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# UK Employer Guide

# Preparing For a Safe Return to Work – Updated FAQs on Employment, Health and Safety and Data Privacy

15 June 2020

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

Yes. On 11 May, the government issued eight separate workplace guides (Workplace Guidelines) on working safely during the coronavirus pandemic. These were produced with input from businesses, unions, industry bodies and in conjunction with the devolved administrations, Public Health England and the Health and Safety Executive (HSE). They cover eight of the workplace settings that are currently allowed to open, from factories and plants to offices and contact centres. Advice to businesses in other nations of the UK is subject to guidance set by the Northern Ireland Executive, the Scottish Government and the Welsh Government. There are currently no equivalent guides for re-opening hospitality premises, such as restaurants, bars, or hotels (they will likely follow when the re-opening date is confirmed). However, the Food Standards Agency has now issued a re-opening checklist for food businesses (as well as guidance on adapting food manufacturing operations).

The Workplace Guidelines contain practical steps for businesses focused around the following five key points:

(a) **Help people to work from home**. Employers are being asked to take all reasonable steps to help people work from home. For those individuals who cannot work from home, and whose workplace has not been told to close, the government's advice is to go to work. This aspect of the guidance has been the subject of criticism and raises a number of issues, not least how it is achievable in practice if schools are still largely closed/employees are being advised not to use public transport/that transport is still operating its currently truncated service levels, etc.

(b) **Carry out a Covid-19 risk assessment, in consultation with workers or trade unions**. This will be critical and should be in accordance with HSE guidance (see further below). The government expects all businesses with over 50 employees to publish the results on their website. There is a notice that businesses should display to confirm that they have followed the guidance.

(c) **Maintain two metres social distancing, wherever possible**. Employers should consider redesigning workplaces to maintain two metre distances between people, for example by avoiding shared workstations, creating one way walk-throughs, etc.

(d) **Where people cannot be two metres apart, manage transmission risk**. The guidance suggests steps such as creating workplace shift patterns or fixed teams to minimise the number of people in contact with one another, and using barriers and other means to minimise face-to-face contact.

(e) **Reinforce cleaning processes**. Workplaces must be cleaned more frequently, paying close attention to high-contact objects like door handles and keyboards. Handwashing facilities and hand sanitisers should be provided at entry and exit points and in every workplace the frequency of handwashing, as well as surface cleaning, should be increased. Other requirements include hand-drying facilities and clear use and cleaning guidance for toilets.

The devil of course is in the detail and the guidelines contain many practical considerations on how the recommendations can be applied in the workplace. Businesses will need to look at what they do and how they do it and translate the recommendations into specific actions based on the nature and size of their business and how they are organised, managed and regulated.

It is also important to remember that the underlying law governing employment, health and safety and discrimination has not changed and employers should continue to ensure they comply with their legal obligations. The Workplace Guidelines contain non-statutory guidance to take into account when complying with these existing obligations, although they are framed with reference to the legal duties on employers under health and safety legislation.

The government recommends that businesses also look to the advice being published by trade associations and similar groups on how to work out the 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, so far as reasonably practicable, that they do not expose employees and non-employees (customers, contractors, members of the public, etc.) to risks to their health, safety and welfare. This is an employer-specific question, in that what is practicable for one might not be so for another, depending on its size, type, organisation, operation, management and any applicable regulatory framework. As a result, the Workplace Guidelines must not be seen as comprehensive – there may be parts with which an 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 reasonably do, but it does not, there could still be a breach even if it followed specific recommendations in the guidelines.

Employers must carry out an assessment of the risks of transmission of Covid-19 in the workplace, documenting the considerations arising and then implementing reasonably practicable control measures to mitigate the hazard. There is no requirement that the workplace be guaranteed free from the virus and, of course, it is very unlikely that the risk of transmission can be eliminated altogether, but the obligation to reduce the risk to the "*lowest reasonably practicable level*" remains onerous and should not be under-estimated.

Employers must also review existing risk assessments and safe systems of work in connection with Covid-19, including taking into account any general risks posed to the health and safety of employees and others and by implementing revised ways of working to minimise transmission risks.

Employees are under a legal obligation to co-operate 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.

