INSPIRING SCOTLAND

# CHARITY FAQs RE: COVID-19

## Employment

***Should the absence management process differ for coronavirus-related absences?***

Where an employee is unable to work for a COVID-19-related reason (for example, they are confirmed as having contracted the virus, they are suspected of being ill due to the virus, or they are self-isolating in line with government guidance or as requested by NHS Test and Trace technology) the employee is entitled to Statutory Sick Pay from day one (the three-day waiting period has been removed in cases of incapacity relating to coronavirus).

Employees will still need to follow the workplace sickness reporting process. Employees can 'self-certify' for the first seven days of absence. Following this, a note from the employee's doctor explaining absence is expected. Those self-isolating due to coronavirus for more than seven days can get an online self-isolation note from the NHS website or (for those registered with a GP in England) the NHS mobile phone app.

Employers may need to exercise leniency in their requirement of self-isolation notes and should not impose the usual strict timelines contained in their absence management processes, especially where an employee has severe symptoms. It will, however, be for each employer to determine the level of leniency they can/should apply.

***Has the disciplinary process changed as a result of COVID-19 restrictions? Is it permissible to hold performance-related meetings online? If so, which factors should be considered?***

Any disciplinary or grievance process carried out at this time must comply with public health guidelines around social distancing.

Going through a disciplinary or grievance process is stressful at the best of times, and employees may be facing particularly stressful circumstances as a result of the pandemic. Employers should therefore give careful consideration to the health and wellbeing of employees when deciding whether and how to proceed with such action, taking into account any additional sensitivities or potentially reasonable objections to the process.

Administering a disciplinary or grievance process via video conferencing facilities is permissible, but it must be undertaken in a fair way, ensuring that:

- Everyone involved has access to the technology required for the hearing;
- Reasonable adjustments are made for anyone involved who has a disability which may impact their ability to use the video technology;
- Any witness statements or other evidence to be considered can be seen clearly by everyone involved during the hearing;
- Evidence given by parties interviewed during the meeting can be fairly assessed and questioned;
- Evidence needed for the investigation or hearing can be obtained safely (if, for example, the required physical records or files are kept in the office);
- The person under disciplinary investigation, or the person who raised a grievance, can be accompanied during the hearing (by inviting the accompanying individual to attend the video meeting).

Employers should consider whether the matter is urgent or could instead be addressed upon return to the workplace. This judgement will depend on the circumstances.

***If a staff member contracts COVID-19 from a member of the public, is this likely to have an impact on their death in service benefits?***

A new life assurance scheme for eligible frontline workers during the coronavirus pandemic has been established, covering frontline NHS employees and social care workers.

The scheme provides insurance cover for those who die from coronavirus during the course of essential work. This includes those providing direct care, as well as cleaners and porters who continue to carry out vital duties in care environments.

Where death in service benefit is provided through a separate insurance policy, it may be necessary to review said policy to consider and assess the impact of the pandemic on its operation. These policies usually include an "event limits" clause that imposes overall limitations on the cover provided. A "catastrophe limit" provision is also likely: this imposes a limit on how much the insurer will pay out if death occurs as a direct or indirect result of a catastrophe. This will be further defined in the policy but can include events or originating causes that result in the death of more than one member of staff.

It is advisable that the arrangement to provide death in service benefit continues where an employee is on furlough and that the definition of life assurance earnings for the purposes of the scheme's rules aligns with the definition of insured earnings where the employee is on furlough.

***How long should we retain a staff member's records after they have left the organisation?***

The general advice is to maintain records of former employees for a period of six years. This applies to such records as personal data, performance appraisals and employment contracts. This is often recommended for official records such as P60s and P45s. Should a former employee wish to bring a civil claim against a company (e.g. breach of contract), six years is the time limit for bringing such a claim.

Alternatively, records relating to payroll should be kept for a period of three years after the employee leaves the company. In the event that HMRC seek to review such information, this will take place during that period.

Employers should keep special category personal data relating to an employee's health or sickness absence for no longer than is considered necessary.

***How does the furlough scheme work?***

Furlough is where an employee or worker agrees with their employer to temporarily stop working (either completely or, from 1 July 2020, on a part-time basis) but to continue in employment. Furlough must be agreed in writing with the employee at issue. Employers can claim for up to 80% of each furloughed employee's/worker's usual monthly wages. This sum is capped at £2,500 per month, and the level of government support available will be gradually reduced from 1 August 2020.

If an employee has not yet been furloughed, it is no longer possible to add these employees to the furlough scheme. The furlough scheme will come to an end on 31 October 2020.

***How should we address staff who do not wish to return to working in the office due to anxiety about, for example, travelling on public transport?***

Employees should continue to work from home where possible. It is important to be reasonable and understanding as regards any worries employees might have about returning to work. Employers should consider steps they could take to make employees feel safer.

