Coming out of lockdown: the next normal

Q & A Guide

WALKER MORRIS

People Management: Employee Relations

Do I need to consult with my employees about the return to work?

Yes. It is important to consult with your employees and their representatives about the coronavirus risk assessment and how you are planning the return. This includes consultation with union representatives where employees are unionised. The government has placed an emphasis on a collaborative approach and states in its guidance that *"At its most effective, full involvement of your workers creates a culture where relationships between employers and workers are based on collaboration, trust and joint problem solving."*

What do I do if an employee refuses to return to work?

Talk to them about their concerns in the first instance (bearing in mind the collaborative approach which is required). Discuss the reasons for their concerns and explore if there are any ways you can alleviate those concerns. You should talk employees through your coronavirus risk assessment and explain why the business has determined that it has met the "Covid-secure" guidelines.

I have tried talking to my employee but they are continuing to refuse to return - what can I do?

If you do not believe there is a "valid reason" for refusal, then you might decide to commence a procedure on the basis that the employee has failed to follow a reasonable management instruction, but note that this is not without risk given the current situation, particularly given that there are various health and safety related employment claims that employees can bring. Specialist legal advice should always be sought.

Are my duties under Equality law relevant in this context?

Yes. Additional considerations apply for those with protected characteristics – in particular:

- Consider what reasonable adjustments can be made for individuals with a disability (including a search for suitable alternative roles – particularly those which can be carried out from home and/or roles where social distancing is possible).
- For those who are pregnant, there is a duty to amend working conditions to ensure their safety or, if that isn't practicable, offer a suitable alternative role where the terms are not substantially less favourable. If you can't offer a suitable alternative role, you will usually need to suspend the employee on full pay.
- There may be other employees in certain protected groups who face difficulties – for example, those with childcare responsibilities (who may seek to argue that a policy forcing them to return is indirectly discriminatory on the grounds of sex). In addition, we are yet to fully understand the statistics regarding the virus being more likely to have a severe impact on ethnic minority groups. Specific consideration should be given to any individuals who are in such protected groups.

People Management: Employee Relations

My employees have returned to work, but they are failing to follow the new rules - can I discipline them?

You can commence a disciplinary process if employees fail to follow new rules and policies which they have been made aware of – but you must consider each circumstance individually. You must ascertain what is "reasonable" in the circumstances – which will be difficult to do given that this is an unprecedented situation. Employees have a duty to co-operate to protect their health and safety and the safety of others. The key point is to make sure policies and procedures are updated and that employees are fully aware of what is expected of them.

Can I change my employees shift patterns?

There are recommendations in the Covid-secure guidelines regarding staggering shift patterns and start and finish times. However, you must remember that these changes are likely to constitute contractual variations – you will therefore need to seek agreement to such changes from your employees. As set out above, communication and consultation is key.

Is there anything else to consider?

Employers must take a collaborative approach with employees. Government advice says: *"We urge employers to take socially responsible decisions and listen to the concerns of their staff. Employers and employees should come to a pragmatic agreement about their working arrangements."* The emphasis here is on being more understanding in the circumstances.

In addition, the above analysis will of course evolve over time – i.e. once the government changes the advice from "work from home if you can", then a management instruction asking employees to return might be more "reasonable".

People Management: Health & Safety

Ensuring the workplace is safe

Government guidance published on 11 May 2020 provides sector specific advice on how employees can safely return to work, with suggested measures to reduce workplace risk to the lowest reasonably practicable level (see: https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19).

What are the HSE's powers?

The HSE have wide ranging powers to ensure duty holders meet their legal requirements under health and safety legislation, including the ability to turn up, unannounced, and inspect premises. The message from the HSE was clear – to ensure government guidance is being followed and employees returning to work are safe, spot inspections will be carried out to ensure companies are keeping people safe. A review of Coronavirus Risk Assessments will inevitably form part of the inspection process.

Will HSE use enforcement powers?

Yes. HSE sent a clear message that they will not hesitate to use their wider enforcement powers. These include ensuring businesses take certain actions within a particular time frame (Improvement Notices) and prohibit certain activities from taking place where there is a serious risk of injury (Prohibition Notices).

The messaging demonstrates a strong commitment from the HSE that they will not hesitate to prosecute those businesses who blatantly and maliciously do not follow the rules. Fines for non-compliance with safety legislation are theoretically unlimited so it is abundantly clear that employers must be aware of, and comply with, COVID-safe practices as their employees return to work.

