Reopening Workplaces:
Considerations for Commercial Landlord and Tenants

Introduction
With more businesses reopening their previously closed premises and following the Prime Minister’s recent encouragement for employees to return to work, it is important that commercial landlords and tenants consider their statutory health and safety obligations and enact all appropriate measures.

This article is primarily aimed at those landlords and tenants who are employers, and should be read in conjunction with the Thomas More Chambers’ Employment Law Team’s articles on Employers’ Reasonably Practicable Duties during COVID-19 and COVID-19, Risk Assessments and Implementing Health and Safety Measures for a Return to Work.

This article will outline landlords’ and tenants’ statutory obligations, explain how these duties will vary depending on the type of lease in question, and discuss relevant aspects of the service charge and alterations provisions in leases, and potential civil liability.

Statutory Obligations
Under the Health and Safety at Work etc. Act 1974 and the Occupiers Liability Act 1957, commercial landlords and tenants must keep premises safe, provide a safe area of work and implement every reasonably practicable measure to ensure the health and safety of employees and visitors.

Landlords and tenants should therefore consider implementing the following measures, in respect of the areas they control:
- Modifying the building to reduce touch-points: leaving interior doors open during business hours or installing automatic doors and contactless elevator systems.
- Adapting the heating, ventilation and air conditioning (‘HVAC’) system to prevent the transmission of COVID-19.
- Installing plexiglass, hygiene screens or other protective partitions on office tables, in reception rooms, canteens and other common areas.
- Rearranging workstations to ensure they are each spaced one metre apart. Removing hot-desk arrangements and preventing employees sharing equipment.
- Placing periodic floor markers as a visible reminder of what one metre looks like.
- Implementing an extensive cleaning programme, which applies to all touch-points (door handles, taps, doors, light switches, escalators, lifts etc), all public spaces, reception, canteen, staff rooms, changing rooms, toilets and lifts etc.
- Displaying posters across multiple parts of the premises, to remind employees and visitors to maintain social distancing, wear facial coverings and wash hands regularly.
- Implementing temperature checks at entrances to buildings.
- Controlling the movement of visitors in the premises (for example, one-way movement).

Before implementing any new building protocols, landlords should talk to their tenants in order to identify if the tenant has any particular operational or business needs. Similarly, tenants should also inform landlords if they have any specific requirements or need any alterations to be made to the premises, prior to reopening the workplace.

**Risk Assessments:**
The Management of Health and Safety at Work Regulations 1999 SI 1999 No 3242 imposes duties on employers to conduct risk assessments in the workplaces. In the Government’s guidance on Reopen your business safely during coronavirus (COVID-19), before returning to the workplace, commercial tenants who are employers, must carry out full risk assessments in respect to the parts of the premises that they occupy. Failure to do so can result in the Health and Safety Executive (‘HSE’) or local council issuing an enforcement notice.
The HSE has provided helpful guidance on the contents of risk assessments. Further, in the Government’s guidance on Working safely during coronavirus (COVID-19), businesses with over 50 employees are expected to publish their risk assessments online.

**Insurance:**

Landlords and tenants should also check the terms of their lease, in order to identify who is responsible for third party/public liability insurance. Most likely, the responsibility will lie with the tenant, in which case, tenants must review their insurance policies to ensure that they have sufficient cover for notifiable diseases, which includes COVID-19 as it is a reportable disease under The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013.

**Regulations:**

It is anticipated that the Government will shortly introduce regulations on social distancing, access and circulation requirements in relation to COVID-19. Tenants should remain mindful of the fact that breaching of any of these regulations will usually constitute a breach of the lease.

**Government and HSE Guidance:**

In order to avoid any liabilities arising under the relevant legislation, landlords and tenants should enact all reasonable measures as outlined in the relevant Government and HSE guidance. The following documents on workplace COVID-19 related measures should be reviewed:

- Reopen your business safely during coronavirus (COVID-19)
- Code of Practice for commercial property relationships during the COVID-19 pandemic
- Working safely during coronavirus (COVID-19)
- Working safely during COVID-19 in offices and contact centres
- Have the right workplace facilities
- Disinfecting premises using fog, mist, vapour or ultraviolet (UV) systems during the coronavirus outbreak
- Air conditioning and ventilation during the coronavirus outbreak
- Gas safety during the coronavirus outbreak
- Working safely during the coronavirus (COVID-19) outbreak
- Legionella risks during the coronavirus outbreak

**Type of Lease**

The extent of the landlord’s and tenant’s statutory health and safety obligations will depend on the type and terms of the lease. For example, landlords and tenants need to carefully consider the reservations in the lease, as many leases will expressly reserve the right to control the common areas, to the landlord. In which case, the landlord must comply with the statutory health and safety requirements in respect of the common areas.