If it is not possible for employees to continue to work from home, it is a good idea to talk to them as soon as possible about the plans for return. Discussing plans for return to work in advance can help employees to understand – and feel included in – these decisions. It is understandable that employees may feel anxious about the prospect of returning to work, and so it is important to communicate in a clear, calm way.

If employees will be returning to the workplace, the employer should follow the government guidelines on safe working during the pandemic.

***How do you work out minimum statutory redundancy pay?***

The amount of redundancy payment owed to each employee is dependent on their age and the length of time they have worked for the company. That length of service is calculated by working backwards from the date on which the employee was made redundant and is capped at 20 years for redundancy payment purposes. A company must pay:

- 1.5 weeks' pay for each year of work after the employee's 41st birthday;
- 1 week's pay for each year of work after the employee's 22nd birthday; and
- Half a week's pay for each year of work before the employee's 22nd birthday.

The limit for weekly pay is currently £538. This limit increases each year. The maximum total amount of statutory redundancy pay that could be paid to an employee is currently £16,140. Employers can use the government's redundancy pay calculator to work out an employee's statutory redundancy pay.

Employers should keep in mind any contractual redundancy policies that might mean enhanced payments are due.

***What are our responsibilities concerning special leave?***

It is at the employer's discretion which other forms of special/unpaid leave are provided, if any. This is normally set out in an employee handbook or may be referred to in an employee's contract of employment. Employers should be flexible (where possible) when employees request leave due, for example, to childcare needs while schools and nurseries remain closed.

***What are our responsibilities concerning the mental health of staff?***

Employers have a duty of care towards their employees and should do all they reasonably can to support employees' health. Employees may need additional support during this difficult period.

Some options to encourage positive mental health include:

- Arranging mental health training for employees and managers;
- Appointing mental health ambassadors for employees to approach if they are experiencing any issues; and
- Promoting any existing support offered.

Talking to employees may help the employer to understand how they are coping, which resources they find helpful and if they would benefit from more support.

***We might not be able to reopen fully until 2021: what are the rules regarding reductions in pay/hours, redundancy, furlough, and sick pay in this case?***

Employers may need to consult with or obtain the consent of employees before implementing some of these measures. The benefits and risks of such moves ought to be weighed against one another. In all instances, clear communication with employees is essential to ensure an understanding of why such steps are being proposed or taken (most importantly, it should be stressed that they are aimed at preventing or limiting redundancies).

Lay-offs and short-time working allow for reductions in pay and hours. Short-time working is where an employee is provided with less work and less pay. Lay-off is where an employee is provided with no work and no pay. Generally, employers can only pay less than full pay if there is a right to implement short-time working or lay-off in the employment contract at issue.

Another option for employers is to ask that employees utilise their annual holiday entitlement by a particular date. Employees must still be paid while on holiday but asking employees to take annual leave sooner rather than later will avoid lots of employees requesting use of their holiday entitlement at the same time as demand begins to pick up again.

Alternatively, employers could offer employees unpaid leave or sabbaticals during the pandemic. Where this is offered, a clear and detailed explanation of the implications should be available to employees.

Pay cuts are not a popular option with employees, but they offer near-immediate savings. The option carries a significant degree of risk, and the employer may need to consult with employees before implementing such a measure. A less controversial but less immediately beneficial option is to impose an employee pay freeze. Alternatively, an employer might choose to reduce, delay, or entirely withhold bonuses. Employers should consult the terms of employment contracts and bonus scheme rules before doing so.

Finally, withdrawing job offers, deferring new joiners and freezing recruitment is a relatively simple way of reducing costs.

***What process should I follow when thinking about bringing staff back to work? What about if employees are shielding for health reasons or have childcare issues?***

Employers should have discussions with employees to understand their thoughts and feelings around returning to work, and whether some might struggle to physically return due to personal circumstances.

Employers need to take care when deciding which employees should return to the workplace. It is important not to discriminate against certain employees, even if this is done with good intentions. Employees who are shielding or otherwise vulnerable, for example, may feel they are being discriminated against on the grounds of age or, where applicable, disability.

Employers should make sure that their decisions around which employees to bring back to the office are driven primarily by government guidance, followed by the needs of the business. Employers must have a business reason to justify their decision. One option is to ask for volunteers to return to the workplace. Employers could also consider objective selection criteria so that employees do not feel discriminated against.

## Governance

***We have moved our board meetings online. Are there any special considerations that apply as a result? Should we consider any formal changes to our governing documents?***

You should check whether your constitutional documents make provision for holding meetings by telephone or online. As long as this is not specifically prohibited, virtual meetings are acceptable. If your constitution specifically states that meetings must be held in person, your governing documents should be amended to remove the prohibition on virtual meetings.

