

# UK Announces Measures To Support Businesses Impacted by Coronavirus/COVID-19

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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The U.K. government has announced a series of measures intended to support businesses impacted by coronavirus/COVID-19, including suspension of the wrongful trading regime, a job-retention scheme and a temporary ban on the eviction of commercial tenants.

## Suspension of Wrongful Trading Regime

On 28 March 2020, the U.K. government announced that the wrongful trading provisions of the U.K. insolvency legislation<sup>1</sup> would be suspended in respect to actions taken by directors between 1 March 2020 and 31 May 2020. Legislation to implement the suspension will be introduced to the U.K. Parliament “at the earliest opportunity”.

- Under the wrongful trading regime, if a director of an English company has concluded — or should have concluded — that there is no reasonable prospect of that company avoiding an insolvent liquidation or administration, the director has a duty to take every step that a reasonably diligent person would take to minimise loss to the company’s creditors.
- If following a company’s entry into insolvent liquidation or administration a court determines that its director has failed to comply with this duty, the court can order the director to make a contribution to the company’s assets such that there are additional funds to pay creditors.
- A director will be liable to contribute if it can be shown that the company ended up in a worse position because of a decision to continue to trade.
- The legislation includes two objective tests: (i) should the director(s) have concluded that the company could not avoid an insolvent process, and (ii) did he/she take every step that a reasonably diligent person would have taken to minimise losses.
- In practice, directors who have taken professional advice and ensured that they are fully informed regarding the financial position of the company are unlikely to face a claim. The courts are more likely to uphold claims where directors have not sought advice and not kept themselves informed of the position of the company and the position of its creditors.<sup>2</sup>
- The effect of this suspension is that directors who have been making difficult assessments about whether to continue to trade in the period since 1 March will not face the risk of having to make a personal contribution if their decisions result in a company entering an insolvent process and increasing the losses.

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<sup>1</sup> Section 214 and 246ZB Insolvency Act 1986

<sup>2</sup> *Re DKG Contractors Ltd [1990] BCC 903*

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- The remainder of the U.K. insolvency regime continues to have full effect. Directors can still face claims for fraudulent trading (where directors have taken actions with the intention of defrauding creditors) and the U.K. government retains the right to apply to court for an order that a director of an insolvent company be disqualified from acting as a director for between two and 15 years.
- The suspension of the wrongful trading regime should provide some reassurance to directors presently facing very difficult decisions that their actions are less likely to result in personal liability.
- The best steps that directors can take to protect themselves remain the same:
  - Take professional advice
  - Obtain and maintain the best available information
  - Maintain formality of meetings of directors
  - Record the key decisions taken and the supporting advice and information

## Job-Retention Scheme

On 20 March 2020 the U.K. government announced the establishment of the Coronavirus Job Retention Scheme (the Scheme), which is widely referred to as the furlough scheme. Details of how the Scheme will operate were set out in guidance provided by HM Revenue & Customs (HMRC) on 26 March 2020:

- The Scheme is “designed to support employers whose operations have been severely affected by coronavirus” by enabling them to retain employees for whom work is not available. Prior to the Scheme, employers would have had to make affected employees redundant if unable to pay them. Under the Scheme, workers can be placed on furlough leave until the employer is able to provide work.
- Employers can claim grants to cover 80% of the wage costs paid to “furloughed workers” up to a monthly limit of £2,500 per worker through an online portal being created by HMRC. The arrangement is intended to be in place by the end of April 2020, to cover April’s payroll, but employers may need to pay their staff and then claim the money back from HMRC once the Scheme is up and running.
- Employer national insurance contributions and minimum automatic enrolment employer pension contributions associated with the furlough wage will be covered by the Scheme (and can be recovered in addition to the £2,500 salary cap).
- Employers can (and, unless employees agree to the change in their status and associated pay reduction, may need to) pay furloughed workers more than the grant provided by the

Scheme, but this additional wage cost and any associated national insurance contributions and automatic enrolment pension contributions will not be reimbursed.

- The Scheme will cover the period from 1 March 2020 to 31 May 2020 but may be extended if necessary.
- The Scheme is available to any U.K. organisation that operated PAYE on or before 28 February 2020 and that has a U.K. bank account. In order to be able to claim under the Scheme for a worker, the worker must:
  - have been on the employer’s PAYE payroll on 28 February 2020;
  - have agreed to be furloughed and to any necessary changes to the employment contract (equality and discrimination rules continue to apply when deciding on which workers are to be furloughed and collective consultation may be required);
  - continue to be paid at least 80% of their salary up to a maximum of £2,500 per month by the employer;
  - be furloughed for at least three weeks; and
  - not undertake any work for the employer (workers on reduced hours or reduced pay will not qualify).
- Workers placed on unpaid leave cannot be furloughed, unless this occurred after 28 February 2020.
- Workers receiving statutory sick pay can be furloughed once their sick leave comes to an end.
- Statutory maternity pay is unaffected by the Scheme. However, enhanced contractual pay for maternity leave, adoption, paternity or shared parental leave can be claimed.
- Furloughed workers continue to have the same rights as other employees, including statutory sick pay entitlement, maternity/parental rights, rights against unfair dismissal and rights to redundancy pay if their role is subsequently redundant. They also are entitled to continue to receive benefits in kind, such as life and medical insurance.

For more background on the Scheme, see Skadden’s 23 March 2020 client alert, “[UK Announces COVID-19 Job Retention Scheme](#).”

## Suspension of the Eviction of Commercial Tenants

On 23 March 2020 the U.K. government announced, as part of a package of measures, the suspension of the eviction of commercial tenants.

- All commercial tenants are covered by the scheme.
- Commercial tenants that are unable to pay rent as a result of coronavirus will not forfeit their lease and be required to leave their premises if they fail to make a rental payment, until 30 June 2020.

# UK Announces Measures To Support Businesses Impacted by Coronavirus/COVID-19

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- The U.K. government has not imposed a rental holiday; commercial tenants are still liable to pay rent due unless they reach another arrangement with their landlord. The effect of these measures is simply to protect commercial tenants from the penalty of eviction if they are unable to pay the rent due.

## Other Measures

The above three most recent measures supplement several existing business support policies implemented by the U.K. Government. These include:

- the Coronavirus Business Interruption Loan Scheme, which will provide loans of up to £5 million to businesses with an annual turnover of less than £45 million;
- the Covid Corporate Financing Facility, under which the Bank of England will buy short-term debt from companies “that make a material contribution to the UK economy”;
- the deferral of VAT and Self-Assessment payments;
- the Self-Employment Income Support Scheme;
- a statutory sick pay relief package for small and medium-sized enterprises (SMEs);
- a 12-month business rates holiday for retail, hospitality, leisure and nursery businesses;
- small business grant funding of £10,000 for all business in receipt of small business rate relief or rural rate relief;
- grant funding of £25,000 for retail, hospitality and leisure businesses with property with a rateable value between £15,000 and £51,000; and
- the HMRC Time To Pay Scheme to help with tax.