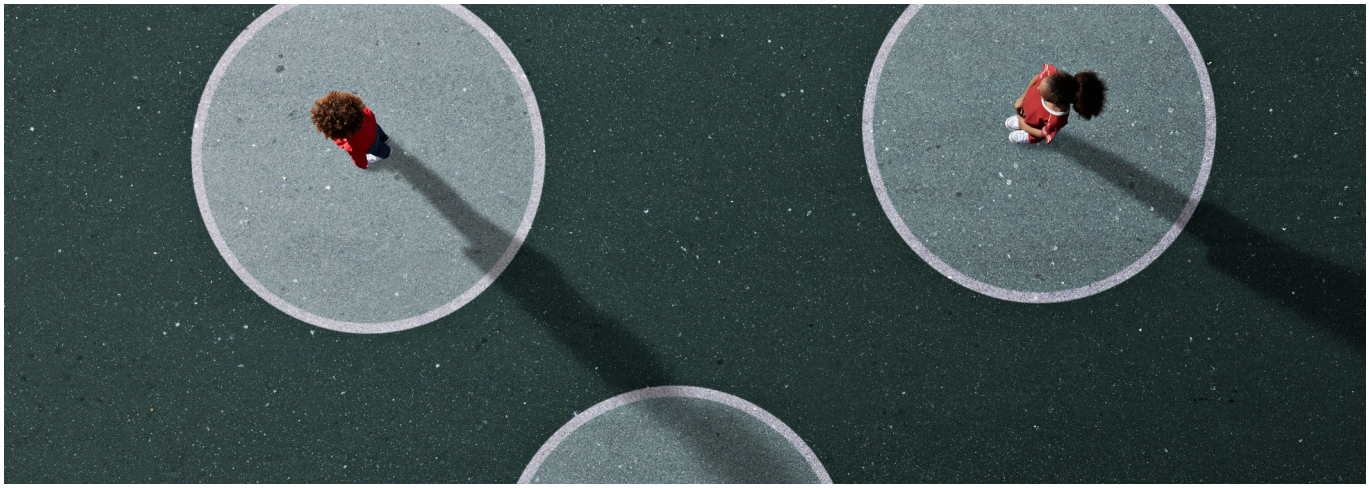
This may be relevant if employers want employees to take certain measures, in that almost any direction aimed at helping an employer comply with its duties to staff and third parties will count as a reasonable management instruction for contractual and disciplinary purposes. Equally, though, employees should be encouraged to report any concerns or potential hazard.

The HSE has produced separate guidance on Covid-19 topics that employers can also download and review for possible ideas and avenues of enquiry.

## 3 What steps are employers expected to take to ensure social distancing measures are maintained in the workplace?

Social distancing is one of the main ways of reducing the workplace risks posed by Covid-19 and forms a key requirement in the Workplace Guidelines. The guidelines make clear that "every reasonable effort" should be made to help employees comply with the social distancing guidelines set out by the government (keeping people two metres apart wherever possible). It is also important to remember that social distancing applies to all parts of a business, not just the places where people spend most of their time, but also to entrances and exits, break rooms, canteens, toilets and similar settings. These may be the most challenging areas in which to maintain social distancing. The duty extends also to where employees work away from the employer's premises, for example, where they go to third party sites/premises.

We have already 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 for fire doors). In retail premises, a number of employers have introduced markings on floors to designate two-metres distance, particularly for queuing areas outside entrance doors and at till areas. Others are reviewing layouts to allow workers to work further apart from each other and avoid people working face-to-face. 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, customers and/ or visitors.



## 4 What alternatives are there if social distancing cannot be maintained?

The Workplace Guidelines state that where the social distancing guidelines cannot be followed in full in relation to a particular activity, businesses should consider whether that activity needs to continue for the business to operate and, if so, take all the mitigating actions practicable to reduce the risk of transmission between staff. This would include measures such as:

(a) Increasing the frequency of hand washing and surface cleaning.

(b) Keeping the activity time involved as short as possible.

(c) Using screens or barriers to separate people from each other.

(d) Using back-to-back or side-to-side working (rather than face-to-face) whenever possible.

(e) Reducing the number of people each person has contact with by using 'fixed teams or partnering' (so each person works with only a few others).

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, consider obtaining gloves (although remember that the risks of using and disposing of gloves should also be assessed). Cleaner and tissues could be provided next to the photocopier and other frequently touched surfaces, with instructions to employees to wipe the relevant buttons/surfaces before and after use. Make sure that dirty cutlery and crockery on desks go straight into hot water/the dishwasher and are not left for someone else to pick up or use by accident.

