SQUIRE PATTON BOGGS

Unlocking Lockdown: Updated Return to Work FAQs on Employment, Health and Safety, Data Protection and Tax

UK – 31 March 2021

On 22 February 2021, the Prime Minister set out his phased roadmap for easing restrictions in England and this week the country is taking its first steps out of national lockdown.

While it is going to be several months yet before everyone is allowed to return to their physical workplaces (21 June at the absolute earliest), now is the time for businesses to focus on how they can facilitate a safe return when the time comes and make the transition as smooth as possible. Whether you are planning to bring your staff back to the physical workplace on a phased basis, introduce remote working hubs, or extend remote/flexible working on a partial, indefinite or compulsory basis, there are a range of issues for your business to consider.

To assist employers in preparing for a return to the physical workplace, we have updated our FAQs to answer the questions employers are most likely to have at the moment. Please also take a look at our recent blogs to see our answers to the additional questions that were raised during our recent return to work webinars and subscribe to receive more on the topic as they are posted.

Please note that these FAQs are intended as a high-level overview only and should not be regarded as a substitute for legal advice. They set out the current position in England. The position may vary in Scotland, Wales and Northern Ireland.

Contacts

Caroline Noblet
Partner, London
Labour & Employment
T +44 20 7655 1473
E caroline.noblet@squirepb.com

David Whincup
Partner, London
Labour & Employment
T +44 20 7655 1132
E david.whincup@squirepb.com

Rob Elvin
Partner, Manchester
Environmental, Safety & Health
T +44 161 830 5257
E rob.elvin@squirepb.com

Patrick Ford
Partner, Manchester
Tax Strategy & Benefits
T +44 161 830 5014
E patrick.ford@squirepb.com

Andrea Ward
Director, London
Data Privacy & Cybersecurity
T +44 20 7655 1526
E andrea.ward@squirepb.com

Francesca Fellowes
Director, Leeds
Data Privacy & Cybersecurity
T +44 113 284 7459
E francesca.fellowes@squirepb.com

Returning to the Workplace

What is the latest position concerning everyone returning to their normal workplaces?	In England, the government's position in its COVID-19 Response – Spring 2021 is that people should still only leave home for work if they cannot work from home – this will remain the case at least up until 21 June (Step 4 in the government's roadmap). If your employees can work from home, you should, therefore, continue to facilitate this as much as possible. Recently, the government published the regulations that implement the government's roadmap for easing restrictions in England. The government is currently carrying out a review of social distancing measures and is due to publish its conclusions prior to 21 June. The results of the review will help to inform future decisions about the timing and circumstances under which the rules on one-metre-plus social distancing, facemasks, physical precautions in the workplace and other measures may be lifted. It will also apparently help shape new guidance on working from home and will probably appear as changes to the Workplace Guidelines issued last year by the government. From 12 April (at the earliest), some businesses that have been closed during this latest national lockdown will start to reopen, including all retail businesses and outdoor hospitality. All these premises will be required to continue to manage the risk of transmission and ensure social distancing rules are followed, regardless of the seeming success of the vaccination programme in the meantime. See the Health and Safety section of this guide for further guidance on an employer's health and safety obligations when reopening workplaces. The Devolved Administrations have set out their own plans for lifting restrictions.
Where can we find the latest guidance on how businesses should facilitate a return to work?	Last year, the government issued Workplace Guidelines on working safely during the COVID-19 pandemic. There are now 14 separate guides covering a variety of different workplaces, including offices, contact centres, shops and branches, factories, plants and warehouses. The guides are updated on a regular basis and contain practical guidance for businesses in England on things such as cleaning the workplace, personal protective equipment, tests and vaccinations. Separate guidance is available for businesses in Wales, Scotland and Northern Ireland. As set out above, we anticipate that as restrictions start to ease and we approach the date on which most employees will be allowed to return to their physical workplaces, this guidance will be updated. It is very unlikely to be withdrawn altogether for some time to come. Employers should, therefore, continue to check it regularly.
If we are proposing a phased return to the workplace, how do we select which staff to bring back first?	Many employers went through this same exercise last year, when we emerged blinking and briefly from the first national lockdown. Any decision about which staff to bring back first 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. 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 bear this in mind when considering which individual 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.