Even though meetings are being held virtually, you must still ensure that there are enough trustees 'present' at the meeting to form a quorum. The quorum will be specified in the charity's governing document. If there are not enough trustees present, then the meeting will not have been validly held.

If you do wish to change your charity's constitution, you should remember that any change to a Scottish charity's constitution must be notified to OSCR within 3 months of the change.

***We are required to hold an AGM. Can we do this online?***

If your charity is required to have an AGM, it is likely that it is a company or a SCIO. If so, you will benefit from a new law called the Corporate Insolvency and Governance Act 2020. It says that any AGM held between 26 March 2020 and 30 September 2020 can be held electronically. This applies even if your governing documents say that meetings need to be held physically – in effect, this law overrides the relevant provision of your governing documents during this period.

***What constitutional arrangements ought we to be thinking about when setting up new enterprises and trading arrangements under our SCIO umbrella?***

If you are setting up a new company then this must be done via Companies House, while SCIOs should be set up via OSCR.

As every charity is different, there is no universal best practice which can be applied in every situation. It is best to seek legal advice to determine the best approach in your specific circumstances.

***What are trustees' liabilities if the charity goes bust?***

Trustees' liabilities will depend on the legal form of the charity. Generally, if the charity is a company or a SCIO then as long as the trustees/directors are complying with their legal duties, they will not find themselves personally liable in the event of insolvency.

If your charity is a SCIO, trustees' legal duties include a duty to act in the best interests of the charity and a duty to act with care and diligence. If your actions in the lead-up to the charity's insolvency were such that you were not acting in its best interests or not acting with care and diligence, you could be in breach of your duties. Compliance with these duties is regulated by OSCR, and the action they take if they find that you have breached them will depend on the seriousness of the breach. Often, OSCR's response to breach of duty will impact the charity as a whole rather than the individual trustee(s). For example, OSCR may prohibit you from acting as a charity trustee in the future, but it may also prohibit the SCIO from making payments or entering into transactions without OSCR's consent.

If your charity is also a company, the directors' liabilities are potentially wider ranging than if it is a SCIO – this is because it is regulated by company law as well as charity law. If a director is found to be in breach of duty, they may be required by the courts to pay damages for the loss caused by that breach. There are various other provisions of company law which apply specifically to directors' actions if the company is nearing insolvency – all company directors should ensure they have a good understanding of their legal responsibilities and should seek legal advice in the event of any uncertainty.

***Can SCIOs merge with other charities?***

Yes. When two charities merge this is known by OSCR as an amalgamation. It should be noted, however, that a SCIO can only merge with another SCIO – it cannot merge with another organisation which is a charity but is not a SCIO. When two SCIOs merge, the legal effect is that both of the previous SCIOs cease to exist and one new SCIO is created. In order to merge with another charity, you must apply to OSCR for consent. The application form is found on the OSCR website.

Before applying, you must consider whether the charity's constitutional documents allow you to merge with another charity. If you want to merge but the constitution doesn't allow this, then the constitution should be amended accordingly. Even if the constitution permits merging, each of the two charities will need to pass a resolution which approves the amalgamation and approves the proposed constitution of the new SCIO. Without these resolutions, OSCR will reject your application.

***How, if at all, do the rules differ for Social Enterprises?***

A Social Enterprise is a business which trades for a social or environmental purpose. Because this is a company, it is subject to company law and therefore is regulated more strictly than a SCIO or unincorporated charity. For example, directors of companies have more wide-ranging duties than charity trustees.

SCIOs and Social Enterprise companies each have reporting requirements. SCIOs are required to report to OSCR, while companies are required to report to Companies House. Social Enterprises are always companies but are often also charities. In this case, the Social Enterprise is required to report to both OSCR and to Companies House. This is relevant, for example, when it comes time to file the accounts.

## Insurance

***Are charities liable for claims of negligence where a worker/volunteer/service recipient is exposed to, and catches, the virus? How can we best avoid such claims, given that governmental safety advice is broadly only guidance, and not the law? Are we responsible for providing personal protective equipment, for example?***

It is a good idea for any charity that is unsure about what is required under their insurance policies as a result of changes arising from COVID-19 to consult their insurance broker.

At the moment, there is a lack of clarity regarding the circumstances in which an employer may be found liable to its employees or third parties who have contracted COVID-19. As yet, there have been no cases or judicial decisions on this point of law. The best guidance that we can offer employers at present is to take account of the following factors to ensure that, as far as possible, an employer can demonstrate it has complied with relevant legislation and the government's guidance:

- Ensure there is a designated person, or team, in the organisation that is responsible for reviewing the government's guidance and updates to it;
- Records should be kept of the measures that are then taken to comply with guidance, including updates to internal policy documents/risk manuals;
- All risk assessments that are completed should be recorded; and
- Where it is not possible to follow the government guidance, consideration should be made as to whether the working practice is safe, and whether it should continue.

