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COVID-19: STEPS TO RECOVERY

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COVID-19: STEPS TO RECOVERY

Back to the office: the essentials

Over the coming weeks and months, as the first wave of the COVID-19 pandemic stabilises and lockdown restrictions start to ease, businesses and organisations will be planning for the return to their workplaces. The recovery process will vary between businesses. The management of that process will be critical to ensure a safe and successful return to work.

In this document we have outlined some of the key legal and practical considerations across three areas – Employment & HR, Health & Safety, Property & Operations. Please feel free to contact anyone named below or your usual Ashurst contact for tailored advice applicable to your business.

We have provided a range of practical guidance and considerations in this document based on the current guidelines issued by the UK Government and the WHO as of Thursday 14 May 2020. We will continue to provide more advice and recommendations as new details emerge. This guidance does not constitute legal advice.

Employment & HR

GOVERNMENT GUIDANCE ON WORKING SAFELY

The UK Government has issued guidance to help ensure workplaces are as safe as possible as businesses begin to return to work. Eight sets of guidance have been published for employers across different industries. Key principles and steps for employers to consider are set out below.

Work health and safety

Employers have a duty to ensure the health and safety of their employees and others affected by their business activities. Employers must therefore ensure staff will be returning to a safe working environment. No one is obliged to work in an unsafe work environment.

The guidance issued by the government does not supersede any legal obligations relating to health and safety, employment or equalities. In applying the guidance, employers should be mindful of the particular needs of different groups of workers and ensure equal treatment. Employers must continue to comply with existing obligations, including those relating to individuals with protected characteristics such as age, sex or disability. In considering how to apply the government's guidance, employers should take into account agency workers, contractors and other people, as well as their employees.

COVID-19 risk assessment

All employers in England are required to carry out an appropriate COVID-19 risk assessment as soon as possible.

The risk assessment should be undertaken in consultation with the health and safety representative selected by a recognised trade union or chosen by the workers. Employers may prefer to consult directly with the workforce but this is not currently endorsed by the government guidance. It is not necessary to obtain consent or agreement from the workforce but employers must engage with them about their plans. This is likely to involve sharing the proposals, asking for feedback and then listening to concerns raised. Conducting a genuine consultation exercise is likely to reassure staff and reduce the likelihood of complaints being raised.

When conducting the risk assessment, employers should have particular regard to whether the people doing the work are especially vulnerable to COVID-19.

Employers are expected to share the results of the risk assessment with their workforce, with those employing over 50 workers publishing the results on their website. Employers should also display notices in the workplace to confirm that they have complied with the guidance.

Assessing who should return to work

Employees should continue to work from home if possible. All reasonable steps should be taken to enable people to work from home. If it is not possible to work from home and the workplace has not been told to close, employees should go to work. Employers should plan for the minimum number of people needed in the workplace to operate safely and effectively.

Employers should also take steps to protect individuals who are classified as being at higher risk. In assessing who should return to the workplace, it will be important for employers to consider the circumstances of any workers who are classified as clinically vulnerable or clinically extremely vulnerable.

Maintaining social distancing and managing the transmission risk

The guidance contains detailed recommendations designed to reduce the risk of transmitting the virus. For example, workspaces should be redesigned to maintain two metre distances between people. It will also be important to increase the frequency of handwashing and surface cleaning, and reinforce the cleaning process. Additional steps to manage transmission risk might include:

- staggering start times

- opening more entrances and exits

- putting barriers in shared spaces

- creating workplace shift patterns or fixed teams to minimise the number of people in contact with one another.

Data protection

Employers should consider the data privacy implications of any new policies or procedures introduced as part of a return to work plan, such as temperature checks on staff or seeking information from individuals to assess vulnerability. Data protection obligations remain in place and employers must continue to comply with these as well as the principles set out in their data privacy notices.

Good practice

Employers should keep up-to-date with the latest health and safety guidance from government agencies and other bodies such as the WHO, and monitor any new legal obligations which the government may impose under COVID-19 emergency powers.

It is important to be aware of existing anti-discrimination laws when making decisions about individual staff members, such as in determining when they may return to the workplace.

Please note that specific guidance has been published for employers in different industries. The principles and steps considered above are applicable to all sectors.

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Health & Safety

MANAGING CHANGE

Returning to work requires change management. There is a changing culture as a result of the increased awareness of health and safety in the workplace and accountability for it, both for mental and physical health. Work environments are also changing as a result of new social distancing measures and increased remote working.

