

BRITISH FASHION COUNCIL

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A limited company registered in England No. 2050620

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1. GENERAL ADVICE/RESOURCES

In general terms, what could fashion businesses and in particular SMEs consider as business priorities under the current circumstances, and what practical actions could be undertaken as soon as possible to ensure business continuity management?

As a priority, businesses should start to implement continuity planning across a range of practical issues. We would recommend focusing on these four key areas:

- Communications to staff, customers, stockists, suppliers and other stakeholders.
- The business impact of workforce absence arising from self-isolation, staff illness, quarantine and/or caring for dependents: see section 2.
- Increasing tech investment and specialist IT support to facilitate remote working where feasible, including investment in back-up hardware and systems and enabling remote workforce supervision and support: see section 3.
- Contingency planning to mitigate any supply chain disruption and/or cash-flow impact: see sections 4, 5 and 6.

In this briefing we set out practical actions that you can take to support these four areas.

2. HR

What can Designer Businesses do to manage their workforce health and safety under the current developing global public health situation related to COVID-19? In particular, how could they assess and mitigate risk to the workforce? What actions could be considered in terms of payroll/sick pay and how could they manage the potential absence of workforce?

The UK government has said up to a fifth of the UK workforce may be off sick during the peak of a COVID-19 epidemic. It appears that there will be more and more disruptions to working arrangements. So what should Designer Businesses be mindful of in their role as employers and what can they do to protect their business and their employees?

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A. How can employers protect business?

Employers should ensure that their business continuity plans are up-to-date in order to limit the impact of disruption caused by COVID-19.

Ensure that the infrastructure allows for employees to work from home, where possible, and that employees have sufficient equipment or technology, as required. Employers should also consider that their duty to protect the health and safety of their employees extends to them working from home so it may be worth carrying out risk assessments and updating or introducing policies around working from home. Employees with work issued laptops should be encouraged or instructed to take them home every evening, in case the workplace needs to shut. Employers should consider what paper based work, if any, can be given to employees who do not work on computers to minimise disruption to the business.

Employers should also consider if employees will be using their own devices to access the company systems that there is an adequate IT policy in place. GDPR should also be considered if employees will be dealing with personal data whilst working from home and also compliance with the company's data security requirements.

Employers should ensure that if a key employee on a project is taken ill, the rest of the team has been sufficiently and properly briefed on a regular basis to reduce the need for an extensive handover of work. Minimise the number of one person teams, and introduce 'buddy' systems if possible and appropriate.

Employers should also consider how best to communicate with staff quickly and efficiently in the event that the employer's place of work needs to close for any reason. They should therefore ensure that they have up to date contact and emergency contact details for all staff.

We recommend keeping up-to-date on government advice as information is changing daily:

- FCO: <https://www.gov.uk/guidance/travel-advice-novel-COVID-19>
- Public Health England: <https://www.gov.uk/guidance/COVID-19-covid-19-information-for-the-public>

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B. How can employers protect staff?

Employers should consider appointing an employee with responsibility for monitoring compliance with official published guidance, as well as internal policies, and who has the responsibility to communicate with health and public authorities in the event that a suspected case of the virus is identified in the employer's premises. They should also take responsibility for communicating with staff.

As employers have a duty to protect the health and safety of their staff, employers should ensure that they communicate advice to employees in line with government advice in respect of infection prevention and hygiene. Some companies are introducing a 'no hand shaking' policy. Adequate hand-washing facilities should be provided, along with readily accessible hand sanitiser and tissues.

It is worth noting that an employee could resign and claim constructive dismissal if they believe that their employer has not taken reasonable steps to protect the health and safety of its workforce by not introducing hygiene policies or allowing a person who should be in self-isolation to come to the workplace. Equally, if employees do not follow reasonable instructions in relation to hygiene, an employer may be able to take disciplinary action against them.

