidance should be taken and adhered to.

Companies with Model Articles are likely to be able to hold board meetings remotely – for example by telephone

Directors' duties – be aware

With the removal of wrongful trading 'protection' on 30 September, Directors need to be evermore aware to whom they owe duties. If solvent, the principal duty is to the shareholders. However, if the company is insolvent or likely to become insolvent then the duty moves to the company's creditors. Take early advice from a legal specialist if you are concerned about insolvency.

With the second lockdown about to start, and its ensuing effects on business, it is at least a little comforting to know that a number (but not all) of the Covid-19 related restrictions set out in the Corporate Insolvency and Governance Act 2020 (CIGA 2020) on creditors using statutory demands and winding up petitions remain in place. This means:

- *Statutory demands served between 1 March 2020 and 31 December 2020 cannot be used to support a winding up petition (unless the petition was presented before 28 April 2020).*
- *Any winding up petition presented between 27 April 2020 and 31 December 2020 will first require the creditor to set out reasonable grounds for believing the company was insolvent even if Covid-19 had not had a financial effect on it (the "Covid Criteria"). Furthermore, the Court will need to be satisfied of the Covid Criteria before making a winding up order.*

This is a sensible and pragmatic move to seek to prevent floods of petitions, particularly because restrictions on landlords forfeiting leases for non-payment of rent have also been extended. [Read more here.](#)

However, that does not mean that company directors can be complacent by thinking that CIGA 2020 gives them a blanket protection against insolvency risks. For more information [see this article.](#)



Take early advice from a legal specialist if you are concerned about insolvency



Mergers & Acquisitions (M&A) during lockdown?

The M&A market was severely impacted by the original lockdown and ongoing economic uncertainty. The second national lockdown could result in a further pause in activity and may affect buyer confidence, but from experience we know deals can be done despite the restrictions. Since March, we have successfully completed several high value transactions for clients and we are currently working on a number of deals going into the new lockdown phase.

Those involved in M&A activity will need to tailor their due diligence requests to address the issues faced by the target business and sellers will need to take extra care in any disclosure exercise. As well as the usual issues that always need to be considered, there are now issues specific to the pandemic which must also be addressed – these range from contractual issues involving disgruntled suppliers or customers who may have suffered in the current climate through to health and safety concerns regarding Covid-19 measures and compliance with government schemes such as the claiming of furlough grants.

With national restrictions applying from 5 November, any requirement for physical meetings such as site visits will have to be re-considered if deals are not to be delayed in the short term at least. In terms of valuation, we can expect to see risk averse buyers looking to price adjustment clauses, contingent payments and material adverse change clauses to address some of the risks involved in undertaking an acquisition in the current economic climate. We can also expect to see at least some element of price chipping from buyers who are concerned at specific issues arising from the pandemic. Sellers will therefore need to ensure they have prepared appropriately in order to respond robustly to increase the likelihood of a successful transaction. With the next Budget originally scheduled for this Autumn now likely to take place in the Spring, we should not rule out a spike in M&A activity to take advantage of current Capital Gains Tax rates and the availability of Business Asset Disposal Relief, particularly if speculation mounts that we may see changes in these areas.



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POSSIBLE DISPUTES

Maintaining the cash flow during this crisis will be all important. Whilst the Coronavirus Business Interruption Loan Scheme (CBILS) has been extended to 30 November, many businesses would have bought in stock for the Christmas trade period, which may be severely affected by this lockdown. While the banks are being tasked with supporting businesses at this time, the effectiveness is being questioned and in any event there does not appear to be much 'free' money available currently.

Courts are open, proceedings are being issued and hearings are being held. We do not see this being seriously affected by the current lockdown.

In nearly all areas of dispute resolution, our dispute resolution team is seeing increased activity. Businesses are trying to stay afloat by reducing their costs, often by terminating supply contracts. This needs to be done correctly to be effective. Additionally, they are keeping a very close eye on their debtors' book and pursuing these if sensible payment terms are not agreed.

If force majeure clauses are being invoked on the basis that Covid-19 prevents contracts from being undertaken, make sure these are properly followed, especially in respect of any requirements needed to invoke the protection. It may be harder to claim contractual frustration this time round, as it will be hard to say that a second lockdown was not foreseeable. Further key information on force majeure for commercial (B2B) contracts is [here](#).

Business interruption claims are being pursued with mixed results, and it is important to avoid being fobbed off by insurers by taking a minute to examine the reasons as to why payment is not forthcoming. Legal decisions are beginning to give some clarity in this area.

Despite many of the moratoriums remaining in place (but remember some come to an end on 31 December 2020) under the Corporate Insolvency and Governance Act 2020, that prevent enforcement action being taken against companies some companies may find it hard to stay afloat and it's a good reminder for all to be aware of the [warning signs of a company in distress](#).

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Consumer Protection?

An ongoing symptom of the Coronavirus pandemic is the impact that it has had on a wide range of ongoing or pre-booked services, such as weddings and holiday accommodation. There have been many instances where such services have either not been able to go ahead, or are only able to go ahead in a substantially different form as a result of Coronavirus-related restrictions. The Competition and Markets Authority (CMA), which has responsibilities around ensuring that consumers are protected, has investigated a number of key sectors where there have been concerns that consumer rights are being unduly prejudiced. It has published guidance as its interpretation of the law, which is available [here](#). In broad terms, the guidance indicates that where Coronavirus-related restrictions mean that the services cannot go ahead, it is not fair to expect the consumer to pay for those services, and they should have the benefit of a refund. Where the services to be provided can still go ahead, but in a different way owing to restrictions such as social distancing, the consumer may still have an entitlement to a refund. There are, however, certain circumstances (such as where the consumer has received at least a partial benefit) where the consumer may reasonably be expected to pay for services used.

The guidance is a useful clarification on the CMA's thinking, but it does demonstrate that businesses, and not consumers, face much of the risks associated with Covid-19 related restrictions. In order to mitigate this risk, businesses providing these services will need to consider how expectations around what they can deliver are carefully managed with consumers. Businesses may also consider whether Covid-19 associated risks can be mitigated within their own supply chains, for example by enabling them to cancel arrangements with third parties such as caterers where events cannot proceed owing to Coronavirus restrictions. This may have a cost attached to it, and businesses will need to consider whether such costs can be passed back to consumers.



Businesses, and not consumers, face much of the risks associated with Covid-19 related restrictions



PROPERTY OPPORTUNITIES



Now is a good time to re-look at any energy projects you have been considering

Many private individuals or businesses are considering converting their holiday letting properties from short-term holiday lets to longer-term rentals, given that there continues to be great uncertainty as to how long the national lockdown will last and whether people will be able to travel even if we move back to the 3 Tier system. This is particularly of interest given the demand in the longer-term let market. Landlords should be careful to check the conditions on title before doing so to ensure that this is permissible – as some properties have restrictions that could impact this.

A further area to consider for landowners is the current positive activity in the renewable energy field. Now is a good time to re-look at any energy projects you have been considering.



We appreciate the severe challenges that Covid-19 is putting on all businesses at this time, but especially so for those that are required to cease their usual operation or severely limit it in a national lockdown.

Rest assured, Stephens Scown has extensive experience of helping businesses through the good times and the more challenging times, with a broad range of legal support to help your business through to the other side of this pandemic and in a position to thrive once the restrictions are lifted once more.

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

