

Over the last few days, we have received an increasing number of enquiries about the coronavirus disease 2019 (COVID-19), commonly known as the “coronavirus”, and what organisations should be doing to mitigate the impact of the virus on their business, staff, supply chains, etc.

Here is an overview of the key legal issues for businesses in the UK to consider, together with some practical steps for businesses to take.

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

Join us on Wednesday 11 March 2020, when we will highlight the key legal and commercial risks for global businesses to consider, together with the practical steps they should be taking to mitigate the impact of the virus on their business, staff, supply chains, etc.

Time

1 – 2 p.m. GMT (UK)

9- 10 p.m. CST (Shanghai)

9 – 10 a.m. EDT (New York)

To join the webinar, please register [here](#)

Employment

The situation in regard to the coronavirus is obviously changing quickly. The extensive media coverage is making many people concerned about the risks, especially if they are more vulnerable to infection, e.g. the elderly and those with certain underlying health conditions. Employers should, therefore, ensure they are communicating with their staff and their union representatives about the virus, letting them know what they can do to protect themselves against the risk of infection, together with the steps the business is taking to deal with the risk, e.g. suspending business travel to high-risk areas, etc. Employers should clearly be careful about the tone of their communications to avoid any panic.

Employers should review their contracts and policies so they are clear about their obligations with regard to pay if members of staff are self-isolating. The UK government has recently confirmed that if employees are self-isolating in accordance with medical advice, they should receive at least statutory sick pay (SSP) if they are eligible for it. The SSP rules are being amended to entitle eligible individuals to claim SSP from the first day of absence instead of four days under the current rules. Employers should ensure they operate a consistent approach to company sick pay, as far as possible.

Stay alert to the potential tension between the privacy and personal data rights of individual employees in relation to health information on the one hand and the obligations of the employer to protect the wider workforce on the other (see further below on data privacy issues).

Employers should ensure they stay up-to-date with the latest government [guidance](#) and advice from [public health agencies](#). Acas has also issued [guidance](#) for employers.

While the number of cases of infection is increasing, it is important that businesses ensure they adopt a proportionate response to the coronavirus outbreak, based on the current level of risk in the UK, the nature of their business, available medical opinion, etc. It will be more important than ever to recognise that the virus will create human problems, not just legal ones, and that even where fears for self or others may not objectively be well founded, they are, nonetheless, genuine. The possible level of disruption to workplaces referred to by the government (i.e. one employee in five off sick) may be hyperbole designed to divert attention from other issues, but even a fraction of that number would be unprecedented for employers, and pure law may not always be the right approach or hold all the answers. Flexibility and pragmatism will be key to managing the employment relations aspects of the spread of the virus.

More detailed guidance and practical advice for UK employers is contained in our comprehensive employment [Q&A document](#).



Health and Safety

Employers have a duty to ensure the health and safety of their employees and non-employees (e.g. contractors, members of the public, etc.) so far as is reasonably practicable. This would include taking reasonable steps to control the spread of the coronavirus at sites under the control of the employer. Employers should carry out an assessment of the risk posed to health and safety of their employees and non-employees by coronavirus, and then implement reasonably practicable control measures to mitigate the hazard.

From a practical perspective, we recommend that employers:

- Ensure staff are made aware of the symptoms and kept informed of the latest medical and government advice on how to minimise the risk of infection (including how the virus spreads and how to reduce the risk of passing the virus on). This should also help to dispel any myths, fears and misconceptions.
- Implement a reporting procedure for anyone with symptoms.
- Implement a reporting procedure for individuals who have recently visited high-risk areas, such as China, Iran, Northern Italy, South Korea, etc. This may mean that staff have to “self-isolate” if they have returned from a high-risk area.
- Consider risks associated with third party visitors to business premises.
- Consider risks from goods imported from high-risk areas and whether updated handling and storage policies are appropriate.
- Ensure any control measures identified by the risk assessment are aligned with the government’s advice.
- Do not over-react – if one cough leads to entire premises being closed immediately, that will feed fears and make it harder to argue that an employee’s refusal to attend work on these grounds is unreasonable.

Employees are under a legal obligation to cooperate with their employer and other duty holders to enable them to comply with health and safety legislation.

