SQUIRE PATTON BOGGS

Preparing for a Safe Return to the Workplace:

UK Government Issues Updated Guidelines

UK – 16 July 2021

It feels as if we have been talking about what to do when your staff return to the office for some years now, but finally, we appear to be getting closer to that actually happening!

Next Monday (19 July), the government's formal advice to "work from home if you can" will end and employers will, up to a point, be able to require their staff to return to the office (assuming this is their contractual place of work). Having said that, nobody is anticipating a mad rush back to the office, not least because the government's stance has already softened and it now says it "expects and recommends a gradual return over the summer". This is indeed the approach that most employers seem to be taking, partly of their own volition and partly because their employees are generally giving them no practical choice in the matter. A number of factors (general uncertainty, a lack of clear guidance from the government on what workplaces should look like post-19 July, rising COVID-19 cases, summer holidays, etc.) have all come together to mean that most businesses are adopting a phased return to the office.

To coincide with this latest step in the roadmap, the government has issued updated Workplace Guidelines setting out "sensible precautions employers can take to manage risk and support their staff and customers". This is discussed in more detail below, as we set out some of the most likely practical questions to arise as we enter this new phase.

Do not forget: As highlighted in previous alerts, now that the government's stance on working from home is changing, employers need to ensure they start formalising any new working arrangements as soon as possible to ensure they are not saddled with arrangements that were adequate in a crisis, but are not those they would have insisted upon in better times. We attach a link to an updated version of our previous alert on the practical considerations for employers to consider in relation to this issue. We have recently been working with a number of clients to prepare the necessary documentation to formalise new working arrangements. If you have not already done this or if you are unsure about whether your documentation is watertight, please speak to your usual contact in the Labour & Employment team or one of the partners whose details are set out opposite.

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.

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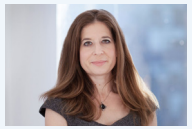

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What is the latest position concerning everyone returning to their normal workplace?

As set out above, from Monday 19 July, the government's position is that people no longer need to work from home. As highlighted above, this means that unless an employer has already agreed to remote working (whether part time or full time), then their proper place of work becomes their physical workplace again and remaining away from it after that date requires their employer's consent. In practice, adopting a gradual return to the workplace taking into account personal circumstances is likely to be the most appropriate approach.

One thing that is also clear is that employers should not assume that office life will be back to normal from 19 July. As the government has been keen to emphasise, the pandemic is far from over, COVID-19 remains a killer and businesses should expect much further disruption to the economy and people's lives. Employers should, therefore, still have contingency plans in place, especially as we approach the end of the year when it seems almost inevitable that there will be a further resurgence of COVID-19 cases alongside other seasonal respiratory diseases and possibly new variants that are vaccine-resistant to some degree.

Where can we find the latest guidance on how businesses should facilitate a return to work?

The government has now updated its Workplace Guidelines on working safely during the COVID-19 pandemic. These cover a variety of different workplaces, from offices and contact centres to factories and warehouses, now grouped into six sector-specific guides. The Workplace Guidelines contain practical steps for businesses focused around the following six key steps:

1. Complete a health and safety risk assessment that includes the risk from COVID-19 – this will continue to be critical.
2. Provide adequate ventilation.
3. Clean more often.
4. Turn away people with COVID-19 symptoms.
5. Enable people to check in at your venue.
6. Communication and training.

As has always been the case, the devil is in the detail and while the guidelines contain a number of generic practical considerations on how the recommendations can be applied in the workplace, if you are looking for a more granular "you must do this" and "you must not do that" then you will be disappointed.

Key changes highlighted in the guidance include:

- As social distancing guidance will no longer apply from 19 July, businesses will strictly no longer need to implement social distancing in their workplace or venue and customers and workers will no longer have to keep apart from people they do not live with. This will no doubt come as a relief to those businesses such as restaurants, bars, shops, etc. that have been operating at reduced capacity due to social distancing guidelines. The fact that social distancing guidance no longer applies, however, does not mean that employers have to (or indeed can) immediately dispense with all the systems, etc., they have put in place to comply with it at all. There might usefully be a review of whether a reduced set of restrictions on masks and social distancing might remain appropriate in unventilated or high-traffic areas. As the guidance for offices points out, COVID-19 can still be spread through social contact and employers should still think about how they can mitigate this risk by reducing the number of people that their employees come into contact with.

