

As we await the UK government's plans on how it intends to take the country out of full lockdown, we set out below our outline answers to the main legal questions employers may have as they start thinking about how to get their people back into the workplace.

For an overview of some of the practical and strategic issues that HR and Legal are likely to encounter as they plan to come out of lockdown, see our recent [alert](#) on "unlocking the lockdown".

1. Is there any government guidance available on how businesses should be facilitating a return to work?

We are expecting government guidance later this week on "unlocking" the lockdown, including advice on travel, work and schools. Hopefully the travel piece will be more useful than Transport Minister Grant Shapps' interview with the BBC on Sunday, in which he seemed to be placing a great deal of reliance on staggered commuting hours, plus people walking and cycling to work instead of getting the bus, Tube or train. Since it is generally accepted that full compliance with social distancing on public transport would reduce its capacity by around 85%, there is clearly some considerable way to go before it will be possible to commute "normally".

Draft guidance has apparently been circulated to business groups and the trade unions for comments. It has already been comprehensively panned by the TUC as paying inadequate heed to worker protection.

In the meantime, some [guidance](#) has already been published by the government on the steps employers should be taking to protect the health and safety of their staff once they get into the workplace, including practical advice on social distancing. This was issued principally for those businesses that have remained open during the lockdown, but it will also clearly be of relevance to those businesses that are planning to re-open/bring staff back to the workplace. It includes practical tips such as:

- a. Staff should work side-by-side or facing away from each other rather than face-to-face if possible.
- b. Businesses should increase the frequency of cleaning procedures, pausing production in the day, if necessary, for cleaning staff to wipe down workstations with disinfectant.
- c. Staff should be assigned to the same shift teams (i.e. not rotated) to limit social interaction.
- d. Staff should not be allowed to congregate in break times. Consider arrangements such as staggered breaks so that staff can continue to practise social distancing when temporarily off duty.
- e. Staff should be advised to wash their hands with soap and water for 20 seconds or more at the beginning and end of every break, when they arrive at work and before they leave.
- f. When entering and leaving, staff should stay two metres apart as much as possible.

The government has also produced separate [sector guidance](#) on social distancing.

The government recommends that businesses look to the advice being published by trade associations and similar groups on how to work out government guidance in their particular sector.

2. What are our obligations from a health and safety perspective in relation to our staff as they return to the workplace?

As highlighted in our previous briefings, employers have a duty to ensure the health and safety of their employees and non-employees (contractors, members of the public, etc.) **so far as is reasonably practicable**. This is an employer-specific question, in that what is practicable for one might not be so for another. As a result, the guidance must not be seen as comprehensive – there may be parts of it with which the employer cannot comply and then a failure against it (though requiring a good explanation) will not be a breach of health and safety rules. Equally, if there is more an employer could practicably do, but it does not, there could still be a breach even if it had acted on all the specific recommendations in the guidance. Employers should be carrying out risk assessments, documenting the considerations arising and then implementing reasonably practicable control measures to mitigate the COVID-19 hazard.

From a practical perspective, as more employees start to return to the workplace, we would recommend that employers:

- a. Continue to ensure that staff are aware of the symptoms and the latest advice on how to minimise the risk of infection. We understand it is likely that the government will advise individuals to take their own temperature before travelling to work and that those with a high reading will be expected to stay at home. Ensure staff are aware of the latest government guidance as and when it is released.

- b. Ensure they have a reporting procedure in place for anyone with symptoms.
- c. Ensure any control measures identified by a risk assessment are aligned with the government's advice, e.g. complying with social distancing measures, putting in place adequate cleaning and hygiene measures, etc.

For example, we have seen employers taking steps to reduce the risk of people bumping into each other by making some corridors one-way only or propping doors open to improve sight-lines (not recommended for fire doors), and adding regular interior cleans for company vehicles that have to be shared between drivers or where passengers are carried. There is no magic formula here – take a hard look at your workspace, imagine a normal working day and walk through who you would see, what you would do, what you would touch and so on, and then consider what you can do to mitigate or remove the risk of close contact between staff or transmission through touching an infected surface. If staff share tools, whether spanners or staplers, see if you can get them one each and make an exception to the usual rules about not carving their name on them. If you cannot supply more, look at where you could get gloves from. Have cleaner and tissues next to the fax or photocopier and instruct your employees to wipe the relevant buttons before and after use. Make sure that dirty cutlery and cups on desks go straight into hot water and are not left for someone else to pick up or use by accident.