(If a charity has specific questions which their insurance broker cannot assist with, CMS may be able to provide some more detailed guidance concerning employment and/or insurance law (for example, in relation to any obligation to provide equipment).)

***Charities are concerned that some of their actions during the pandemic may not fall within the boundaries of their current insurance cover. Could there be legal repercussions around this in future?***

In general, if there is a material alteration in the risk that has been insured (as a result of COVID-19 or otherwise) then an Insured has an obligation to advise Insurers of that change (usually they will do so via brokers). Insurers may then impose different terms or an increased premium. The Insured should notify the Insurer of this change. This ensures that – if the Insured has to make a claim at some point – there is no argument that the Insurer is entitled to decline cover as a result of that risk not having been insured against, or because there has been a material non-disclosure/misrepresentation as to the scope of the risk.

Specifically, then, each charity should speak to their broker about anything that they might have done differently as a result of COVID-19, and the broker should advise on what needs to be notified.

***What can organisations if they are unsuccessful in a claim for business interruption insurance?***

This is a very high-profile issue that is affecting many charities and businesses in the UK and beyond. As with question 2, as a first step we recommend that any charity facing this issue should ensure that they keep in touch with their insurance broker. Brokers should be following a test case that is currently being brought by the Financial Conduct Authority's (FCA) against a number of Insurers. The purpose is to "test" the wording of a number of business interruption insurance policies so that the court can provide guidance on whether or not Insurers should pay out. It is expected that the Commercial Court in London will issue a judgment in relation to the test case policy wordings later in the summer (though that decision might be appealed to the Supreme Court, which would add some delay).

The advantage of the FCA test case is that, effectively, Insurers are going to have to prove in court that they do not have to pay out under these policies and it is expected that, for some wordings, the Court will decide that Insurers do have to pay. Insured charities will then benefit from this decision (if they have helpful policy wordings) without incurring legal cost. Again, brokers should be able to assist with this. Even if a charity's Insurer is not directly involved in the court action, the FCA expects Insurers to:

a) Review their policy wordings and decide whether the outcome of the FCA test case impacts their claims and complaints handling policies;
b) Review their existing claims and complaints to reflect the results of the policy wording review and notify the relevant policyholders; and

c) Re-assess any previously rejected claims or complaints once the test case has been determined.

Insurers are also under an obligation to update policyholders whose claims or complaints are being determined on the outcome of the test case at various points.

The FCA test case will be decided in the next few months (possibly later if there is an appeal). We therefore have to wait for the outcome of this test case before we know exactly how it will apply to each policy. We expect that Insurers will be obliged to pay under some policies (depending on the exact wording) where claims have previously been turned down.

## Health & Safety

***What are our obligations to staff who are returning to work in the office?***

Employers should start by updating their general risk assessment to manage the risks inherent in re-opening and running your business in a "COVID-secure" way. As an employer, you have a duty to protect your employees and others from the risks of COVID-19. As COVID-19 is a new risk to workplace safety, it is a risk that must be incorporated into existing workplace risk assessments. It is important to share the risk assessment with all employees and consult with them during the process.

If you have fewer than five employees, you do not have to write your risk assessment down although it is recommended that written records are kept.

The Health and Safety Executive has produced guidance to assist employers in allowing their employees to return to work safely and the following steps are recommended:

- Everyone who can effectively work from home should continue to do so;
- Stagger arrival or departure times to avoid people congregating in groups;
- Provide handwashing facilities so that people can wash their hands when entering and exiting the workplace;
- Hand sanitiser should be provided where handwashing facilities are unavailable;
- Keep work areas 2 metres apart and keep the number of people in each work area as low as possible;
- Use signage to remind people to keep a distance of 2 metres from one another;
- One-way systems and floor tape should be used to maintain a one-way flow of "traffic";
- Physical screens may be used where there is the potential for face-to-face working;
- Allow only essential trips within buildings and between sites and locations;
- Limit one person to one task where possible, to avoid handovers and equipment/resource sharing;
- Assign and keep individuals within the same "shift teams" to minimise the extent of social interaction;
- Limit the number of people who use lifts or work vehicles;
- Identify surfaces that are frequent "touchpoints" such as turnstiles, swipe card accesses and handrails and consider increasing the frequency of cleaning;
- Encourage good respiratory and hand hygiene;
- Provide hand driers or disposable paper towels (communal towels should not be used);
- Good ventilation should be maintained wherever possible, for example by opening windows and doors where safe to do so.

