Monday, June 15, 2020

As the UK Government works through its phased Coronavirus (COVID-19) recovery strategy and lockdown restrictions are progressively eased, employers in the United Kingdom are contemplating the implications of returning staff to the workplace under the “new normal”.

In this Alert, we address some of the key issues for employers to consider in relation to returning employees to the UK workplace, with a particular focus on the UK Government’s “Covid-secure” workplace guidance.

The issues raised in this Alert are subject to any additional/differing, localised requirements that may apply under devolution arrangements in Wales, Scotland and Northern Ireland.

IN DEPTH

What Are the Key Obligations on Employers in Relation to Staff Returning to the UK Workplace?
Employers in the United Kingdom owe a duty of care to ensure the health, safety and welfare of their employees at work, so far as is reasonably practicable. They are also required to conduct their business in a manner that does not expose third parties (including workers, contractors and visitors to premises) to risks compromising their health and safety.

These duties cannot be delegated, even if, for example, an employee indicates that he or she is willing to assume the risk.

Employees themselves have a responsibility to take reasonable care so as not to endanger themselves or anyone who may be affected by their actions at work.

These core obligations — breach of which can lead to enforcement notices, criminal prosecution and/or claims for personal injury — remain unchanged in the wake of COVID-19. The risk profile has, however, changed considerably.

Is There Any Guidance to Assist Employers in Complying With These Obligations?

The UK Government has issued eight sector-specific guidance documents outlining steps that it expects employers to take in order to make the following UK workplaces COVID-19 secure:

- Offices and contact centres
- Shops and branches
- Factories, plants and warehouses
- Laboratories and research facilities
- Construction and other outdoor work
- Other people’s homes
- Restaurants offering takeaway or delivery
- Vehicles

An employers’ health and safety obligations are not necessarily fulfilled by simply following the COVID-secure guidance alone; e.g., there may be additional steps required by the employer’s own risk assessment (see below). It will, however, be very helpful evidentially in demonstrating that an employer has taken reasonably practicable steps to secure the health and safety of its staff, and comply with its implied duty to maintain trust and confidence between employer and employee.

What Steps Are Employers Expected to Take in Practice in the UK?

Risk Assessment

Employers should undertake a risk assessment tailored to their workplace and business operations, accounting for the specific dangers of COVID-19. This should
be done in consultation with a trade union (if one is recognised by the employer), or otherwise with the employees themselves or any health and safety representatives they have elected. The Health and Safety Executive (HSE) has issued guidance to assist employers in consulting about health and safety matters; see here and here.

The result of the risk assessment should then be shared with the workforce at large. Employers with over five employees must record their risk assessment in writing. In addition, the UK Government expects all employers with over 50 employees in the UK to publish this information on their website.

A safe system of work must then be set up that addresses the risks identified in the risk assessment, and accounts for any employee feedback. The employer must take active steps to ensure that the safe system of work is followed. This will include monitoring behaviour and addressing non-compliance with health and safety policies swiftly and effectively.

**Develop Cleaning, Handwashing and Hygiene Procedures**

Employers are called on to ensure an increased frequency of handwashing and surface cleaning by

- Providing hand sanitiser around the workplace, in addition to in washrooms
- Frequently cleaning and disinfecting objects and surfaces that are touched regularly
- Enhancing cleaning for busy areas
- Setting clear use and cleaning guidance for toilets
- Providing hand drying facilities: either paper towels or electrical dryers.

**Help People to Work From Home as Much as Possible**

Employers are expected to make “every reasonable effort” to enable working from home as a first option. The guidance is clear that “everyone should work from home, unless they cannot work from home.”

In connection with this, employers should discuss home-working arrangements with employees, look after their mental and physical well-being (including, potentially, making a virtual assessment of their work station at home), ensure that that they have the right equipment and communicate appropriately. Such was the speed of the COVID-19 lockdown, many employers will likely still have work to do in this regard and may find the working from home guidance issued by Acas and HSE useful.

**Maintain Social Distancing as Much as Possible**

Where working from home is not possible, employers should make every reasonable effort to comply with the social distancing guidelines set out by the Government, which currently involve keeping people two metres apart wherever possible. This is likely to include
• Putting up signs to remind workers and visitors of social distancing guidance
• Avoiding sharing workstations
• Using floor tape or paint to mark areas to help people keep to a two-metre distance
• Arranging one-way traffic through the workplace if possible
• Discouraging all but essential visitors to the workplace and putting protocols in place in relation to visitors, e.g., making visits appointment only.

*Discontinue Non-Essential Activities Where Social Distancing Cannot be Observed*

Where the social distancing guidelines cannot be followed in full in relation to a particular activity, employers are expected to consider “whether the activity needs to continue for the business to operate”.

*Manage Transmission Risk*

Where people cannot be two metres apart and the activity needs to continue, employers are expected to take “all mitigating actions possible”. This will include but, importantly, won’t necessarily be limited to

• Increasing the frequency of hand washing and surface cleaning
• Keeping the activity time as short as possible
• Using screens or barriers to separate people from each other
• Using back-to-back or side-to-side working, rather than face-to-face, whenever possible
• 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.

Employers are also expected to take account of whether particular staff are especially vulnerable to COVID-19.

**Are Employers Required to Take Employees’ Temperatures in the UK? Is This Permitted?**

This is not required in the United Kingdom.

If an employer proposes to take the temperatures of the staff, it will need to act in compliance with UK data protection laws, which are particularly protective of health-related data.

Amongst other things, UK law requires any monitoring of employees to be necessary and proportionate, and in keeping with reasonable expectations. The UK Information Commissioner’s Office (ICO) has made it clear that, in their assessment of necessity and proportionality, employers should consider whether or not they can achieve the
same results through other, less intrusive, means. This is likely to be the case in many instances relating to checking individuals’ temperatures.

