

Unwinding the Jersey lockdown: things to think about

Service area / [Employment, Pensions and Incentives](#)

Location / [Jersey](#)

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The end of the beginning?

COVID-19 has meant that governments in the Crown Dependencies have imposed lockdown orders on homes and businesses. Whilst many businesses have managed to carry on trading, many more businesses have had to close. Additionally, restrictions on individual movement and travel have meant that even if businesses are able to open, demand is in many instances low or non-existent.

The Government of Jersey announced a relaxation of its lockdown measures on 1 May 2020. It is currently proposing a four stage relaxation of its lockdown, which would work as follows:

- Level 4 (the current level as at 5 May 2020): Lockdown
- Level 3: "Soft" Lockdown
- Level 2: "Soft" Opening
- Level 1: Physical distancing

The details of the exit framework are available [here](#).

The approach taken by the Government of Jersey has been different to that in the UK (although it obviously has a significant number of similarities) and the initial moves to exit from lockdown have come at an earlier stage.

However, the Government of Jersey has emphasised that over 65s and those with underlying medical conditions are advised to be especially careful when outside the home. The Government has stated that such individuals may work, if they agree with their employer that they can do so safely (although what this looks like in practice is open to question).

Some areas to consider might include the following;

Reopening: operational issues

Employers should evaluate when and how to reopen. For retail and hospitality business this may mean reopening a fully closed businesses – for those in other sectors it may mean reversing some (if not yet all) remote working arrangements. The unwinding of lockdown is also staged, meaning that the range of services businesses will be able to offer is accordingly likely to be limited in a range of respects.

What works for one business may not be practicable for another. Planning to reopen and executing that plan will depend on the lockdown "level" of the Islands and a wide range of business specific factors, including business sector, size of business and the current health status of employees.

Businesses may also be dependent on other businesses to be able to provide staff, goods and/or services – meaning that any planning will potentially need to take into account the readiness and ability of other businesses to reopen.

Businesses which have reached agreements with landlords, employees and other contractual counterparties to reduce, amend (or suspend) payments and other contractual obligations for the duration of the lockdown will also need to consider if, when and how to unwind those arrangements.

One thing is clear: businesses (including their commercial counterparties) which have spent most or all of their cash reserves in surviving lockdown may need on-going support in getting back on their feet. Accordingly, planning and communication should be undertaken now.

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Planning should also take into account the fact that Jersey appears to have successfully suppressed COVID-19 for now – that does not mean that the virus has in any sense gone away.

Regulatory issues

The Jersey Financial Services Commission has published a range of responses to COVID-19, including the relaxation of a number of deadlines.

Once lockdown is lifted, such measures are likely to come to an end. Regulated businesses should keep developments under review.

Additionally, those businesses which have engaged in outsourcing under the JFSC Outsourcing Policy and Guidance Notes should ensure that they have reviewed their outsourcing arrangements and updated their risk documentation accordingly.

Employees

Employee communications should be carefully considered. Employees may have and/or express concerns regarding return to the workplace – some of those concerns may be based on a medical condition which the relevant employee or a member of their household have. Whilst other employees may naturally be concerned at the prospect of even a limited return to work in current circumstances.

Employees may also have caring responsibilities (child related and otherwise) which may present difficulties in resuming their full responsibilities. This may particularly be the case where schools or childcare arrangements are yet to reopen either fully or at all.

Employers should be considerate of workers' concerns and should encourage them to come forward to discuss their concerns. Most concerns should be capable of being addressed; however others may require careful handling.

Employers should be conscious of their obligations to employees under the Discrimination (Jersey) Law 2013 to consider making reasonable adjustments for disabled employees – and it should be noted that the "timeframe" for disability in Jersey is lower than that in the UK at 6 months, meaning that some employees who are recovering from COVID-19 may potentially fall within the definition.

Employers should also expect a rise in requests for flexible working and/or to continue working remotely. In relation to remote working, if it has worked well in recent weeks it will undeniably be more difficult to refuse future requests which include remote working.

As noted above, employers may have agreed (or imposed) changes to working hours, pay, work location and other provisions. Some of these changes may need to be unwound (either immediately or in the medium term) and others may need to remain in place either temporarily or permanently. This process will require careful planning and execution.

Employees may also have deferred large amounts of annual leave which they will wish to take in the second part of the year – potentially posing an operational challenge for later in the year. This is an issue picked up specifically by the JFSC, who have advised regulated businesses to consider how annual leave will be managed.

Planning should take into account the possibility of further lockdowns and/or the widespread unavailability of employees due to COVID-19; this may be as a result of infection or unwillingness to take the risk (whether perceived or actual) of coming to work.

