



PENNINGTONS
MANCHES
COOPER

ROADMAP TO REOPENING

THE TOP 5 QUESTIONS WE HAVE RECEIVED THIS WEEK: 12 JUNE 2020



1. CAN I REQUIRE AN EMPLOYEE TO RETURN TO THEIR WORKPLACE WHEN THEIR CHILDREN ARE SCHOOL AGED AND WON'T BE GOING BACK UNTIL SEPTEMBER?

A requirement for an employee to return when their children are not in school due to Government restrictions may be indirectly discriminatory on grounds of sex, unless it is can be justified.

If the employee is a key-worker, has the ability to send their child to school, or has older children capable of being left home alone, it will be easier to justify a requirement to return. In cases such as these, if the employee cannot work from home or it is disruptive to the business to continue to work from home, the employer could, in theory, require the employee to return and a refusal to do so could be treated as a failure to adhere to a lawful and reasonable instruction. However, even then, what is reasonable will depend on the precise circumstances of both the business and the employee.

If the employee is not a key-worker and/or has no alternative childcare arrangements, it will be harder to insist on them returning to work. If they cannot work from home, the employer should use the Government's Job Retention Scheme to cover some of the employee's wages until 31 October 2020. If they are just less efficient by working from home, other options such as compressed or varied hours should be considered until the schools reopen.



EMPLOYMENT

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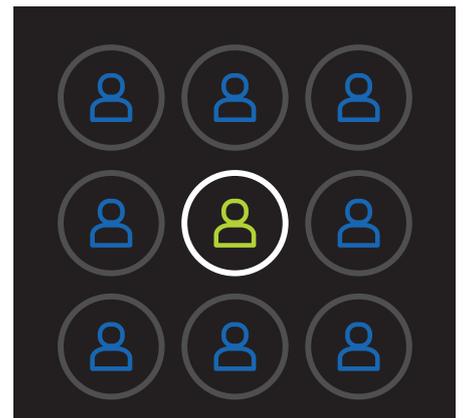
2. WHAT SHOULD A BUSINESS DO IF SOMEONE ON WORK PREMISES HAS TESTED POSITIVE FOR COVID-19?

On any return to the workplace or opening of premises such as schools and/or retail sites, businesses should ensure that employees, pupils and customers have not tested positive for or experienced symptoms of Covid-19 for a week. If they have, check that they have followed the Government's quarantine advice.

An employer must take appropriate social distancing measures in the workplace to ensure that there is limited risk of any contamination or cross infection. This can also be limited by regular deep cleaning. However, where the work being undertaken is such that employees are working in proximity and unable to comply with social distancing, for example in schools and/or care settings, an employer should also have implemented a "bubble" system.

In these circumstances, employers and service providers will need to consider how they treat the rest of the "bubble". Can they still attend the setting or workplace or will they be required to quarantine? Ideally, businesses should publish their policy on this to provide clarity and transparency.

As has been seen throughout lockdown, the situation will change over the course of the pandemic and the Government's track and trace programme will assist with this.



EMPLOYMENT

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3. ARE BUSINESSES ABLE TO REOPEN PREMISES AND/OR CONTINUE TO PROVIDE SERVICES TO CONSUMERS IF THEIR INSURER IS REFUSING TO CONFIRM COVER IS IN PLACE? WOULD A DISCLAIMER BE USEFUL IN THESE CIRCUMSTANCES?

Many organisations have already reopened their workplaces and more will open in the coming weeks. Businesses will need to ensure that they meet their health and safety obligations to third parties in reopening, particularly in regard to social distancing.

A number of organisations have issued disclaimers to be signed by consumers and/or staff to limit their liability in case an individual is exposed to and then tests positive for Covid-19. These disclaimers range from a simple acknowledgement of the risk to a broader exclusion of liability. While these disclaimers have their own issues, the more serious issue is if an insurer either withdraws cover or refuses to confirm cover is in place.