What is the latest position concerning (a) employees who are clinically extremely vulnerable, (b) pregnant employees, and (c) people who refuse to come back to the workplace because they are concerned about the risk of infection?

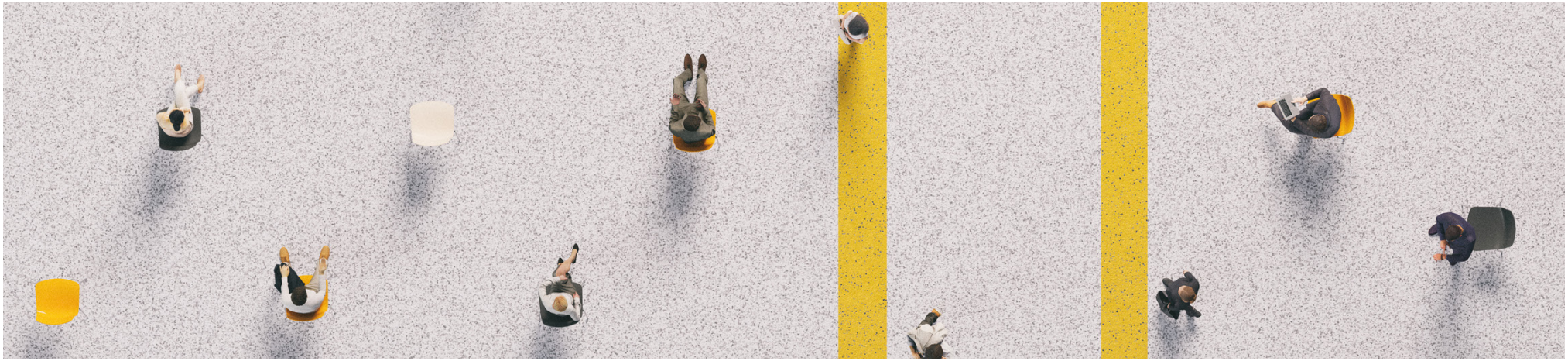
a) The government has recently confirmed that clinically extremely vulnerable people in England will no longer be advised to shield from Thursday 1 April. They are still being advised to continue to work from home where possible, but if they are unable to do so, they are able to return to the workplace, if it is COVID-19-secure. Employers may, however, wish to consider whether there is an alternative role they can perform from home. Alternatively, employers may furlough them under the Coronavirus Job Retention Scheme (CJRS), bearing in mind that they will no longer be eligible for SSP from 1 April on the basis of being advised to shield.

b) The government has produced separate guidance for pregnant employees. For women who are less than 28 weeks pregnant with no underlying health conditions that place them at a greater risk of severe illness from COVID-19, employers should carry out a workplace risk assessment. They should only continue working if the assessment advises that it is safe to do so. If this cannot be done, they should be offered suitable alternative work (which may include working from home) or be suspended on normal pay. For women who are 28 weeks pregnant and beyond or who have underlying health conditions that place them at greater risk of severe illness from COVID-19, employers are advised to take a more cautious approach. They should consider redeployment and the potential for homeworking, wherever possible. Where adjustments to the work environment and role are not practicable and alternative work cannot be found, those employees should be suspended on full pay.

c) It is understandable that some people may be feeling anxious about the prospect of going back into the workplace and/or travelling to and from the workplace. After all, they may have been working from home for more than 12 months now. However, the question is not whether that fear is real, but whether it is reasonable (see answer below for the legal position). If this situation arises, 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. 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 they might prove a valuable source of support in uncertain times.



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 believed 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".

At the heart of this is 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 that 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. They will be assumed to be aware of government guidance around COVID-19-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-19-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. However, if there are obvious and remediable gaps in the precautions an employer is taking that would be proportionate to the extent to which they would reduce the risk of infection, an employee would be entitled to say so. That would, again, gain the employee the protection of sections 44 and 100. If that gap were not then swiftly plugged, an employee's belief that they 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 employees to look after themselves, not rely wholly on the employer. The reasonableness of an employee's belief will be assessed on the basis that where they could take the sort of daily precautions threaded throughout the government's guidance, they do 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 their particular belief is reasonable.