Legal obligations

All employers have a duty under the Health and Safety at Work etc. Act 1974 (HSWA) to protect, as far as reasonably practicable, the health, safety and welfare of their employees and those affected by their undertaking. In relation to risks posed by the Coronavirus, this principally includes implementing social distancing and avoiding person to person contact, wherever possible.

What is 'reasonable'?

To demonstrate working practices are objectively reasonable and evidence compliance with HSWA obligations, a carefully considered and specific Coronavirus risk assessment will be key. This should identify essential / non-essential activities and appropriate risk mitigation measures. Where activities are identified as non-essential or high risk, they should be avoided.

Do I need to carry out a Coronavirus Risk Assessment?

Yes. You need to show that reasonable procedures to ensure the health, safety and welfare of your employees are in place. Share Coronavirus Risk Assessments with employees and, if possible, publish on your website and display in the workplace. Businesses employing over 50 people are "expected" to publish their risk assessment and those who do not are likely to be subject to further scrutiny.

If you have fewer than five employees, or are self-employed, you don't need to produce a formal written risk assessment. However, for every other business the risk assessment should be written down, setting out specific risks and the measures implemented to minimise those risks.

People Management: Health & Safety

RISK ASSESSMENTS - A PRACTICAL GUIDE

For many, the concept of undertaking a comprehensive assessment of the risks arising from the Coronavirus will seem overwhelming. But it doesn't need to be complicated. All businesses should be used to producing risk assessments and a Coronavirus risk assessment is no different. Set out below are key things every business should think about during this process.

KEY PRINCIPLES

Identify where person to person contact is likely to occur and minimise/eliminate that contact, where possible. Think about whether you can:

- Reduce the number of employees on site at any one time.
- Stagger start/finish/break times.
- Implement shift patterns. Can you create and maintain shift cohorts?
- Record your risk assessment in writing. Keep it simple, clear and concise.

WHERE TO START

Take a logical approach – how and where do employees/customers arrive at the premises? Now, follow their journey around the site to identify possible points of contact. For example:

- **Car parks** - Can you block out alternate spaces? What about car sharing? Employees taking public transport?
- **Doors** - Can you have one entrance and one exit? Will this also be used by customers? Consider providing hand sanitiser.
- **Reception area** - Can you mark out two meters from your reception desk and use a plastic screen?
- **Cloakrooms and toilets** - Do you have appropriate space? Are additional racks required? Do you need separate facilities for employees and customers?
- **Lifts** - Are stairs an available alternative? Consider limiting the number of people in the lift and providing hand sanitiser.
- **Shop floor** - Identify the best single direction route and mark it out along with 2m intervals? Can you limit the number of customers in the premises at any one time? Do you need to protect employees on the shop floor by using PPE or plastic screens?
- **Employee floors/warehouse space etc.** - How many employees can safely be in the premises at any one time? Do they require PPE? Do you need to control the direction of movement? Can you provide employees with their own work stations/equipment? How will you manage shared equipment e.g. photocopiers? Do you need any additional facilities e.g. hand washing stations? Use signage, demarcate two metre intervals, encourage good hand hygiene and remind employees of any key principles you want them to follow.
- **Staff kitchen/canteen areas** - How will you provide access to refreshments? How will you manage shared facilities? Can you stagger break/lunch times? Can employees go outside on their breaks? Consider smoking shelters and how to avoid people congregating.

What else to think about

You should specifically identify all tasks that involve employees working closely together. These should be reviewed to establish if they are essential and/or can be done differently. Where tasks are essential and social distancing cannot be maintained, employees should work side by side or back to back, rather than face to face, and limit any face to face contact to 15 minutes.

People Management: Health & Safety

OTHER PRACTICAL THINGS YOU SHOULD CONSIDER:

- Do you have the appropriate equipment/ facilities/PPE and if not, how will you source it?
- Do you have contract cleaners? Do you need to increase the frequency of cleaning, particularly in high risk areas?
- How will you communicate with your employees/customers? Do you have up to date emergency contact details for all employees?
- How will employees raise any concerns about the work environment? What about vulnerable employees?
- Do you need first aid provision? How will this be safely and effectively provided?
- What should employees do if they or a member of their household displays symptoms of Covid-19?

What next?

Once a risk assessment has been completed and control measures identified, it is critical that these are implemented before the work place reopens and are communicated to everyone before they arrive / on arrival.