It may also be advisable to carry out a risk assessment for all staff as it is the employer's duty to provide a safe working environment. Some employees, such as (for instance) those who are pregnant or have a compromised immune system, are at a higher risk of developing severe COVID-19. If an employee has a disability under the Equality Act 2010 that puts them at a higher risk of developing COVID-19, the employer has a legal duty to make reasonable adjustments to the working arrangements of that employee. Employers may wish to consider changing attendance management policies for those who are more vulnerable to contracting severe COVID-19.

If an employee does not want to come into the office due to anxiety around COVID-19, the employer should listen to the concerns carefully. Acas recommends where genuine concerns exist, the employer could offer flexible working or agree to the employee taking annual leave or unpaid leave for an agreed time period.

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Employers should also carefully consider any flexible working requests, under which employees may apply to travel outside peak hours to lower the risk of infection.

Employers with a customer-facing retail business will need to consider what steps they may reasonably take to protect their employees from catching the virus from the general public in the course of their employment. For example, it may be advisable to put up signs to explain to customers that the business has a 'no handshaking' policy, or to provide employees with masks and gloves (if appropriate and the employees are given the necessary training on how to use masks).

Employers should make clear what employees should do if they are taken ill at work and exhibit symptoms of COVID-19. The Acas guidance states that they should:

- Get at least 2 metres (7 feet) away from other people
- Go to a room or area behind a closed door, such as a sick bay or staff office
- Avoid touching anything
- Cough or sneeze into a tissue and put it in a bin, or if they do not have tissues, cough and sneeze into the crook of their elbow
- Use a separate bathroom from others, if possible

The employee should then follow the guidance in force as to whether to return home and self-isolate or, if their symptoms are severe, to seek medical advice.

C. Should employees be required to self-isolate?

Employers have a legal obligation to protect the health and safety of their employees at work. Therefore we recommend introducing a policy which is in line with the PHE guidance in force from time to time.

If employees are sick, they should remain home and self-isolate for the requisite period (as advised by PHE). Many companies are asking employees to work from home as a precaution, but this may not be practicable for all businesses and/or roles. It may be advisable for some asymptomatic employees to stay at home and self-isolate (but not because they are ill, or because they fall into one of the risk categories set out in the PHE guidance).

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If the employee refuses to remain at home in self-isolation when reasonably instructed to do so, it is likely that the instruction would be lawful given the employer's duties to its other staff under health and safety legislation. In these cases, employers may be entitled to take disciplinary action on the basis that the employee has failed in their duty to maintain trust and confidence, to follow a lawful instruction, and/or to maintain the health and safety of those around them. However, employers should be wary of suspending staff without good reason to do so – particularly if the employee's remuneration is based on performance (for instance, by way of commission).

D. Can employees take time off to look after a dependent due to COVID-19 or self-isolation?

Under UK legislation, employees are able to take 'reasonable' time off to look after a dependent in response to an unexpected disruption to care arrangements, illness or an incident at school. There have been some instances of schools being closed due to COVID-19. In such circumstances, employees should inform their employer as soon as possible.

It is worth noting that the right to 'reasonable' time off is unlikely to extend beyond one or two days, other than in exceptional circumstances. The leave is designed to allow employees to make alternative arrangements in relation to caring for dependents. If, however, it becomes very difficult to find alternative childcare in circumstances where it would be inadvisable for (say) a grandparent to look after a child with a high risk of infection and no other options are available in the circumstances, it may be necessary for the employee to agree to take annual leave in order to cover the absence.

Whilst there is no statutory right to be paid in respect of the right to time off for dependents, there may be provisions in the employee contract or handbook that allow for payment during this time.

Equally, an employer may take the view that if the dependent is at high risk of infection, the employee is therefore also more likely to contract the virus, and they should therefore self-isolate (see above).

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E. Are employees entitled to sick pay?