In summary:

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

Note that from 31 May, workers will also have protection against detriment in such circumstances. The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 will come into force on that date.

Can we require staff to use up some holiday before they return to the workplace?

An employer is entitled, within limits, to tell its employees when they must use their statutory minimum holiday entitlement. Strictly speaking, in order to comply with the Working Time Regulations (WTR), it is required to give its employees notice of this instruction, which must be at least double the length of time the employee is being required to take off. This is usually wildly poorly received by staff and much to be avoided in normal circumstances, but entirely lawful and potentially necessary this year to prevent the build-up of unmanageable holiday entitlements by the year-end and mass requests to take leave at the same time.

Employees on furlough can take holiday without disrupting their furlough. The guidance also confirms that employers can require furloughed workers to take holiday at a specified time and they can also cancel a worker's holiday, provided, in each case, that they give the requisite notice to the worker in accordance with the WTR. Just remember that holiday pay for furloughed workers should be calculated in line with current legislation and based on usual earnings, i.e. the worker must receive 100% of their usual pay. Given that only up to 80% will be covered by the CJRS, employers will be obliged to top up the rest. This should at least sweeten the pill for employees required to take holiday they would sooner have saved for a time when they might actually have enjoyed it.

Please note, you cannot require employees who are off sick to take holiday. The usual rules will apply there. They will be treated as sick during their sickness absence, but as soon as they are signed fit to return to work, they can then be asked to take their holiday.

Early on during the pandemic crisis, the government introduced a temporary new law amending the WTR to allow workers to carry forward up to four weeks' paid holiday over a two-year period, if they cannot take that holiday due to COVID-19. The guidance provides more information around when it will not be reasonably practicable for workers to take holiday in accordance with the new law. In brief, it means when you cannot physically leave the house due to self-isolation or shielding, or when your workplace is so busy that you cannot be spared. It does not mean when you could, indeed, down tools but then have nowhere to go, nothing to do and no one to see. That does not make taking your holiday impracticable, just seriously disappointing. The law provides no right to holidays you can actually enjoy – sorry.

If an employee or worker leaves their job, or is dismissed during the two-year period, any accrued but untaken holiday must be added to their final pay.

Remote Working

As lockdown restrictions are lifted, we are anticipating an increase in requests to work permanently from home. How should we deal with such requests, bearing in mind most of our employees have been working from home for the last 12 months?	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. There is no question that the extended period of working from home will have made relying on those reasons harder, but it is not impossible if the employer can point to tangible evidence of things going wrong or at least operating sub-optimally over that period. 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 now favouring them rather than the employer. Therefore, it makes sense to seek to flush out now those who may seek to work from home even after lockdown lifts.
Are there any rules that require employers to reimburse their staff for costs incurred by them in working at home due to COVID-19?	Working from home has become the norm for many employees over the last 12 months. An employer is not required to reimburse its staff for any additional costs incurred by them from working at home, subject to what is said in the employee's contract, any homeworking/expenses policy, etc., but some employers may wish to do this. If an employer agrees to reimburse employees in respect of any costs they incur in working from home, it needs to be aware of the tax implications of doing so. There is an exemption from income tax for the provision to employees of certain supplies and services used by the employee in performing their duties when working from home, provided that certain criteria are met. This exemption covers the provision of items such as laptops, computers and office supplies used mainly for business purposes and without significant private use, which remain the property of the employer. If ownership of the equipment is transferred to the employee, the transfer will be a taxable benefit. The tax charge will be on the market value of the equipment at the time of the transfer (less any amount the employee pays, or has paid, for the equipment). The tax position is different if the employee purchases their own office equipment and the employer reimburses them. In such circumstances, this would normally be treated as a benefit and would be taxable and NIC-able on the employee. However, the position has been slightly different in light of COVID-19. Any reimbursement of expenses incurred on the purchase of home equipment deemed necessary for the employee to work from home between 16 March 2020 and the end of the 2021/22 tax year will be exempt from tax and national insurance liabilities. To be exempt, the equipment must (i) be obtained for the sole purpose of enabling the employee to work from home during the crisis; and (ii) have been exempt from income tax had it been provided directly by the employer (see recent HMRC guidance here, here and here). Employers can also make tax-free payments to cover their employees' reasonable additional household expenses incurred when carrying out their duties at home under homeworking arrangements, subject to certain criteria being met. Payments of up to £4 a week (for 2019/20) and up to £6 a week (for 2020/21) for additional household expenses incurred while the employee is working from home will be non-taxable. As with all homeworking arrangements, a contractual agreement should be reached, making it clear what the employee will and will not be entitled to claim in terms of expenses, regardless of the tax position.