Supply Chain Issues

There is a range of supply chain risk management measures that companies should consider in light of the coronavirus outbreak:

- Maintain good lines of communication with your key suppliers, logistics providers and end customers as to what you are doing, steps you are taking on a regular basis, etc.
- Conduct assessments of the risk posed to your supply chain, considering factors specific to high-risk suppliers and working conditions.
- Obtain information from suppliers on measures they are taking in relation to goods (or services) supplied to you and, if appropriate, consider whether procuring supplier agreement to minimum standards of conduct is necessary.
- Consider auditing suppliers and reviewing their respective work health and safety systems and policies, especially any provisions relating to disease and virus control, to ensure they are up to date and appropriate, and/or to require urgent compliance with applicable standards if significant areas of risk are identified.
- Consider whether you are going to prefer certain suppliers and customers, including the consequences of doing so. Be mindful of not unlawfully seeking or giving (or appearing to seek or give) priority to suppliers and/or customers in return for the payment of money or the giving of some other advantage.
- Review the terms of all key/critical contracts for risk and potential contractual protections, including penalties, limitations of liability and *force majeure* clauses (see further below), etc., including how they might be interpreted in different jurisdictions.
- Consider the use of express infection/disease/epidemic/pandemic wording in all new contracts and, where possible, amend and incorporate into existing contracts.
- Be alert to attempts by your customers and suppliers to sign you up to declarations of compliance with applicable health guidelines, monitoring of staff, limiting contagion, etc., which could inadvertently shift liabilities and/or expose your company to increased legal and financial risk.
- Activate crisis management plans and procedures (Who? What? Where? When? How?) – hope for the best, plan for the worst!
- Assign responsibilities and specify how ameliorative action will be taken, with clear roles and duties alongside the correct messaging.



- Keep up-to-date with details of the affected areas through the World Health Organisation's (WHO's) Disease Outbreak News, and local, national and international best health practices, especially in the jurisdictions where you do business.
- Meet with your corporate peer group to share good/best practice.
- Check your insurance arrangements – reviewing policies, liaising with brokers and potentially notifying circumstances/claims. Does your insurance cover economic loss during any virus period? Consider whether such insurance covers losses caused as a result of a *force majeure* event (see the section on *force majeure*). Some insurance policies may exclude any and all such losses, while others may be more permissive.
- Maintain records and evidence to assist any future supply chain claims/defences – have a good audit trail.
- Is there scope to switch suppliers and/or dual source product? Are there any easy access alternatives? Can you modify your product to substitute different components/suppliers?
- What law/jurisdiction applies to your supply contracts? Is the contract silent or deficient on governing law and jurisdiction? Consider what can be done now to try and protect your position.
- Be mindful that if there is a shortage of raw materials/components, suppliers may be compelled to use alternative materials to meet customer demand. Such materials may not be quality-tested or even be out-of-spec. Depending on the type of raw materials/components, consider whether there is a risk that they may be contaminated by the virus.
- Logistics companies may stop operations for a time, thereby affecting road, rail and sea deliveries. As a result, air (and other) freight rates may increase considerably over pre-virus levels. Moreover, many airlines have stopped flights to/from China and other affected jurisdictions.
- Small- or medium-sized suppliers may struggle because of the adverse effects of the virus. If so, the downstream customers may need to promptly find an alternative supplier. For those suppliers struggling to survive, many may need to borrow from banks because they do not have sufficient cash flow on hand.
- Fear may drive decision-making. In some affected parts of the world, people are not returning to work, not making deliveries, not going to banks, etc., out of fear, rather than based on the level of risk or government advice.
- During periods of disruption, local officials may request (either expressly or implicitly) payment from you or your local representative in return for expediting the performance of an otherwise routine task or function, adding further pressure on your supply chain. Be aware that, whilst such requests are not unusual, the making of such payments (known as “facilitation” or “grease” payments) is generally unlawful across the globe.

We have produced a number of supply chain specific blogs over recent days, all of which can be accessed via our *Global Supply Chain Law blog*.