The Workplace Guidelines make clear that if people must work face-to-face for a sustained period with more than a small group of fixed partners, then employers will need to assess whether the activity can safely go ahead. Unfortunately, there is no further definition of what a 'sustained period' is, or what a 'small group of fixed partners' is considered to be. However, it is clear that the length of time that people must work face-to-face is important, as is the number of contacts. Previous government guidance referred to sustained contact as spending more than 15 minutes within two metres of an infected person, but there is no reference to this "15 minute rule" in the Workplace Guidelines (instead there are references to keeping activity time "*as short as possible*").

## 5 To what extent are employers required to involve employees and/or their representatives in their health and safety measures in the workplace?

The Workplace Guidelines state that employers "*must consult with the health and safety representative selected by a recognised trade union or, if there isn't one, a representative chosen by workers*" and, indeed, it is a legal duty for employers to consult safety representatives, where the appointment of such representatives is prescribed, with a view to making and maintaining arrangements to enable employees to co-operate effectively in promoting and developing health and safety measures (and checking the effectiveness of such measures). The guidelines stress that the people who do the work are often best placed to understand the risks – encouraging an open dialogue as to those risks and the effectiveness of safeguards introduced can be valuable. However, the provision of training and instructions to employees on new ways of working and requirements are key.

It is also the duty of every employer to prepare and, as often as may be appropriate, revise a written statement of its general policy with respect to health and safety and the organisation and arrangements for the time being for carrying out that policy. Any revision of that statement must be brought to the attention of all employees. Furthermore, there is a health and safety duty to provide employees with information about the risks they may face when carrying out their roles, which is why many employers provide employees with risk assessments relevant to their role/place of work. We have also been instructed by clients to help draft summary documents setting out their approach to the management of Covid-19 for communication with employees (and, in some cases, customers).

Some HR professionals may already be familiar with these obligations, especially those working in a non-office environment, e.g. a plant or a factory where health and safety issues may be more critical, but we are aware that they may not have been on everyone's radar.

In addition to the overarching obligations under health and safety legislation, the relevant regulations are:

(i) the Safety Representatives and Safety Committees Regulations 1977 (as amended). These apply to businesses where a trade union is recognised; and

(ii) the Health and Safety (Consultation with Employees) Regulations 1996 (as amended). These apply to non-unionised workplaces. In such circumstances, health and safety representatives should be elected by the workforce, but if there are no such representatives, employers are required to consult with the workforce directly. Contrary to what the Workplace Guidelines say, therefore, consultation can take place directly with employees if there are no elected representatives in place.

Employers will need to consider how they are going to comply with these consultation obligations. If they already have designated health and safety representatives in place, this is not going to be a problem, but employers without them need to be thinking now about whether they are going to arrange for representatives to be elected or opt for engaging staff directly.

Consultation for these purposes would involve the business not only giving detailed information to its employees or their representatives, but also listening to them and taking account of what they say in response. The existing legislation does not set out any minimum timescales for this, but it does say it must be 'in good time'. In practice, this means you have to allow enough time for your employees to consider the matters being raised and provide them with informed responses before any major move back to the workplace occurs. This process is also relevant to the reasonableness of an employee's fears about returning to the workplace (see 18 below).

The HSE has produced guidance on consulting employees on health and safety matters, which sets out what employers need to do to comply with the law.

## 6 How do we carry out a Covid-19 risk assessment?

There are many templates available online, including a variety of interactive tools from the HSE and an example risk assessment for Covid-19 from the Health and Safety Executive for Northern Ireland. We would, however, encourage businesses to use their current risk assessment template and feed in the new risks associated with Covid-19 (as employees/unions will be familiar with that style). Remember that in some cases the risk assessment document will need to be published and/or be disclosed in later litigation/enforcement, so doing this thoroughly and accurately will be very important.

If your organisation has a health and safety professional adviser who works with you already, they should easily be able to adapt your usual risk assessment form. There is a duty to ensure an employer has access to competent health and safety advice. This is often met by employing a health and safety professional, but it is also possible to obtain the advice from an external source, such as a health and safety consultant. Given the importance of Covid-19 risk assessments, it would be prudent for employers to ensure their competent adviser is involved in the risk assessment process.

## 7 Do risk assessments need to be documented and published?

As summarised in HSE guidance on controlling risks, if you have fewer than five employees you are "not obliged to write anything down" (although in practice it may be difficult to demonstrate/evidence that you have carried out the required risk assessment if it is not written). In all other cases, risk assessments must be documented.