The government's guidelines emphasise the need for health and safety risk assessments to help employers decide what needs to be done to ensure a safe return to work. Risk assessments are a fundamental part of health and safety risk management, and they are a legal requirement.

As well as creating a new return to work risk assessment, it is also likely that existing risk assessments will need to be updated in light of the impact of return to work measures to ensure that working practices are safe.

The implementation and management of the recovery process will be challenging for both landlords and occupiers, especially those managing and occupying multi-let buildings and estates. For example, the "new normal" is likely to include new entrance protocols, social distancing measures and the staggered use of facilities.

We have set out below some general advice and practical guidance. Please feel free to contact us for specific advice. Note that public health guidance in England may differ from Scotland, Wales and Northern Ireland.

Key considerations:

Risk assessments should help identify what measures will need to be put in place to manage the risks identified to workers.

Key questions as part of the risk assessment include:

1. How will you protect vulnerable staff, e.g. shielding or carrying out specific risk assessments?

2. Do you need to share responsibilities with other duty holders e.g. landlords and facilities maintenance contractors, and if so, are you engaging with them?

3. Have your containment and isolation plans been reviewed and updated?

4. How will you communicate and train your staff, ideally in advance of returning to work, and how will new measures be effectively enforced?

5. How will you monitor and review the situation to check how effectively the measures are being implemented and keep applicable guidance under review?

What measures should employers be taking?

Employers will need to translate the government's guidance into specific actions depending on the nature of their businesses. The guidance sets out a "hierarchy of control" which prioritises what the government considers to be the most effective measures to prevent transmission in the workplace. These are hygiene and cleaning protocols, encouraging home working, and social distancing measures. Where social distancing cannot be maintained, operations will need to be reviewed and if necessary changed or stopped, and mitigation measures put in place to reduce the risk of transmission.

Enforcement

Employers are expected to ensure that the risks that employees face are evaluated and specific steps are taken to minimise them, depending on the nature of their business. While the guidance is expressed to be non-statutory, its underlying obligations (such as carrying out risk assessments and ensuring, as far as is reasonably practicable, the health and safety of workers) have a statutory basis.

Failure to comply with the guidance by putting in place adequate control measures may result in enforcement action by health and safety regulators, for example enforcement notices to secure improvements or prohibition notices to shut down premises. Breaching an enforcement notice is an offence which in the most serious cases can lead to a prosecution and criminal fines.

What about continued home working?

Employers continue to owe health and safety duties to remote workers. As working from home has continued for the foreseeable future for many office workers, employers should ensure employees carry out a workstation assessment, and should provide equipment if they need it and regular contact to protect mental health and reduce the stress of lone working.

Key considerations include:

1. communication, training and supervision of staff working remotely.

2. what activities are being carried out over what period of time (for example significant display screen equipment use).

3. what control measures might be needed.

The guidance says that PPE is "not beneficial" – does that mean facemasks should not be used in the office?

There is a distinction between personal protective equipment (PPE) and face-coverings. The role of PPE is being kept under review, but the government's current position is that wearing PPE outside of healthcare settings should not be encouraged. However, if PPE is required by law, (for example, for cleaners) employers must provide PPE free of charge and training to ensure that it fits correctly.

In relation to face coverings, the guidance states that employers should support their workers in using face coverings safely if they choose to wear one, but employers also need to promote good hygiene.

What can we learn from lockdown to make the "new normal" more sustainable?

Before the pandemic took hold, climate change and sustainability had become a central focus for the new decade. Lockdown has prompted many people to stop and consider the way in which they live and work, and whether it is sustainable. Examples of what may change include:

1. Reducing carbon footprints by fewer face-to-face meetings and physical events, walking or cycling to the office and taking fewer flights.

2. Reducing energy consumption and commercial waste as a result of increased remote working and consumption of home brought food and beverages.

3. Increasing focus on social and welfare issues, e.g. mental health and social impacts.

4. Increasing use of technology and data collection to drive operational efficiencies in building and facilities management.

5. Requiring supply chains to demonstrate environmental and social commitments, e.g. sustainable development goals.

By evaluating what we have been doing well and what we can do better, we can use the recovery process to refocus on sustainability in a way that optimises performance and strengthens business continuity.

