

## The Coronavirus – Covid-19

### A Guide to the Employment Law Issues in the UK

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Version 2

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## **1 Introduction**

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The outbreak of the Coronavirus - COVID-19 ("the COVID Virus") began in Wuhan, Hubei Province, China, and was first reported on 31<sup>st</sup> December 2019.

Since then it has spread rapidly around the world, with cases now in almost every country. Current figures \* show more than 254,000 infected and over 10,450 deaths.

The World Health Organisation (WHO) has declared the situation a pandemic.

The impact of the COVID Virus on population demographics, travel, the economy and ultimately businesses worldwide is already quite significant and may become much worse.

Employers will have started to consider the issues and planning for the potential impact.

This iGlobal Guide to the COVID Virus provides an update on the main issues and current view, together with practical guidance for In-House Counsel and HR.

*\*As at 20.03.20*

## 2. Background to the Coronavirus – COVID-19

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### What is a Coronavirus?

Coronaviruses are a large family of viruses which may cause illness in animals or humans. In humans, several coronaviruses are known to cause respiratory infections ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS). The most recently discovered coronavirus causes coronavirus disease COVID-19.

**Source:** WHO

### What is COVID-19?

The most common symptoms of COVID-19 are fever, tiredness, and dry cough. Some patients may have aches and pains, nasal congestion, runny nose, sore throat or diarrhoea. These symptoms are usually mild and begin gradually. Some people become infected but don't develop any symptoms and don't feel unwell. Most people (about 80%) recover from the disease without needing special treatment. Around 1 out of every 6 people who gets COVID-19 becomes seriously ill and develops difficulty breathing. Older people, and those with underlying medical problems like high blood pressure, heart problems or diabetes, are more likely to develop serious illness. People with fever, cough and difficulty breathing should seek medical attention.

**Source:** WHO

### Where is it?

The COVID Virus has spread to almost every Country, with China, Italy, Iran, South Korea, Spain, France and Germany currently the worst affected. The position is changing on a daily basis and can be monitored at this website: <https://www.worldometers.info/coronavirus/>

### **3. Employer and Employee Legal Obligations**

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#### **The Employer's obligations**

An employer has a number of obligations to consider when dealing with the COVID Virus.

It has a duty to protect the health and safety of its employees under the Health and Safety at Work Act 1974 ("the HSWA").

It also has implied obligations to provide a safe system of work and not to breach the duty of trust and confidence. There may also be further obligations in the employment contract.

An employer must also comply with any discrimination laws that may be applicable, for example, disability, race and sex.

#### **The Employee's obligations**

It should be noted that under the HSWA an employee also has a duty to protect their own health and safety and that of other employees.

Employees must therefore follow an employer's reasonable instructions and act responsibly, both at work and outside of it.

Employees are also under an obligation to act in away so as not to breach the duty of trust and confidence owed to the employer.

There will be further contractual obligations in employment documents such as the employment contract, disciplinary procedure, and possibly a Health & Safety Policy.

## 4. Risk Assessment and Workplace Measures

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Employers should first conduct a risk assessment of the business and then consider the appropriate workplace measures to implement now and any contingency plans.

### **Assess the Risks:**

- Locations in high risk areas, large workforces and high frequency travel = highest risk
- Locations with a multi-occupancy Office are also likely to be high risk
- Vulnerable People: assess employees aged 60+ or those with underlying conditions
- Homeworking: assess what work can be done from home and what cannot
- Lockdown: assess the impact of this, particularly if homeworking is not an option

### **Measures:**

The following preventative measures should be considered:

- Introduce Workplace Hygiene Measures and Instructions: see Section 5
- Educate employees and introduce a COVID Virus Policy
- Medical checks – are these needed? see Section 6
- Self-isolation: decide on the policy see Section 7
- Business trips – decide on position: see Section 8
- Employee holidays – decide on position: see Section 9
- Sick Leave: decide on policy for COVID-19: see Section 10
- Vulnerable People: identify who they are: see Section 11
- Visitors: decide on policy: see Section 14