As set out above, it is a legal duty (under the provisions of the Health & Safety at Work, etc. Act 1974) for employers to provide a copy of the written statement of their general policy with respect to health and safety and the organisation and arrangements for the time being for carrying out that policy, as well as any revisions to that statement, to employees. However, there is no legal duty to publish that statement, or the risk assessments.

In relation to Covid-19, the Workplace Guidelines make it clear that the government encourages publication of the results of risk assessments on employers' websites and indeed expects this where an employer has over 50 workers. However, this is guidance, not law, and therefore, although adverse inferences may be drawn if risk assessment results are not published on websites (there may be an implication that a business has something to hide, for example), an employer could not face formal enforcement action for a failure to do so.

In practice it is at least possible that the publication of full risk assessments, including all of the hazards in a particular workplace, as well as the control measures intended to reduce such risks, might lead to an intense scrutiny by those who do not have detailed knowledge of the business and health and safety obligations/risk assessment processes (and, as such, prompt unfair criticism). As the guidance refers to publication of the results of risk assessments, employers may wish to consider publication of a summary of the risk assessment process they have undertaken and key control measures that they have taken/will take, rather than the full risk assessment itself. To date, we believe that only a minority of businesses have published a full risk assessment on their website.

## 8 What should be covered in a back to work questionnaire for staff?

A back to work questionnaire for staff should be based upon your own assessment of risks. Employers may, however, need to consider factors such as whether employees are classed or consider themselves to be vulnerable or extremely vulnerable within the meaning of government guidance (employers may not have details of underlying health conditions), whether there are vulnerable or extremely vulnerable persons within an employee's household, whether an employee or any members of their household have suffered symptoms of coronavirus within the last 14 days and how the employee normally travels to work.

Employers may also need to consider the particular role of the employee. For example, drivers of certain vehicles may have to undergo medical assessments and have particular training requirements, which may have become overdue during the period of lockdown.

## 9 Can we ask staff to let us know if they fall into a clinically 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 clinically vulnerable category (e.g. those with certain pre-existing conditions, people aged 70 or over, pregnant women, etc.), to the extent they have not already done so.

The government advises anyone who is clinically vulnerable (and thus at greater 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 stay at home as much as possible and if they do go out, take particular care to minimise contact with others outside their household or support bubble. To the extent this is practicable, employers should therefore continue to facilitate working from home. If this is really 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 clinically 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 relevant team members about what steps they think 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. Extremely clinically vulnerable individuals are still advised not to work outside the home. See 17 below.

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.

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

In the Workplace Guidelines issued on 11 May, the government's starting position is still that workplaces should not encourage the precautionary use of personal protective equipment (PPE) to protect against Covid-19 outside clinical settings or when responding to a suspected or confirmed case of Covid-19. The risks posed by Covid-19 are best managed by steps such as social distancing, increased hand and surface washing, etc.

The guidance acknowledges, however, that wearing a face covering (not the same as a facemask, which is used as part of PPE equipment) may protect others if the wearer themselves is infected but is not displaying symptoms, although the evidence on this remains weak. It goes on to say that employers should advise their workers in wearing them safely if they choose to wear one. There is no general obligation on employers to supply facemasks (or face coverings) to address the specific additional risks posed by Covid-19, but employers should not usually stop their workers wearing face coverings (which can be made at home from domestic materials) if they wish to do so. There may be other safety considerations for some businesses, such as food production where face coverings may pose risks to hygiene. The use of face coverings should therefore be risk assessed, where this may be relevant.

If employers decide to mandate and/or provide facemasks or face coverings, they need to ensure there are clear instructions on how to wear them to ensure they are effective and how to store/ dispose of them safely. We have heard that some organisations have required all of their employees to wear facemasks, but they have also introduced very specific training instructions by video, etc. to show how these should be worn. We also know that some employers are now issuing facemasks to their employees 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.

The use of face coverings on public transport is mandatory from 15 June.

## 11 Could we have any potential liability in relation to an employee's journey to and from work, for example if they have to use public transport?

Travelling to and from work has historically been a matter for the employee. You would not usually see in any risk assessment from an employer, an assessment of the employee's travel to work (unless the employee has a mobile role and it sends them to different locations, etc.). However, this is a very unusual situation. As an employee's mode of transport might affect how healthy they are when they get to work, employers should at least be thinking about how their staff are travelling and whether this may create a higher risk, in which case the screening and questioning of employees may be needed to address this.