Re-iterate the new measures frequently (posters, leaflets and/or announcements may be appropriate) and take steps to ensure compliance.

Periodically review and audit the risk assessment/ control measures to ensure they are fit for purpose, being followed and are working effectively. Encourage employees to provide feedback and commentary as part of the process to ensure they feel safe at work and that the measures are practical.

People Management: Data Security

As working from home becomes more common, what should we do to maintain data security?

Put an agile working policy in place – this should let employees know what is expected of them when working outside the office. It can also be provided to regulators to demonstrate your compliance considerations. If employees are allowed to use their own phones or laptops, then a separate Bring Your Own Device policy might also be appropriate.

Install appropriate security measures on all devices on which personal data is processed – virtual private networks (VPNs) and anti-virus software will mitigate some security risks. Further considerations will be needed depending on the level of risk home working poses in the context of your business, and the purpose of your data processing activities.

Review how employees keep hard copy documents and other information at home – any personal data processed by an employee at home, or anywhere else, will constitute a processing activity by the organisation (and remember that the storing of personal data is in itself a processing activity). The same data protection, storage limitation and secure destruction principles therefore apply. Where employees don't have the capability to securely destroy documents, then documents should be kept safe until they can be taken back to the office for shredding.

Take care when transporting personal data to or from remote working locations – and be careful when making data accessible online. Undertake due diligence on any file sharing sites used, and prohibit staff from forwarding work emails to personal email addresses.

Ensure any collaboration software adequately protects any personal data involved – where cloud based collaborative working software is involved, the software provider is likely to be acting as a processor on behalf of your organisation. The terms and conditions will therefore need to contain the mandatory provisions in article 28 GDPR. Review transfers outside of the EEA (to servers in the USA for example) to ensure adequate protection is in place.

Remind employees that confidentiality must be maintained when discussing personal data – and to use the usual security measures when working with personal data in shared areas or in close proximity to others (even family members). Regardless of where employees are working, you will need to report any data breaches in the ordinary way**.**

Maintain reporting lines for the escalation of any data protection matters – such as data breaches or requests by data subjects to exercise their rights in respect of the processing of their personal data. Maintain these escalation processes wherever staff are located. Where a breach is reportable, you must inform the ICO within 72 hours. Similarly, to avoid any failures to comply with requests by data subjects, employees need to be able to independently recognise these and forward them on as appropriate, even when working away from the office.

During the coronavirus pandemic, the ICO has confirmed it will take an empathetic and proportionate approach to regulation. As we start to move back towards a semblance of normality, the potential for any leniency is removed and expectations will return to their usual high standards. As agile working is normalised, take care to ensure that data protection obligations continue to be met.

Customers & Suppliers

I chose not to enforce my rights during the pandemic - where do I stand now?

What you can and cannot validly do is primarily governed by the terms of the specific contract. Right now, you should:

- Consider what, if any variations or waiver of contracts, have taken place.
- Review the terms of existing contracts and ensure that prescribed formalities are complied with in either varying or waiving a right under a contract.
- Specify exactly what right you have waived. If the right is a continuing one, for instance a continuing right to receive delivery of an item every week, you should specify what period of time the waiver operates for. If you merely intended for delivery of one item to be delayed, you should make this clear in the notice.
- Consider formally reserving your rights to the party in breach in writing if you are concerned that you may have inadvertently waived a right under a contract, including by delaying taking any action in relation to the breach.

How will lifting of restrictions affect any current use of a force majeure clause?

Where force majeure has been called, parties will need to carefully consider what the contractual trigger was, and if a lifting of lockdown measures will mean the end of that event and therefore an end of the relief granted. Where the relief has ended, parties need to be alert to the risk of termination for failure to perform, even if the lifted provisions of lockdown mean that performance will be difficult, inefficient and/or costly.

What if we allowed/were granted some relief/ commercial forbearance?

As lockdowns are lifted, pressure may start to build on such arrangements, particularly where they are informal. Many contracts contain a 'No Waiver' clause which requires any waiver of strict enforcement of rights to be in writing in order for it to be enforceable. In the case of informal agreements relieving a party of its performance obligations, there may therefore be nothing in the contract to stop the waiving party from requiring full performance once more at any time.

We agreed to vary obligations/waive rights in the light of the pandemic. Will those still be valid once restrictions are relaxed?

