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The COVID-19 pandemic and the resultant lockdown have caused a massive shift in the way we work, and as the U.K. prepares for the lockdown to ease, employers will continue to face a variety of challenges as the U.K. adapts to a new normal. In a three-part series, Faegre Drinker’s London labor and employment attorneys will be examining the challenges U.K. employers are likely to face in the coming months, including how employers can manage the transition back to the workplace, addressing the economic impacts of COVID-19, and the potential trends and changes to U.K. workplaces following the pandemic. This week, we will be starting the series with a look at how employers should manage the return to the workplace.

**Transitioning Back to the Workplace**

**Overview of Employers’ Health and Safety Obligations**

As the lockdown in the U.K. eases, employers will no doubt be considering a return to the workplace and how best to manage it. As a starting point, employers should consider the three key responsibilities they have in relation to their employees’
health and safety:

1. Duty to ensure the health, safety and welfare of employees

   - U.K. employers have a common and statutory duty to ensure the health, safety and welfare of their employees. This duty extends to the workplace and anywhere an employee is acting in the course of their employment (including where employees are working from home).

   - Any employer found to be in breach of this duty will be liable for civil and criminal sanctions.

2. Duty of mutual trust and confidence

   - Implied into all U.K. employment contracts is the duty of mutual trust and confidence. As part of this duty, employers must act reasonably towards their employees.

   - A failure to do so can give rise to a variety of employment claims, including breach of contract and constructive unfair dismissal claims.

3. Duty not to subject employees who raise health and safety concerns to detriment or dismissal

   - Under the Employment Rights Act 1996, an employee must not be subjected to a detriment or dismissed because the employee refused to attend work or took steps to protect themselves in circumstances where the employee believed they were in serious and imminent danger and they could not have reasonably expected to avert it.

   - Employees do not have to prove that a serious and imminent danger was actually present; the perception of the danger is subjective.

   - Many commentators consider that an employee may be able to show that the risk of contracting COVID-19 in the workplace constitutes a serious and imminent danger. Factors such as the particular nature of the workplace, or the employee themselves being at heightened risk from COVID-19, are likely to be relevant to the analysis of whether the risk of COVID-19 in the workplace constitutes a serious and imminent danger.

**Recommended Steps for Employers to Manage the Transition Back to the Workplace**

The first step an employer must take before transitioning their employees back to the workplace is to conduct a detailed risk assessment. The risk assessment should identify the COVID-19 risks that employees will encounter in the workplace, and the steps that the employer intends to take to mitigate such risks. If an employer is unable to mitigate the risks appropriately, employees should not be required to return to the workplace. The U.K. government expects employers with 50 or more employees to publish their risk assessment on their websites, although smaller employers may choose to do so in order to promote communication and transparency.
Q: Does the health and safety assessment need to take a particular form?

A: Health and safety assessments do not need to take a particular form, but they should be accessible, concise and easy to understand. The U.K. government expects employers with 50 or more employees to publish their risk assessment on their website, and smaller employers may choose to do the same. The government guidance states that employers with fewer than five employees do not need to produce a written risk assessment, although they do still need to perform an assessment. The government has produced a notice on its website which employers can download and display in the workplace to demonstrate that they have performed a risk assessment and followed the relevant government guidance on COVID-19 in the workplace.

Communication with employees is key at all stages of the transition process, including during the risk assessment process. Any risk assessment should be conducted in consultation with the employees. If there are elected trade union representatives, they should be consulted with. Where there are no elected trade union or employee representatives, the employer may wish to ask its employees to elect representatives that it can consult with. This may assist to streamline the consultation process where there is a larger workforce.

Employers will need to consider all aspects of workplace life, such as how employees will enter and move around the workplace, how social distancing can be maintained, how communal facilities will be accessed, and how work activities (including internal and external meetings) will be carried out. There is a wide range of measures that employers can take to maintain the safety of their employees, including:

- Staggered arrival and departure times
- Reorganising desks in order to maintain social distancing
- Limiting or even prohibiting the use of communal areas, such as kitchens and canteens.
- Limiting contact amongst employees to small fixed teams.
- Organising one-way entry and exit routes.
- Arranging for regular deep cleaning of the workplace.
- Providing masks, gloves and antibacterial sanitiser to the workforce.

Any transition back to the workplace will in most situations need to be phased, with employees who are unable to work from home returning first. The U.K. government guidance currently states that staff should work from home if possible, whilst those in ‘critical’ roles that are needed on site should be allowed to return. The U.K. government guidance describes ‘critical roles’ as those which are critical for business and operational continuity, safe facility management or regulatory requirements.
Currently, employers’ health and safety duties towards their employees do not generally extend to travel to and from the workplace, but in the current circumstances the U.K. courts may decide to extend the existing duties to commutes on public transport. It is also possible that employees’ right not to be subjected to a detriment or dismissed where they refuse to attend work because of a serious and imminent danger could be extended to cover employees’ commutes on public transport. Employers should therefore consider taking steps to address this, such as implementing later start and end times in order to avoid rush hour travel times, and carefully take into account any concerns raised by employees about their commute, particularly in large cities where no alternative to public transport is available.