We would not usually expect employers to be liable if their employees contract Covid-19 outside of the workplace. We also have to remember that travelling on public transport is not actually prohibited and that there has been an increase in public transport services to allow more people to travel safely by that means.

The current advice from the government is nonetheless that when travelling, everybody (including critical workers) should continue to avoid public transport wherever possible. If they can, they should cycle, walk or drive so as to minimise the number of people with whom they come into close contact, but clearly this will not be practicable for many people in urban centres. Those people who do need to use public transport to get to and from work are advised to comply with social distancing guidelines (to the extent this is even possible!) and the use of face coverings is mandatory from 15 June.

## 12 If our employees are going to a client site for a meeting, what are our obligations?

The first question must be whether there is any reason why this meeting needs to take place in person at all. For the near future at least, employers should be ensuring that meetings continue to be held remotely, e.g. using video conference facilities, wherever possible. This is underlined in the Workplace Guidelines. There may of course be some instances where meetings or visits to third party sites will be unavoidable, but even in those circumstances, only absolutely necessary participants should attend.

If a visit to a client site is necessary, you will need to assess whether social distancing guidelines can be maintained as part of your risk assessment and, where required, work with third parties (such as your client) to reduce the risks to health and safety. Employers should ensure that the places their employees are visiting for work have a risk assessment and Covid-19 policy and are addressing the risk appropriately. For example, you might need to check whether any of their employees are self-isolating because they are suffering symptoms, whether the room/meeting place will allow for two metre distances to be maintained, or check whether there will be face-to-face contact. You should also consider providing your employees with guidance on how to operate safely at third party sites – no shaking hands with the client, for example, and no sharing of equipment such as pens.

There may be further government guidance on this in due course, but in the meantime, you should certainly include these factors as part of your risk assessment.

## 13 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, so that they are as low as reasonably practicable. Assuming that it is not reasonably practicable to send a trained health and safety assessor to each individual's home (which would of course have its own risks, both in relation to transmission of Covid-19 and otherwise) 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, considering whether a home visit is required (taking risks associated with home visits into account).

(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).

Employers should also be aware of potential risks to mental health connected with staying at home. The Workplace Guidelines remind employers to keep in touch with off-site workers, including in relation to mental health and to provide support for workers around mental health and wellbeing. The government has also issued guidance to the public on the mental health and wellbeing aspects of Covid-19.

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. Remember that the data security obligations imposed under data protection laws apply to homeworking in the same way as when staff are working in the office, namely that appropriate security measures must be taken to protect personal data in light of the risks associated with unauthorised access to that data, or other types of data breach. Unfortunately, hacking attempts and phishing scams have increased during the pandemic, as criminals seek to take advantage of vulnerabilities, including those created by homeworking.

## 14 What should we do if a member of staff comes back to work, contracts Covid-19 and has recently been in the workplace?

Any member of staff who develops symptoms of Covid-19 and/or tests positive for Covid-19 should of course be sent home and advised to stay at home for the relevant period, in line with the government's current medical advice.

If an employee contracts Covid-19, employers need to consider whether that employee has been in close contact with other identifiable employees in the workplace and ascertain if they may also have contracted it (for example, have symptoms) and assess whether that cohort should isolate.

Such an approach will likely be needed in connection with the NHS's test and trace service. Under this service, anyone who has been in close contact with a person who has tested positive for coronavirus will be told to self-isolate for 14 days from their last contact with that person. There are some concerns that introduction of the track and trace app in due course may wipe out entire shifts, where employee phones have been in proximity to the phones of others (potentially in lockers) but trade associations continue to work with the government to help ensure that doesn't happen.

The government has published guidance for employers on the current test and trace service. This says that employers should support workers who are told to self-isolate and in particular must not ask them to attend work even if they are suffering no symptoms and say they are happy to come in anyway. If employees are able to work from home during that period, they should be allowed to do this. The guidance recommends that employers consider finding staff alternative work that could be completed at home during this period. If this is not possible, workers in self-isolation in these circumstances will be entitled to Statutory Sick Pay (SSP) for every day they are in self-isolation, as long as they meet the eligibility conditions. The NHS test and trace service will generate a notification that can be used as evidence that someone has been told to self-isolate for SSP purposes.

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.