### **Contingency Planning Scenarios:**

- Complete or Partial Lockdowns
- Multiple Homeworking
- Employee Lay-Offs, Short Time Working, Unpaid Leave or Redundancies
- School closures
- Large scale employee sick leave
- Large scale employee holiday leave
- Employee deaths: worst case scenario

## 5. Workplace Hygiene Measures

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Employers should consider introducing the following Workplace Hygiene Measures:

- Hand sanitisers in all public areas such as outside toilets, kitchen area, meeting rooms
- Issue personal hand sanitisers to all employees.
- Issue Management Instructions on Hygiene Measures and Care:
  - cover your mouth and nose with a tissue or your sleeve (not your hands) when you cough or sneeze
  - put used tissues in the bin straight away
  - wash your hands with soap and water often, especially after commuting or washroom trips – use hand sanitiser gel if soap and water are not available
  - Issue [hand washing guidance](#)
  - try to avoid close contact with people who are unwell
  - clean and disinfect frequently touched objects and surfaces
  - do not touch your eyes, nose or mouth if your hands are not clean
- Put up posters on hygiene care, "cough etiquette" and food hygiene.
- Ensure more frequent cleaning of the workplace, in particular toilet and kitchen areas.
- Educate and train employees on the COVID Virus and workplace hygiene measures.
- Request that employees immediately report any signs of the following:
  - Fever
  - Coughing, especially dry coughs
  - Breathing difficulties

The UK Government's and Public Health England's websites provide further useful guidance:

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19>

<https://www.gov.uk/government/organisations/public-health-england>

## **6. Employee medical checks**

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### **Can an employer request an employee to have a medical check?**

It is not likely that an employer can insist on random medical checks without the employee's consent. Most employers are relying on self-isolation as the appropriate step to take.

Practically speaking it may also be difficult and expensive to test an entire workforce. In the UK, there is currently only one private provider offering tests for the COVID Virus and Public Health England is tightly controlling who it tests. Many with symptoms will not be tested.

Medical checks may be justified if there is a real business need or a serious outbreak in the work environment, but even then an employee could refuse to undergo an examination.

In reality, if there is a major outbreak of the COVID Virus in the workplace, the employer is likely to be forced into a complete closure and lock down.

### **iGlobal Practical Advice**

- Consider medical checks only if there is a real or specific business reason to do so.
  
- Focus on measures to contain the spread of the COVID Virus in the workplace:
  - Employees must notify the employer immediately of any symptoms
  - The policy on self-isolation if symptoms develop
  - Imposing self-isolation on people returning from Category 1 areas
  - A clear policy on people returning from Category 2 areas (See Section 7)

## 7. Self-isolation

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### Government Guidance

Current Government policy is focused on a "self-isolation" period (14 days) as follows:

- People who experience the symptoms of the Corona Virus should self-isolate;
- People who have had close contact with an infected person should self-isolate;
- people who have returned from a Category 1 area (see Appendix 1) should self-isolate, whether or not they feel any symptoms;
- people who have returned from a Category 2 area (See Appendix 2) should self-isolate if they start to feel symptoms.

**NOTE:** From 13<sup>th</sup> March 2020 the Government Guidance on people travelling to Category 1 and 2 areas has been withdrawn and replaced by the [COVID-19: stay at home guidance](#). However, most of the advice below will still apply.

### Can an employer instruct employees to self-isolate?

An employer has a duty to protect the health and safety of its employees, so it will be entitled to insist that an employee self-isolates in line with the above Government policy.

If an employee refuses to obey the instruction, they can be prevented from access to the premises, and disciplined if they continue to refuse observance of the self-isolation rules.

There will be issues about pay during the self-isolation period: this is covered in section 10.

### iGlobal Practical Advice

- Decide on a clear Self-isolation Policy and ensure all employees know about it.
- Ensure people returning from Category 1 areas or who have been in contact with an infected person self-isolate whether or not they feel symptoms.
- Decide the policy on people returning from Category 2 areas - many employers have imposed the same rules.
- Ensure employees who report symptoms self-isolate immediately.
- Ensure people who contract the COVID Virus self-isolate immediately, seek medical attention and only return once they are certified as fully recovered.