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Property & Operations

Landlord & tenant considerations

Whether you are a landlord or a tenant, there are a number of issues to take into consideration:

Rent payable

There is a common misconception that tenants are entitled to a statutory rent free covering the Q2 rent. The reality is quite different: unless the landlord and tenant have agreed otherwise, then the Q2 rent is payable and can be collected by the landlord. The government has forbidden landlords from forfeiting leases before 30 June 2020 for non-payment of rent and they have recently also restricted the exercise of CRAR unless there are 90 days' worth of arrears. We anticipate new legislation to be introduced which will limit the ability of landlords to serve statutory demands and winding up petitions.

Note that many lease arrangements will have some additional security – so that if a tenant hasn't paid their Q2 rent, the landlord may be able to draw down on a rent deposit, or claim it from a guarantor or former tenant. If that happens, that liability is likely to quickly bounce back to the tenant – either because a rent deposit deed enables the landlord to require the tenant to top up the deposit, or because any guarantor has the benefit of an indemnity from the tenant.

Even where landlords have agreed payment terms with tenants, those will frequently be limited to the current quarter. As we all look forward to the end of lockdown, the Q3 rent day is also fast approaching.

Landlords are considering payment holiday requests on a case-by-case basis, taking into account the nature of the tenant's business, the impact COVID-19 has had on that tenant, including considering their current trading figures, and the landlord's ability to provide flexibility so their finances work.

Access to the property?

If a landlord imposes constraints on accessing the property, which are more stringent than government restrictions, there may be claims for breach of quiet enjoyment/derogation from grant.

Some landlords have offered rent reductions to compensate for reduced access.

Workspace/Property portfolio rationalisation

With working from home now a common practice, there is speculation that companies may decide to reduce their physical footprint. The key points to bear in mind here are:

* Leases tend to restrict assigning, subletting and sharing of occupation.

* It is notoriously difficult to serve a valid break notice and it is important to take advice if you are looking to exercise a break option.

* Is there a premium for the tenant to pay, and is the break clause conditional?

* If a tenant does exercise a break option, then a claim for dilapidations and wants of repair will almost certainly follow.

Other contracts (for example serviced office agreements) can be terminated and there are several options here:

* Exercising a contractual termination right.

* Note that there is no implied force majeure provision in leases, and it is vanishingly rare for a lease to include an express force majeure provision enabling the lease to be terminated, the service charge or rent to be reduced or suspended either during the lockdown, or as we come out of the lockdown in the phased return to work.

- Some commentators have been discussing the possibility of arguing that a lease, or certain provisions in a lease, have been frustrated because of Covid-19. The English law concept of frustration deals with unforeseeable events which render contractual performance impossible through no fault of the contracting parties. It includes events such as the subject matter of the contract being destroyed or performance becoming illegal. Frustration has the effect of discharging the parties from future liabilities. If it can be said that the lockdown, and/or the return to work guidance makes full usage of a building unlawful, then there are the beginnings of an argument for frustration and that might release an obligation to pay the whole of the rent or service charge. Note, however, that this argument has not yet been tested in the courts - watch this space.

Service charges

The majority of service charge provisions work on the basis that tenants pay a quarterly contribution of costs reasonably and properly incurred by a landlord based on an estimate and then the actual costs are reconciled at the end of the year.

Most services supplied by landlords do not simply cease to be payable because the tenant isn't in occupation.

While offices have been locked down, some questions arise:

- have running costs reduced?

- does the recommissioning of buildings result in extra costs?

- If a service company, for example a cleaning company, becomes insolvent it is possible that new legislation will mean that you can't immediately terminate the contract (by reason of the insolvency – but you may be able to terminate on other grounds). It is possible that it will be necessary to run two concurrent supply contracts for a period of time, and this may increase service charge costs.

Workspace alterations to make premises COVID-19 secure

If you own the freehold of your building, then you need to think about whether you need planning, listed building or conservation area consent to make these types of alterations.

If you have a lease of the whole building, then you might also need your landlord's consent and should check the terms of your lease.

If you are a tenant of a multi-let building, then you probably will not be able to make alterations to parts of the building that fall outside of the area demised to you. Depending on the terms of your lease, you may need the landlord's consent to carry out alterations within the area demised to you and should check the lease carefully.

Responsibility for the cost of modifying a building to make it Covid-19 Secure will depend on how you occupy your building. If you are a tenant, you should check the terms of your lease. It is likely that some of the costs will fall to be paid by tenants directly, and some (for example the cost of works to the common parts) will initially be paid by the landlord and then be recharged through the service charge.

PREPARING THE OFFICE

As we plan to reopen offices following the easing of government restrictions, the firm will think about the new normal and how we will adjust. Social distancing keeping a healthy distance from others - is now part of our daily language and behaviour. And while the recommended distance may vary by country, the idea remains the same.

