
Returning to the office and homeworking: Scotland

13 November 2020

1. What is the current position for office workers in Scotland?

The Scottish Government's message to office workers in Scotland has been consistent throughout the pandemic, that non-essential office workspaces and call centres should **remain closed and those who can work from home should do so**. There have been various updates along the way however the key message has not changed. This requirement was set out in Scottish Government [guidance](#) for homeworkers which was first published in July 2020.

On 23 October 2020 the Scottish Government published a revised Strategic Framework. This framework sets out the new approach to outbreak management based on five levels of protection, from the Route Map Phase 3 baseline of 'Level 0' up to Level 4. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 ("the Scottish Regulations") came into force on 2 November 2020 implementing this new levels-based approach and replacing previous Regulations¹ in the process. Schedule 6 sets out the level of each area in Scotland. As soon as the Scottish Ministers consider that it is no longer necessary or proportionate for restrictions at Level 0 – 4 to apply to an area, the Regulations must be revised.

This requirement to work from home as set out in the Scottish Government guidance applies across all five levels.

While Scotland adjusts to this new approach, England is in national lockdown. There are many differences in the respective jurisdictions and the requirements imposed. An example is the requirement to self-isolate: in England it is an offence to attend work if you are required to self-isolate; in addition it is an offence for an employer to knowingly allow a self-isolating worker to leave their home for work-related reasons. The corresponding position in Scotland remains guidance only. The current status for office workers in England is captured by CMS [here](#).

¹ Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020

2. What are the exceptions to homeworking as “the default position”?

Firstly, the Scottish Government’s position on homeworking is guidance and not law. Secondly, the guidance does not expressly state what the exceptions are, to the requirement to work from home. However, the guidance includes the following wording:

- Organisations should make **every reasonable effort** to make working from home the default position.
- Where a worker can perform their work from home, they should continue to do so.
- If organisations have largely managed to have their staff working from home effectively during the pandemic, they should continue to do so **wherever possible**.
- Employers should continue to **maximise homeworking** in their organisations.
- Employers should take **every possible step** to facilitate their employees working from home.

A reasonable interpretation of the guidance in light of the above wording would therefore be that grounds for justifying a departure from the homeworking position should be approached cautiously and in limited circumstances. Reasons for permitting a worker to attend the office would be: (i) issues associated with working environment (space constraints and noise levels); (ii) the work cannot be carried out safely at home, taking into account both the worker’s physical or mental health. However, the decision should be assessed on a case by case basis, not losing sight of the emphasis placed on homeworking as the default position.

The above position is not a change to the rules and has been the case for some time. However, there is now also the introduction of the five levels approach to consider when making decisions about permitting access to the workplace. Where an area is in a higher level of restriction, careful consideration should be given to whether as an employer, *every reasonable effort* has been made to allow working from home.

3. Can anyone who wants to come into the office do so?

As above, there is no outright ban on attending the workplace. However, organisations need to take steps to ensure there are suitable and sufficient measures in place to manage the risk of transmission of Covid in the workplace. Then, requests from workers to come into the office should be considered on a case by case basis. In considering requests, reference should be made to the Scottish Government [guidance](#) on individual risk assessment for the workplace.

4. Can I make someone come into the office?

If an individual does not want to come back to the workplace, this will substantially impact the assessment. It is unlikely that an employer could reasonably force them to return to work.

If an employer is considering compelling an employee to attend work, it should document carefully its reasons for doing so, and ensure it has conducted a detailed individual risk assessment as well as clearly communicated to the workforce the safety measures they have put in place. Even then, the employer should be cognisant of the risks of the individual raising issues with the HSE, as well as any discrimination, personal injury or breach of employment contract claims they might bring. It may also be possible for the employee to bring claims under the specific health and safety provisions of the Employment Rights Act which provide protection against detriment or dismissal for certain conduct “in circumstances of danger which the employee reasonably believed to be serious and imminent”.

5. What do we have to have in place if people are in the office?

There are a number of measures that organisations need to have in place if people are to have access to the office. These are set out in guidance, the Scottish Regulations and pre-existing health and safety legislation.

Guidance

There is a variety of guidance available to support office-based workplaces implementing measures to reduce the risk of transmission of Covid in the workplace. There is a short [guide](#) prepared by the HSE and a [sample COVID-19 Risk Assessment](#); there is Scottish Government [guidance](#) for call centres and customer contact centre environments; there is also UK Government [guidance](#) for offices and contact centres. There is no Scottish Government guidance on offices generally and instead, the guidance points employers to general safer workplaces [guidance](#).