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

In England, the government's position in its Covid-19 recovery strategy is that for the near future, workers should continue to work from home rather than their normal physical workplace, wherever possible. This will help minimise the number of social contacts across the country and therefore keep transmissions as low as possible. If your employees can work from home, you should therefore continue to facilitate this as much as possible.

Only those workers who cannot work from home should travel to work if their workplace is open. This position is echoed in the Workplace Guidelines. In terms of health and safety duties, if employees can work from home, they should be asked to do so. In such circumstances, asking them to go into the workplace where Covid-19 may be contracted, could be a breach of health and safety laws. This will of course depend upon the nature of the workplace and the degree of risk prevailing at the time.

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. 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.

## 16 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 until the end of October 2020.

Initially, make the assessment by role and then decide how many in each role you will need back. Remember to consider the number of personnel required to be in safety-critical or supervisory roles, particularly given the health and safety implications of the Workplace Guidelines. Where only some staff in each role are needed to be brought back, 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 would make good sense for employers to document their thinking in this respect.

## 17 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. See 18 below for the legal position.

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 guidance 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 should 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 that 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 will 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 fully re-opened. At the moment, only certain year groups have gone back, 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 remain eligible to be furloughed, provided they have been furloughed for a full three-week period at any time before the end of June. The government has additionally confirmed that parents returning from extended leave (e.g. maternity leave) will still be eligible to be furloughed even if they have not completed three weeks' furlough before 30 June.

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?**

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

For clinically vulnerable employees who are at higher risk of severe illness if they contract Covid-19 (for example, those over 70, or with certain pre-existing conditions), the strategy document says that they should continue to take particular care to minimise contact with others outside their households, but they do not need to be shielded. The guidance says that such individuals should work from home if possible, as summarised above.

Clinically extremely vulnerable (shielded) individuals (who should have received a letter or been informed by their GP that they are in this group) have been strongly advised not to work outside the home. Such individuals remain eligible to be furloughed, provided they have been furloughed for a full three-week period at any time before the end of June. Such individuals are also eligible for SSP.

As for any workplace risk, employers must take into account specific duties to those with protected characteristics, including, for example, expectant mothers who are, as always, entitled to suspension on full pay if suitable roles cannot be found. Particular attention should also be paid to people who live with clinically extremely vulnerable individuals.

Where employees are fit to return to work, but are 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 agree to 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.

## 18 Do employees have protection against dismissal if they refuse to return to work?

Sections 44 and 100 of the Employment Rights Act 1996 protect employees against detriment and dismissal respectively as a result of their taking certain steps to protect themselves or others. Probably key for return-to-workplace purposes is where *"in circumstances of danger which the employee reasonably believes to be serious and imminent and which he could not reasonably be expected to avert, he left or … (while the danger persisted) refused to return to his place of work"*.

There is obviously not much argument available to an employer at present that the danger from Covid-19 is not serious or imminent. Similarly, until a vaccine arrives, the danger persists. At the heart of this is therefore the requirement that the employee's belief is reasonable. All sorts of people have all sorts of fears about the safety aspects of their workplace, from allegedly bullying managers to 5G making your teeth fall out, but it is only reasonable beliefs that attract protection under sections 44 and 100. Here we must make a careful distinction between fears that are real and understandable on the one hand, and those which are objectively reasonable, legally-speaking, on the other. The two are not necessarily the same.

Much of what will be reasonable for these purposes depends on the employee's state of knowledge. He will be assumed to be aware of government guidance around "COVID-secure" workplaces and of the information the employer has provided around the risk assessment it has carried out and the control measures it has taken to comply with those requirements (and beyond, if that is the case). What might be a reasonable concern held in ignorance will be less so if given the full picture.

Employee beliefs may also be more reasonable if it is clear that employers are not following government guidance as best they can (remembering that it is not completely mandatory – the guidance states that the employer's obligation is not to eliminate risk but only to reduce it to the *"lowest reasonable practicable level"*, and that the steps referred to are just those *"usually"* required). No workplace can be made definitively Covid-secure, any more than can any visit to the shop or any walk in the park. You can take your own precautions but you cannot control the actions of others. Therefore it will not be reasonable to demand or expect a 100% guarantee of freedom from the virus as a precondition of returning to work, just as you could not demand 100% certainty that you could never suffer any other form of workplace injury. But if there are obvious and remediable gaps in the precautions your employer is taking which would be proportionate to the extent to which they would reduce the risk of infection, then you would be entitled to say so. That would again gain you the protection of sections 44 and 100. If that gap were not then swiftly plugged, your belief that you were in circumstances of serious and imminent danger would be that much more reasonable.