The ICO has nevertheless recognised that employers will be processing increased volumes of personal data in connection with Covid-19, such as data noting whether employees have symptoms or have been tested as positive, and has issued a helpful guidance note.

**Are Covid-Related Personal Protective Equipment (PPE) and/or Face Coverings Compulsory in the UK Workplace?**

Wearing a face mask or covering in the UK workplace is generally optional and not required by law. Whether or not one should be used will depend on the workplace setting and an employer’s individual risk assessment.

The basic expectation under the Covid-secure guidance is that workplaces should not encourage the precautionary use of PPE (such as clinical face masks or respirators), beyond what a person would usually wear, except in clinical settings or the small handful of other roles for which Public Health England advises the use of additional PPE, such as first responders and immigration enforcement officers.

Other than in situations where the risk of COVID-19 transmission is very high, an employer’s risk assessment is expected to reflect the fact that PPE has an extremely limited role in providing additional protection. If an employer’s risk assessment does show that PPE is required, e.g., because there are circumstances when employees may come within two metres of each other when moving around the workplace, the PPE must

- Be provided free charge to those who need it
- Fit properly
- Be supplemented with appropriate instruction and training consistent with general PPE requirements.

Even if no need for face masks as a mandatory item of PPE is identified in the risk assessment, employers are expected to support employees in using face coverings safely if employees choose to wear them. This will mean telling employees to

- Wash their hands thoroughly with soap and water for 20 seconds or use hand sanitiser before putting a face covering on, and after removing it
- Avoid touching their face or face covering when wearing it, as they could contaminate it with germs from their hands
- Change their face covering if it becomes damp or if they’ve touched it
- Continue to wash their hands regularly
- Change and wash their face covering daily in line with manufacturer’s instructions. If it’s not washable, employees should dispose of it carefully
Are There Any Steps Employers Should Consider Taking in Anticipation of the NHS Test and Trace Service?

The NHS test and trace service, launched by the UK Government on 27 May 2020, asks people who are experiencing coronavirus symptoms to order a test immediately. If the result is positive, individuals must share details of their recent contacts with the test and trace service.

Those contacts will be alerted by the service and may be asked to self-isolate at home for 14 days, even if they do not have symptoms.

Whilst the service is still being rolled out, and in anticipation of greater numbers of employees starting to move around more in public, employers may find it useful to consider whether they will

- Put their own test and trace policy in place. This may assist employers in effectively implementing protocols to address issues such as identifying who might be their employees’ “close contacts” in the workplace, who would need to be identified to a contact tracer, and pre-warning those close contacts pending test results if necessary.
- Make it a requirement that an employee must immediately notify their line manager/HR if they receive notification to self-isolate under the test and trace system, and self-isolate if they receive a notification.
- Require staff to produce evidence that they have received notification that they should self-isolate under the test and trace system.
- Pay enhanced sick pay to staff who are required to self-isolate and who cannot work at home, or just statutory sick pay.

For further information on this topic, see our previous Alert.

What are the Primary Potential Claims Against an Employer in Relation to COVID-19?

**Personal Injury**

If an employer does not take sufficient steps to protect an employee’s health and safety, and an employee contracts COVID-19 in the course of their employment as a result, the employee would have a basis on which to bring a personal injury claim.

The employee would need to establish that the employer was in some way negligent (or is vicariously liable for someone else’s negligence e.g., a fellow employee acting in the course of their employment) and that such negligence caused or materially contributed to the claimant employee contracting COVID-19.
Reasonable Adjustments for Disabled Employees

In the usual way, employers should ensure that they consider any reasonable adjustments that may be required to address disadvantages experienced by those with disabilities. This will almost certainly include shielding employees who are categorised as extremely vulnerable, and possibly others.

For instance, depending on the circumstances, it may be a reasonable adjustment to offer such employees the opportunity to change or swap roles.

Indirect Discrimination

Employers should ensure that any policies, criteria or practices that could place employees of a particular protected characteristic at a particular disadvantage, are objectively justified. For example, a blanket policy requiring all employees to continue to attend the workplace and/or work in front-line public facing roles would potentially have a greater impact on groups with certain protected characteristics, such as pregnant or older employees.

Direct Discrimination

Employers should take equal care not to treat employees less favourably because of a protected characteristic. For example, by favouring male employees in the allocation of work on the assumption that female employees are more likely to be preoccupied with child care-related responsibilities.

Pregnancy Discrimination

Employers should take particular care to fulfil their duties towards pregnant employees, such as undertaking individual health and safety risk assessments.

Protection from Dismissal or Detriment

In certain circumstances, it may be permissible for an employee to refuse to attend work if they have a significant health and safety concern. This could include concerns in relation to their commute to the workplace, or perhaps that they do not believe that the employer’s protective measures are sufficient. Reporting such a concern may also constitute a “protected disclosure” for the purposes of whistleblowing laws.

Employers should be alert to the fact that dismissing or subjecting such employees to a detriment in response to any such action could lead to employment tribunal claims. It should be noted that potential compensation for such claims is not subject to a cap.

How Can Employers Mitigate These Risks?

- Keep abreast of current government guidance
- Regularly review and update risk assessments
- Take active steps to ensure that the identified measures are implemented and
observed

- Encourage employees to tell you if they have any thoughts or concerns
- Identify and nominate someone to be the point person for this input
- Consistent with the duty to maintain trust and confidence in the employment relationship, engage and consult with employees on these matters on an ongoing basis, particularly when specific concerns are raised.

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