Employees are under a legal obligation to cooperate with their employer and other duty holders to enable them to comply with health and safety legislation. Employees owe statutory duties (1) to take reasonable care for the health and safety of themselves and of other persons who may be affected by their acts or omissions at work and (2) to cooperate with the employer on health and safety matters. It is strictly a criminal offence for employees to breach these duties. This may be relevant if employers want employees to take certain measures, in that almost any direction aimed at helping an employer comply with its duties to staff and third parties will count as a reasonable management instruction for contractual and disciplinary purposes.

The Health and Safety Executive (HSE) has produced [guidance](#) on COVID-19 topics that employers should download and review for possible ideas and avenues of enquiry.

3. Should we be issuing our staff with personal protective equipment, e.g. facemasks, etc. if we are requiring them to come back into the workplace?

The advice from the government at this stage remains that employees outside the care sector are not recommended to wear facemasks to protect against the virus.

There have however been suggestions that its position on this issue may change depending on the scientific evidence, and we know that some employers are now issuing facemasks to their employees, for example those working in customer-facing roles. This may have the benefit of reassuring customers, as well as staff, that the business is taking steps to ensure their health and safety. Employers should keep this under review in light of the latest government guidance. Some other countries have also mandated the use of masks on public transport, though whether that is medically useful on the one hand or merely a cosmetic gesture designed to help people get back to work on the other remains to be seen.

4. Most of our staff have been working from home during the lockdown. When can we require them to come back into the workplace?

As at 5 May, the guidance from the UK government is still that travelling for work purposes should only be done where it is not "reasonably practicable" for employees to work from home. If your employees can work from home, you should on that basis continue to facilitate this as much as possible. If it is your position that they cannot function effectively from home, be sure that you have examples from the last six weeks as to why not.

We anticipate that even when the government outlines its plans for easing the lockdown, it will expect employers to continue to allow their staff to work from home as much as possible, at least in the short term. A phased approach is then likely to be adopted, as employers start bringing such staff back into the workplace.

Working from home is likely to become more commonplace following this pandemic, as many employers and employees review their stance on homeworking in light of what has taken place over the last six weeks. Employers should prepare themselves for an increase in requests to work from home/to work flexibly as we come out of full lockdown. Note that the underlying law around such arrangements has not changed, so an employer will still need to approach the question with an open mind, allow an employee in a discussion about it to be accompanied by a colleague or union official and, if not minded to grant it, be able to point to one of the eight lawful reasons for not doing so. Moreover, these are decisions that will generally need to be made well within the permitted three-month timespan for these things, as otherwise requests for flexible working are likely to be made by some employees merely as a means to prolong their stay at home, the status quo in these circumstances favouring them rather than the employer.

5. If we are proposing a phased return to the workplace, how do we select which staff to bring back first?

This should obviously be driven by business need. Practically speaking, which staff do you need back in the workplace first? Those individuals who can continue to do their jobs from home are likely to be the last ones to return to the workplace. Also, consider the ongoing effect of staff being on furlough. After all, the scheme is going to be available at least until the end of June 2020. Initially, make the assessment by role and then decide how many in each role you will need back. Where it is some only, we would suggest a form of reverse redundancy selection (though not by that name!) using similar criteria – those who would have scored highest if it were about who to retain and who to put at risk are asked to come back first.

Having reached a set of business-driven conclusions (without reference to individuals, so far as possible) as to which functions should be brought back first, employers should then be aware that some employees' personal circumstances may continue to make it difficult for them to return to the workplace in the short term and they should bear this in mind when considering which staff to bring back first. They may prefer to seek volunteers first if this is practicable. It goes without saying that they should not discriminate (directly or indirectly) or do anything to breach trust and confidence in any selection exercise. As always, it may make good sense for employers to document their thinking in this respect.

6. How should we deal with staff:

a. Who refuse to come back to the workplace because they are concerned about the risk of infection?

It is understandable that some people will be feeling anxious about going back into the workplace and/or travelling to and from the workplace. The question is, however, not whether that fear is real but whether it is reasonable.

Before taking any action, employers should seek to understand the reasons why an employee is reluctant to come back to work. They should also explain what steps the business is taking to minimise the risk of infection in the workplace, e.g. by complying with the government's social distancing recommendations and the practical steps outlined in the answers to questions 1 and 2 above. If employees are aware of the steps their employer is taking to protect their health and safety, they will have fewer objective grounds for continuing concern and are likely to feel more confident about returning to the workplace.