## **8. Business Travel and Events**

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Employers will need to weigh up their duty to care for the health and safety of their employees against the business need to make trips or attend events.

Most employers have restricted or banned business trips and attendance at business events, the latter being more high risk if it involves a large gathering of people.

In any event, the position is now largely being dictated by most countries closing their borders to any foreign visitors.

### **Can an employer make an employee travel to a high risk area?**

Although, the Government Guidance does not prohibit travel to high risk areas, such a request by an employer is unlikely to be reasonable given the serious risks involved.

### **What if an employee decides to travel on business to a high risk area?**

It is important to have a clear Policy in place first and if the trip is a breach of the Policy, the trip should be stopped and if too late, the employee could be disciplined.

The situation may be considered to be more serious if the employee travelled without informing the employer and returned to the work environment without self-isolating.

Employees have a duty of care for their own health and safety and that of other employees: making a trip that endangers peoples' health and safety may be a breach of that duty.

### **iGlobal Practical Advice**

- Make a policy decision on whether to ban all trips or just non-essential trips
- Ensure a ban on business travel to Category 1 areas.
- Consider a ban on travel to Category 2 areas, depending on business needs.
- Make a policy decision on trips to low risk countries.
- If allowing certain business trips, ensure there is a process to assess the risks.
- Appoint someone to review all requests for business trips.
- Make similar policy decisions to the above on attending business events.
- Make available alternatives, such as video-conferencing or changing the location.

## 9. Employee Personal Holidays

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Health and safety risks may also arise with employees who choose to book their holidays in high risk areas.

### **Can an employer stop an employee from taking a holiday in a high risk area?**

An employer has a duty to protect the health and safety of its employees and would consider an instruction not to travel to a high risk area to be lawful and a legitimate business reason.

An employee might argue that current Government guidance does not prohibit travel to a high risk area, but rather they must self-isolate on return, which is correct.

On balance, it is likely that the employer's health and safety argument would prevail if the instruction is limited to Category 1 and 2 areas and does not include low risk areas.

There may be indirect discrimination issues if local nationals cannot visit their families, but again, the health and safety argument may still prevail for legitimate business reasons.

Employers have to decide whether to issue a strict instruction or simply recommend to employees not to travel to high risks areas and if they do, they must self-isolate.

Some employers have decided not to stop employees on the basis they take their own risk and the employer will not be paying salary for the 14 day isolation period on their return.

### **iGlobal Practical Advice**

- Decide whether to issue an instruction not to travel to Category 1 and 2 areas.
- If not, impose a strict 14 day self-isolation rule on the employee's return.
- Consider whether or not you will pay wages for the self-isolation period.
- If not, offer it as unpaid leave or allow employees to take additional holiday.
- Note the employee may qualify for SSP under the Government's new rules.
- The above may be less relevant if the employee can work productively from home.
- Consider a more lenient position on local Nationals who have a good reason to go.

## **10. Sick Leave and Sick Pay**

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### **The Self-isolation Period**

If an employee develops symptoms of the Corona Virus, they are clearly sick and properly on sick leave: they should be paid sick leave in accordance with the employer's policy.

If an employee has no symptoms, but has self-isolated because they returned from a high risk area or came into contact with an infected person the legal position is unclear because the employee is not technically "sick". This view has been acknowledged by ACAS.

In practice, if the employee can work from home they would simply receive normal pay. If they cannot it may depend on the following:

- If the employer sends the employee home, the employee will say they were able to work and should be paid full salary i.e. they are not sick so sick pay is not relevant;
- if the employee self-isolates on their own, the employer could argue it should not have to pay salary as the employee is not sick nor available to work.

The best advice is to pay salary regardless, otherwise it would encourage the employee to return to work. The need to protect the business and other employees is paramount.

If self-isolation or sick leave is due to an employee returning from a high risk area and the employer advised or instructed them not to go, the employer could stop enhanced sick pay.

The above may be possible if a clear instruction was issued together with the consequences.