Note also the reference in sections 44 and 100 to the employee not being reasonably expected to avert those circumstances. Within limits, this places some onus on the employee to look after himself, not rely wholly on the employer. The reasonableness of his belief will be assessed on the basis that where he could take the sort of daily precautions threaded throughout the government's guidance, he does so.

Despite that, the primary burden of showing the employee's belief not to be reasonable lies firmly on the employer. Once government guidance shifts to allow a return to work and the employer has taken all the steps incumbent on it (and made that clear to the employee), however, the position changes. The workplace is then "officially safe" and the boot is in practical terms on the other foot, i.e. for the employee to show why his particular belief is reasonable.

In summary:

(a) If an employer does all it reasonably can and the employee knows it, an unspecific fear of infection at the workplace is unlikely to be deemed "reasonable".

(b) Therefore it would be open to the employer (after due process) to suspend pay or ultimately dismiss that employee if his refusal persisted.

(c) if the employee's concern arises, as many will, not from the workplace but from the need to use public transport to get there in the first place, sections 44 and 100 are unlikely to be engaged, so it would again be open to the employer in the end to terminate the employment.

(d) But note that disapplying section 100 does not mean that any resulting dismissal will necessarily be fair. That will still be judged on ordinary principles. Therefore, you will still need a fair process, to consider alternatives to dismissal and to look at how easy it would actually be to take the additional measures the employee seeks as a condition of their return (especially if they are disabled), whether you consider them strictly required or not.

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

Unless as the result of government diktat, 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 9 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 extremely clinically vulnerable and at higher risk of serious illness from coronavirus, they will continue to be required to stay at home (currently until at least 30 June). Remember that such individuals are eligible to be furloughed under the government's coronavirus job retention scheme, subject to meeting the criteria, in particular that they have been furloughed for at least three weeks by the end of June.

## 20 Are there any Covid-19 specific rules relating to the ability of employers to require employees to take holiday or prevent them from taking holiday in the period following a return to work?

An employer is entitled to tell its employees when they must use their holiday entitlement. In order to comply with the Working Time Regulations 1998, it must give them notice of this instruction, which must be at least double the length of time the employee is being required to take off. Practically speaking, the need to give notice can be avoided if the employee agrees to take holiday. Holidays booked by employees can be cancelled by the employer giving them prior notice of the same length as the time booked off.

Be aware that employers cannot require employees who are off sick to take holiday. The usual rules will apply there, including where an employee falls ill during a period of sickness absence (i.e. the holiday days during which they were ill are cancelled and treated as sickness absence rather than holiday). They will be treated as sick during their sickness absence but can, as soon as they are fit to return to work, then be asked to take their holiday.

The UK government has also introduced a temporary new law to deal with coronavirus disruption. Employees and workers can carry over up to four weeks' paid holiday over a two-year period, if it is not reasonably practicable for them to take holiday due to coronavirus.

Some employers will already have an agreement to carry over a certain amount of paid holiday. This law does not affect any such agreements.

If an employee or worker leaves their job or is dismissed during the two-year carry-forward period, any untaken paid holiday must be added to their final pay ('paid in lieu').

See our alert on holiday entitlement and pay during Covid-19.

## 21 Are there any rules that require employers to reimburse their staff for costs incurred by them from working at home due to Covid-19?

An employer is not obliged to reimburse its staff for any costs incurred by them from working at home, subject to what is said in the employee's contract, any policy on homeworking, etc.

Clearly, at the moment, many staff are being required to work from home to comply with government guidance and it is possible they may be incurring additional costs in doing so, e.g. the cost of installing broadband connection, purchasing additional equipment to enable them to work from home, etc. Against that, they are saving what are likely to be greater sums through not commuting and it is appropriate to take that into account when deciding whether to offer reimbursement of these.

If an employer agrees to reimburse an employee in respect of certain costs incurred from working at home, it needs to be aware of the tax implications of doing so.

Any reimbursement of expenses incurred on the purchase of home office equipment between 16 March 2020 and the end of the 2020-21 tax year will be exempt from tax and national insurance liabilities. To be exempt, the equipment must (a) be obtained for the sole purpose of enabling the employee to work from home during the crisis, and (b) have been exempt from income tax had it been provided directly by the employer. See recent HMRC guidance here and here.

