

Covid-19 coronavirus: 10 key points for effective contingency planning

Covid-19 coronavirus is at the top of the agenda for businesses globally, for good reason. Here are 10 key points to consider to ensure your business is fully prepared.

1. Coordinate your response

Consider setting up a dedicated team, reporting to senior management, to take responsibility for assessing and managing the potential impact of Covid-19 (and the steps put in place by relevant Governments and authorities to deal with it). Ensure that the team:

- Has representatives from support functions including HR, IT, purchasing, procurement, security and legal and is split across different regions and time zones (where relevant).
- Develops or implements a business continuity plan, taking into account relevant legal and regulatory obligations and the issues we set out below.
- Prioritises effectively and manages potentially conflicting imperatives.
- Establishes and maintains clear internal and external protocols for regular and emergency communication with employees and other key stakeholders.
- Monitors and responds to developments and takes advice, with appropriate senior management and/or legal oversight.

2. Manage the impact on the workforce

Employers will need to comply with health and safety duties and broader duties of care and good faith owed to workers. Steps to consider, subject to local law requirements, include taking action to:

- Monitor local Governmental and World Health Organisation advice and notify/remind staff of recommendations not to travel to particular areas and of measures to help prevent the spread of Covid-19.
- Introduce policies prohibiting or limiting business travel, particularly to high-risk areas, and consider alternative communication solutions (eg video-conferencing).
- Introduce policies on the self-isolation of staff (whether mandated by law, imposed by you or requested by individual staff members).
- Establish procedures requiring staff to report if they feel unwell or are absent, and to report possible infection or exposure to the virus (including following private travel to high-risk areas) or concerns involving others they have been in contact with at work.
- Provide staff with the right equipment for disinfecting hands and (if official advice recommends) protective masks, and with any additional health and safety training or support that they might need.
- Implement flexible or home-working arrangements and accommodate requests where feasible for particular roles – considerations might include whether the technology and equipment used to cater for a surge in remote working are reliable and whether further measures are necessary to maintain customer confidentiality.
- Plan resourcing strategies such as the re-allocation of staff, the splitting of teams, the rotation of in-office/home-working arrangements or the cross-training of staff who perform business-critical functions, to minimise the risks of disruption if large numbers of staff, or key staff, are absent.
- Have back-up arrangements in case employees responsible for health and safety are unable to perform their roles.
- Make special arrangements for vulnerable employees.
- Consider carefully any proposal to repatriate staff from high-risk areas, particularly the impact on local staff in terms of workload and from a segregation and potential discrimination perspective.

Wider legal issues that you might also need to consider include whether:

- Local management has the authority that it needs to take appropriate action.
- Employment terms or legislation permit or require periods of self-isolation (whether mandatory or self-imposed) to qualify as paid sick leave or as unpaid leave.
- You have a right to require staff to work from home.
- You are able to conduct voluntary or mandatory screening.
- Voluntary absences or work from home arrangements require remuneration, or, if quarantine is imposed by Government, whether Social Security allowances are payable.

- Workers can be required to use annual leave for relevant absences.
- You will allow requests for staff absence where a family member has the virus or is self-isolating (or if schools are closed or childcare arrangements impacted) and, if so, on what basis.
- You have a duty to inform/consult with health and safety representatives or works councils/trade unions in relation to the measures being taken.
- You are compliant with discrimination and privacy legislation in relation to staff who may contract the virus and ensure proper protection for those from high-risk areas against bullying, discrimination or harassment.
- You are eligible to apply for subsidies or financial support from national authorities if there is a business shutdown due to the virus, or a reduction in capacity due to sickness.