Health and Safety Obligations

What are our obligations from a health and safety perspective in relation to our staff?	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 and safety. 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. The Health and Safety Executive interpret 'so far as reasonably practicable' to require employers to do everything that is not grossly disproportionate to the risk. As a result, the Workplace Guidelines issued by the government 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 underestimated. 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 cooperate with their employer and other duty holders to enable them to comply with health and safety legislation. Employees owe statutory duties (i) 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 (ii) 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.

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 "have a duty to consult on health and safety matters …This may be through consulting with any recognised trade union health and safety representatives or, if you don't have any, with a representative chosen by workers." 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 cooperate 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. In addition to the overarching obligations under health and safety legislation, the relevant regulations are: • The Safety Representatives and Safety Committees Regulations 1977 (as amended). These apply to businesses where a trade union is recognised. • 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. Employers should already have given thought to this issue and arranged for representatives to be elected (if they did not already have designated health and safety representatives in place) or opted 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 above). 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.
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 still be ensuring that meetings continue to be held remotely, e.g. using videoconference 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 social distancing 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 is a decent argument that any place that employees are required to visit in the course of their duties will count as their workplace for the purposes of ss44 and 100 Employment Rights Act (see above), such that if you send them somewhere that they reasonably believe to pose a serious and imminent danger to their health, they will be entitled not to enter that building and you cannot touch them for it.

What are our obligations from a health and safety perspective if we want our staff to continue to work from home on a long-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: • 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. • 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). • 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). Homeworking requires employers to consider a broad range of the risks posed to the employee that is homeworking, beyond ergonomics of desks, computers, etc. Employers should 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. There could be other risks that make the home an unhealthy place to work, for example, an abusive household, noise issues, etc. 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 the 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. 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 homeworker 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 homeworking. 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.

Vaccinations and Testing

How realistic is it to think that employers may be able to mandate vaccination of their employees and/or visitors to their workplace?

Employers will clearly not be able to physically require employees to have the vaccine. That would be an assault or battery by the employer.

The government will also not be making it mandatory for everyone to be vaccinated, though new Acas and Department of Health guidance is very much in favour of employers encouraging them to do so.

However, can you insist as a matter of law, i.e. dismiss for a persistent refusal? Potentially, yes, although each case would need to be considered on its particular facts. Employers should avoid adopting a blanket approach on this issue.

Whether an employer's decision to dismiss is reasonable is likely to depend on a number of factors, including (i) whether the employee's refusal to have the vaccine poses a serious health risk to themselves and others (e.g. colleagues, customers, clients) and this risk could not be mitigated sufficiently in other ways (e.g. remote working, complying with government guidelines on mitigating the spread of COVID-19, regular testing); (ii) the sector in which the employee works and the nature of their job (it is more likely to be reasonable to dismiss an employee who works in close proximity to other people, especially those who are clinically vulnerable, e.g. in a care home, hospital, etc. – some employees may also be prevented from travelling abroad or to particular venues if they have not had the vaccine); and (iii) the employee's reasons for refusing to have the vaccine and whether these are real and substantial.