### **Employees who test positive for the Coronavirus**

In this case the employee is clearly sick and is entitled to sick pay in accordance with the employer's policy, unless the employee ignored a warning from the employer (see above).

Employers should ensure that infected employees do not return until they have been certified as clear of the Corona Virus.

## **11. Vulnerable People**

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The following categories of people are considered the most vulnerable to the Corona Virus:

- The elderly, in particular above the age of 60
- People with existing underlying conditions, particularly with weaker immune systems
- People generally with a weak immune system

Employers must treat Vulnerable People as a high risk category amongst their workforce and ensure that adequate steps have been taken to protect their health and safety.

Measures would include allowing them to work from home immediately to minimise or eliminate the risks and if they continue to attend work, ensuring an audit is carried out on the potential risks and these are addressed.

### **iGlobal Practical Advice**

- Conduct an Audit of the workforce in order to identify any Vulnerable People.
- Discuss the working arrangements and risks with them.
- Ensure they are properly educated and trained about the potential risks.
- Facilitate and implement homeworking if it is possible.
- If not, assess any specific risks in the workplace and address them, for example:
  - Other people in the immediate work area such as high frequency travellers
  - Proximity to high infection areas such as toilet or kitchen areas
  - Is there a safer place to relocate them?
  - Can separate wash and toilet facilities be provided?
  - Raise awareness of the risks and responsibilities with less vulnerable people
- In the event of a lockdown or outbreak of the Corona Virus, Vulnerable People should be a priority and put onto immediate homeworking arrangements or leave.

## 12. Discrimination Issues

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Employers must be careful to ensure that their policies and practices on Corona Virus do not discriminate directly or indirectly (disproportionately) against certain groups of people.

Discrimination could potentially arise on the grounds of Race (Nationality), Disability, or Sex.

Examples include:

- A Self-isolation Policy that targets a specific Country only = direct discrimination
- A Self-isolation Policy that disadvantages certain nationals = indirect discrimination
- A general policy banning personal holiday travel to all high risks areas which has the effect of disadvantaging certain nationalities from returning home e.g. to see family
- A working at home policy that might disadvantage people with disabilities because their work station is not properly set up
- Treating employees with disabilities differently if they are unable to work from home
- A policy not to pay sick leave could disadvantage vulnerable people with disabilities who could be on sick leave for longer periods
- A policy not to pay employees who have to take time off for school closures that disproportionately affects more female employees

Clearly direct discrimination cannot be justified. For indirect, it may be the employer's argument to protect the health and safety of its employees is a legitimate business reason to justify the practice and we will have to see how the Courts decide this issue.

### **iGlobal Practical Advice**

- Ensure any Policy does not target a specific Country – make sure it applies to all high risk areas.
- Apply the Policy consistently for everyone i.e. not inconsistently between Nationalities.
- Consider more flexibility for Nationals who wish to return home to families in high risk areas. Try to agree a protocol that minimises the risks.
- Carry out Health and Safety and Workspace Assessments for people with disabilities working from home.
- School closures – take a reasonable view on the pay situation – see Section 13.

## 13. School Closures

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School closures took effect in the UK on 20<sup>th</sup> March 2020. It is unclear how long this will be, although some Government Ministers have suggested it might be until the summer.

The impact will be significant on employees who do not have alternative childcare arrangements: a parent will have to be at home and may not be able to work due to childcare. Parents are also likely to be asked to "home school" after the Easter break.

Employers will have to assess a number of issues: will they lose a large number of employees for child care reasons? For how long? Could they still work from home? What about pay?

A School closure is a non-work related event: in the absence of any legislation or a contractual right, employees staying at home during the closure period have no right to pay.

An employee is entitled to dependents leave, but this is for a few days only in order to sort out care arrangements and unpaid (unless there is a contractual right to pay).

There could be sex discrimination issues if female employees are disproportionately affected, but it may not be a strong argument: the policy and its impact on the employee is a result of the Government's decision, not the employer. This would have to be tested in Court.

Employees who are "critical workers" (i.e. in industries such as public services, utilities, banks etc.) are entitled to continuing educational provision for their children.