3. Manage contractual risks

Evaluate the potential implications for your customer and supply chain contracts. Review how Covid-19 will affect your ability to perform your contractual obligations (either directly or due to issues in your supply chain). Assess what rights you might have if your counterparty is unable to perform. Consider:

- Event of Default – will a failure to fulfil obligations result in an Event of Default?
- Force Majeure and frustration – will the effects of Covid-19, or any response to it, be caught by a Force Majeure provision or frustrate your contract? This may require you to consider whether Covid-19 has made it impossible or unlawful for either party to fulfil its contractual obligations.
- Change in law/illegality – will any relevant Government response trigger change in law provisions or render performance illegal?
- Material Adverse Change – will the effects of Covid-19, or any response to it, fall within a MAC clause?
- Suspension of performance/termination – are either of these possible and/or likely and, if so, what are the consequences, both under the terms of the contract – for example, liquidated damages – and as a matter of law?
- Notification obligations – are there notification obligations in relation to possible delays/suspension/termination/frustration?
- Mitigation – are there express provisions requiring parties to mitigate their losses in relation to possible Force Majeure or other events, such as obligations to use “reasonable endeavours” and devise commercial workarounds? Even if there are no express contractual provisions a failure to mitigate may still affect the amount of damages that can be recovered.
- Payments – can they be effected remotely?
- Guarantees/indemnities/performance bonds/liquidated damages – is there a risk of these being called on if obligations are not performed?
- Consequences of getting it wrong – if you act (or fail to act) based on an incorrect assessment of your rights, will you be in breach?
- Related contracts – will a failure to perform one contract have implications for other contracts?

- Non-contractual overlay – are there non-contractual obligations in a relevant jurisdiction that should inform your approach?
- Insolvency risks – do you need to deal with supply chain insolvencies? Is it possible (or necessary) to look to alternative suppliers or to agree to a commercial re-negotiation
- Renegotiation of terms – have you considered no waiver, no oral modification, entire agreement and related provisions, and ensured that any alternative arrangements are properly documented?

4. Manage financial arrangements

Borrower and lenders may need to review finance documentation and related arrangements to assess potential consequences and contingency measures. Considerations will include:

- Representations/Repeating Representations – is the company able to make the specified representations at the required times?
- Undertakings – can the company still comply with its undertakings? Does it benefit from any thresholds, grace periods or other reliefs?
- Information covenants – will financial statements be delayed? Are relevant parties (such as external auditors) able to access premises/information as needed? Will delivery of documents (such as financial reporting, operational certificates or waiver requests) be delayed due to employee absences? Is it necessary to disclose the impact on operations or any default?
- Financial ratios – are these adversely affected by historic or forecast loss of operational revenue or changes in asset valuations?
- Event of Default – is the company in a default situation and at risk of acceleration or of credit support being called or security being enforced?
- Material Adverse Effect provisions – will these be triggered?
- Cross-default risk – is the company at risk of default under any agreement due to its position under other agreements and financings?
- Insolvency – is the company at risk due to impact on revenues?
- Debt service – has the company put in place staffing and IT arrangements to ensure that it is still able operationally to effect repayments of principal and interest when due?
- Disruption event provisions – is there a risk of material disruption to market or individual payment systems which is beyond the control of the parties?
- Credit support – are financial support arrangements at risk of being called due to defaults or inability to access financing?
- Lender obligations – have lenders put arrangements in place to ensure disbursement is unaffected and waiver/amendment requests can be considered in required timeframe?
- Lender failings – are lenders at risk of being “yanked” or of their views on waiver requests not being counted due to an inability to respond?
- Access to financing – will lenders be able to process applications for new forms of financing, refinancing or credit support (such as letters of credit) when needed? Will companies be able to meet conditions precedent? Are alternative measures available?

- Negotiating new financing – will financial and operational forecasts and due diligence need to be updated? Will logistical arrangements need to be adjusted for transaction closing steps?

5. Consider insolvency risks

Consider your financial position and that of any contractual counterparties, in particular:

- Any concerns about the solvency position of any counterparties. What would be the impact on your business if they were to enter into an insolvency proceeding and cease to trade? Will they be able to continue to perform if their own supply chains are disrupted? If there are concerns then consider:
 - Finding alternative suppliers.
 - Tightening credit terms and including retention of title clauses until payment has been made.
 - Renewed efforts to collect any payment arrears.
 - Your termination rights and whether local law would permit you to exercise them in the event of insolvency.
 - The impact of other companies in your group going into insolvency, in particular, your access to vital assets (IP, IT, employees etc) and whether it is still appropriate to exercise group treasury/cash sweep mechanisms.
 - The impact of global stock market underperformance on pension scheme deficits and whether any obligations arise to consult with interested parties as a result.
 - Your ability to meet your payment obligations as they fall due and any steps you may need to take to manage your cash flow, such as pushing out your creditors. If your financial situation worsens, you may need to consider whether management is obliged to make an insolvency filing. Ensure that directors/management consider their duties and carefully document decisions.