The Scottish Regulations

As well as the guidance noted above, the Scottish Regulations stipulate that those carrying on a business “*must have regard to guidance issued by the Scottish Ministers about measures which should be taken... relating to its premises*”. This includes “*measures which are reasonably practicable to minimise the risk of the incidence and spread of coronavirus on the premises, for example measures which limit close face to face interaction and maintain hygiene*”. Reference is made to the layout of premises, location of furniture, workstations, controlling the use of entrances, passageways, stairs and lifts, shared facilities such as toilets and kitchens; controlling the use of, or access to, any other part of the premises, installing barriers or screens; providing, or requiring the use of personal protective equipment; and providing information to those entering or working at the premises about how to minimise the risk of exposure to coronavirus.

In other words, the Regulations create a legal duty to comply with elements of the Government guidance.

Pre-existing health and safety legislation

There is also the extensive pre-existing health and safety duties imposed on organisations to be aware of; the duty to do all that is reasonably practicable to ensure safety. Further, it is not injury which creates an offence under the Health and Safety at Work Act 1974 but the exposure to risk of harm. This is relevant both to the duty to ensure the safety of workers permitted to enter the workplace and to the safety of home workers.

Even where a Covid related measure is guidance and therefore arguably not legally binding, any deviation from such guidance should be approached carefully in light of health and safety law. It is for the employer to demonstrate that they have done all that is reasonably practicable to ensure safety and the courts tend to judge that with reference to what guidance was available at that time. This imposes a very considerable burden on any organisation to justify departure from guidance, making it effectively mandatory.

6. What about managing the safety of homeworkers?

The duty to do all that is reasonably practicable to ensure the safety of workers applies every bit as much to homeworkers as it does to those entering the workplace. There is a duty to carry out a risk assessment of the work activities of workers, including homeworkers. This assessment involves identifying hazards relating to the homeworkers' work activities. Then, deciding whether enough steps have been taken to prevent harm to them or to anyone else who may be affected by their work. Safe systems of work then need to be set up, as identified by that risk assessment and employers must make sure those systems are implemented and followed. Where there are 5 or more employees, those risk assessments need to be recorded. Organisations need to note what steps have to be taken and tell the homeworkers, or anyone else affected by the work being done, about the findings.

Office-based workplaces should have updated their homeworking risk assessment at the start of the pandemic to reflect the change in circumstances where the majority of the workforce have started working from home.

Risk assessment is a process rather than a piece of paper and should be kept under review. The HSE's [template](#) risk assessment highlights the two main areas of risk to homeworkers in a typical office desk-based role, namely Display Screen Equipment (DSE) and mental well-being.

7. What are the risks to homeworkers and what do we need to do?

As above, the two main risks to homeworkers are DSE and mental well-being.

DSE

Early in the pandemic the HSE published [guidance](#) on protecting homeworkers. The guidance states that *“for those people who are working at home on a long-term basis, the risks associated with using display screen equipment (DSE) must be controlled. This includes them doing workstation assessments at home. There is no increased risk from DSE work for those working at home temporarily. So in that situation employers do not need to ask them to carry out home workstation assessments.”*

This guidance has not changed, however, the temporary situation envisaged when that guidance was introduced is no longer realistic. It could therefore be argued that workers are now working from home on a long-term basis, rather than on a temporary basis. Organisations should therefore consider how they are managing the risk from DSE work to their current homeworkers.

The Scottish Government [guidance](#) on working from home corresponds with this view. It goes further and states that employers must do a DSE workstation assessment. There are various practical options organisations can consider in determining how to carry out these assessments remotely, such as telephone or video assessments, providing workers with clear information on carrying out an assessment themselves and information on who to contact if issues arise.

Mental wellbeing

The duty upon employers to ensure the *“health, safety and welfare”* of the workforce extends to mental well-being, under pre-existing health and safety law. Workload, lack of support and changes at work are listed as three of the main causes of work-related stress and these are all active issues just now. Measures required in relation to working hours, mental health, social isolation and loneliness are all considered in the Scottish Government guidance on working from home.



Eric Gilligan
Of Counsel
T +44 1224 261028
E eric.gilligan@cms-cmno.com



Jacqueline Rédarès
Senior Associate
T 0131 200 7326
E jacqueline.redares@cms-cmno.com