

Coronavirus and your charity – key legal issues to consider

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In association with NCVO

Coronavirus and your charity

Key issues to consider



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Head of Charity and Social Enterprise

Governance and Solvency



Governance and Solvency

- Legal form and personal liability
- Create a crisis team
- Meet regularly
- Information
 - Reviewing income and expenditure
 - Contracts / grants (Mindy covering)
 - Using assets: reserves, restricted funds and permanent endowment
- Cash flow forecast
- Crisis plan
- Government rescue packages
- Communicating: bank / HMRC / creditors / donors / debtors / contractors
- Professional advice

Insolvency Act Issues

- Solvency tests
 - Cash flow

Can the charity pay its debts as they fall due?
 - Balance sheet

Assets worth more than liabilities?
- Wrongful trading
 - If you know (or ought to know)
 - There is no reasonable prospect of avoiding insolvent liquidation
 - You must take all steps to protect the interests of creditors
 - Switch of duties from purpose to creditors
- Preferences and transactions at undervalue

Trustee Meetings



Board meetings

- Good decisions more important than good process right now
- Simple guide to getting it right on our website
- You can hold video meetings
- You probably can hold telephone meetings
- What is a 'meeting' anyway, and do you have to hold them?
- If you can't get the process right, take the decision and worry later
- Alternative solutions:
 - Unanimous approval
 - Written resolutions
 - Ratification
- Take and quickly distribute good minutes

Coronavirus and your charity

Contracts, insurance and reporting serious incidents



Mindy Jhittay

Senior Associate, Dispute Resolution

Force Majeure 1

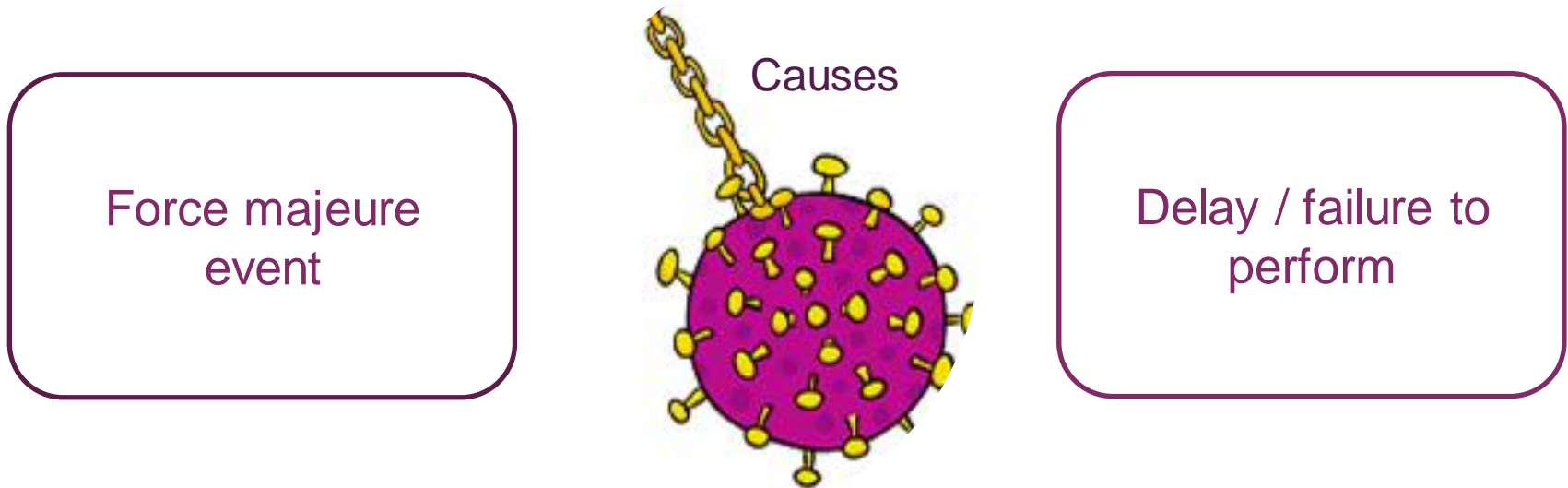
Circumstances **beyond the reasonable control** of the parties

Contract will specify **definition**
e.g. war, natural disasters, disease, “acts of God”

Pandemic? Restrictions on travel / social gatherings?



Force majeure 2



Alternative performance?

Contract will specify **effect**

e.g. parties excused from performance of obligations
until the *force majeure* event(s) end

Frustration of contract

- Something happens which makes it **impossible** to perform the obligations under a contract
- E.g. a change in the law. Recommendations and guidance?
- No frustration if event is reasonably foreseeable / contract no longer commercially attractive / not impossible



Contract is **dissolved**
→ no future performance
+ recover monies paid to date

Reporting Serious Incidents



Charities should continue to report serious incidents using the current guidelines and their own judgement and we will advise if and when this situation changes



Adverse event
which results in or risks
significant harm
to staff, operations, finances or reputation

Insurance

- Position is uncertain
- Unlikely that COVID-19 is a specified event
- Notify ASAP



Coronavirus Job Retention Scheme



Paul Seath
Partner, Employment



Introduction

- Where home working is not possible, employers have the following options:
 - Pay their employees whilst they do not work (which is not sustainable long term)
 - By agreement, pay employees a reduced rate of pay whilst they do not work, and permit them to take annual holiday on full pay despite it not having fully accrued
 - Lay off employees without pay – subject to the **Furlough Scheme** announced on 20 March 2020
 - Make employees redundant

Lay off

- Lay off occurs when:
 - employees are not provided with work
 - their pay is reduced
 - but the employment contract is not terminated as the situation is expected to be temporary
- The following points arise:
 - There is no statutory right for employers to lay off employees without pay or reduced pay
 - Some employers may have a provision in their contract allowing for lay off without pay or reduced pay. If so, follow the provisions in the contract