If an employee simply refuses to come to work without a good reason (and fear of infection which is real, but not objectively warranted will not count as a good reason in most cases), pay could be stopped and disciplinary action/dismissal may be considered, but this is likely to be very much a last resort. In the first instance, employers should consider other practical steps, such as allowing an employee to continue to work from home for a period of time if this is possible. If an employee does not want to go in, they may be able to arrange with their employer to take the time off as holiday or unpaid leave. The employer does not have to agree to this, but moving straight to dismissal without at least considering those steps may be difficult to justify.

If you have an Employee Assistance Programme in place or other support services, make your employees aware of these, as these might prove a valuable source of support in these uncertain times.

b. Who are unable to return to the workplace due to the continuing school closures?

We do not know at this stage when schools will be re-opening. Even when they do re-open, it is looking likely that this will be done on a phased basis (e.g. exam years first), so it may continue to be difficult for some individuals to return to the workplace if they have childcare commitments.

We anticipate that many employers will continue to want to find a way to help their staff make this work, even if that involves some creative thinking. If employees are able to work from home, the employer may agree to continue to allow them to do this, assuming it is practicable.

Employees who are unable to work because they have caring responsibilities resulting from COVID-19 can be furloughed for so long as the scheme continues.

Other alternative arrangements may include allowing them to take an extended period of unpaid leave, changing their working hours, taking some parental leave if they are eligible or using some of their annual leave entitlement, etc. In the end, however, there is no right to indefinite time off for childcare purposes and so, if all else fails, employers may be entitled to dismiss those who cannot for that reason return to work, but again this is likely to be a last resort.

c. Who are in self-isolation or shielding or who may be fit to return, but are unable to do so by reason of the duties they owe to ill family members or elderly parents?

Employees who are self-isolating in line with government guidance are entitled to Statutory Sick Pay, as are employees who are shielding. If they are in receipt of such benefits, they should continue to be treated in the same way as employees who are sick.

Where employees are fit to return to work but unable to do so by reason of the duties they owe to ill family members or elderly parents, we anticipate that many employers will continue to want to find a way to help their staff make this work.

If employees are able to work from home, the employer should continue to allow them to do this, assuming it is practicable.

Other alternative arrangements may include allowing them to take an extended period of unpaid leave, changing their working hours to give them greater flexibility about when they work, taking some parental leave if they are eligible, taking dependants' leave or using some of their annual leave entitlement, etc.

Remember also that employees who are unable to work because they have caring responsibilities resulting from COVID-19 can be furloughed.

7. Can we ask staff to let us know if they fall into a vulnerable category before returning to the workplace?

If you are bringing staff back into the workplace, it would be lawful to ask them to let you know if they fall into a vulnerable category, to the extent they have not already done so.

The government advises anyone who is at high risk of getting a severe illness if they catch coronavirus to take particularly strict social distancing measures. The current advice is that such individuals should work from home if possible. To the extent this is practicable, employers should, therefore, continue to facilitate this. If this is not do-able, employers should ensure they comply with the government guidance on social distancing in the workplace, etc.

Depending on the reason for the employee's inclusion in the vulnerable category, some employers may prefer to allow such staff to remain at home even if they cannot work from home. As always, the sensible approach would be for employers to have conversations with any such individuals about what steps are necessary to facilitate a return to work. If the employee is keen to return to work regardless, even though fully understanding of the risks, a refusal by the employer to have them back may be discrimination on grounds of age, pregnancy or disability and so must be approached carefully.

Employers should also be aware of their data protection obligations when processing any health information, i.e. that any data around the health of identifiable individuals must be retained for the shortest time, accessible to the smallest number of people, kept as secure as possible and used only for the purposes of protection of the health of that individual and others who may be affected by it.

8. Can we ask older/more vulnerable members of staff not to come back into the workplace?

Employers should not place blanket restrictions on older/more vulnerable staff coming back into the workplace. Even if done with the best of intentions, singling out individuals on this basis may result in claims such as pregnancy/disability/age discrimination.

As set out in the answer to question 7 above, employers should consider asking staff to let them know if they fall into a vulnerable category to enable them to discuss the best approach concerning a return to work. Any decision should be made on a case-by-case basis.

If individuals are "shielding" in line with government guidance because they are at higher risk of serious illness from coronavirus, they will continue to be required to stay at home (currently for 12 weeks). Remember that such individuals are eligible to be furloughed under the government's coronavirus job retention scheme.