The following are measures to be considered when preparing the office for a return to work. Not all will be needed in each instance, depending on the local circumstances.

Cleaning

- Introduce and maintain advanced cleaning and disinfection standards, such as routine cleaning and disinfecting of high-touch spaces and surfaces per health authority guidelines.

- Sanitise all workspace areas, including offices conference rooms, breakrooms, cafeterias, restrooms, and other areas.

- Place signage in workspace and common areas promoting employee safety through emphasising basic infection prevention measures, including posting hand-washing signs in toilets.

- Provide tissues, hand soap, alcohol-based hand sanitiser and wipes containing at least 60 per cent alcohol, disinfectants, and disposable towels for staff to clean their work surfaces.

- Provide additional hand sanitiser, surface disinfectant wipes and tissue available in workspace, cafeterias, break rooms, lift lobbies and high traffic areas and other common areas.

- Provide receptacles for used/discarded PPE.

Procurement of supplies/equipment

For businesses with an international presence, you should keep in line with any local government requirements, offices should look to source their own cleaning, sanitising and PPE equipment.

Frequently Touched Surfaces

Frequently touched surfaces are key to reducing the possible spread of infection. By reducing the frequency of physical contact with items in the workplace that are also touched by others, individuals can reduce their exposure to the virus.

In addition to providing disinfectant sprays or wipes adjacent to each touchpoint, consider the following range of precautions to reduce touchpoints:

- Provide disinfectant dispensers.

- Affix doors in an open position if local regulations allow.

- Provide wipes for conference phones and encourage the use of personal mobile phones or laptop Skype for business for teleconferences.

- Affix signage to remind staff to keep light switches "on" all day.

- Provides wipes and signage at printers encouraging staff to clean before use.

- Allow easier access to stationery.

Space Planning

Space planning can be used as tool to reduce transmission of COVID-19 among colleagues at work through social distancing. Options may differ depending on how many people are expected to return to work versus continuing to work from home. What measures are necessary will be influenced by local circumstances including existing office density and layout and local health directives given by government.

Considering that dynamic will allow calculation of the total workforce expected to be accommodated in the office and assessment of the demand for workspaces.

Consider the following range of precautions and social distancing measures:

Density monitoring and use of space

Determine a method for conducting regular counts of occupants per floor where necessary. This can be a simple headcount by a member of staff or using access control data to monitor when staff enter and leave the office.

Below are a range of precautions and social distancing measures which may be considered:

Desks/Offices

- Use alternate desks in a chessboard style.
- If required utilise spaces previously used for group activities (convert training/meeting rooms, cafe area and the like into desk areas).
- Make offices into one person spaces - individuals can stand in doorway to ask questions.
- Phone Rooms with Doors - these can become spaces for individuals

Circulation spaces

- Consider one way circulation routes through the workplace.
- Designate and signpost the direction of foot-traffic in main circulation paths: corridors, stairs, entries if floor space allows.
- Mark increments of locally acceptable social distance on floors where queues could form, this could be reception desks, security barriers, toilets or staff kitchens/restaurants.

Meeting rooms, internal meeting and shared spaces

Small meeting rooms can be repurposed to provide additional staff seating/offices as required.

Conference Rooms Greater than 5 Seats:

- Evaluate the occupancy of each room and maintaining an appropriate separation and determine maximum capacity. A good rule of thumb is to remove 50-60% of the chairs from conference rooms.
- For larger rooms, there should be no more than 8 occupants allowed in any space to maintain the social distancing guidelines. If larger meetings are required, consider video conferencing within the office between rooms (i.e. holding an all hands meeting) using a number of rooms "virtually connected" together.
- Keep in mind that tables are typically less than appropriate in width so staggering occupants may be required to maintain distancing.
- Record the occupancy of the rooms after the overlay and change the capacity in the room reservations system details and issue new room capacity diagrams to staff.
- It is important to remove the excess chairs from these conference rooms to help educate the workforce on the new capacity limitations. Consider taking one room offline to house chairs that need to be stored during distancing.

Building Entrance and Reception

Examine recommendations and guidelines to control the flow of ingress and egress, and that promote ongoing safety and precautionary measures at those points. These might include:

Entrances:

- Hand sanitiser at doorways.
- Floor markings for safe distancing for any queues or waiting areas.
- Reduce the number of entrances (but maintaining building regulations) to direct occupants to use monitored and protected routes.
- Reduce/space out seating waiting area.