6. Maintain appropriate data and documents

Ensure compliance with relevant data protection legislation. In the EU, data concerning health is subject to enhanced protection under the GDPR as special category data.

Document decisions and steps taken in response to the outbreak, for example where this may be necessary to comply (or evidence compliance) with contractual or legal/regulatory obligations or helpful in the event of possible future disputes (whether arising under contracts or otherwise). For example, some express obligations to mitigate may require you to demonstrate efforts made. Consider also whether and if so how documents might be protected from disclosure in any dispute (whether on the grounds of legal privilege or otherwise).

7. Consider potential insurance claims

Consider whether the consequences of any business interruption can be claimed under existing insurance policies, and discuss with brokers any need for cover on specific new exposures. In particular:

- Review existing cover, especially business interruption insurance and “credit insurance”, if any. For instance, existing cover may provide for “loss of use” of premises due to contamination or payment protection in the event that a debtor becomes insolvent and unable to pay. There may also be specific requirements in relation to unoccupied premises. Check terms for notice periods and other formal requirements.
- Make notifications where applicable and comply strictly with obligations in relation to how and when to notify.
- Discuss with brokers whether bespoke cover may be advisable, including where there are large employee absences contemplated or where large groups of employees may need to be repatriated.
- Consider whether insurer consent will be required for any steps you anticipate taking to respond to events and whether mitigation activities may fall under any available heads of cover.

8. Manage wider operational risk

Consider wider operational impacts, for example in relation to:

- Managing the wider logistics (and costs) of halting “business as usual” activities – this may be significant in some sectors, for example where factory shutdowns are required.
- Inability to hold or attend physical meetings and events (for example shareholder general meetings) – to what extent can these be held remotely? Will the technology be sufficiently reliable?
- Minimum staffing levels required to maintain operations.
- IT disruption (for example where this is outsourced) and ability to continue financial and operational activities dependent on IT systems, whether on site or remotely.
- Attendance at site visits, tests and inspections.
- Attendance at time-critical events, in particular where there may be adverse consequences from a failure to attend, such as court or tribunal hearings or public exams.
- Inability to obtain signatures, for instance in relation to documents requiring physical signing.
- Obligations to report on risks arising from (or the impact of) Covid-19, including in financial reports, or under market abuse laws.
- Providing timely information required by regulatory or legal authorities, for example where relevant staff or access may be unavailable.
- How to respond to stakeholder queries or press enquiries and whether you need to appoint a spokesperson and internal PR controls to manage this.

9. Consider impact on potential M&A transactions

Businesses looking at entering into M&A transactions with targets that may have trading links with affected areas or sectors may wish to consider delaying or taking steps to protect themselves, for example via bespoke due diligence, conditions, termination rights, pre-completion undertakings, warranties or indemnities. [Please see our February 2020 bulletin on this issue, here, for further details.](#)

10. Stay up to date on your rights and obligations

Ensure that the team leading the response keeps up to date with the evolving situation:

- Comply with current legal obligations and guidance: many aspects of your response will be informed by your legal and regulatory obligations in each relevant jurisdiction and by guidance already given by relevant authorities. It is important that your response team has a good understanding of those obligations and ensures compliance with them.
- Identify and respond appropriately to changes to relevant legal obligations or guidance: your room for manoeuvre may well be constrained not just by the current legislative regime in relevant jurisdictions but also by any new emergency legislation or regulatory and industry guidance. Any legislation may well allow for draconian measures to be introduced in a very tight timeframe. Guidance from Governments, regulators, multilateral organisations (for example the World Health Organisation) and industry groups or representative organisations in relevant jurisdictions may also be updated frequently and will need to be monitored. Regulators are already making clear their expectations, for example in the UK, the recent FCA/Bank of England/HM Treasury statement that they expect all firms to have contingency plans in place to deal with major events.
- Liaise with Government and industry bodies where necessary on the extent and impact of any controls that may be imposed.

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