



Supporting retail risk and loss prevention globally

# Preparing to Reopen: Reducing the Risks of Criminal and Civil Litigation due to Covid-19

As retailers prepare to reopen, they will need to assess the risks, protect staff and customers, and implement control measures to reduce the risks associated with Covid-19. The statutory duties on employers with respect to health and safety are of general application: the fact that Covid-19 was unheard of a short while ago is irrelevant.

The risk of serious harm or death from Covid-19 is clearly foreseeable, and employers will have to assess risk and take action where appropriate. If they do not, then the threat of criminal or civil action being brought against a company, or individuals, is very real. There is also the potential for significant reputational damage if there is a perception that insufficient preventative action has been taken, or reactions to emerging new evidence of risk have been too slow.

The potential legal implications of the pandemic are wide-ranging. Perhaps most significantly, where a person has contracted Covid-19 and the exposure was likely work-related, the injury, or in the worst cases the death, must be reported to the relevant authority. This puts regulators on notice of cases in respect of which they may take action. It is likely that regulators will be on the lookout for clusters of cases with common links to particular organisations.

The penalties imposed on businesses for breaching health & safety regulations have grown significantly in recent years, with the potential for directors and individuals with significant control to be imprisoned, and unlimited fines to be imposed. Equally, the costs of civil litigation can be enormous, and the management time dealing with any legal action can itself be very draining for a business.

So how can retail operators reduce the risk of criminal sanctions and protect their businesses from the risk of civil litigation? Our online seminar will address the key statutory duties which businesses need to consider in order to protect themselves from the financial and reputational consequences of non-compliance.

We frequently hear reference in the media to 'safety' or 'safe' operation; but what does 'safe' really mean? In a legal context, safety is a relative concept. It has

to be understood in the context of both industry specific and general knowledge, and the prevailing standards of acceptable risk at the relevant time. Of course, that is a particular issue when it comes to Covid-19: businesses and regulators alike are starting from a low knowledge base regarding the virus and the risks it poses, but that is changing all the time, and it will be important for all parties to be reviewing their approaches frequently in order to keep up. Regulatory action considers events retrospectively, so it will be particularly important for businesses to keep records not only of their response to the virus as it changes over time, but also their rationale for the same, taking into account in particular the contemporaneous guidance and advice that is available from experts, and HM Government.

The core tool we suggest any business uses to respond to the challenges of dealing with Covid-19 is regular and rigorous risk assessment. There is no simple 'one size fits all' solution, and the considerations for every business are likely to differ. Even within a single business, different geographical locations may require different measures and responses. Businesses that take the time properly to consider and understand the specific risks their operation poses, and then respond to those risks with bespoke reasonably practicable measures to mitigate them are likely to be looked

upon much more favourably than those that take a generic approach, or who make an initial assessment at the point of re-opening, and then fail to perform sufficient reviews thereafter.

Of course, amidst all of the concern about the coronavirus, it is easy to lose sight of the broader context. The coronavirus will not be the only health and safety concern for any business, and for many businesses it will not be the biggest concern. Inevitably, the need to take measures to mitigate the impact of the coronavirus will clash with the need to guard against other health and safety risks, as well as with other legal duties. Here, it will be particularly important to document the considerations made and evidence used to support your ultimate actions.

In summary, the challenges posed to the retail sector re-opening in the face of the Covid-19 are almost unprecedented, and that is certainly so in the era of modern health and safety legislation. Many unknowns remain, but with careful thought and consideration, prudent businesses will be able to navigate the challenges and return to successful physical trading.

Dominic Adamson QC and David R White are barristers at [Temple Garden Chambers](#)

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