9. What should we do if a member of staff comes back to work, gets COVID-19 and has recently been in the workplace?

Any member of staff who develops symptoms of COVID-19 should, of course, be sent home and advised to stay at home for seven days from the onset of symptoms, in line with the government's current medical advice. Where they have been in close contact with other staff, those other staff should be told of the infection and asked to self-isolate pending tests. Data protection law would prohibit any dissemination of that information beyond those to whom the sick employee is most likely to have been in close proximity.

The government says that complete closure of the workplace is not recommended. A knee-jerk response risks demonising the sick employee in circumstances where later infections of others may not be down to them at all. The government has also issued advice on cleaning workplaces in these circumstances, particularly the work station of the sick employee and surfaces they are most likely to have touched – doors between them and the exits and toilets, for example, desks, office equipment, lift buttons, drinks machines, etc.

10. Are we allowed to disclose employees' medical information to protect others, for example, by telling employees they may have been exposed to the virus through close proximity to someone else?

Pragmatically, the answer will always be that you would do that whether strictly allowed to or not. That approach was officially green-lighted by the [Information Commissioner's Office \(ICO\) on 12 March 2020](#), though only to the extent reasonably required for the protection of the health of the other employees and the public generally. The basic right to privacy in respect of one's sensitive medical data is not in any sense waived by the ICO, but it has made it tolerably clear that it will not criticise an employer doing its best to protect other employees and potentially affected third parties.

11. Can we conduct temperature checks on our employees, e.g. before they re-enter our sites?

With their consent, yes, although employers should consider whether less invasive measures may be more appropriate, e.g. requesting individuals to take their own temperature before attending work. This is apparently one of the approaches that is being considered by the government as part of its action plan to take the country out of full lockdown.

If an employee refuses, the employer should explain to the employee that the employer owes a statutory duty of care to ensure the health and safety of its employees and other people who may be affected by the employer's business (e.g. contractors and visitors to the site). If the employee still refuses to take the test, there may well be disciplinary options available (although to start with such action may not be advisable from a wider employee relations perspective) and/or you should consider sending them home.

The more important question arising from this is what you do with the medical data you obtain. A "normal" temperature reading is of no precautionary value and so should be discarded immediately – only a "fever" result should be retained. Employers should ensure they treat that information with proper discretion. You should send that employee home, notify senior management/HR/their immediate colleagues and disinfect surfaces they are particularly likely to have touched in the last 72 hours. However, do not overreact or broadcast their identity to other employees or third parties with whom they have not been in close contact in the last week or so.

From a practical perspective, you should also ensure you have the people in place who are qualified to carry out such tests and are appropriately trained on the confidentiality and personal data/privacy aspects of collecting such information.

12. What are our obligations from a legal and health and safety perspective if we want our staff to continue to work from home on a longer-term basis?

The key duties on employers are to ensure that, where employees work from home, a risk assessment is carried out of the work activities they are carrying out at home and that appropriate measures are taken to reduce any associated risks. Assuming that it is not feasible to send a trained health and safety assessor to each individual's home, and that the work is low-risk, there are alternatives:

- a. Giving home-based employees basic training on risk assessments so they can carry out the initial review – then, if any issues are identified, a more qualified assessor gets involved.
- b. Doing an initial assessment by telephone between the company's usual risk assessor and the employee – then, if any issues are identified, a home visit may be required.
- c. Using photographic or video evidence to accompany the review (e.g. the employee submits photos of their working area or is interviewed via videoconference by a risk assessor and shows the assessor the areas being discussed).

If working from home becomes long-term, employers should regularly check and review the risk assessments with the employee to ensure nothing has changed – again, this might be over the telephone. Note that the primary obligation to maintain a physically safe working environment strictly only applies to premises under the employer's control, which will not include the employee's front room or kitchen table, but that the employer remains responsible for ensuring that the equipment being used by the employee (if not their own) is safe for the purpose and that employee is fully trained on how to use it. Despite that exclusion, the steps above will help satisfy the overriding duty to take all practicable steps to protect home-working employees' health and safety. The legal duty also extends to arrangements for the employee's "welfare" at work and so the possible adverse impacts on their mental health of extended isolation from colleagues must also be borne in mind.

There is useful guidance from [IOSH](#), which includes a checklist that could be used as the basis of a risk assessment by the employees. We consider it is reasonable for employees to be sent such a checklist and asked to complete it. Of course, whether they do actually do so is another thing! The point is that the employer wants to be able to show that it has acted reasonably in the circumstances to discharge its obligations so that if a home-worker were injured at home, etc., the employer could say that it had taken all practicable steps to discharge its obligations

The ICO has also produced [guidance](#) on the data protection issues to be aware of in light of the increase in home-working.