## 22 Can we tell 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, as long as you keep the information you disclose to a minimum and avoid naming individuals, if possible. 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 what it needs to, in order to protect other employees and potentially affected third parties, as long as the use is necessary and proportionate.

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

From an employment law perspective, 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.

Be aware that from a data protection law perspective, consent is unlikely to be a valid legal basis for processing such data due to the perceived imbalance of power which prevents consent from being 'freely given' in an employment context – employers would need to rely on an assertion that testing was necessary to comply with health and safety obligations. Employers should document this assessment.

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). The employer should also explain that the employee owes 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. 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 and in accordance with data protection laws.

You should send that employee home and advise them to get tested (as having a high temperature does not necessarily mean they have the virus), notify senior management/HR, consider whether they have been in close contact with other employees or visitors and disinfect surfaces they are particularly likely to have touched in the last 72 hours, for example. However, do not overreact or broadcast their identity to other employees or third parties.

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, including on the confidentiality and personal data/privacy aspects of collecting such information.

The ICO has published guidance for employers on coronavirus workplace testing in anticipation of some businesses returning to work. The general thrust is that data protection law does not prevent employers from taking the necessary steps to keep their staff and the public safe and supported during this public health emergency, but it does require employers to be responsible with people's personal data and ensure that use of it is limited to what is necessary and proportionate. Employers must also be fully transparent with employees about how their personal data will be used and who will have access to it, which is likely to require them to amend or supplement their current Employee Privacy Notice.

Where employers undertake workplace Covid-19 testing or process other health information, they are required under data protection laws to carry out a data protection impact assessment to document whether the use of this data is necessary and proportionate and complies with data protection laws.

## 24 Can we require our employees to submit to any other forms of testing?

Potentially, yes and indeed essential workers (including transport workers and critical personnel in the production and distribution of food, drink and essential goods) can apply for priority testing, although employers are not entitled to a copy of the employee's test results, even though they can refer relevant employees for such tests. There is government guidance available on eligibility and how to get tested.

For employer-tests, the key issue from a data privacy point of view will be to ensure that the testing is a necessary and proportionate measure to prevent the spread of the virus and that there is no less intrusive measure of doing this.

From a technical perspective, employers need a lawful basis under data protection laws to process this employee personal data (and an additional condition to process health data, categorised as the more restrictive 'special category data'). As highlighted above, it is unlikely that reliance on employee consent for this will be valid, as consent has to be voluntary and it is unlikely to be so, even if it is presented as such, due to the assumed imbalance of power as between employer and employee. Accordingly, employers will likely need to demonstrate that it is necessary in order to comply with a specific obligation in connection with employment – i.e. their health and safety obligation to keep employees safe in the workplace. This should not be difficult to establish.

Employers should document their assessment and take 'data minimisation' measures to reduce the level of intrusion and safeguard the personal data collected, i.e. appropriate data security, restricted access and use, short retention periods, etc. Remember, though, that if you are informed of a positive test result, you should identify others that have been in close contact with the relevant individual and they may also need to be tested and/ or self-isolate.

## 25 Can we require our employees to sign up to any track and trace type system, e.g. the new NHSX 'track and trace' app?

Use of the NHSX Covid-19 track and trace app is likely to be voluntary, although from an employment law perspective, an instruction by an employer that their employee should download and use it is likely to be considered to be reasonable, meaning that refusal could potentially justify disciplinary action. However, there may be some concerns as to whether use of the app will be effective in some circumstances, for example where employees are required to place phones in lockers at the start of a shift and therefore phones may be in close proximity to each other, even where employees are not.

If an employee downloads the app and receives an alert warning that they have recently been in contact with someone who has tested positive for the virus, then it is likely that they will need to inform their employer. This is for practical reasons, namely because they will either need to work from home (if they are able to do so) during the self-isolation period, or take sickness absence if they are not able to work from home. In any case, the employee may well have a duty of care to inform their employer that they are potentially infectious.

It is likely that the employer will be able to process this personal data lawfully under data protection laws on the basis that it needs to, in order to comply with its legal obligations to safeguard its workforce and others. However, employers will need to restrict the use of this data, access to it and retention of it to what is strictly necessary for that purpose. They may also need to carry out a data protection impact assessment, to ensure that their processing of that data is necessary and proportionate.

If you have any questions about the issues raised in this note, please speak to your usual contact or one of the following:

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