A recent example of this is when some independent schools tried to open to children outside the year groups recommended by the Government. Although organisations may be able to limit the Covid-19 risk to a level with which they are happy, if an insurer removes or refuses to confirm cover, the organisation could be subject to a raft of liabilities.

A disclaimer is unlikely to work in these circumstances, particularly if it is signed by a consumer, and is also unlikely to provide appropriate protection from any Health and Safety Executive (HSE) investigation.



COMMERCIAL DISPUTE RESOLUTION

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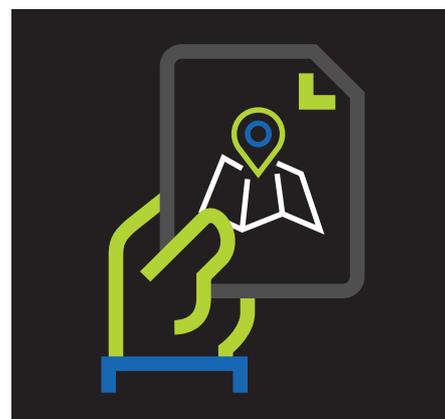
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4. WE HAVEN'T APPLIED FOR ANY GOVERNMENT SUPPORT BUT NOW FIND OURSELVES IN NEED OF FINANCIAL ASSISTANCE, ARE ANY MEASURES STILL AVAILABLE? HOW DO I APPLY?

Recently we have seen the furlough scheme extended with new parameters, retailers preparing for reopening and the continuance of social distancing measures. These developments and factors require boards of directors to continually adapt and consider the available options and how to act in the best interests of the business.

It may have been possible to survive to date without reliance on Governmental support - or perhaps the eligibility criteria meant the measures were out of reach - but as restrictions continue boards may find themselves asking with greater urgency what support is still available.

The corporate team with the assistance of our colleagues in employment and tax have prepared a [summary document](#) which aims to present the key measures available in a single, easy-to-navigate format. This should assist directors in considering the viability of the options and how they can be incorporated into business strategy.



CORPORATE

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5. AS A TENANT OF A MULTI-LET OFFICE BUILDING, DO I HAVE TO CONTRIBUTE TOWARDS MY LANDLORD'S COSTS OF CARRYING OUT COVID-19 RELATED WORKS TO, AND ENHANCED CLEANING OF, THE COMMON PARTS?

As a tenant is only obliged to contribute to its landlord's costs if the lease requires them to do so, normally through the service charge, the answer will depend upon the precise wording of the lease which should be carefully considered.

Landlords face additional costs following increased demand for frequent and thorough cleaning of common parts and additional facilities such as bike racks, communal showers, changing rooms and social distancing measures. They will want to pass these costs onto you if they can.

As it is unlikely the lease has specific wording to cover all additional Covid-19 related costs, landlords will probably seek recovery under a "sweeper clause" (if the lease contains one). Such clauses normally allow landlords to recoup expenditure for additional services they provide. It is worth noting that courts have traditionally interpreted such clauses restrictively and sometimes the clauses require landlords to act reasonably in the interests of good estate management. This can give tenants scope for argument. Tenants should scrutinise service charge bills received before they pay to ensure each cost listed has been appropriately incurred and falls within the specific wording of the lease. Likewise, if a tenant is not in occupation because they are taking measures to protect staff, they may challenge additional charges for works they have not requested or benefited from.

Also check whether your lease contains a service charge cap or specific exclusions which will offer protection against increased costs.

Finally, it is worth reminding landlords that emerging Government-backed codes of practice encourage them to collaborate with their tenants and take a sensible approach in their discussions on Covid-19 related measures to provide a safe working environment for staff and visitors.



REAL ESTATE

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For a selection of briefings and practical guidance to help minimise risk in this period of uncertainty visit our [coronavirus resource hub](#).

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The information contained in this Q&A is general in nature and is not intended to constitute legal advice.

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