Employers should also remember that, under the Scottish Government "Test and Protect" scheme, employers are strongly encouraged to support workers in heeding any notifications to self-isolate and provide support to those individuals isolating by checking in with them and assisting them in continuing to work from home if they remain well and symptom-free. Employees are entitled to Statutory Sick Pay for every day spent in isolation as a result of a "Test and Protect" notification or may choose to utilise Annual Leave in order to remain on full pay whilst isolating. Employers can assist the Test and Trace services by keeping temporary records of staff shift patterns for 21 days to identify close contacts if the data is requested.

***What are our obligations to staff who are still working at home? Do risk assessments need to be carried out?***

As an employer, you have the same health and safety responsibilities for your home working staff as for workers who are physically attend the workplace. Practically, this means that employers must provide supervision and training as well as implementing control measures to protect the home worker. There is no obligation to undertake a specific risk assessment for workers working from home but, given the likelihood during the COVID-19 pandemic that employers will have large numbers of employees working from home, there are a number of measures that employers should consider implementing. There are always further risks if an employee is working alone from home with no direct supervision.

Employers should take into account the mental health of the employee and provide opportunities to "check-in" regularly and stay in regular contact, for example by Teams, Skype or video calls. Employers should provide all equipment required for employees to work safely from home, which may include monitors, laptops or video conferencing facilities.

If an individual is working from home for an extended period of time, the risks associated with using equipment such as display screens (DSEs) must be controlled. This will include the homeworker doing a workstation assessment at home. Whilst there is no obligation to conduct a DSE assessment when working temporarily from home, for example during this period of pandemic, it may still be good practice to ask employees to undertake a self-assessment of their workstation. HSE provides a useful checklist which can be downloaded here. Employers should have regular discussions with home workers regarding their work equipment and whether any other needs are identified. Any adverse effects of working from home, for example aches or discomfort relating to their temporary home office setup or a lack of structured rest and recovery breaks should be discussed with the employer.

As an employer, you should share an emergency contact with all home workers so that individuals know exactly how to get help if and when it is required.

Lone working

It is likely that employees, if they are working from home, may also be categorised as lone workers. If, as an employer, you are concerned about a person's medical suitability to work from home, medical advice should be sought. For example, individuals suffering from seizures or serious health conditions may be particularly vulnerable when working from home alone. Assess the risk to the employees and whether that risk can be reduced by carrying first aid equipment or by receiving further first aid training and learning to self-administer.

It is particularly important to monitor the mental and emotional health of lone home workers as they may feel additionally isolated and disconnected. It is important to maintain regular, albeit virtual, contact to assess their mental and physical wellbeing and recognise any signs of stress in employees.

***Do the incident reporting rules still apply?***

Under RIDDOR, instances of COVID-19 will need to be reported where there is reasonable evidence of occupational exposure. The responsible person (usually the employer) must follow the reporting procedure if, after making an informed judgement, it is decided that there is reasonable evidence linking the nature of the person's work with an increased risk of becoming exposed to COVID-19.

Various factors should be taken into account when deciding if there is reasonable evidence for COVID-19 to be reportable (for example, if there was a specific incident which can be identified as having led to an increased exposure risk). Factors may also include whether the nature of the individual's work activities increased the risk of COVID-19 exposure and whether the individual, during the course of their employment, was brought into direct contact with a COVID-19 hazard without the necessary and effective control measures such as PPE or social distancing requirements.

It should be noted that there is no onerous obligation to conduct extensive investigations in determining whether COVID-19 is as a result of workplace exposure; the responsible person need only make a determination on the basis of the available information. There is no need for RIDDOR reports to be submitted protectively as a precaution where there is no evidence to suggest that occupational exposure to COVID-19 occurred.

HSE have highlighted that this is not a complete list and other factors may apply when determining if COVID-19 is reportable under RIDDOR. For occupational exposure to be judged as the likely cause of COVID-19, it must be determined that it is more likely than not that the individual was exposed during the course of their employment rather than at a different location or occasion. It may therefore be difficult to identify that exposure has definitely occurred at work, when COVID-19 is at large in the general population of Scotland and societal exposure is likely (for example when at shops or in public places, e.g. parks).

## Property

***If staff continue to work at home for an extended period, could we request that our landlord considers a rent review (particularly where we are ready to return to the office, but the landlord is not willing to reopen)?***

If the lease is silent on the issue and the tenant can still access their property, there is no automatic entitlement to a rent reduction or rent-free period. However, tenants may wish to approach their landlords to ascertain if they are willing to agree a rent concession to help the tenant's cash flow. Considering the current climate, in an attempt to keep tenants solvent, landlords may be more amenable to a commercial discussion about a rent concession. For example, this may take the form of a rent-free period, moving to monthly rents or a deferral of rental payments to be paid back at a later date.