We know that their having the vaccine will reduce the chances of someone suffering from COVID-19, but it is still unclear whether the vaccine also reduces the chances of their passing on the virus. This may become clearer over the next few months as more safety data becomes available. We would always recommend that employers seek advice before deciding to dismiss someone for refusing to have the vaccine.

In terms of refusing visitors to the workplace, ultimately, this would be the employer's decision, but it should consider similar factors to those outlined above when considering this issue. Care needs to be taken to allow at least for those medically unable to have the vaccination, e.g. the immuno-compromised, as, otherwise, there may be a disability discrimination risk. See the Data Protection and Privacy section for the main data protection issues to consider if you want to start asking employees/visitors about whether they have been vaccinated.

On what basis can employers make vaccination mandatory for existing and new employees without being deemed discriminatory?	If an employer introduces a policy of compulsory vaccination, it needs to be aware that some employees may allege discrimination if it takes any form of detrimental action against them (e.g. dismissal) for refusing to have the vaccine. Clearly, this will depend very much upon the employee's reasons for not having the vaccine, and whether they relate to a protected characteristic under the Equality Act 2010. Any legal pushback here is most likely to be presented as an indirect discrimination claim, i.e. the employer's policy of requiring its staff to be vaccinated puts those employees with a particular protected characteristic at a disadvantage and it cannot be justified. A key question will be whether the employer can demonstrate that its policy of mandatory vaccination is a proportionate means of achieving the undoubtedly legitimate aim of keeping its workforce, customers, clients, etc., safe so far as practicable in line with its duties under the Health & Safety at Work Act. This proportionality issue will involve consideration of similar factors to those identified in the answer to the question above, namely the sector in which the employees work, the nature of the employee's job, whether the employer's aim of keeping people safe could be adequately achieved by different means, e.g. continuing to allow homeworking, regular testing, compliance with social distancing requirements, etc., and, in particular, what evidence exists that vaccination prevents or reduces transmission risk. A discrimination claim is most likely to be brought on the grounds of: • Disability – If, for example, an employee has a particular condition that amounts to a disability and which means their health could be put at risk by taking the vaccine. • Religion or belief – A small and diminishing number of religious groups disapprove of vaccinations. Mainstream religions have, however, made it clear that they recommend vaccination. Is being an anti-vaxxer a philosophical belief allowing employees to argue they fall under the Equality Act 2010 and should be excluded on that basis? There are a number of conditions to a belief falling under the Equality Act protections, including that it is something worthy of respect in a democratic society and that there needs to be a coherent belief system behind it. Most scientific opinion would suggest this is not the case for the anti-vax movement (the World Health Organisation has described it as one of the top 10 health threats to the world). The wide range of reasons why people are anti-vax (distrust of Big Science or Big Pharma, bad childhood reaction, historic drug scandals, religion, etc.) suggest that statutory protection under the Equality Act 2010 is unlikely for anti-vaxxers. • Pregnancy or sex – Apparently, the vaccines have not yet been tested in pregnant women, so the current guidance is that most otherwise low-risk women should wait until their pregnancy is completed before they are vaccinated. See our previous FAQs for additional questions and answers about vaccinations.
What is the government's lateral flow testing programme and is my business eligible to participate?	The government has set up the workplace rapid testing programme to help identify cases of COVID-19 in employees who are not showing any symptoms and cannot work from home. The aim of the programme is to identify asymptomatic carriers of the virus. All businesses can now register to order tests if they are registered in England and their employees cannot work from home. An online portal has been set up to enable eligible businesses to register for the tests. From early April, eligible employers will also be able to order tests for their employees to collect from their workplace and use at home twice a week, where on-site testing is not possible. Businesses have until 12 April to register for the scheme, which will remain free until the end of June. All those who can work from home should continue to do so. Further details of the scheme can be found here. The government is encouraging businesses to regularly test their staff to help protect essential services and businesses. Further guidance about the programme can be found in the Workplace Guidelines. See the Data Protection and Privacy Issues section for a discussion of the data protection issues to consider with testing.