Specific advice should be sought if your business falls into one of these categories: the full list can be accessed here: [A full list of critical workers and further information is available.](#)

Employers will need to consider the impact of school closures on their business.

### **iGlobal Practical Advice**

- Take a sensible approach: assess who has children and consult with them on their circumstances and what arrangements could be put in place.
- Decide on whether to pay salary: this will depend on resources, length of the closure, whether employees can work from home and the number of employees affected.
- Consider alternative options for affected employees: See section 16 below.
- Consider if your policy is adversely affecting a larger proportion of female employees.

## **14. Third Party Visitors**

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Employers are increasingly limiting the number of third party visitors to their premises in order to prevent potential infection.

Employers are also under a duty to protect the health and safety of their employees so putting in place a policy for visitors is advisable.

Many employers are issuing a Health Declaration Form but note this may present Data Protection issues in many EU countries due to the collection of sensitive personal data.

The UK General Data Protection Regulations allow an exception for serious cross border health risks such as this and as such the collection of this data is permitted without consent.

Visitors who show any sign of a risk would be refused access to the premises. It is advisable to have in place alternative arrangements so as not to offend visitors.

### **iGlobal Practical Advice**

- It is advisable, if possible, to ask questions prior to the visitor arriving.
- Visitors should be asked if they have had contact with an infected person, come from high risk countries or show signs of symptoms.
- Alternative arrangements could include video-conferencing, calls or off-site meetings.
- For multi-occupancy buildings, always check your visitor policy with the Landlord's Policy which may be different and result in the visitor being refused access.

## **15. Homeworking and Lockdown**

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### **Homeworking**

Employers who can sustain their business through homeworking should plan for it now and many employers have already implemented homeworking in anticipation of a lockdown.

Technically an employer needs a contractual right to insist on homeworking, but if there is none, it would be as a reasonable instruction in light of the health and safety risks.

Strictly speaking, normal Homeworking rules would continue to apply such as risk assessments, provision of tools and allowances (electricity, phone etc..).

The above rules are unlikely to be enforced strictly due to the sudden exceptional circumstances and what might be a short term temporary arrangement. However, over time, an employer may be expected to comply.

Employers should however make immediate adjustments for employees with disabilities.

### **Lockdown**

A Government decision to lockdown will compound the already negative impact on business and workflows, and will make the position more serious if it continues for a long time.

Employers who cannot implement a viable homeworking plan will be affected the most.

Employers need to plan for this scenario now by assessing the impact.

Most employers will struggle to pay their employees if there is no work and will need to consider ways to cut costs or more drastic measures see Sections 16 to 18 below.

## **16. Business Continuity: Part 1 – An Overview**

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Many businesses will be, and are, forced to take measures to control costs to ensure business continuity and ultimately survival.

In many cases it may be that clients have put orders and work on a temporary hold, so the business is there, but this creates serious short term cash flow issues, with employers unable to pay expenses or employees' salaries.

The Government has understood the potential impact and crisis and is introducing measures on an almost daily basis: all employers should keep up to date with this.

Below is a list of the types of measures an employer could introduce. Section 17 covers some of the key measures in more detail and Section 18 covers current Government assistance.

### **iGlobal Practical Advice on Potential Measures**

Employers can consider the following options:

- General business cost cutting measures
- Government Assistance – See Section 18 below
- Contractors – terminating them first
- Reduced hours and pay – short time working or zero hours contracts
- Deferred pay (possibly with repayable bridging loans)
- Flexible hours
- Benefits reduction or withdrawal
- Withdrawing, reducing or placing on hold Bonuses
- Requirement to take Holiday
- Time Off in Lieu – ask employees to utilise this
- Sabbaticals or a period of Unpaid Leave
- Lay-Offs – (if there is a contractual right)
- Redundancies

Please refer to Section 16 for more high level information on some of the above options.

## **17. Business Continuity: Part 2 - Key Measures**

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Many businesses will be, and are, forced to take measures to control costs to ensure business continuity and ultimately survival.

In many cases it may be that clients have put orders and work on a temporary hold, so the business is there, but this creates serious short term cash flow issues, with employers unable to pay expenses or employees' salaries in the interim period.