Employers can rely on their usual sick leave and pay entitlements under the relevant employment contract if an employee has COVID-19. If there is no contractual sick pay, then an employee suffering from COVID-19 will be entitled to statutory sick pay (SSP). The Government has recently announced a change to the usual rules relating to SSP to allow workers to claim from the first day of sickness absence, rather than waiting for the usual three-day period. However, this may not be the case if an employee is in self-isolation or quarantine with no symptoms. In the recent Budget, the Government also announced that small businesses (with fewer than 250 people) will be able to claim back the cost of providing SSP due to staff being affected by COVID-19; more detail on this is expected shortly.

Contractors who are not employees and who are not 'employed earners' for tax purposes are not currently entitled to SSP (but this may change, given the concerns that have been raised about those in this category who will be unpaid during the crisis).

If an employer instructs an employee who is fit for work and not in a high risk category (as determined by PHE) to self-isolate, the employee should receive full pay as their absence is a type of suspension. It would therefore be theoretically open to an employee to say that although their family or friends have tested positive for the virus, they are feeling fit for work and intend to attend the office – thereby requiring their employer to ask them to stay at home for the wellbeing of the rest of its workforce.

Acas considers that it would be "good practice" for employers to treat self-isolation as sick leave and to follow the usual policy, or to agree with the employee for the time to be taken as holiday in order to minimise the risk that they will come into the office and potentially spread the virus. Employers must also consider their policies for individuals who wish to self-isolate voluntarily, bearing in mind the need to protect the health and safety of the rest of the workforce.

Contractors who are not employees and who are not 'employed earners' for tax purposes are not currently entitled to SSP (but this may change, given the concerns that have been raised about those in this category who will be unpaid during the crisis).

F. Should employers restrict business travel or personal travel of employees?

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Employers should consider whether to introduce a business travel ban to minimise the risk of employees being exposed to COVID-19. There are a number of factors to consider, such as the impact of such a ban on the employer's business, and also whether there would be a need for a quarantine period for employees who travel. Many employers are limiting travel to essential trips only, and others have restricted all international travel.

We recommend monitoring and adhering to government advice of any countries your employees may be travelling to, reviewing any business travel insurance and to keep in communication with any employees who are travelling. If an employee has to travel to a high risk area, employers should ensure that they receive specific advice from a qualified health professional – and if that employee is themselves in a high risk group, employers should think very carefully before allowing them to travel to such an area.

It is arguable that restrictions to personal travel of employees to countries where the risk of infection is high may be justified if they are reasonable due to the employer's duty to protect the health and safety of its workforce. However, it is unlikely that the employer will have reserved an express right to place restrictions on personal travel in the employment contract. In the circumstances, it may be more advisable to seek to agree a compromise whereby an employee who intends on undertaking travel to a high risk area will need to agree to self-isolate on their return, and, rather than receiving full pay, will only be paid an amount equivalent to SSP for that period if they are asymptomatic and unable to work remotely. Employers should be careful not to restrict travel beyond what has been recommended by the Foreign and Commonwealth Office. It is also worth noting that employers should ensure that they do not discriminate directly or indirectly on the grounds of race or nationality when it comes to restrictions on personal travel.

3. IT

If a Designer Business can support remote working for its staff, what IT considerations should be taken into account?

For designer businesses that can support, or partially support, remote working, ensure that:

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- Access to adequate IT infrastructure is in place, including sufficient software licences and (if you have a larger team) bandwidth to accommodate an upsurge in remote working; and
- Delivery of clear communication of the policies the workforce is required to follow when working remotely, including strict compliance with confidentiality obligations to customers, stockists, suppliers and the business.

Wherever possible, remote workers should be provided with the facility to access the business email system securely. If remote workers have to access another system to work remotely, this will likely be sub-optimal – increasing the risk of hacking, loss of confidentiality and loss of data. GDPR requires all businesses to ensure adequate levels of data security. Using an unknown or unsecure provider risks putting the employer in breach of that obligation. If this cannot be avoided, at the very least, impose policies that restrict remote hard copying facilities to the extent possible to avoid inadvertent confidentiality breaches and ensure communications and work product are password protected. More broadly, you might want to remind staff that all business communications (by whatever medium or device) are potentially discloseable in response to a GDPR request, or in legal proceedings – employees should always maintain appropriate levels of professionalism.

