SQUIRE PATTON BOGGS

Webinar Questions and Answers: COVID-19 Outbreak – Legal and Commercial Risks for Your Global Business to Consider

19 March 2020

During our recent webinar, we were asked a number of questions via the chat facility. We thought it would be useful to share these questions and our outline answers with you, as these are likely to be the sort of questions that other UK employers may have about the potential legal and business implications of the coronavirus disease 2019 (COVID-19).

Please note that the position is changing very quickly, so the guidance set out in this note may change. We would always recommend that you check the latest position with your local firm lawyer and specific advice should be taken on particular cases. Save where stated otherwise, the questions and answers deal with the position in the UK only.

Please also bear in mind: 1) this is not just a legal issue, but also a very human one; 2) these are unprecedented times in recent history; and 3) for both those reasons, a considered and proportionate approach to these issues will almost always lead to a better outcome than knee-jerk over-reactions or blind compliance with the law, regardless of your actual circumstances. We must also bear in mind that the law was not designed for these unprecedented times and so it will occasionally struggle to provide a convincing answer.

Employment Law Questions

Are you allowed to disclose employees' medical information to protect others, for example, by telling employees they may have been exposed to the virus through close proximity to someone else?

Pragmatically, the answer will always be that you would do that whether allowed to or not. That approach was officially green-lighted by the Information Commissioner's Office (ICO) on 12 March 2020, though only to the extent reasonably required for the protection of the health of the other employees and the public generally. The basic right to privacy in respect of one's sensitive medical data is not in any sense waived by the ICO, but it has made it tolerably clear that it will not criticise an employer doing its best to protect other employees and potentially affected third parties, even if it is a little over-zealous in doing so.

See our recent blog posts on the various data privacy issues that have been raised by COVID-19.

I have been telephoned by an employee telling me that they have "a bit of a cough" and asking if they should come into work. How should I respond?

This is an unfair question to ask you. They can see the latest government guidance on self-isolation as easily as you can, and you are not in a position, either physically or medically, to verify the level or nature of their symptoms. The only proper course is to put the decision back to them to make in the light of the official guidance. Either they are caught by it or they are not, but you cannot know one way or the other.

There is some inevitable scope for abuse of this by those so inclined – having "a bit of a cough" is hard to evidence, especially when contact with doctors is limited, but also hard to disprove. Being told by your employer that you should not come in is akin to being suspended, so you would almost automatically be paid. However, making that decision yourself could lead to later concerns on the part of your employer that you were not ill enough (or at all), so you should not be paid.

The UK government has introduced the Statutory Sick Pay (General) (Coronavirus Amendment) Regulations, which confirm that statutory sick pay (SSP) will be available for those self-isolating in line with official guidance (and so not for those who take it upon themselves to do so without satisfying those conditions). Employers are likely to take the same view in relation to company sick pay over and above SSP.

Can we do temperature checks on our employees?

Subject to not assaulting them in the process (i.e. with their consent), yes.

If an employee refuses, the employer should explain to the employee that the employer owes a statutory duty of care to ensure the health and safety of its employees and other people who may be affected by the employer's business (e.g. contractors and visitors to the site). The employer should also explain that the employee owes statutory duties (1) to take reasonable care for the health and safety of himself or herself, and of other persons who may be affected by his or her acts or omissions at work; and (2) to co-operate with the employer on health and safety matters. The employer should make it clear that it is a criminal offence for the employee to breach these duties. If the employee still refuses, there may potentially be disciplinary options available (although such action may not be advisable from a wider employee relations perspective) and/or you should consider sending them home.

The more important question arising from this is what you do with the medical data you obtain. A "normal" temperature reading is of no precautionary value, and so should be discarded immediately – only a "fever" result should be retained. Despite the new ICO guidance referred to above, you should still treat that information with proper discretion. You should send that employee home, notify senior management/HR/their immediate colleagues and disinfect surfaces they are particularly likely to have touched in the last 72 hours. However, do not overreact or broadcast their identity to other employees or third parties with whom they have not been in close contact in the last week or so.

Again, see our blog posts for a more detailed discussion of the data protection issues to consider in relation to temperature checks.

What do we do if one of our employees triggers self-isolation by going to a high-risk area despite government advice? Can we stop them from going?

The prospect of Venice without the crowds might be attractive; however, it must be unlikely that someone aware of the risk would go there (or any other high-risk area) without absolutely needing to.