The Coronavirus (Scotland) Act 2020 introduced additional protections for commercial tenants as a result of the pandemic. It extends the statutory grace period for non-payment of rent or other monetary sums due under the lease from 14 days to 14 weeks after a formal notice demanding payment has been served. This means that if the tenant can clear its arrears during a 14-week period from the serving of a formal notice from the landlord, the landlord will not be entitled to terminate the lease. Depending on the length of the pandemic these periods of notice may be further amended, as the Act provides for the Scottish Ministers to further extend them.

For non-monetary breaches, the position remains as it was before the crisis – i.e. the landlord is required to give a reasonable period in which the breach is to be remedied. The crisis may have an impact on what is considered "reasonable" in this context, but that would have to be considered on a case-by-case basis.

There is also a temporary ban on the use of winding-up petitions where a company cannot pay its bills due to coronavirus. This ban has been extended to 30 September 2020.

Tenants should consider whether any business disruption insurance they hold will allow them to recover losses suffered due to the closure of premises.

***What is the law around land leasing, particularly regarding sole occupancy use and the maintenance of assets which might come with the land?***

Where the landlord and tenant are jointly responsible for the maintenance of land, which party is responsible for which aspect of the land should be clearly stated in the lease. This may take the form of joint responsibility for all maintenance costs (where this is the case, it should be clear who decides what maintenance is required and who is responsible for carrying out the works), or may allocate the duty of maintaining certain assets or areas of land to each party. In addition, the lease should contain provisions as to what to do in the event of disagreement about the maintenance of the land or the cost of any remedial work.

Where the lease states that both the landlord and the tenant are responsible for maintaining the property, both parties have a duty to take reasonable care to ensure that third parties entering the land will not suffer injury or damage (Occupiers' Liability (Scotland) Act 1960). This might include signage to warn others of potential dangers, fencing hazards and regularly assessing the condition of the land, taking remedial action where necessary. Recent court decisions suggest that, unless concealed or unusual, an occupier is generally not obliged to provide protection against an obvious danger arising from a natural feature, such as woodland or a lake. This will very much depend on the property, however.

In most commercial leases, landlords grant tenants peaceful enjoyment of the land for the duration of the lease. In addition, the lease will usually contain provisions allowing the landlord to enter the property without permission (but upon giving notice) for certain purposes and in the event of an emergency. The parties are free to negotiate the access criteria, however, and this should be clearly set out in the lease.

Tenants should instruct solicitors to negotiate any lease to ensure their objectives are achieved and to ensure they do not take on more liability than expected.

***How do we go about changing our lease/rent agreement? Are rent holidays enforceable?***

Unless provided for in the lease, there is no automatic entitlement to a rent holiday or change in rent where the tenant is still able to access the property. Tenants may wish to approach their landlords about a change to the lease terms as explained above.

***What is the situation with rates?***

The Scottish Government has introduced several changes to business rates in order to ease the financial pressures of the pandemic:

- Automatic 100% business rates relief for 12 months for properties in the retail, hospitality, and leisure sectors (applicable from 1 April 2020 to 31 March 2021);

- Automatic 1.6% relief for all other properties (applicable from 1 April 2020 to 31 March 2021);
- £10,000 one-off grant to businesses in receipt of Rural Relief or the Small Business Support Grant (whether or not the organisation is currently in receipt of Charitable Rates Relief or Sports Relief). Find further information and details of how to apply here;
- One-off grant up to £25,000 for retail, hospitality, and leisure businesses. To apply, the rateable value of the property needs to be between £18,001 and £50,000. The Scottish Government has confirmed that if an organisation owns multiple properties, it may be able to get a £25,000 grant on the first property. Each additional property may then be eligible for a Retail, Hospitality and Leisure Support Grant of £18,500, subject to a limit of €800,000 per business. Find further information and details of how to apply here.

Charities may wish to approach their local authority in order to discuss the possibility of additional discretionary business rates relief or to agree a payment plan, in addition to the normal charity relief.

## GDPR

***We have collected lots of personal data for emergency response reasons. What do we do with that data now?***

As with any personal data that you collect, this will have been collected for a specified purpose. You may continue to process this personal data for this purpose. The purpose must be as clear and as specific as possible, as this ensures that you are processing any personal data fairly, lawfully, and transparently. To the extent that the purpose is no longer valid, you must either cease processing or you may continue to process this personal data for a new purpose, subject to the following:

- the processing for the new purpose is compatible with the original purpose,
- you get explicit consent from the data subject, or
- you have a clear obligation or function set out in law.

In general, if your new purpose (i) is very different from the original purpose, (ii) would not be a reason that the individual would expect for you to be processing their personal data, or (iii) would have an unjustified impact on the individual, it is likely to not be compatible with the original purpose.