*Long Lease of a whole building:*

If a tenant’s lease covers the entire building and does not reserve any ongoing maintenance of service obligations to the landlord, then the tenant will be liable for statutory compliance. The tenant will also have a duty of care to ensure the safety of the premises for all who access it (for example, employees, independent contractors, customers and other visitors).

*Lease of a whole building excluding structure and common areas:*

Where a landlord retains control of the external structure and common areas (for example, reception areas, bathrooms, stairways and lifts), they will be responsible for ensuring the common areas meet the relevant health and safety statutory requirements. It is common for leases to include a positive covenant, which requires the landlord to ‘keep the common parts of the premises clean and safe’. Tenants will be responsible in respects of the demised premises. However, for those employer tenants, their duty of care to provide a safe area of work requires them to check that their landlord has enacted all appropriate health and safety measures in common areas.

*Lease of one floor in multi-let offices or serviced offices:*

A landlord will likely have more extensive obligations where a tenant’s lease covers one floor of a building or is restricted to serviced offices. Consequently, landlords are likely to retain responsibility for the shared services (for example, the HVAC system and common areas). Therefore similarly to above, landlords must ensure those services and areas which they control, comply with the relevant requirements.
**Alterations**

Tenants must check the alterations clauses in their lease to determine whether or not their landlord’s consent is required before making any structural or non-structural alterations. It should also be noted that structural alterations may be strictly prohibited in short-term leases (of less than 3 years).

If alterations are prohibited but a tenant requires work to be carried out, in order to provide a safe workplace (for example by erecting partitions to maintain social distancing), the tenant should obtain the landlord’s express consent to undertake these alterations. Although, the landlord is not obliged to provide consent, there is an implied term under section 19 of the Landlord and Tenant Act 1927 not to unreasonably withhold consent.

Tenants must strictly comply with the alteration clauses because if works are carried out without the appropriate consent, this will be a breach of the lease and could result in forfeiture.

**Service charges**

As explained above, landlords who retain control of parts of the building will need to implement the relevant health and safety measures, such as installing: plexiglass partitions, appropriate signage and/or deep cleaning programmes. As these are costs are likely to form part of the building’s operating expense, they will usually be able to be recovered from the tenant, via the service charge provisions. However, if significant modifications need to be made, for example to the HVAC systems or to the elevator, these costs are more likely to be deemed capital expenses, in which case recovery through the service charge provisions would be inappropriate. It is therefore imperative that landlords and tenants carefully check the relevant terms of their lease to determine the appropriate method and level of charges:

‘Sweeping up’ Clause:

It is common for leases to include a ‘sweeping up’ or ‘catch all’ provision, which enables landlords to vary existing services, if these are in the interests of the estate. It is likely that this provision would cover the costs of adding protective health and safety measures in the context of COVID-19. Consequently, landlords can recover additional charges, which are not expressly referred to in the lease. Tenants and landlords should therefore check their leases to see if such a provision applies.
Statutory Compliance Clause:
Further, some service charge clauses will allow costs to be recovered if they were incurred due to complying with the ‘statutory compliance’ or ‘applicable laws’ clause. This will of course depend on the government’s compulsory measures at the time and therefore landlords and tenants should keep up-to-date with the recent guidance.

Fixed Service Charge:
However, if the tenant’s service charge is ‘fixed’ or ‘capped’, or the additional service is specifically excluded in a list of services contained in the lease, additional costs will be irrecoverable.

Potential Civil Liability
If landlords reopen premises but impose onerous or disproportionate restrictions that impact the tenant’s use of the premises (for example, by unjustifiably keeping the common areas closed), they could be at risk of claims for breach of quiet enjoyment or derogation from grant.

Further, if landlords or tenants do not comply with their statutory obligations as outlined above, such that the premises are unsafe and employees contract coronavirus, landlords or tenants could be at risk of a claim for negligence. Although, such a claim is very unlikely to succeed given the difficulties with causation, as employee claimants would need to establish that they contracted COVID-19 in the workplace.

Conclusion
Now that workplaces are reopening, it is imperative that landlords and tenants remember their statutory obligations and impose every reasonably practicable measure to ensure the health and safety of all employees and visitors to the premises. The extent of the landlord’s and tenant’s respective obligations will vary depending on the type and terms of the lease in question. The clauses relating to service charges and alterations must also be carefully scrutinised. As government guidance is regularly updated, landlords and tenants need to continually reassess what additional measures are required for the premises.
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If you need such assistance, please contact Craig Brown, Senior Civil Clerk on 020 7404 7000 or at cbrown@thomasmore.co.uk.

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