- Face coverings are no longer required by law. However, the government has already said that it "expects and recommends" that people continue to wear face coverings in crowded, enclosed spaces. So, you do not have to but you are expected to – hardly difficult to see the confusion that that stance might generate! The updated guidance for offices, for example, asks employers to consider "encouraging the use of face coverings by workers", particularly in indoor areas where they may come into contact with people they do not normally meet. This week, however, we have already seen instances of organisations and transport providers in particular saying they will go further and continue to require individuals to wear face coverings in certain circumstances. On the one hand, employers may welcome a greater degree of flexibility, but there is no doubt this lack of certainty about what people must do will result in more issues for employers as more staff return to the workplace. In broad terms, however, we consider that an employer's requirement that employees continue to comply with reasonable anti-COVID precautions even after 19 July (masks, social distancing, vaccinations), will be a reasonable management request and so ultimately enforceable via the disciplinary process up to and including dismissal. We have already spoken to clients who have been approached by employees who are concerned about this, who say they do not want to work in close proximity to someone who is not wearing a mask, etc. Employers are going to have to decide on their approach and then clear communications to staff are going to be critical in reducing the scope for uncertainty, disputes, concerns, etc.

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 those existing obligations. As highlighted previously, employers continue to 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. In the Workplace Guidelines, the government states that in the long term it expects that businesses will need to take fewer precautions to manage the risk of COVID-19 and that it will continue to keep its guidance under review and will remove the advice once it is safe to do so.

What is clear is that the government is now very much placing the onus on employers and it is for them to carry out the relevant risk assessments and determine what is the best approach for their business. Some level of conflict between what the government says and what it means is an inevitable consequence of the relaxation of restrictions being a political rather than medical decision. This allows the government to placate libertarian voters and MPs while prospectively making employers carry the can if it all turns out to be a bit premature. Freedom Day is just a date – the COVID-19 virus certainly is not much fazed by it and so remains as big a risk to the health of your workers on 20 July as it was on 18.

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

Many employers went through the same exercise last year when we emerged blinking and briefly from the first lockdown.

Any decision about which staff to bring back first should obviously be driven by business need. Having done this, 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, or at short notice or full-time, and bear this in mind when considering which individual staff to bring back first. Employers may prefer to seek volunteers first if this is practicable. It goes without saying that employers should not discriminate (directly or indirectly) or do anything to breach trust and confidence in any selection exercises. As always, it would also make good sense for employers to document their thinking in this regard.

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

a) The government has recently issued updated guidance for individuals who are clinically extremely vulnerable. This will apply from 19 July.

The government is recommending that as restrictions lift, clinically extremely vulnerable people should continue to follow the same guidance as everyone else, save that they may wish to think about additional precautions they can themselves take to reduce the risk of catching COVID-19, especially in those areas where disease levels are currently high.

The guidance makes it clear that employers still have a legal responsibility to protect their employees and others from risks to their health and safety (under their general health and safety obligations). Employers should, therefore, consider each case on an individual basis and speak to any employees who have concerns about returning to the workplace because they are clinically extremely vulnerable. It may be appropriate to continue to allow them to work from home, for example, if this is what they have been doing up until now, certainly while COVID-19 cases are high. Alternatively, they may continue to carry out an alternative role. Employers should remember that if an employee is disabled under the Equality Act 2010, the duty to make reasonable adjustments may be triggered, which may involve consideration of the points highlighted above. Employers may also still furlough eligible staff under the Coronavirus Job Retention Scheme, but this option will only be available until the end of September, and some hard decisions will need to be made at that time by both employees and employers.

b) Earlier this year, the government produced separate guidance for pregnant employees. This was last updated on 21 June so presumably it will be revisited in light of these latest developments. Having said that, employers are likely to want to continue to follow the approach set out in the guidance above, namely taking a more cautious approach in relation to 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. They should carry out the required risk assessments, but where adjustments to the work environment and role are not practicable and alternative work cannot be found, should consider suspending on full pay.

c) It is understandable that 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 16 months. However, as we have highlighted before, the question is not whether the fear is real or understandable, but whether it is reasonable. 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 ensure the workplace is COVID-19-secure. 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. On the other hand, if they see for themselves or hear from colleagues that the employer has taken Freedom Day all too literally and abandoned many of the former safeguards, then their anxieties will be that much more reasonable and the protections of sections 44 and 100 (see below) will be that much more likely to apply.

We have seen businesses be creative in how they share this information and support their employees, with companies putting together videos inside the workplace to show what steps have been taken (and now, which will continue to be taken past 19 July) to make the workplace COVID-19 secure, sending out surveys to seek employees' views on returning to the workplace, etc. Clear communications are key, even if you have to keep updating them to reflect new developments.

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?

As highlighted in previous alerts, 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, and common to both sections, 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, 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 them, 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, which have been and will continue to be threaded throughout the government's guidance, they do so.

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 workers now also have protection against detriment in such circumstances.

In the last few months, we have started to see some Employment Tribunal decisions where employees have left their workplace because of health and safety fears arising from the pandemic. Although only first instance decisions and, therefore, not binding on future tribunals, these give an idea of how tribunals will be approaching such cases. See our recent blog for further details.