Where you have a specified and legitimate purpose, you must ensure that the data that you do process is limited to only that which is required to fulfil this purpose. You should not be collecting any data which is irrelevant to your purpose (e.g. if you are taking information only in relation to an emergency contact, it would be justifiable to take a telephone number and home address, but not information about that contact's race or religion). If you have done so, this data should be securely deleted.

In any event, you must not keep personal data for longer than you need it to serve your purpose. You need to consider for how long you can justifiably retain the data. This may be done in accordance with your documented retention policy. However, please note that if you are a small organisation undertaking occasional low-risk processing, you may not require a documented policy. Whether or not a policy is required, you must still regularly review the data that you have and delete/anonymise anything that you no longer need.

GDPR does not dictate how long you should keep personal data – you must judge how long you can justifiably keep this data to serve your purposes. Where you no longer require this data, you should delete or anonymise it.

***What should we do with, for example, details of volunteers without PVG checks?***

PVG checks are dealt with outside of GDPR. Details of volunteers can be collected without the individuals requiring PVG checks, as these are only required in limited circumstances. There are two types of regulated work that are covered by this – work with children and work with protected adults. While this work will, in most cases, involve working directly with vulnerable persons (e.g. carer or teaching roles), this work may include membership of certain committees or serving on the board of trustees for charities focused on the safeguarding of vulnerable persons.

To the extent that volunteers are "coronavirus response workers", PVG checks will be prioritised and free. These may be volunteers that are in a role only supporting response to coronavirus, working in a qualifying sector, and who only require a disclosure because of their coronavirus work. Some relevant qualifying sectors include:

- healthcare;
- social work/social care;
- animal health and welfare;
- medicines and pharmaceutical supply;
- food supply and food processing;
- financial services; and
- food retail.

A full list of these qualifying sectors (and more information on this scheme) can be found here.

Whether PVG checks are required, the data of volunteers will still require to be collected, processed, and stored in strict accordance with the GDPR. This includes ensuring that you have a lawful basis to process the volunteers' personal data and providing each volunteer with information as to how their data will be processed (which is normally provided by way of a **privacy policy**).

***What personal data do we need to hold on employees going forward? For example, regarding health, can I ask if they have had COVID-19?***

The Information Commissioner's Office (ICO) (an independent body upholding information rights in the UK) has set out some easy-to-follow guidance to follow where collecting health data from employees particularly relating to COVID-19. They have set out six key steps, as follows:

Only collect and use what is necessary

- You are not necessarily required to ask employees this question or to hold any other information about employees, unless you understand there to be a specific reason as to why you require additional information. You should ask yourself how this data processing will help to keep your workplace safe, if the measures that you are considering will help you to provide a safe environment and if you could achieve the same result without collecting this data. If you can show that your approach is

reasonable, fair and proportionate to the circumstances, then it is unlikely to raise any data protection concerns.

- You must ensure that you have a lawful basis for using any personal data that is set out in GDPR. Some of the common lawful bases that are relied upon by an employer include (i) processing is necessary for performance of a contract, (ii) processing is necessary for compliance with a legal obligation to which you are subject (e.g. by way of employment legislation), or (iii) processing is necessary for the purposes of the legitimate interests pursued by the employer. Where processing particularly sensitive data (like health data), you are required to have an additional lawful basis. Generally, you may rely on consent, but this is not recommended in an employer-employee relationship.

Keep it to a minimum

- As was highlighted in our response to the first question above, you must ensure that the data that you do process is limited to only that which is required to fulfil the purpose for which you have collected it. If you are collecting test results or symptoms, you must collect this information only to implement your measures appropriately and effectively.

Be clear, open, and honest with staff about their data

- If there is sufficient purpose for collecting the data, you must set this purpose out clearly and communicate this to your employees. You must ensure that you tell your employees how and why you wish to use their data and what possible implications there may be. Amongst other things, you should also be telling your employees if you are providing this data to any third parties and how long you intend to keep this data for (bearing in mind, of course, that this should not be longer than is necessary). This is all best set out in a clear and accessible **privacy policy**.

Treating people fairly

- Your collection must be fair and not unjustifiably detriment any of your employees (i.e. the measures should not be discriminatory).

Keeping people's information secure

- You must make sure that you can keep all individuals' data safe and secure. As this data may be health-related data, which is particularly sensitive, you should consider what level of security is appropriate, taking into account the additional risk of collecting this data.

Employees exercising their rights

- When informing employees of how their data is to be processed/collected, you should also be informing them of the rights that they may exercise in relation to their data. Employees must have the option to exercise those rights if they wish to do so, and to discuss any concerns that they may have with you. Openness and transparency are of significant importance.

You may find more guidance from the ICO on data protection and COVID-19 here.