If you chose not to enforce your rights in relation to a failure of performance by the other contracting party, you may have legally "waived" that right.

Any right that exists under a contract can be waived by the party that holds that right. For instance, if your contract provided for delivery of certain items to take place at certain times after the lockdown commenced and the supplier did not deliver those items, you would have a right to sue for breach of contract. If you didn't take steps at the time to preserve your right to sue for breach of contract, but accepted the continuing non-delivery, then you might be taken to have waived your right to do so in future, whether you intended to waive that right or not.

In order to constitute an effective waiver, a statement or your conduct must unequivocally indicate an intention to give up, or promise not to, enforce a right. A short period of inaction can constitute an effective waiver, as can allowing the breaching party time to perform.

If you have waived your rights due to the lockdown, you should now achieve certainty by stating in writing to the party in breach exactly what right you have waived. This will help if the other party argues that you have waived your rights in relation to similar breaches in future.

Customers & Suppliers

I think the other party to the contract has waived their right - can I rely on that?

Review the terms of relevant contracts to ensure no terms restrict you from relying on an apparent waiver. Contracts often contain a 'No Waiver' clause, which may prevent any failure or delay being taken as establishing a waiver of the right to enforce that obligation.

'No Waiver' clauses do not automatically stop waiver being established – whether the clause is effective will depend on the specific drafting and the circumstances that give rise to the apparent waiver. If the clause is poorly drafted or the facts surrounding the breach are exceptional, waiver can still be established.

Similarly, your contract may contain a 'No Oral Waiver' clause that specifies that any failure to enforce a right under a contract only constitutes a waiver of that right if it is in writing. Despite the existence of such a clause, you may still be able to rely upon an oral waiver of a right if you can establish unequivocal conduct showing that the oral variation is valid notwithstanding that it does not comply with the 'No Oral Waiver' clause. Courts may be more willing to find that an oral waiver has taken place notwithstanding the existence of a 'No Oral Waiver' clause in order to restrict unscrupulous parties abusing such clauses to their benefit in the Coronavirus context.

Can we formally vary the contract?

You may not have considered it necessary to formally vary your contract due to Coronavirus. You might, instead, have reached informal agreements to put contractual obligations "on standby" until a more normal business outlook is resumed.

If you intend to formally vary a contract you should check for clauses prescribing:

- Whether you are permitted to vary the terms of the contract; and/or
- What procedure must be followed to vary the relevant contract e.g. must the variation be in writing.

What if there is a second wave of restrictions?

If restrictions are re-imposed, there may be an expectation that parties are more adaptable and should have been taking steps to prepare now, so reliance on formal or informal agreements between parties to allow commercial forbearance are less likely to be agreed in circumstances where the scale and nature of the disruption should be known in advance.

If a business does want to rely on a force majeure clause again, it is important to take the required contractual steps afresh. Don't assume the other parties know you want to rely on this, or that you can escape formalities.

Ensure you are complying with any notice provisions, and make sure you are ready to mitigate the impact the second wave is having. You will likely need to show that you have taken reasonable steps to limit the impact.

Time spent working on supply chain resilience, and enhancing business continuity planning now is likely to be time well spent, particularly if a second wave does strike.

Is termination a risk?

If it becomes apparent that there will be a second wave of restrictions and the impact will be much longer than originally anticipated, parties may want to revisit their termination provisions and even consider the doctrine of frustration (where it becomes impossible to perform a contract). However, timing is key. If parties wait until lockdown provisions are released they risk the force majeure event coming to an end and potentially wrongfully terminating.

Customers & Suppliers

Are there any other provisions we should consider?

Now is also a good time to check for other helpful provisions in your contracts that may be triggered to help with the long term effects before a second-wave. For example price review mechanisms and provisions for trading with companies at risk of an insolvency event. It is important to also consider if existing provisions may give rise to new obligations, such as an obligation to provide relevant PPE or to operate in ways which comply with new government guidance. Many contracts will apply the default position in which the cost of such compliance falls on the impacted party (usually a supplier), but some may include a mechanism allocating costs.

What about contracts I'm entering into now?

Going forward it will be insufficient to rely on generic clauses for events that could be readily anticipated in the current climate and particularly before an arguably predictable second wave. Any force majeure clause should be specific about the trigger events and the relief it gives. It will also be important to make sure your agreements are flexible. Are the termination provisions sufficient that you can exit if you need to? Consideration should also be given to serving notice in circumstances where many businesses are closed.