High levels of awareness around COVID-19 and resultant public concern has also seen an increase in criminals using public health themed phishing emails to deliver malware and steal sensitive information. Staff should be advised of this and reminded of relevant processes for handling suspicious emails. Requirements for remote working may also present opportunities for cyber criminals as staff may be required to work outside normal policy and using unfamiliar systems. Personnel should be provided with clear guidance on processes for authentication and secure access. This is particularly relevant where staff are providing temporary cover or are working remotely. Extra controls should be introduced around financial transactions, including their authorisation.

4. SUPPLY CHAIN

If a Designer Business has part of its supply chain in territories which have been affected by COVID-19, can you suggest a step-by-step approach to addressing any issues with their counterpart? From assessment of potential impact, to review of contracts, to what conversations they should have with suppliers or manufacturers.

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SUMMARY OF KEY POINTS:

1. Understand your exposure, both from your upstream suppliers and to your own customers.
2. Don't react quickly to terminate agreements or claim a "force majeure event". Your contractual rights will be determined by the specific wording of the agreements and the facts.
3. Maintain a dialogue with retailers and suppliers, and try to prioritise certain orders.
4. Try to line up alternative suppliers where possible and identify where products are in transit.
5. Be open and honest with consumers about the impact on orders and deliveries.

A. Assessing the impact:

- A rapid assessment of your supply chain is key:
 - Identify key manufacturers/suppliers and customers;
 - Identify affected and potentially affected manufacturers and customers;
 - Identify any contracts where a failure to perform will have implications for other contracts.
- Ensure that you have a dedicated and coordinated internal team who take responsibility for managing and reviewing the potential impact of COVID-19. Ensure that this team regularly communicates statuses and updates internally.
- If your suppliers are stating that they are unable to perform under your agreements, ask for details on exactly how they are affected. Get as many facts as possible and keep these documented. Carefully consider your response to an affected supplier so that you reserve your legal rights. Obtain legal advice if you are unsure about how to respond.
- Document any attempts you make to mitigate your exposure or losses, including any unsuccessful attempts, for contracts where your counterparty is unable to perform and where you are unable to perform. Keep detailed records of what has happened and discussions with counterparties, as these may be useful evidence in future.

B. Contract review:

- Review affected and/or key contracts and identify any:

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- "Time is of the essence" obligations. These mean that the performing party must perform its obligations by the specified dates, otherwise the other party can terminate the agreement for breach.
- "Events of Default" or "Material Breach" definitions. Will a failure of either party's obligations be an Event of Default or Material Breach (as defined)?
- Favourable termination rights which may be triggered by the COVID-19 outbreak (e.g. generous rights to terminate for convenience, rights to terminate with immediate effect for material breach etc); and
- Specific notification obligations in the event of possible delays or non-performance?

If you have the benefit of these termination rights in supplier contracts, identify how quickly you can line up a replacement supplier in the event that you terminate your agreement.

If your counterparty has the benefit of these termination rights, start a dialogue with them as early as possible (rather than wait until you breach your obligation), so that your counterparty is aware of the issue and can begin to take steps to mitigate its loss. Take care, however, in sharing information and putting your counterparty on notice if they have an immediate right to terminate the agreement or orders, where they reasonably suspect that you may not perform.

- Do not assume that delayed or non-performance by you or your counterparty will necessarily be a breach of contractual obligations or give rise to a termination right. This will depend on the terms of the contract and the facts applying to each situation.
- Do you have the benefit of a liquidated damages clause in your supplier agreements? If so, you may be able to rely on these to receive some compensation if your supplier is delayed or unable to fulfil its obligations. Check any notification requirement which you may be under before you can claim your losses.
- Check your agreements to see whether you or your counterparty are under any obligation to implement a business continuity / disaster recovery plan. This is a typical obligation on suppliers and may cover the alternative availability of goods, materials or premises.
- Review the liability provisions in your agreements (both with your suppliers and customers). Is liability capped? Is there an exclusion for loss of business, profits or contracts? If you are not able to rely on a force majeure clause (see below) to obtain relief from

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performance under customer contracts, you may be able to rely on the exclusion of certain liabilities. This may also apply to your suppliers, and so identify any losses which are excluded from your agreements with suppliers and which you may be unable to recover.