You cannot physically prevent your employees from going on holiday to a high-risk area (assuming, of course, that they can still get there at all in light of all the new global travel restrictions). You can point them to the Foreign and Commonwealth Office (FCO) website and make it clear that in these very unusual circumstances, you would regard it as a breach of a reasonable management instruction if they go nonetheless. You can and should tell them that if they do and are either then self-isolated or actually ill, no company sick pay will be paid. More constructively, given the disruption and possible costs of temporary cover, you might consider a contribution to any lost holiday costs, if that is their driver for still going, as this might be cheaper than losing them for the self-isolation period.

If they insist on going anyway, then what?

Based on the new SSP regulations, the resulting self-isolation would be in line with UK government guidance, and so should be paid at least at the SSP rate. However, the need for self-isolation arose from actions flying in the face of government guidance (i.e. their going to the high-risk area in the first place), which would point away from their being paid. In reality, the argument around SSP is probably not worth having, but what about company sick pay on top? First, check your contracts – if the sick pay entitlement can be suspended where the employee contributes to their absence by their own deliberate act (dangerous sports, not following doctor's orders, etc.), you would be on safe ground in withholding company sick pay. If it does not, but you had told the employee both that they should not go and that they would not be paid for the isolation period if they did, we think an employment tribunal would be less than sympathetic to an unlawful deductions or breach of contract claim.

Health and Safety Questions

Are there any risks in terms of desk assessments/health and safety for individuals working from home during the outbreak?

The key duties on employers are to ensure that, where employees work from home, a risk assessment is carried out of the work activities they are carrying out at home and that appropriate measures are taken to reduce any associated risks. Assuming that it is not feasible to send a trained health and safety assessor to each individual's home, and that the work is low risk, there are alternatives:

- Giving the home-based employees basic training on risk assessments so they can carry out the initial review – then, if any issues are identified, a more qualified assessor gets involved. The Institute of Safety and Health has published short guidance on homeworking, which includes a checklist that could be sent to homeworkers and used to help them through the risk assessment process.
- Doing an initial assessment by telephone between the company's usual risk assessor and the employee – then, if any issues are identified, a home visit may be required.
- Using photographic or video evidence to accompany the review (e.g. the employee submits photos of their working area, or is interviewed via videoconference by a risk assessor and shows the assessor the areas being discussed).
- Depending on how long the situation continues, employers should regularly check and review the risk assessments with the employee to ensure nothing has changed – again, this might be over the telephone.

Presumably, civil liability would arise if the employer failed to put in place any reasonable precautions and an employee contracted the virus?

Potentially, yes. Employers owe a common law duty to take reasonable care to safeguard the health and safety of their employees. If they breach that duty and the breach causes harm to the employee which is not too remote, the employer will be liable for the harm suffered.

In the case of COVID-19, therefore, employers should take reasonable care to protect their employees by taking appropriate steps to reduce the chances of infection. Of course, given the likely prevalence of the virus, the legal difficulty would be establishing the necessary causation – showing that the employer's failure to take reasonable care directly caused the employee to become ill (they might have caught the virus from a non-work-related source). Nevertheless, the UK courts have been willing to take a claimant-friendly approach to causation and may overlook this type of problem where the defendant has clearly breached its duty of care.

As a related point, the taking or not of those precautions might also be relevant to employees' rights under sections 44(1)(d) or 100(1)(d) Employment Rights Act 1996. These are the rights not to be subjected to a detriment or dismissed as a result of those employees absenting themselves from the workplace where "in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work". If, despite all government advice, the employer does not do anything to combat the spread of what is clearly a serious virus within the workplace, it seems likely that an employee could bring themselves within that definition. If the employee is then penalised or dismissed for not going in, they are likely to have a solid claim for compensation in the tribunal.

We are a recruitment business – we have interims working on both a PAYE and Ltd company basis on sites with our clients. Where does the obligation lie on health and safety as regards COVID-19?

An employer has a duty to safeguard, so far as is reasonably practicable, the health, safety and welfare of its employees (i.e. those interims working on a PAYE basis). An employer will also owe a duty to ensure, so far as is reasonably practicable, that people not in its employment who may still be affected (e.g. interims working on a Ltd company basis) are not exposed to risks to their health or safety. Your clients will also owe a duty to ensure, so far as is reasonably practicable, that the interims are not exposed to risks to their health or safety from the client's business. Self-employed people in certain higher-risk jobs (e.g. agriculture, asbestos and construction) will also owe duties to ensure, so far as is reasonably practicable, the health and safety of themselves and others who may be affected by their work. Therefore, health and safety responsibilities are potentially spread across a number of people. This is to ensure that no one is left unprotected.