Lay off

- If an employer needs to implement a lay off there is no minimum notice or information that must be given to the employee, however the following should be considered:
 - meet with the affected employee(s) to explain the circumstances, and the proposal to implement a lay off period
 - provide information about when it will take effect, and for how long it is expected to last
 - give the employee(s) an opportunity to ask questions, raise concerns or make alternative proposals
 - explain what arrangements are proposed in relation to pay (bearing in mind any contractual entitlements in this regard), and, if relevant, the process for claiming a guarantee payment
 - explain that the arrangement may be more favourable than the alternative of being made redundant
 - give the employee(s) as much notice of the arrangement as possible
 - follow up in writing, confirming the outcome of the discussion

Lay off

- If (following consultation) employers move to lay off without pay or on reduced pay, employees can accept the lay off and treat the contract as continuing, but varied by consent
- If employees do not accept the lay off without pay and the employer goes ahead anyway, the employee can:
 - affirm the original contract and sue for damages for breach of contract or claim that there has been an unlawful deduction of wages;
 - claim the actions amounted to a repudiatory breach of the contract, giving rise to potential claims for breach of contract unfair dismissal and/or redundancy pay;
 - claim statutory redundancy pay provided they have been laid off without pay, or had their pay reduced by more than 50%, for four consecutive weeks or for six non-consecutive weeks out of 13 weeks.

Coronavirus Job Retention Scheme – how it works

- The government has published a short overview for [employers](#) and a separate overview for [employees](#), and we are expecting more information imminently
- Whilst detailed guidance is needed, the position appears to be as follows:
 - The scheme is available to all UK employers
 - It requires “Furloughing” (a US concept) designated employees who would otherwise have been laid off or made redundant
 - Furloughed staff are those workers who are kept on the payroll instead of being dismissed as redundant, or being placed on unpaid leave
 - HMRC will reimburse 80% of Furlough’s workers wage costs, capped at £2,500 per month

Coronavirus Job Retention Scheme – how it works

- It is unclear whether or not the figure is gross or net (the expectation is that it is gross) and it appears to include “all” employment costs”, which could include employer’s NI
- It may therefore be that if an employer wants to pass on to its staff, only the amount of the wage subsidy, it will be less than £2,500 gross per month
- There is nothing to stop employers choosing to pay at a higher rate than the reimbursed figures
- Employers will have to agree with staff (in most cases) who will be furloughed and once that is done submit information to HMRC about those employees and their earning through a new online portal – which is yet to be set up

Coronavirus Job Retention Scheme – how it works

- Will people choose to be able to be Furloughed?
 - Consent is a key condition , but it seem likely that certain staff, who would otherwise be required to take unpaid leave, would prefer to be Furloughed
 - It is unclear whether or not Furloughed staff will be able to work for any other employer. We would assume not, on the basis that their contract of employment is likely to preclude them from working for another employer whilst still an employee of the organisation
- The government's position on zero hours contracts and how those would be paid is unclear, but the expectation is that the scheme will apply to workers on the PAYE system and therefore not include the genuinely self-employed who have been paying tax under Schedule D

Coronavirus Job Retention Scheme – how it works

- Whilst the employer is likely to be required to pay Employer's National Insurance contributions for furloughed staff, whether or not contractual benefits would also apply to them will be a matter of negotiation between the employer and the employee
- The expectation is that employees would prefer to be Furloughed, even without benefits, and subject to the cap, rather than being made redundant ...
- ... but that will not always be the case particularly in relation to a high earning employee where there is an enhanced contractual redundancy scheme

Coronavirus Job Retention Scheme – how it works

- Areas of uncertainty
 - The payment is a grant from HMRC. What conditions will be imposed? For example, where there be a requirement to commit to not making any redundancies?
 - How will HMRC decide if the worker would otherwise have been “laid off”? Will it be necessary for a process to have started?
 - If there is work to be done, how should an employer approach selection? Will those asked to continue working resent that fact, when others are off on 80% of full wage
 - Will employers be able to furlough some staff one week and other staff the next week?
 - How long will employers have to wait for the grants to come through?
 - What if a furloughed worker becomes sick? Will they tell the employer and risk going onto SSP or company sick pay?

Coronavirus Job Retention Scheme – how it works

- What if a furloughed worker becomes sick? Will they tell the employer and risk going onto SSP or company sick pay?
- Employers will presumably be expected to maintain benefits for furloughed employees unless they can agree something different
- Employers already negotiating temporary pay cuts or lay off may face delay in staff agreeing, while they wait for more detail on the Furlough Scheme

PRACTICAL SUPPORT HOW NCVO CAN HELP?

HOW NCVO CAN HELP?

PRACTICAL SUPPORT AND SIGNPOSTING

General information and guidance

- [NCVO: Your Organisation and Coronavirus](#)
- [NCVO Knowhow](#): we've made our member-only resources free to everyone because of the current situation.
- [NCVO legal advice page](#): support with accessing legal advice

HOW NCVO CAN HELP?

PRACTICAL SUPPORT AND SIGNPOSTING

Specific areas of support

- HR Employment Law: Croner: [Business helpline](#), [Covid-19 tool kit](#)
- Volunteering: [I want to Volunteer](#), [Volunteers responding to Coronavirus](#)
- Governance: [NCVO blog: what charity trustees need to think about](#)
- Funding: [NCVO blog: Coronavirus and charity funding](#)

Questions?

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Thank you



We use the word ‘partner’ to refer to a member of the LLP or an employee or consultant with equivalent standing and qualifications.