C. Force majeure clauses:

- Force majeure clauses typically operate by offering one or both parties, on the occurrence of certain predefined force majeure events, (i) relief from delayed or non-performance of contractual obligations and/or (ii) the right to cancel the contract.
- Contracts normally include a specific list of force majeure events (e.g. "Acts of God", floods, fires etc) and an objective test for whether an event, which is not included in the list, is a "force majeure event". Reference to "pandemic" or "epidemic" may cover COVID-19, and emergency measures to counter COVID-19 may themselves be captured by general terms such as "government action".
- Determining whether COVID-19 is a "force majeure event" will likely mean applying this objective test, as most contracts are unlikely to call out COVID-19 specifically. Take care when applying the objective test, as there is no certainty that COVID-19 or resulting government actions will necessarily be covered. Be prepared that your counterparty may contest any argument that COVID-19 is a force majeure event under the agreement.
- If in doubt about whether a force majeure event applies, seek legal advice before acting or sending any communications. If you incorrectly terminate an agreement for force majeure, this in itself will be a material breach by you of the agreement.
- There is no general right to a force majeure clause in English law and so, if your contract does not have an express force majeure clause, you will not be able to claim it. You may be able to rely on the English law doctrine of "frustration", however its application is extremely limited and we recommend obtaining legal advice before proceeding further.

D. Managing orders placed with suppliers

- Where you have placed orders with suppliers, try to identify key pieces, samples or materials which should be prioritised. It may be better to provide smaller collections than nothing at all. Consider likely delivery dates of seasonal items and whether it is possible to reduce orders for these, if their actual delivery will make them much less relevant. Regularly review any temporarily reduced services with your suppliers.

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- Are your supplier agreements exclusive or are you able to put in place a replacement supplier? When obtaining a replacement supplier, ensure that replacement goods meet any necessary quality or safety requirements. Document the costs of any replacement suppliers in case you are able to claim these as losses from your original supplier.
 - Try not to overwhelm your suppliers or be too heavy handed in your approach, particularly if you otherwise have a good working relationship with them. As well as damaging future working relationships, any disgruntled suppliers may be tempted to prioritise other customer orders above yours.
 - Given the escalating government actions, customs clearance may be delayed as quarantines are introduced. Identify where any goods in transit are currently held and who is responsible for insuring goods whilst they are in transit. Request confirmation of any insurance coverage applicable to such goods so that you can confirm the position.
- E. Local law advice:
- If your contracts are governed by anything other than English law or your counterparty is based outside of the UK, it is recommended that you take local law advice.

5. STORES

Likewise, can you provide some suggestion on how to manage any other commercial relationships with, for example, retailers who might be affected by COVID-19? Are there any pre-emptive conversations that can be had with stores around the possibility of unfulfilled contracts, from both sides, eg. obligations on delivery of goods, potential delays, payment terms and order cancellations?

A. Start communicating with retailers as early as possible:

- Seek information from, and begin an open and regular dialogue with, your customers regarding the impact of the outbreak. Pass on any information, insight or reassurances from your suppliers onto your customers.
- There may be a temptation not to inform retailers of any potential delays or non-performance. However regular communication puts them on notice of issues and gives

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them a chance to mitigate their own exposure. It may also make it harder for them to claim against you for all losses suffered, following your conversations with them, as they would have been made aware of any problems.