Some employers may also wish to introduce temperature testing, health questionnaires and/or testing for COVID-19 to limit the risk of their employees spreading or contracting COVID-19 in the workplace. When conducting such checks, employers must be careful not to breach the implied duty of mutual trust and confidence (mentioned above). There must be reasonable grounds for requiring such tests, and any testing should be implemented in a reasonable manner. Invasive or excessive testing or questioning could breach this duty.

Q: Can I require my employees to get a test for COVID-19 before they come back to work?

A: In principle, yes you can, but the reasons for requiring the tests would need to be reasonable (which would involve looking at whether the aims for requiring the testing can be achieved in a less intrusive way, e.g., with social distancing) and the requirement should be carried out reasonably (which would involve consultation with the employees). On a practical level, however, in the U.K., tests are only available on the National Health Service if the employee displays at least one of the three symptoms recognised by the U.K. government, namely a high temperature, a new or persistent cough and/or loss of taste or smell. If you wanted employees who don’t display symptoms to be tested, this would need to be paid for and carried out privately (tests from the National Health Service are free).

You should also bear in mind that it can take several days for the results to come back and, therefore, just because a test has come back negative doesn’t mean that the employee won’t have the virus when they return to work. Therefore, while testing can be helpful, you shouldn’t rely on it too heavily and should still look to have in place robust health and safety measures to ensure a safe work environment.

Additionally, employers will need to be mindful of their data protection duties when collecting and processing health data about employees, including any health data obtained through temperature testing, COVID-19 testing and/or health questionnaires. Among other things, this will require employers to carry out a data protection impact assessment prior to any testing being carried out and to keep employees fully informed about how their data will be processed.

Managing Employees Who Do Not Wish to Return to the Workplace

Many employers may find that issues arise with employees who do not wish to return to the workplace because of COVID-19 concerns.
The basic position under U.K. employment law is that employees are under a duty to obey their employer’s reasonable and lawful instructions, which would ordinarily include an instruction to return to the workplace, and a failure to obey such instruction would ordinarily result in disciplinary action, up to and including dismissal. However, in the current climate employers will need to approach any issues carefully on a case-by-case basis and in light of their health and safety duties, set out above. The general consensus is that where employees are able to work from home and do not wish to return to the workplace, they should be allowed to work from home for the time being.

The situation is more complicated for employees who are vulnerable or highly vulnerable. In the U.K., vulnerable employees are those who are deemed to be higher risk of COVID-19 (due to factors such as age) and highly vulnerable employees are those recognised as such by the U.K. health authorities. Highly vulnerable employees are required to “shield” (i.e., stay at home at all times) until further notice so should not be required to return from the office. If they can work from home, they should do so. If not, they may be entitled to receive Statutory Sick Pay. There are no set rules for how to deal with vulnerable employees, so their situation should be considered on a case-by-case basis.

Additionally, highly vulnerable and some vulnerable employees, are likely to meet the legal definition of disability. Employers will need to have regard to the duty to make reasonable adjustments to accommodate any disabled employee in the workplace and be aware of the risk of disability discrimination claims which could arise from such situations.

Q: What if one of my pregnant employee is in a role that can’t be done from home?

A: Employers have a duty of care towards their pregnant employees and should carry out health and safety assessments to identify and minimise any risk to them in the workplace. During the COVID-19 pandemic, if it’s not possible for a pregnant employee to work from home, you should see whether you can change her working conditions (e.g., relocate her to somewhere in the workplace away from colleagues and customers) or offer her a suitable alternative work on similar terms which can be carried out safely, and ideally from home. If neither of these options is possible, you should suspend the employee on full pay until she starts maternity leave.

Employers may also have employees who do not wish to return to work because they live with or care for a vulnerable or highly vulnerable individual who they do not want to place at increased risk. In this instance, employers will need to be aware of the risk of associative disability discrimination claims, where an employee is treated less favourably because of someone else’s disability, such as someone they live with.

Employers should also be aware of the additional duties they have towards pregnant employees. Pregnant women are currently classed by the U.K. government as vulnerable due to the risk of COVID-19. More generally, employers must assess the workplace risks to pregnant employees and, where appropriate, alter their working conditions to avoid any significant risk. Employers should also be aware of the risk
of maternity discrimination when managing such situations.

In next week’s edition, we will be discussing how employers can manage the economic impact of COVID-19 on the workforce.

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