## Miscellaneous

### *What happens if the charity goes bust?*

The implications of a charity 'going bust', or becoming insolvent, will vary depending on the corporate structure the charity takes. If a charity is insolvent, it is deemed unable to pay its debts. In other words, it has insufficient assets to pay its liabilities. In the UK, the following are the four primary structures that a charity can adopt, including both incorporated and unincorporated structures:

1. Company limited by guarantee (incorporated),
2. Charitable incorporated organisation ("**CIO**") / Scottish charitable incorporated organisation ("**SCIO**") in Scotland (incorporated),
3. Trust (unincorporated), and
4. Unincorporated association (unincorporated).

Company limited by guarantee

A company limited by guarantee is similar to a company limited by shares, with the main difference being that the members do not have limited liability up to the nominal amount they paid on their shares, but rather the members guarantee to contribute up to a specified amount to the assets of the company as may be necessary.

The Insolvency Act 1986 allows for the same insolvency processes to be available for a company limited by guarantee as for a company limited by shares. These processes are broadly divided into rescue proceedings, such as voluntary arrangements and administration, and liquidation, which can be voluntary and compulsory.

Broadly, a voluntary arrangement is an agreement between the company and its creditors to set out a plan for the repayment of the company's debts in a manner that will enable the company to meet its new repayment obligations (i.e. those as agreed by way of the voluntary arrangement) without becoming insolvent. Administration on the other hand is where professional insolvency practitioners, called administrators, are appointed to take control of the company to try and (in order of priority) (1) rescue the company, (2) get a better result for creditors of company than liquidation, or (3) realise company property to make a distribution to creditors.

Unlike rescue proceedings, liquidation anticipates that the company cannot be 'rescued' and is a procedure whereby a liquidator is appointed to sell the assets of the company and distribute the proceeds to the creditors to satisfy the debts they are owed. After the liquidation process has been completed, the company will be dissolved.

The Insolvency legislation sets out the order of priority under which certain classes of creditors are to be repaid in insolvency procedures, with secured creditors (i.e. those whose debts are secured by way of collateral, such as a standard security over real estate) usually being repaid first and guarantors of the company last.

CIOs/SCIOs

A CIO/SCIO is a corporate structure designed specifically and exclusively for registered charities. A CIO/SCIO must be a registered charity, has separate legal personality – meaning it can enter into contracts, own property, and sue and be sued in its own name – and the

members and charity trustees have limited liability. The members and charity trustees do not, however, have a right to receive any of the assets of a CIO/SCIO on dissolution.

CIOs/SCIOs are subject to a slightly modified version of the usual Insolvency legislation for companies. This means that CIOs/SCIOs can also be subject to the normal rescue proceedings (such as voluntary arrangements and administration) and liquidation (voluntary and compulsory).

Trust

A charitable trust is not a separate legal entity. They use a trust deed (or sometimes a will) to conduct their business and the charity's trustees are named on the deed. The trustees own the property personal, but such property is owned in trust, meaning the trustees owe duties to the beneficiaries of the trust to only use the trust property for the trust purposes (which are typically defined in the trust deed).

This means the trustees are personally liable for any debts incurred by the charity that cannot be repaid. As such, if the trust becomes insolvent in the sense that its debts outweigh its assets, the trustees will be liable personally and be subject to the rules of personal insolvency, namely sequestration.

Unincorporated association

An unincorporated association is an organisation of two or more persons (the members) and is not a separate legal entity. The members tend to cooperate for a common purpose and will regulate their affairs with a written constitution, with decisions being taken by way of a committee. Each members' personal liability will typically be limited to the extent of their subscription fee.

An unincorporated association cannot go into administration as it is not considered a "company" for the purpose of the Insolvency legislation. An unincorporated will rarely be able to go into compulsory liquidation, as in order to qualify as an "unregistered company" for the purposes of compulsory liquidation, the charity cannot be constituted by a trust and must be formed for commercial purposes. Whether an unincorporated association has been formed for commercial purposes will be determined on a case by case basis, but for most charities this will not be the case.

As such, if a charity operating as an unincorporated association becomes insolvent, any property or liabilities that it has will legally be the property or liabilities of some or all of its members, depending on the circumstances. In order to wind up the affairs of such an association, such property and liabilities will need to be distributed and discharged, respectively. On an insolvency event, if the association's liabilities outweigh its assets each member is only liable to the amount of their subscription, unless the written constitution or 'rules' provide otherwise. As such, on an insolvency, no member will be liable to a creditor unless they have assented to the creditor's contract generating the relevant liability.

***What happens if we cannot deliver on our contact with the Local Authority?***

There are a range of Procurement Policy Notes (PPNs) issued by the UK and Scottish governments providing guidance to local authorities on potential relief which can be granted to suppliers. You should contact the relevant local authority, explain what you can and can't do, and ask them for the opportunity to discuss potential relief or amendments to your contract for the relevant period.