A collaborative approach to variation, dispute resolution and service levels/service credits which may not ordinarily be considered would also be helpful in preparing for a second wave.

WHAT PRACTICAL STEPS SHOULD YOU TAKE?

- Prepare to be challenged or to challenge if an existing force majeure event has ended, and therefore the relief that it offers has come to an end.
- Check your contractual provisions in existing contracts and consider if any force majeure relief will still apply.
- Start preparing now for how you can adapt if there is a second wave of restrictions.
- Document the steps you have taken in each circumstance – this may be particularly useful for any future claims.
- Don't assume you can rely on the same contractual relief you are relying on currently.
- Where you are considering terminating an agreement, make sure you are aware of the requirements and notice provisions – this may not be a quick fix.
- Consider if there is any other relief available in your contract.
- Make sure your new agreements are adapted for both the current situation and any second wave.

Commercial Property: I'm a landlord

I'm worried my tenant will continue to not pay their rent. What should I do?

The UK government has introduced a number of measures that preclude commercial landlords from forfeiting commercial leases and evicting tenants for non-payment of rent. The government has also announced that there will be a temporary ban introduced on commercial landlords (and all other creditors) on the use of Statutory Demands and Winding up Petitions where companies are unable to pay their bills as a result of coronavirus.

The majority of these measures will remain in place until 30 June 2020 and will be reviewed thereafter.

Although the Government has made these announcements it is unlikely you are under an obligation to agree to any rent deferment or non-payment, unless there's a specific provision in the lease (again, unlikely).

However, commercially, it might be sensible to come to an arrangement with your tenant. It's unlikely that you'll be able to re-let the premises at the moment and it is uncertain what the market will look like once restrictions have been eased, and you might just expose yourself to more cost in the long run. Just remember to properly document any alternative arrangements.

Speak to your lender to discuss deferring interest and possibly suspending financial covenants so you have room to negotiate rent forbearance. Prepare your request carefully to make the lender's credit decision as easy as possible.

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Should I continue to keep premises closed?

Whilst non-essential shops have been forced to close, this is likely to legitimise steps to close premises to ensure that staff, tenants and visitors are protected and to comply with the government directive.

However, now that the government has announced that most non-essential shops are to soon open, there's a chance that such action might amount to a derogation from grant and whether any closure is lawful will depend on the facts of the particular case. It's also unlikely that you'll be able to insist on rent payment should you close the property.

Am I able to ask a tenant to pay for extra cleaning and other costs associated with Covid-19?

It depends on the terms of the lease. Generally speaking, most service charge provisions include recovery of cleaning costs and they may allow for other costs to be recovered. Whilst they might be higher at the moment, we think the courts will likely see them as reasonably incurred – subject to any cap.

Commercial Property: I'm a tenant

Covid-19 has reduced my cashflow and I'm worried that I still will not be able to pay the rent when the lockdown restrictions are lifted. Can I defer?

It's unlikely, unless there is specific provision in your lease (also unlikely). If your landlord takes a strictly legal position, they're probably entitled to continue to demand rent from you. However, please note the comments within the landlord section relating to commercial landlords being precluded from forfeiting commercial leases for non-payment of rent until at least 30 June 2020. This means you are temporarily protected from a forfeiture claim from your landlord if you do ultimately fail to pay the principal rent due. For further information on this please read the separate advice note that we have prepared on this issue here.

Rent suspensions generally only apply if premises are damaged or destroyed. However, it's possible that your landlord is also thinking about commercial and reputational risks. In these exceptional circumstances, they might be flexible. Just remember to properly document any alternative arrangements.

Will I have to re-open my premises when Covid-19 restrictions are relaxed - especially if my staff refuse to return to work?

Check your lease. If there are 'keep open' and/or turnover clauses, you run the risk of being in breach of the terms of your lease. Keeping your premises closed is only likely to be legitimised whilst the government's directive is for all non-essential shops to close.

Remember, whilst the premises are closed, you'll also still probably need to pay your rent, as there's likely nothing in your lease to provide for this situation. However, again, speak to your landlord to see if you can reach a solution together. Also check your insurance policies.

What do I do if there is a disruption to postal services or such services are suspended. How do I serve notices?

It is important to check the service provisions in the leases and in legislation very carefully to see whether alternative methods of services can be used, such as by hand. Most property notices cannot be validly served by email only.