However, from a practical perspective, you will owe duties to these interims whether they are PAYE or Ltd company, so you should check to see what arrangements your clients have in place to manage the virus risk to satisfy yourself that they are appropriate to reduce the risk to the interims you supply.

Commercial/Supply Chain Questions

Have the courts in England and Wales provided any guidance on COVID-19 legal issues? What if the contract is governed by the laws of England and Wales?

The courts in England and Wales will not proactively offer general guidance as to the position they are likely to take on COVID-19 issues. Rather, they will always consider legal cases on their individual merits, on a case-by-case basis, by reference to the specific facts and matters in issue, including based on statute, established legal principles and case law from similar previous cases.

While we fully expect there will be COVID-19 litigation in due course, it is too early for any such claims to have reached the courts and provide any insight as to the approach the English and Welsh courts will take on the virus. That said, the courts are bound by precedent. A good degree of insight can therefore be found from existing cases on issues such as *force majeure*, material adverse change, change of law, frustration, illegality, etc.

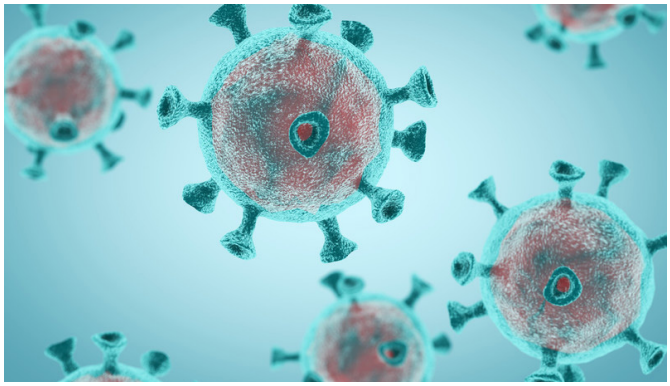
As we advised in our recent webinar on 11 March, there is a temptation to think that the courts in England and Wales will adopt a sympathetic and reasonable approach to legal claims in a COVID-19 setting, particularly given the unprecedented and uncharted nature of the situation. However, generally speaking, the courts have always sought to hold the contracting parties to exactly what has been agreed and not to seek to imply protection for matters that the parties simply did not make specific provision for and/or turned their minds to, even if that results in seemingly unfair or unjust outcomes in all the circumstances. The same is likely to be true for specific matters they could not have turned their mind to, e.g the coronavirus, because although no one knew of that specifically, they could have catered for large scale disruption in the contracts entered into, regardless of cause.

Just a word on the COVID-19 position with the courts – HM Courts and Tribunals Service (HMCTS) has issued some guidance over the operation of courts and tribunals at this current time. At the moment, they remain open and it is business as usual, with all the currently advised precautions.

In terms of contingency planning, there has been some government consideration of using Magistrates' Courts for civil work, because of their better video conferencing technology. This would enable some civil claims to proceed without the need for parties to attend physically. Most of the issuing/filings made at court can already be done electronically – and we would hope this will continue – but this is obviously always subject to the availability of staff at court to process documents/administer cases.

More specifically, there has not yet been any guidance on existing claims and whether case management and timetabling will be stayed for any period of time. Obviously, until that happens, current court deadlines remain strict and will need to be met. Judges maintain their discretion whether or not to adjourn.

It is a fluid situation and much planning is being undertaken in the UK at the current time. Further guidance is likely to be issued later this week. In terms of what is going on elsewhere, we know that District and State courts are closing in some jurisdictions (e.g. in the US).



What happens if an insurance company refuses to cover the health insurance (on the grounds that "exotic" illness is not covered under a policy) and the employee raises an issue towards the employer?

This will very much depend on what the relevant employment contract says about the obligation of the employer to provide the employee with the benefit of health insurance cover.

Some employment contracts make clear that any payments to an employee are subject always to the terms of the insurance scheme. Further, they do not provide the employee with any rights to bring a claim against an employer should the insurance not pay out. In those cases there should be no employer liability. However, this question is likely to be a fact-specific determination in each case, so it is largely a case of dusting off your employment contracts and insurance policies and taking a look at them. It will only be in cases where the employer promises a benefit which the insurers refuse to provide that there is a material risk to the employer.

As a logistics company, we have had customers asking our drivers to sign a declaration of health before accepting delivery. With more than 800 drivers a day and a concern around data protection, what would you suggest as the best approach to such requests?

