

CORONAVIRUS:

GENERAL BRIEFING NOTE NO 1

FOR DIRECTORS, CHIEF EXECUTIVE OFFICERS AND IN-HOUSE LAWYERS

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1. INTRODUCTION:

This is a briefing note on key COVID-19 issues for Directors, Chief Executive Officers and In-house lawyers to consider. We expect the Board to have considered the following COVID-19 related issues and taken steps to mitigate the risk:

- 1.1. Indemnity
- 1.2. Insurance
 - 1.2.1. Public Liability Insurance cover
 - 1.2.2. Director's and Officer's Liability cover
 - 1.2.3. Cybercrime and Data Protection Insurance cover
 - 1.2.4. Professional Negligence against insurance/broker
 - 1.2.5. Business Interruption Insurance
- 1.3. Negligence Claims
 - 1.3.1. General negligence
 - 1.3.2. Statutory. For example, Health and Safety obligations.
 - 1.3.3. Vicarious liability for the acts of the employee by the employer.
- 1.4. Employment Tribunal Risk
 - 1.4.1. Coronavirus Job Retention Scheme
 - 1.4.2. Shielding
 - 1.4.3. Self-isolating
 - 1.4.4. Sick Pay
- 1.5. Provider Victimisation
- 1.6. Human Rights

2. INDEMNITY:

- 2.1. England, Wales and Scotland: The Corona Virus Act 2020 extra layer of indemnity for healthcare providers only. It does not include social care providers.
- 2.2. Northern Ireland: Indemnity covers both health and social care providers.

3. INSURANCE:

3.1. Public and Employers Liability Insurance

3.1.1. Public and employers' liability claims may arise from allegations of failures to protect staff and customers from COVID-19. Whether or not you are covered will depend on the exact wording of your policy. It is important to seek professional review your policy to ensure you ask the right questions to establish whether or not your specific policy covers COVID-19-related claims?

3.1.2. Some insurance companies are excluding COVID-19 in new policy cover because they argue COVID-19 is no longer an 'unforeseeable event' to be covered by insurance. Therefore, it is important to explore extending current insurance terms where they afford coverage or to start your insurance renewal process early because the insurance options are fewer and insurance costs are likely going to be significantly higher by up to 25% to 50%.

3.2. Directors and Officers Liability

3.2.1. Directors and officers (together called "Officers") owe a duty to the business and, if insolvency threatens, to creditors ("Officers duties to business").

3.2.2. Officers are also **personally liable** for their acts where these are outside the scope of the Officers' duties to the company. These can range from health and safety to a claims for breach of duty, negligence, defamation or even pollution and prosecutions. It is therefore important to ensure that you have Directors' and Officers' liability insurance and that this covers the actions officers take in response to COVID-19, including defending any prosecutions by public bodies, such as the Health and Safety Executives, Local Authorities or the police.

3.3. Cybercrime and Data Protection Insurance

3.3.1. The Information Commissioner Office (ICO) has published a document setting out our regulatory approach during the coronavirus pandemic ("Guidance")¹. The ICO accepts its responsibility to take into account the exceptional circumstances of the coronavirus pandemic and set out the flexibility the law gives us to be a pragmatic and empathetic regulator. We confirm our efforts will be focused on the greatest threats.

3.3.2. Given the nature of the COVID-19 pandemic, personal details are going to be processed in unusual ways. This may potentially breach the Data Protection Act or your own Data Protection policy, so it is important to ensure that you have cover for Data Protection, which includes both personal data and sensitive personal data, such as medical records e.g., testing data.

3.3.3. Please note that testing is voluntary and staff or residents do not need to reveal their results. This is a direct conflict between data protection laws on the one hand and health and safety on the other hand.

3.4. Professional Negligence

Professional Negligence claim against an insurance or broker may well be available that the cover which was brokered for you does not cover either the

¹ <https://ico.org.uk/media/about-the-ico/policies-and-procedures/2617613/ico-regulatory-approach-during-coronavirus.pdf>

pandemic or other issues that arise out of the pandemic. In this case, it would be useful to look at how you arrived at the insurance – whether you did provide the information necessary for the broker to establish that the cover that was eventually offered included the events that have now arisen.

3.5. Business Interruption Insurance

3.5.1. Business interruption insurance (BII) is designed to protect businesses against the financial loss suffered as the result of a property claim. BII seeks to covers the income a business would have received had the incident not happened.

3.5.2. Of the policies we have reviewed so far, only a limited number have included business interruption cover that would extend to losses arising from COVID-19. It is not surprising that COVID-related BII are being routinely rejected. The FCA has recognised the widespread business concern about the lack of clarity and certainty for some customers making BI claims, and the basis on which some firms are making decisions in relation to these claims. The dispute hinges on whether the lockdown and the coronavirus are enough to trigger a clause in business interruption insurance, designed for insured premises that cannot be used because of restrictions imposed by a public authority and in the event of a notifiable disease or infection. Group action has commenced against a number of insurers, such as Hiscox.

3.5.3. The Financial Conduct Authority (FCA) has published its expectations of insurance firms under its document “Insurance Cover and Corona Virus (COVID-19)” which is available at www.fca.org.uk/firms/insurance-and-coronavirus-our-expectations. The FCA expects firms to consider very carefully the needs of their customers and show flexibility in the treatment of their customers.

3.5.4. FCA has applied for the courts to examine typical business interruption insurance policies and to seek court declarations as part of a test case, aimed at resolving the contractual uncertainty around the validity of many BI claims.

4. PROVIDER VICTIMISATION

This will cover threats by public authorities against future placement with providers that refused placement of COVID-positive patients or those who have not been tested. There are significant liability issues arising from infected users being placed in, for example, care services. Providers will need careful documentation of this so that it can form effective evidence in support of pushbacks, future legal action or serious conversation.

5. CORONA VIRUS JOB RETENTION SCHEME

It would be important for providers to maintain robust records of their decision, retained for at least five years should there be HMRC Audit during this time. Other items which the provider must retain include the business case and justification of the Provider Furlough Decision; and all versions of guidance that the Provider relied upon in carrying out the Corona Virus Job Retention Scheme.

6. EMPLOYMENT TRIBUNAL RISK

6.1.1. Under the Health and Safety at Work Regulations, relevant factors within the COVID-19 pandemic will include Personal Protective Equipment (‘PPE’) shortages,

lack of testing, outbreaks amongst clients and staff, increased risk from underlying health conditions, age, and pregnancy if infected.

6.1.2. Other issues would arise from the lifting of lockdown in homes and will require careful thought for creative solutions. To this end, it would be important that providers review and monitor contracts, policies and safety procedures.

7. HUMAN RIGHTS

There are conflicting rights here. These include the following: Rights to family and private life – e.g., relevant for visits by relatives and other visitors; the right not be deprived of liberty and the right to life. These are other relevant human rights must be considered in each situation.

Please contact us if you would like a briefing on Zoom or with any issues you would like further advice on issues identified.