You should undertake a review of all your leases and consider at an early stage whether you want or need to serve any notices such as break notices. Contact your legal advisers at the earliest opportunity so that preparation and planning can be undertaken as it is likely it will be necessary to build in extra time to allow for service.

Commercial Property: Landlord & Tenant

Will my insurance policy pay out whilst I have had to close my premises?

Tenants and Landlords should review their leases and insurance policies and speak with their brokers/ insurance companies and understand the cover available. For example, some policies have cover relating to notifiable or infectious diseases; others loss of attraction of the demised premises or denial of access through government action. All of these types of provisions need be reviewed carefully to see if the insurer must pay out in the particular circumstances of the insured party.

Where this is the case, both landlords and tenants should be careful to ensure that they notify the insurer of any potential claim at the earliest opportunity and certainly within any parameters specified by the insurance policy. There are likely to be notification obligations under the relevant policy and failure to comply with the policy provisions is likely to prejudice any insurance cover that may be available.

We are aware that a number of insurers are refusing claims made by both landlords and tenants. As a result, the FCA released a statement on 1 May 2020 announcing the unprecedented step they are taking to obtain a court declaration to resolve uncertainty regarding business interruption insurance and whether certain insurance policies will cover for business interruption related to the current pandemic crisis.

Residential Property: I'm a landlord

What is the current Government position?

Housing Secretary Robert Jenrick revealed last week that the Government is working closely with the Lord Chief Justice to ensure that a Pre-Action Protocol for the Private Rented Sector (PRS) is put in place when the current "eviction ban" is lifted.

Mr Jenrick told MPs that the Pre-Action Protocol will apply at the end of the moratorium on evictions, whether that's in late June or later in the year, if the moratorium is extended.

Mr Jenrick said the Protocol will enable tenants to have an added degree of protection, because instead of embarking upon the eviction proceedings immediately, there will be a duty upon landlords to reach out to tenants to discuss their situation, and try to agree an affordable repayment plan. He further suggested that this will enable tenants to remain in their homes, and to deal with the rent they haven't been able to pay because of their circumstances.

What are the current restrictions and changes to possession proceedings during the Coronavirus pandemic?

At present the Coronavirus Act 2020 has imposed a statutory notice period of three months for both section 21 and section 8 notices. This is for notices served between 27 March and 30 September 2020 (although the latter date may be extended).

In addition, the Ministry of Justice released a new Practice Direction which requires Courts to place a 'stay' (a hold) on all claims filed within a 90 day period commencing on 27 March. Claims will still be issued by the Courts, however no further action to progress the claim will be permitted during this 90 day moratorium period.

What happens now (and pre-Coronavirus) in the Private Rented Sector regarding rent arrears?

At present, a PRS landlord is not required to comply with a Pre-Action Protocol before possession proceedings for rent arrears are commenced. There is however a statutory notice (under section 8 Housing Act 1988) which must be served upon the tenant to notify them that the landlord intends to seek possession via the court should the arrears not be repaid before a set date. The notice period is 14 days (as stated above, this notice period has been temporarily extended under the Coronavirus Act 2020 to three months).

In practice, a section 8 notice is usually served when the tenant has a rent arrears of at least 2 months. In addition, there are often some communications with a tenant before a landlord decides to serve a section 8 notice, in an attempt to resolve matters. The notice is usually served as a last attempt to highlight the seriousness of the arrears situation to the tenant and to prompt them into to properly addressing the arrears

How does this differ in the Social Housing Sector?

Social Housing providers are required to comply with the 'Pre-Action Protocol for Possession Claims by Social Landlords' ("the Protocol"). This is a set of rules which is intended:

(a) to encourage more pre-action contact and exchange of information between landlords and tenants;

(b) to enable the parties to avoid litigation by settling the matter, if possible; and

(c) to enable court time to be used more effectively, if proceedings are necessary.

This Protocol applies in respect of the landlord's actions both before and after service of the section 8 notice.

Residential Property: I'm a landlord

How could the Protocol be applied in respect of the PRS?

To comply with the Protocol, it is likely that a PRS landlord will need to demonstrate it has exhausted all reasonable options to resolve the arrears situation with the tenant, before court proceedings are commenced.

Professional landlords and property managers usually have an arrears process involving various methods of contact with the tenant to some degree already. The change in procedures/workload may not therefore be significant, but timings and record keeping will need to be adjusted, along with further consideration of what extra support might be given to the tenant to reach a solution regarding repayment of arrears.