This is a common theme emerging from both our supplier and end-customer clients. Any such request obviously raises a wide number of legal issues, including, among other things, inadvertent potential shifting of liability if future problems emerge; health and safety considerations for those coming onto and off site; risk to company employees; and data protection considerations. It is a tricky issue.

On a practical level, it is worth considering, depending on which side of the fence you sit (i.e. making the request or being asked to provide such health assurances):

- What is the driver's likely state of knowledge as to his/her actual state of health?
- Is the answer meaningful even if given, and what if drivers refuse?
- What are the risks if assurances are given/not given and/or the practical consequences of non-compliance (e.g. refusal to accept deliveries, denial of access to a site if there are positive signs of illness, duties of care, breach of contract, etc.)?

From the supplier's/driver's perspective, the prudent approach is probably to try to resist giving the requested assurance (i.e. a bit like in a battle-of-the-forms scenario). From a recipient's perspective, it is a case of carefully considering what you are seeking to achieve with such requests.

We would also advise extreme care when being asked to provide declarations of compliance with applicable health guidelines, the monitoring of your staff, limiting of contagion, etc. These could well be extremely onerous and/or incapable of assurance/policing. Readily agreeing them could operate to inadvertently shift liability and/or expose your company to increased legal, financial, reputational and other risks further down the line.

In terms of other practical, "best practice" steps, we are hearing that companies are:

- Monitoring published health guidelines very closely.
- Splitting teams and working segregated shift patterns (week 1 = A team; week 2 = B team, etc.), and using pods and/or working on separate parts of a site with no travel/movement between sites/teams (with as much separation as possible). This is to minimise the risk of a whole plant closure, especially if a particular area/site becomes infected/has to be deep cleaned and/or a particular team/team member tests positive for COVID-19.
- Introducing more stringent health, safety and other checks, including:
  - Health-screening all visitors on-site and off-site
  - Maintaining visitor logs
  - Keeping "social distance"
  - Using tissues and hand sanitisers
  - Enhanced cleaning of metal and other hard surfaces on which the virus lives longest, and emergency deep-clean arrangements being placed on standby
  - Temperature testing of employees (with their consent), etc. See the separate answer above on issues raised by temperature testing.

In one particular instance, we are aware of a company handling all delivery paperwork with gloves, taking copies of the same, using sanitising gels on all photocopiers after copies have been taken, returning all originals to drivers so potentially contaminated paperwork is not stored on-site, etc.

- Setting up on-site emergency response squads, isolation units and first aid rooms to send staff on shift/visitors to when they start to show signs of illness, etc., and ultimately sending people home.
- Homeworking and cancellation of all unnecessary meetings/events.
- Travel bans – with companies staying as local as they can.

Anecdotally, we are now seeing many more practical measures being implemented by clients in our network this week than last week.

Do you have any tips on negotiating new *force majeure* clauses in contracts, as we suspect everyone will be alert to wanting to include/exclude "viruses" and "government intervention" wording on the back of this?

Consider at the outset what the clause applies to. For example, as a customer, if *force majeure* means the product cannot be used, it will likely need to be narrowly drafted. It may amount to a customer cancellation right – but suppliers will likely be keen to resist such cancellation clauses. As ever, much will come down to your negotiating leverage, the reasonableness or otherwise of the counterparty, whether you sit as supplier or end customer, and what you are ideally intending to achieve – either:

1. A fair and reasonable clause with an overall balanced set of rights for each party
2. A robust clause that gives you excellent legal protections, but where you might be prepared to give up some of your strict legal rights in subsequent commercial negotiations with your counterparty at a time of crisis

Pragmatic operators will recognise that for business-critical arrangements, there is little point hammering the other party into instability/insolvency with unreasonable demands and liabilities. Sensible middle ground is likely to be a provision that affords protection for these types of circumstances, but that also makes that protection conditional on the parties working together (acting reasonably and in good faith) to try to identify and implement workarounds.

In terms of legal drafting, among other things, you might wish to include references to specified *force majeure* wording/circumstances, such as viruses, epidemic, pandemic, etc., and government interference, national crisis or emergency measures. This should, however, steer clear of becoming an exhaustive list for fear of inadvertently omitting the relevant circumstances/events.

Also, consider whether to reference any likely underlying causes of disruption, such as:

- Travel bans on employees
- Shut-down of public services, flights, exchanges and money markets
- Mandatory quarantine measures, etc.