Communications Policy

A communications policy should be devised/implemented to protect the reputation of the business in the event of disruptions to business associated with coronavirus. The policy could include:

- A framework for identifying issues associated with the virus, which may damage reputation.
- Identification of the senior individuals responsible for the management of communications internally and externally.
- Guidelines on the key information that messages should include.
- Timelines for responses to requests for information and other communications.
- Authority for sign off.
- Communication and consultation with worker representatives.

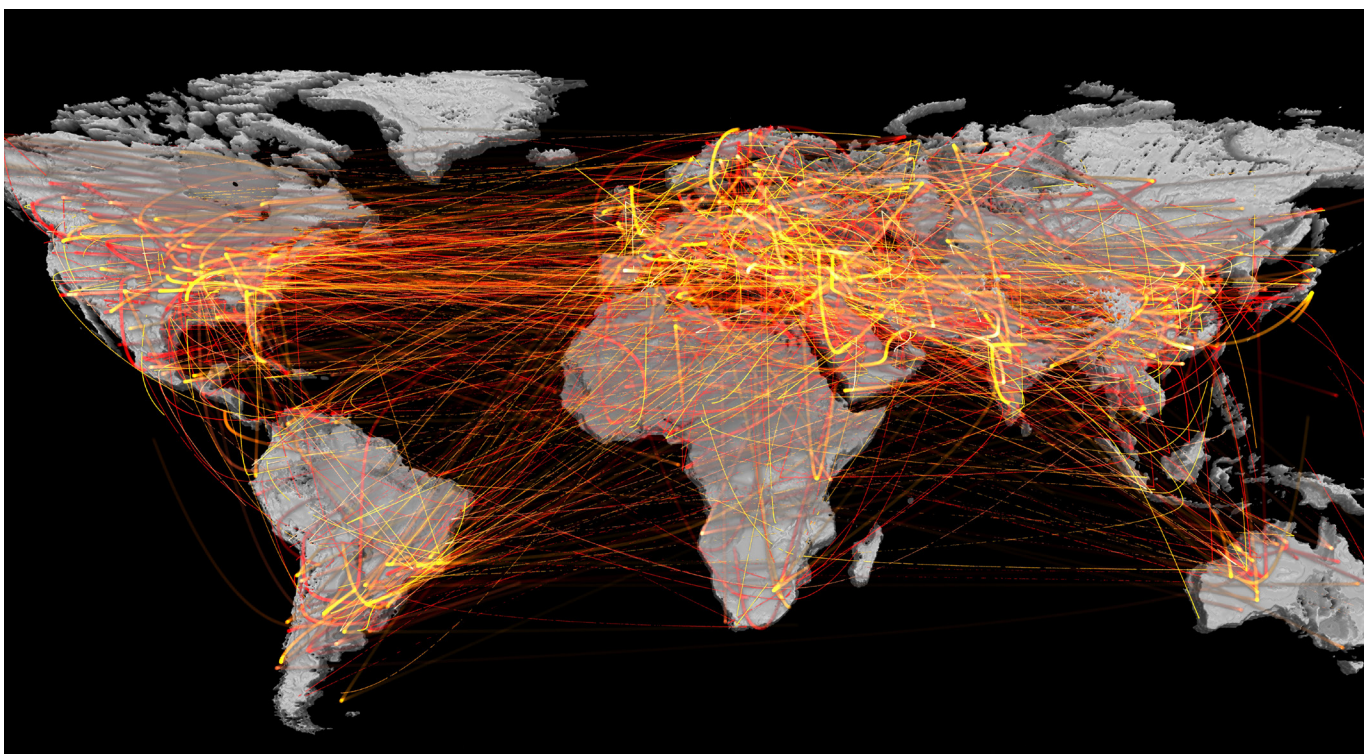
Force Majeure

A *force majeure* provision seeks to exclude the liability of one or more parties for events beyond their reasonable control.

Often (and mistakenly) overlooked as “standard boilerplate”, the increasingly apparent and potentially extensive impact of the coronavirus outbreak on global supply chains is likely to bring such provisions into sharp focus over the coming weeks and months.

Below is an overview of the key issues to be aware of for anyone seeking to rely on *force majeure* protection or who is at the receiving end of a *force majeure* defence. A longer version of this summary, together with a companion piece on the interaction between *force majeure* and contractual penalties, can be found on our *Global Supply Chain Law* blog.

