

Returning to the office – implications for landlords following Government guidance

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Helen Kearns

Last week the Government released guidance to help businesses understand how to work safely during the Covid-19 pandemic including for those looking to return to offices. Businesses will be deciding how and when they choose to return to the office and what practical changes they need to make to manage the continuing risks of Covid-19.

Practical Steps

The recommended changes proposed by the guidance include:

- one-way flow systems at entry and exit points;
- reducing congestion by creating additional entry and exit points;
- reducing the maximum number of people in a lift at one time;
- using floor tape or paint markers to ensure social distancing;
- installing screens and partitions between desks;
- providing additional parking spaces, bike rack and locker room facilities, to reduce use of public transport;
- reviewing ventilation systems;
- increased cleaning of common areas and availability of hand sanitiser.

Some of these changes will clearly be easier to implement than others, and the more onerous measures suggested under the guidance will undoubtedly raise questions for both landlords and tenants over how such measures are to be achieved and who should cover the cost.

Practical difficulties

Landlords are going to be faced with the practical problem of finding additional space to accommodate some of the recommendations in the guidance (for example, providing increased bike rack facilities, locker rooms and creating additional entry and exit points). Accommodating such requirements may be impossible where there is simply no additional space to provide such things.

This leaves the question, what happens if landlords are not able to implement these measures? Tenants may not feel comfortable returning to buildings where their Covid-19 health and safety concerns can't be addressed. This could lead to tenants seeking a reduction in rent, looking to exercise break rights where applicable, lease surrenders or vacant space which will all have an effect on the overall value of a landlord's asset.

Service Charge

A number of the changes recommended by the guidance affect the common parts of a building which are typically controlled by landlords. Landlords will want to recover any costs associated with these changes through the service charge. However, these items won't have been anticipated in landlords' budgets, are unlikely to be covered by landlords' insurance policies and may well be challenged by tenants.

In each case, it will come down to the interpretation of the individual leases and, where it is a multi-let building, how service charge is apportioned between tenants.

Lease provisions to consider

Is it a fixed or flexible service charge?

Where tenants are paying a fixed service charge it is unlikely landlords will be able to charge the costs of additional Covid-19 related changes. However, where the service charge is flexible, well drafted leases should have sufficient flexibility to allow recovery of reasonable costs incurred in complying with law and government guidance and protecting the health and safety of tenants and visitors to the property.

"Sweeper" clauses

These clauses will allow landlords to recover the cost of additional items or services that they may decide to provide. These will typically be limited by a requirement for the landlord to act reasonably and in the interests of good estate management. However, it is worth noting that courts typically construe sweeper clauses very narrowly and landlords should be careful if relying on this sort of clause.

Sinking funds or reserve funds

Although sinking and reserve funds are increasingly rare, some landlords still operate them and they may be an option for landlords looking to recoup costs associated with Covid-19 changes.

Caps on the amount the landlord can recover

Some tenants may have negotiated specific service charge caps into their leases which will affect the amount the landlord can recover.

Length of a tenant's lease

The length of a tenant's lease will have a bearing on what it can fairly be expected to pay, even if the service charge provisions in a lease are widely drafted.

Multi tenanted buildings and co-operation with tenants

In multi-let buildings, some tenants may choose to return in whole, some in part and others, due to effective home working, not at all (at least for several months). This may lead to some disputes over how the service charge should then be divided between tenants. Where there is a fixed percentage of service charge costs tenants may have to pay their share regardless of whether they return to the office or not. Where the service charge provisions refer to a "fair and reasonable proportion" or "according to use" there may be scope for argument on both sides.

Whilst tenants have been negotiating various changes to how they pay their rent, landlords have argued that service charge should remain payable throughout the Covid-19 outbreak, as many buildings have remained in operation and landlords have still been obliged to maintain and secure buildings, regardless of whether they are occupied or not. Landlords will maintain this position when considering the practical changes to be made to buildings to prepare for tenants' return to offices and tenants are likely to have to contribute towards some costs regardless of their decision about whether and when to return. However, tenants may argue that whilst some services will remain constant, others may vary depending on who is in occupation of the building.

These arguments are leading to some tenants beginning to ask landlords for service charge cessers. There is little evidence so far to suggest landlords are agreeing to these requests, but it remains to be seen going forwards whether landlords will come under pressure from tenants and the wider market to agree service charge cessers.

Payment

The cost to a landlord for Covid-19 related changes may not be able to be recovered straight away unless it is expressly permitted in the lease. If the lease is silent, a landlord may not be able to recover additional expenditure until the reconciliation and balancing payment at the end of the service charge period which could take a year or more.

Communication and Collaboration is key

Service charge is already a contentious issue between landlords and tenants. Covid-19 related changes may increase these tensions but it is arguable that, unlike some service charge items, they will benefit everyone. Social distancing measures are likely to remain in place for some time. Covid-19 related changes landlords make to their buildings will not just be temporary but could also be part of a strategy to adapt for the future and mitigate against future pandemic risks. As with so many other Covid-19 related issues, early communication and collaboration between landlords and their tenants will be key to effectively managing the return to the office.

For further information please contact:

[Helen Kearns](#)

T: 020 3465 4341

E: hkearns@maplesteesdale.co.uk