A comprehensive clause may list several such causes/events as illustrative examples, and which could subsequently give you a vast array of arguments to explore. Consider, too, whether certain events, such as an economic downturn, should be expressly excluded.

Generic catch-all wording (e.g. "any other cause beyond [the party's] control"), coupled with express wording such as the examples referred to above, could well be the most helpful approach in many situations. Remember that catch-all language alone may still be effective in any given scenario – but it should be appreciated that reliance on this alone will likely give rise to significantly more uncertainty and litigation risk for both parties.

Think about the extent to which the triggering *force majeure* event must impact the situation. There is a big difference between the high bar trigger of "preventing", where it would likely be necessary to show performance had become legally/physically "impossible", and less restrictive wording such as "hinder", "delay", etc. – which could well afford you more latitude, for example, to simply demonstrate that the contract had become much more onerous.

Remember to address what is expected in terms of notice of the *force majeure* event/circumstance and what the effect/consequences are of *force majeure* being established (e.g. temporary suspension of a party's contractual obligations, extension of target deadlines, the right to compensation or termination of the contract if delay exceeds a specified duration, etc.)

A good clause should clearly identify who can exercise the termination right. It should also address the duration before the termination right kicks in. A word of warning: some parties to long-term contracts are being caught out in COVID-19 circumstances by the relatively short duration (30 days) before *force majeure* terminations kick in. Even 90 days looks tight against the anticipated backdrop of the virus.

Finally, it is also worth considering whether protection can be obtained via other provisions not directly related to or badged as "*force majeure*" – for example, general termination rights or the ability to pass on cost increases, etc.

In summary, think **carefully** and **holistically** about your contracts. The path you ultimately tread in a given situation will very much depend on whether you sit as supplier or customer and what you want and realistically can achieve.

As a global company with manufacturing sites across the world, we are sourcing products elsewhere and offering more expensive product alternatives at the same price. If there are additional cross-border costs, such as import/export duties/tax and tariff implications, who should bear the additional costs and are we obliged, as the supplier, to ensure the "business-to-business" customer is aware that their costs and tax liabilities may increase with the alternative supply chain solution?

High-level Response

Contractually, who bears the additional cross-border costs will depend on:

1. Whether you are obliged to deliver, or do you have the right to reject or suspend orders?
2. The contract terms

In terms of notification to the end customer, this will be as per the contract. However, in these unprecedented times, a "no surprises" approach is a practical one.

Some Further Detail

In particular:

- Look at whether there is any specific agreement in the contract as to the basis of pricing and/or allocation of responsibility for importation (particularly via the use of Incoterms) – for example, if pricing is stated to be "delivery duty paid" or "DDP", the supplier would be exposed to the risk of picking up these sort of costs.
- Absent specific agreement or allocation as to responsibility for cost increases, the general position under English law is that it does not protect a party from a bad bargain or unfair deal. By way of illustration, if a major exchange rate fluctuation were to occur as a result of COVID-19 affecting the underlying costs of a contract, an English court would not normally imply protection against that if the parties had not made specific provision for it.

That said, it is not in a customer's interests to have a business-critical supplier go bust. This is particularly true in the current COVID-19 circumstances, where it is going to be very difficult to find a replacement supplier willing to supply on favourable terms/that will take all of the virus risk.

For these reasons, it is vital to talk to your suppliers and end customers, as it may be possible to cut deals with them regardless of what the strict legal/contractual position is – but we would always recommend trying to record any such deals in writing (or at least have an audit trail of what has been agreed, e.g. an exchange of emails) in case the other party subsequently tries to renege on what has been agreed.

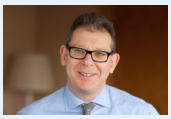
Outside of specific contractual rights to adjust pricing, also consider if there are any other contractual provisions that would be helpful and could be used as leverage in any such discussions. For example, you may not be contractually obliged to accept orders. You could decline them if the customer is unwilling to accept a higher price (making sure you follow any contractual process for refusing orders). Alternatively, if you have a general right of termination, you could threaten to exercise this right if the other party is not being reasonable/sensible about pricing.

Any tips for new contracts moving forward?

Pretty much as above. Specifically:

- Try to agree pragmatic *force majeure* arrangements that do not seek to place all of the benefit or risk on one party
- Consider what protections might be available via the use of more general contractual rights, which are not specifically badged or linked to fire, flood, pestilence, etc.
- Think through the consequences of whatever is drafted, and before it is agreed

Contacts



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