- **No implied protection for *force majeure* events:** Absent specific contractual provision, English law will not, by default, protect a party from liability due to events beyond their control such as the coronavirus. If a party wants such protection, they are expected to reserve it for themselves in the relevant contract. As such, identifying and reviewing relevant contracts is necessary to identify what (if any) protection may be available, whether to you and/or your affected suppliers.
- **No recognised definition of “*force majeure*”:** There is no generally accepted or implied definition of “*force majeure*” under English law, so, if tested, contractual provisions excluding liability due to simply “*force majeure*” are unlikely to stand up to scrutiny; the parties to a contract are expected to define exactly what they consider to be “*force majeure*”. In the current circumstances, provisions that specifically name-check disease, virus, pandemic, etc., are likely to stand the best chance of success.
- **Follow the process:** Many *force majeure* provisions require the party seeking protection to follow a prescribed process, often requiring formal notice to be served as soon as that party becomes aware of the existence of a potential *force majeure* event. For a party wanting protection, following such a process is critical – if any specified process is not followed, then there is a risk of jeopardising any subsequent claim for protection.
- **Be aware of the consequences:** Rather than just excluding liability, many *force majeure* provisions will trigger rights and remedies for the other party – typically the option to terminate and/or the suspension of any contractual exclusivity. These risks should always be factored into the decision as to whether to claim *force majeure* protection. Sometimes, the short-term benefit of claiming protection can be outweighed by longer-term consequences.
- **Consider other options:** Even if a contract is silent (or unhelpful) on *force majeure*, it may contain other helpful general provisions. For example, the contract may provide a right to terminate for convenience, which then avoids a dispute over whether coronavirus is or is not a *force majeure* event. Considering a contract in its entirety, not just any provisions directly relevant to coronavirus, is key.
- **Commercial discussions:** Many of the leading cases on *force majeure* arise from specific events that affected only one party (e.g. a building burns down, a ship sinks, etc.), whereas coronavirus is headline news affecting businesses globally at all stages of the supply chain. As such, an affected business may find customers and suppliers more willing than normal to adopt a “we’re in this together” mind-set when formulating solutions. However, care needs to be taken in any such discussions to avoid goodwill gestures being used against you in the future or leading to the loss of valuable contractual rights and protections.



Data Protection

In addition to employment law queries, businesses are aware of concerns about the potential impact on employees' personal data and privacy rights. Certain of the measures that are under consideration to help combat the threat of the coronavirus raise a number of questions about the practical impact of current Information Commissioner's Office (ICO) guidance on efforts to prevent the spread of infection.

Clearly, in light of the serious global threat posed by this virus, data protection is not likely to be the primary concern, but we understand that businesses are keen to understand (and where possible, to comply with) their obligations in this context, and we are dealing with queries, such as the following:

- Can you require employees to undergo a medical, or submit to tests to check their temperature?
- What can you tell other employees about an actually or potentially affected individual?

Considering these issues from a UK data protection perspective, they certainly involve the processing of employees' personal data. To comply with the General Data Protection Regulation (GDPR)/Data Protection Act 2018, the employer (the "controller" under data protection law) would be required to have a lawful basis on which to collect and to process such information, before any processing begins.

Employee consent is difficult to rely on, given the perceived imbalance of power between the parties, so unless the processing becomes truly necessary to protect the "vital interests of the data subject or of another natural person" (usually understood to mean an emergency, "life or death" situation), it seems likely that the most appropriate lawful basis to rely on would be the legitimate interests of the controller, or a legal obligation. Legitimate interests requires the employer as controller to assert that it has a strong legitimate interest to carry out the processing of employees' personal data, which is not overridden by the fundamental rights and freedoms of the data subject.

The employer has a clear interest in and an obligation to ensure the safety of all staff and visitors where the employee works and must take into account the rights of all data subjects.