Health and safety

An employer has a duty of care to its workforce and to others under the Health and Safety at Work (Jersey) Law 1989 (the H&S Law). Article 3 sets out the duty of an employer to their employees and requires every employer to ensure, so far as is reasonably practicable, the health, safety and welfare of all the employer's employees.

There is also a raft of common/customary law duties to take reasonable steps to ensure the safety of employees.

Health and safety expertise may be in relatively short supply in Jersey (particularly in relation to areas such as occupational health). Jersey employers should have regard to UK advice in addition to local advice (whilst being conscious that the UK is a very different environment).

Article 3(3) of the H&S Law requires every employer with 5 or more employees to have a documented health and safety policy and a documented risk assessment. These documents will almost certainly need to be reviewed as part of planning to reopen businesses.

Where the employer is aware that someone may be at particular risk (for example if they are over 65 or have underlying health conditions), a risk assessment should be carried out in relation to their individual circumstances. Where appropriate, medical advice and/or occupational health advice should be sought on a case-by-case basis.

Any employee-specific risk assessment should be discussed, in confidence, with the affected employee.

High risk employees may not always be obvious to employers: employees should be encouraged to come forward (and seek medical advice) if they think that they may be at particular risk.

The workplace to which employees return will not necessarily be a 'normal' one (although it may look very similar to the one which existed immediately prior to lockdown).

Reopening safety measures should include consideration of resources, policies, communication and (where necessary) training on:

- Staggering working hours
- Continuing remote working where possible

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- Ensuring that entry and exit points are appropriately managed
- Closing (or restricting access to) communal areas
- The cleaning of workplaces – with a particular focus on communal areas and/or toilets
- The maintenance of physical distancing (including between colleagues and clients/visitors)
- The wearing of facemasks and gloves (the latter is likely to be of limited application)
- The provision of adequate hand washing and hand sanitiser facilities
- Issuing or restating to employees with information on the symptoms of the virus and what to do if they or someone in contact with them develop symptoms
- Isolation for those who are showing symptoms, or share a household with those who do
- Business and social travel policies. There may be different considerations in respect of travel to places like Guernsey, the UK and then further afield.

Health Data – Testing, disclosure of symptoms and contact tracing apps

Some employers may wish to introduce private testing programmes to manage the risk to their employees. They may also wish to make it mandatory for employees to disclose symptoms (either their own or those they have been in contact with) and/ Employees' health and medical information is special category data for the purposes of the Data Protection (Jersey) Law 2018. Processing of such data will only therefore be lawful if:

- it is necessary for the purposes of exercising or performing any right, obligation or public function conferred or imposed by law on the employer in connection with employment. In this case there are several such duties – but necessity will need to be assessed and documented
- there is a substantial public interest, or a public interest in the area of public health, in doing so. This will particularly apply to the sharing of employee health data with the authorities. The UK Information Commission has published a set of FAQs which should assist – they are available [here](#)

Our view is that requiring disclosure of COVID-19 symptoms (or exposure to such symptoms) is reasonable.

In relation to workplace testing regimes, practice is still developing and it may be some time before there is a reliable test available to workplaces.

We are aware that some workplaces have considered temperature testing – whilst this may have little validity in medical terms in diagnosing COVID-19 it should at least flag up those employees with fevers (one of a wide range of potential symptoms).

Any workplace testing regime should be subject to the following:

- an appropriate privacy notice for employees
- limited data collection and retention
- limited disclosure within the employer or to third parties

There has been a significant amount of publicity and discussion about COVID-19 contact tracing apps. It is unlikely that employers would seek to utilise their own solutions in relation to such apps – but should employers require employees to download and have regard to such apps?

In our view, where contact tracing apps have been endorsed by the government (not something which has happened yet), requiring employees to download and utilise such an app is likely to be a reasonable instruction in current circumstances. However, this should be kept under review – there remain significant concerns surrounding data protection and privacy relating to such apps.

Broader legal issues

Following the 2008 financial crisis, there was significant legal fallout to deal with even when the crisis itself had passed.

We expect COVID-19 to generate similar legal fallout and unfortunately there is likely to be a higher risk of insolvencies and resulting litigation for many organisations. Businesses may also find that their supply chain and commercial counterparties are under severe pressure which places them at risk either of insolvency or being unable to fulfil their contractual obligations.

Organisations should take stock of their financial, contractual, legal and regulatory position and assess where their likely exposure is likely to be.

Businesses should also ensure that they have access to appropriate insolvency and dispute resolution advice.

We also expect there to be significant demand in relation to corporate reorganisation, restructuring and refinancing.

Trustees and private wealth managers may also face challenge from beneficiaries and other stake holders. Dealing with such issues is likely to require access to specialist legal advice.

Whatever your particular issues or concerns may be, we would be happy to assist you. Please do not hesitate to get in touch with our team below or your usual contact at Carey Olsen.

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