Reception:

- Reconfiguration of visitor registration systems to avoid guests leaning over receptionists.

- Training reception personnel on safe interactions with guests.

- Install perspex or glass screens between guests and reception personnel.

Signage:

- Introduce signage to relevant locations in the entry sequence.

- Explain building access rules and other protocols that impact how clients and staff use and move throughout the building.

Post room and Courier Areas

Prior to reopening, operations managers should review the current processes for inbound and outbound deliveries (parcels, mail, food deliveries, couriers and so forth) and develop a revised plan to align to new post-pandemic safety precautions. These might include:

- Separate shipping and receiving areas from the main office.

- Avoid deliveries through employee or main entrance and instead route through areas that will minimise contact with the larger building population.

- Ensure staff handling mail and parcels wear PPE to receive parcels, mail and other deliveries, and train them in the proper use and disposal of PPE.

- Sanitising the exterior of deliveries.

- If possible remove items from boxes and letters before distributing.

Lift Lobbies, collaboration spaces and other facilities

Review guidelines and recommendations that promote safety and guide building occupants through common and amenities areas beyond the entrance. Some of these facilities may be controlled by Landlords. These might include:

- Hand sanitiser in stairs, lift lobbies and all other building common areas.

Signage:

- Wayfinding signage or floor markings to direct foot traffic and ensure safe social distancing.

- Explain new rules or protocols for common areas.

Collaboration spaces:

- Rearrange furniture to promote social distancing.

Food service amenities:

- Consider acrylic dividers between service provider and users.

- Offer pre-packaged foods.

- Reduce self-service access to foods.

- Clearly signpost queuing areas.

- Remove or rearrange furniture to promote social distancing.

Lifts

Lifts can be a particularly difficult area to establish social distancing. Methods for managing the use of lifts might include the following:

- Instructional signage displaying healthy lift use protocols including passenger limits and safe distances in the carriage.

- Social distancing queue management for waiting passengers.

- In large managed buildings landlords may employ lift attendants to manage flow and discourage overcrowding of lift carriages.

- Signage inside lift cars displaying healthy lift use protocols – this may include floor stickers to establish distancing zones and describe where and how to stand.

- Reassess lift cleaning processes and updates to ensure on-going cleaning of high touch surfaces such as lift panels/buttons.

Shared/Agile/Flexible Workspaces

- Provide storage units (lockers) for storing personal items in the workplace.

- Remove shared keyboards and mice and distribute personal peripherals to mobile workers.

- Create and post guidelines for desk and equipment sharing, disinfecting and use.

Kitchen areas

Install new practices which may include some temporary measures such as:

- Encourage staff to bring food and beverage items from home and manage them individually.

- Reduce touchpoints by removing coffee pots and lids.

- Provide pre-packaged items in containers.

- Increase frequency of cleaning appliances such as refrigerators and microwaves.

- Consider installing physical barriers, such as perspex sneeze guards.

It is important to note that these approaches will impact sustainability initiatives as additional waste is produced from individually packaged food and beverages.

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CHECKLIST

Each organisation has unique needs that require a unique roadmap to recovery. Below we have set out a series of key points which we believe is a good place to start as a checklist.

☐ Additional hand sanitation points added throughout the building, particularly at entrances and exits.

☐ Queuing markers added to the floors to note a two meter gap at high traffic areas, reception desk entrance barriers, beverage areas, lifts, etc.

☐ Decreasing touch points throughout the floors by leaving doors in open position.

☐ Decreased seating in reception waiting and collaboration areas. Preference over leather/pvc seating rather than fabric.

☐ Introducing a one way circulation route around the floors with signage.

☐ Segregated entrance and exit routes and doors.

☐ Adding disinfection wipes at beverage areas, work area and printers.

☐ Lifts to become 1 person only.

☐ Meeting rooms to have reduced seating or removed from system.

☐ Perspex screens for reception desks and restaurant tills.

☐ Information added to digital signage screens in reception and lift lobbies.

☐ Offices to become single person on a rota basis.

☐ Desks to be used alternatively on same basis.

☐ Security/Receptionist to be posted at barriers to manage queues.

☐ Beverage areas – Tea jars left open, signage to encourage staff to wipe down coffee machine, cupboards, water tap touch points.

☐ Restaurant – reduced service, seating reduced and spread out. Soft seating reduced/removed.

☐ Provide PPE for certain members of staff – catering, cleaning, post room, etc.

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