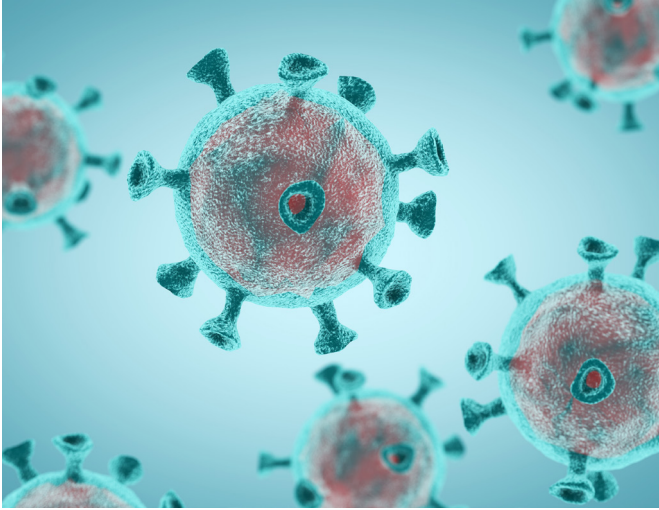
Regarding the first question above, a medical or temperature check would involve processing of health data (i.e. special category data), so in addition to a lawful basis (such as satisfying the legitimate interests basis, as described above), a further condition would be required under Article 9.2 of the GDPR/the Data Protection Act 2018 before any processing is carried out. This needs to be supported by a separate policy in many cases. Although explicit consent of the employee might be preferred (and it is hard to see that this would be refused), the employer will not strictly be able to rely on this under data protection laws, unless the employee is genuinely free to decide whether to provide their consent, with no threat of adverse consequences if they refuse. That seems unlikely to be the case here.

However, the obtaining and processing of test data can be legitimised by Article 9.2 where it is necessary (a) for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law (e.g. where it is necessary to take a particular measure in order to comply with its obligation to safeguard employees or others); (b) for reasons of substantial public interest; (c) for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment; or (d) for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of healthcare.

The key test here is "necessity". Is it strictly necessary to conduct this processing of health data in order to safeguard employees/ combat the threat of the coronavirus? This will depend (in theory) largely on the level of threat posed by the coronavirus in the UK, whether the intended measure is likely to be effective in combating that threat and whether any alternatively effective – but less intrusive measures – are available. The employer should also consider how it can reduce the level of intrusion caused by the testing or assessment. If a medical assessment is needed, will the employer conduct this through Occupational Health or rely on the employee's own GP? What results will be given in the light of the specific purposes of the disclosure? Finally, how long will these records be kept and by whom? Again, an assessment of the risks and rights of data subjects should be conducted. If there is likely to be a high risk to the rights and freedoms of individuals, or special category data processed on a large scale, then a Data Protection Impact Assessment (DPIA) will be required.

The second question (above) involves the deliberate disclosure of what is clearly sensitive health data of the data subject to other people, so the highest safeguards must apply, but necessarily overlaid with the practical reality of the situation. If it could or would protect the health of employee A to know that colleague B had actually or potentially developed the virus, then the employer must be seen as able (indeed obliged) to tell A of B's position. In many cases, this will be obvious anyway from B's absence from work or disclosures the employee might make to A and others. An employer in this situation should be aware of its legal obligations, legitimate interests and the need to protect employee privacy, whilst dealing with the immediate risks and making decisions on how to protect employees and others.

Whatever the business decides to do, it should provide employees with clear information about its plans and how their personal data will be processed. It is worth revisiting existing employee privacy notices and policies to address any gaps, or create a new version to cover the new purposes for processing, whilst prioritising the efforts to protect employees' health.



Further Updates

We will continue to monitor the situation carefully and keep this advice note under review.¹ This is to provide you with the very latest guidance on the practical steps to take, given that the situation is an evolving one and the government and health authorities' guidance and advice may well change.

We have also set up a [dedicated resource hub](#) for businesses on the legal, regulatory and commercial implications of coronavirus COVID-19.

If you would like to discuss any of the issues raised in this advice note, please contact any of our team listed below.

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¹ Links to further reading:

<https://www.squirepattonboggs.com/en/insights/publications/2020/03/client-advisory-regarding-covid-19-legal-issues-in-china>, <https://www.squirepattonboggs.com/en/insights/publications/2020/03/coronavirus-your-employment-related-questions-answered>
<https://www.squirepattonboggs.com/en/insights/publications/2020/03/research-results-impact-of-covid-19-on-the-uk-consumer-sector>