- Where a retailer has the right to terminate your agreement with them, ask if they would be willing to terminate part (rather than all) of the orders or to receive delivery of goods in instalments. Ask them if there are any particular orders which they would like prioritised above others, and see if your suppliers can facilitate this.
- Consider asking retailers for better payment terms (e.g. shorter payment timeframes or part payment upfront), to assist with cash flow and to assist your upstream suppliers in fulfilling their orders to you.

B. Don't forget your consumer customers

- Maintain an open dialogue with consumers, informing them of any potential delays to order fulfilment or deliveries.
- Be aware of consumers' rights to cancel any online orders within statutory "cooling off" periods, which may differ across different territories.
- Make sure that any solutions or remedies offered to consumers are fair and do not risk leading to adverse PR (e.g. raising prices of SKUs in stock).
- Consider offering consumers a goodwill gesture e.g. 15% off next order code, to reduce the risk of order cancellations and maintain good consumer relations during order delays.

6. CASHFLOW

How could fashion businesses and in particular SMEs go about a contingency plan to mitigate cash-flow impacts due to COVID-19, which may affect all key stakeholders (from manufacturers to stores)?

Key considerations relating to any contingency plan during this period are:

1. Cash to businesses is likely to slow so revisit your cashflow model. How much room for manoeuvre does the business have? It might be an idea to revisit priorities, for example

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deciding which suppliers need to be paid first. Consider whether your deposits on order or your cash on delivery needs to increase. Other avenues include:

- a. Speak to your bank/financier to see what options are available for credit if it is needed. The Government has announced a new temporary Coronavirus Business Interruption Loan scheme, as part of a package of measures to help small businesses – more details are expected in the next few days, but in essence the Government will provide lenders with a guarantee of 80% of each loan to give lenders more confidence in approving credit decisions for small businesses that have insufficient security to meet a lender's normal requirements.
 - b. If you suffer business interruption or suspension that adversely impacts on cash flow, funding PAYE (income tax and national insurance contributions), payments on account of corporation tax and/or VAT may become difficult. If this is the case, you can make an notification to HMRC before the applicable deadline and apply for an extension to the filing period, to which HMRC ought to be sympathetic.
 - c. If you have a retail premises that suffers business interruption or suspension, consider speaking to your landlord to see whether they will be willing to defer rental payments for a specific period. The Government has announced that it will effectively abolish business rates for small businesses holding property with a rateable value below £51,000 for tax year 2020/21 and expand the relief for businesses in the leisure and hospitality sectors, with more details expected shortly. Retailers eligible for small business rates relief may also be eligible for a one-off £3,000 cash grant to meet ongoing business costs.
2. If you are not doing so already, start to credit check your suppliers and stockists (it is important to know the financial strength of both). There are a number of systems on the market that will flag financial distress of businesses, so consider investing in one of these.
 3. Start your collection of outstanding payments earlier. If possible, two weeks after sending your invoice, call the client to make sure that the invoice has been received and has been approved for payment, and request the date of their next payment run. If businesses are short staffed, normal payment runs may be delayed.

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7. INSURANCE

Can you recommend what Designer Businesses should check exists in their current insurance policies that could cover potential losses arising from COVID-19, and which specific terms could be rectified or added, if not already present?

Your insurance losses relating to the outbreak of COVID-19 may include losses concerning business interruption and interference, event cancellation, product liability cover, supply chain interruption, as well as other insurance-related issues, for example travel insurance losses.

It has been confirmed that the UK has moved from the containment phase to the delay phase of its four-part coronavirus plan. The UK Government has also previously confirmed that COVID-19 is to be classified as a "notifiable disease", which should assist in securing coverage for losses that are still continuing to emerge and develop.

Entitlement to coverage will depend on the terms, conditions and exclusions specific to your particular policies. You should in the first instance ascertain the nature of insurance covers that you have in place, and then try to identify potential business exposures.

In the event that you are concerned about insurance coverage for losses to your business, or require assistance on the submission of claims notifications to insurers as a result of the COVID-19 outbreak, we would recommend that you seek legal advice.