Increasing the frequency of attempts to communicate with the tenant (who due to Covid may be relying on or eligible for state benefits) and ensuring the tenant is provided with as much support as possible to assist with a solution, will therefore be key to compliance with the Protocol.

What could this increased communication look like?

- Communications with each named tenant individually (rather than addressed jointly).
- Provision of easy to understand rent account statements showing all payments due and any payments which have been received (separated by those directly from the tenant and those paid via Housing Benefit), along with a running balance of the arrears.
- Asking the tenant if there is an ongoing Housing Benefit claim in progress which is likely to pay the arrears and /or future rent payments and, if not, asking them if they would like help with the application or signposting them to an advice agency or charities that could provide help with claiming any applicable state benefits.
- Consulting with the local housing authority (with the tenant's permission) on any solution they can assist with, such as a discretionary housing payment to pay down the arrears.
- Making an application to Universal Credit (or the Local Authority if they are still managing the payment) under Housing Benefit Regulations 2006 for direct payment to the landlord of any housing benefit element the tenant is receiving.
- Asking the tenant to complete an income and expenditure form and/or to make a repayment plan offer for consideration.

The Protocol currently requires the landlord to conduct the initial communications with the tenant before the statutory (section 8) notice is served and, following that notice, further communication is required before court proceedings are commenced. As the section 8 notice period is currently extended from two weeks to three months, this time based structure may differ when the full details of the PRS Protocol are announced.

What about Universal Credit/Housing Benefit claims?

The current Social Housing Protocol states the following in respect of Universal Credit or Housing Benefit claims:

"Possession proceedings for rent arrears should not be started against a tenant who can demonstrate that –

(a) the local authority or DWP have been provided with all the evidence required to process a housing benefit or universal credit (housing element) claim;

(b) there is a reasonable expectation of eligibility for housing benefit or universal credit (housing element); and

(c) they have paid other sums due that are not covered by housing benefit or universal credit (housing element)."

Replication of this directive regarding non-issue of proceedings in the PRS context could well lead to significant delays in respect of landlords being able to progress arrears cases to Court. The financial implications would therefore be significant.

Residential Property: I'm a landlord

What may happen if the PRS Protocol is not followed?

As the law currently stands in the Private Sector, where possession is sought on the basis of rent arrears relying on the mandatory ground (Ground 8) a Judge is required to make an outright order for possession, so long as the landlord can demonstrate the requirements of that ground have been met (i.e. at least 2 months arrears when the notice is served and also at the date of the possession hearing).

Unless new legislation is introduced to temporarily suspend the use of Ground 8 for any arrears that have accrued for Covid-related reasons, there is no statutory basis a Judge could refuse to make an outright order for possession where Ground 8 applies, even if the PRS Protocol is not followed.

Non-compliance with the Protocol in an arrears case may however impact upon the costs order the Court may make or it may influence the use by the Court of its limited "exceptional hardship" statutory discretion in Ground 8 cases (under section 89 of the Housing Act 1980) to delay the date for delivery of possession under the court order by up to 6 weeks (rather than the usual 14 days).

What should PRS landlords and Property Managers be doing now to prepare for the introduction of the Protocol?

The detail regarding the application of the Protocol to the PRS is unlikely to be released much before the expiry of the existing Court moratorium on 25 June (or any Government extension of that date).

PRS landlords and their operators/property managers can however review their current arrears policies/ procedures/template documents and think about how they should be adapted to comply with the enhanced tenant consultation that the PRS Protocol is likely to require (based on what is already in the existing Social Housing Protocol).

Once the PRS Protocol is introduced, it will also be important to demonstrate compliance with it in the event that court proceedings are commenced. An appropriate checklist will be an invaluable tool in that regard. It will also be a means of ensuring the interactions with the tenant regarding the arrears are Protocol compliant (both before and after service of a section 8 notice) and that a case can safely proceed to Court without delay and without risk of any adverse order due to non-compliance.

Further help

As you prepare to emerge from crisis, what is the ‘next normal’? What will the future world of work look like? What do you need to do to be ready?

Call our advice helpline on **0113 283 4011** for support from our experts.

For insight into the future world of work please contact one of our specialists.

Useful resources are also available on our Walker Morris on the Go app.

You can also visit our ‘Coronavirus (Covid-19) hub for details on dealing with the pandemic.

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