Data Protection and Privacy Issues

Can we carry out tests on our employees, e.g. lateral flow tests?	From an employment law perspective, with their consent, yes. From a data protection perspective, the key issue will be to ensure that the testing is a necessary and proportionate means of preventing the spread of the virus and there is no less intrusive means of doing this. Employers need to comply with their obligations under the Data Protection Act 2018/UK GDPR to process this employee personal data. As it is special category (health) data, employers will need a lawful basis for processing it, most likely to be compliant with a legal obligation and protecting employees and others under health and safety legislation. Consent is obviously difficult in an employment context and employers should usually avoid seeking to rely on this. Employers would then need to satisfy an additional condition for processing – either the rights and obligations under employment law (which requires an appropriate policy in support); substantial public interest; or necessary for the purposes of preventive or occupational medicine/assessment of the working capacity of the employee – which requires the collection and processing to be carried out by an OH/company doctor. Where employers undertake workplace 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. The Information Commissioner's Office has published guidance for employers on data protection and COVID-19, including guidance on workplace testing. 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, who will have access to it, how long it will be kept for, etc. This is likely to require employers to amend or supplement their current employee privacy notices to the extent they have not already done this. If an employee refuses, the employer should seek to understand the employee's reasons for failing to take the test. It 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, other visitors to the workplace). The employer should also explain that the employee owes statutory duties (i) to take reasonable care for the health and safety of themselves and other persons who may be affected by their acts or omissions at work; and (ii) 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 consider the wider employee relations issues of taking such a step.

What are the data privacy implications of collecting data about whether our employees have been vaccinated against COVID-19?	In terms of data protection, information about who has been vaccinated and when will constitute special category data. The same will be true of information about who has not been vaccinated and why. Employers are, therefore, going to have to comply with their UK GDPR/Data Protection Act 2018 obligations. As it is special category (health) data, employers will need a lawful basis for processing it, most likely to be compliant with a legal obligation and protecting employees and others under health and safety legislation. Consent is obviously difficult in an employment context and employers should usually avoid seeking to rely on this. Employers would then need to satisfy an additional condition for processing – either the rights and obligations under employment law (which requires an appropriate policy in support); substantial public interest; or necessary for the purposes of preventive or occupational medicine/assessment of the working capacity of the employee – which requires the collection and processing to be carried out by an OH/company doctor. All three seem at least arguable at this stage. Because this would be processing of special category data on a large scale, it would need a data protection impact assessment first (to evidence the risks, and how they are mitigated). Storage and access to the information should obviously be limited and secure. Records will need to be kept long enough to be used in any possible proceedings arising out of the vaccination, e.g. if it comes to action against the employee, third-party claims, or enforcement of the employer's duties by the HSE. Employers need to be clear, open and honest with staff about how and why they would use their personal data, how long it would be kept for, and whom it would be shared with. Staff should also be told how the information would be held securely, as well as the rights they have in relation to the data. Privacy notices may need tweaking. The ICO has published guidance on vaccinations.

Coronavirus Job Retention Scheme

Is the Coronavirus Job Retention Scheme (CJRS) being extended?	Yes. In the Spring Budget, the chancellor announced an extension to the CJRS until 30 September 2021. The government will continue to pay 80% of employees' usual wages for any normal hours not worked, up to a cap of £2,500 per month, until the end of June 2021. For July, CJRS grants will cover 70%, up to a cap of £2,187.50, and in August and September this will reduce to 60%, capped at £1,875. These wage caps are proportional to the number of hours not worked, so someone working 75% of their normal hours in September, for example, would receive under the CJRS no more than 25% of that £1,875. For July to September, therefore, employers will be expected to top up the government's contribution so that furloughed staff continue to receive 80% of their usual wages for any unworked hours, up to the cap of £2,500 per month (or beyond it to 100%, if the employer wishes). Employers must also continue to pay the associated employer National Insurance contributions and pension contributions. Further details of the changes in government contributions can be found here. The government has also extended eligibility for the scheme. From 1 May onwards, employers will be able to furlough employees who were first on their PAYE payroll as late as 2 March 2021, i.e. even very recently recruited staff will be eligible for furlough support.

SQUIRE PATTON BOGGS

squirepattonboggs.com