Below we look at some of the key measures in a bit more detail.

### **Varying Pay, Bonuses, Hours or Benefits**

In most cases, it is likely the consent of the employee will be required. The starting point is to review the employment contract.

If the employment contract only contains a general clause on amending the terms, it is not likely to be enough to make a material change, such as reducing pay or hours.

If there is a more specific clause, say giving a right to vary salary or working hours, it will be more effective, but legal advice should be sought to see if it can be relied on.

In the absence of an express clause, employers must obtain the employee's consent.

It may be possible to impose the change unilaterally on employees given the exceptional circumstances: legal advice should be sought and a proper consultation process followed.

Changes to benefits are considered less material and easier to do, but be careful of the impact of removing health benefits on existing claimants or those who may need it in future.

### **Taking Holidays, Sabbaticals or Periods of Unpaid Leave**

On holiday leave, review the employment contract on the right to request holiday leave.

If there is none, an employer can serve a formal request to take leave, provided the notice is at least twice the length of the period the employee is required to take.

Note such a request cannot be served on an employee who is on sick leave.

Unless there is a contractual right to do so, requesting employees to take sabbaticals or periods of unpaid leave will require their consent. It is probably best introduced on a voluntary basis first and then imposed if the position becomes more severe.

### **Lay-Offs and Short-time Working**

Lay-offs mean not working for a temporary period without pay, but remaining an employee.

Short time working means reduced hours or days of work for a temporary period.

The above can only be done if there is a right to do so in the employment contract, otherwise consent is needed.

Employees who have been laid off, may, in certain circumstances, apply to the Government for Guaranteed Payments (note this is currently only £29 per day).

Employees who have been laid off or on short time working for a certain period of time may apply for a Government redundancy payment, but this does mean resigning first.

The time periods are a) 4 consecutive weeks or b) 6 weeks in a 13 week period.

### **Redundancies**

This would be the final course of action for employers. Most employers are familiar with the process, but generally speaking, it depends on the number of redundancies being made:

- If 19 or less employees = an individual redundancy process
- If 20 or more employees in a 90 day period = a collective consultation process

Legal advice should always be sought with redundancy programmes due to the potential risks and issues e.g. pooling, selection criteria, following the right process and collective consultation if it is triggered.

If it is not reasonably practical for an employer to comply with collective consultation due to special circumstances, it may be a defence to non-compliance with the Regulations.

It is not yet clear whether the Coronavirus situation allows this defence. The threshold is already very high, for example, potential insolvency is not enough. The circumstances must be very severe with a likely imminent impact. In the majority of cases some form of consultation would still be expected. Legal advice should be sought.

## **18. Business Continuity: Part 3 - Government Assistance**

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All employers should keep up to date with the Government's plans to help businesses, particularly since it announced a £350 bn survival fund. The position changes on a daily basis.

Below are some of the main Government initiatives to help businesses:

- Statutory Sick Pay relief package for SMEs
- 12-month business rates holiday for all retail, hospitality and leisure businesses in England
- Small business grant funding of £10,000 for all business in receipt of small business rate relief or rural rate relief
- Grant funding of £25,000 for retail, hospitality and leisure businesses with property with a rateable value between £15,000 and £51,000
- The Coronavirus Business Interruption Loan Scheme offering loans of up to £5 million for SMEs through the British Business Bank
- A new lending facility from the Bank of England to help support liquidity among larger firms, helping them bridge coronavirus disruption to their cash flows through loans
- The HMRC Time To Pay Scheme – business in financial distress may be eligible to receive support

The following link will provide further information:

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses>

## **Appendix 1**

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### **UK Government Category 1 Countries and Areas**

- China – Wuhan City and Hubei Province
- Italy
- Iran
- South Korea - Daegu or Cheongdo regions

## **Appendix 2**

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### **UK Government Category 2 Countries and Areas**

- China
- Hong Kong
- Japan
- Laos
- Malaysia
- Macau
- Myanmar
- Republic of Korea
- Singapore
- Taiwan
- Thailand
- Vietnam