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# Allowing or encouraging a return to the office – the potential legal liabilities

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*This note is current as at 8 July 2020*

## 1. Can my workplace re-open?

At the time of writing the Westminster Government guidance remains that people should continue to work from home if they can. However, that is guidance not law. The relevant law, the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (the “**Regulations**”), only specify those businesses that currently **cannot** open, now a much shorter list of businesses including nightclubs, casinos and beauty businesses, and the restrictions on certain gatherings over a certain size.

Up until 3 July 2020, an individual committed an offence under the Regulations if they went to work unless it was “reasonably necessary” “for work purposes” or “to avoid injury or illness or escape a risk of harm”.

Now the Regulations only prohibit gatherings of more than 30 people which take place in private homes (including gardens and other outdoor spaces), or which take place in a public outdoors space, unless planned by an organisation in compliance with COVID-19 Secure guidance. This means that workplaces which are allowed to reopen can do so and can also allow employees to return.

However, employers must continue to comply with the UK’s health and safety legislation, which requires them to undertake a specific coronavirus risk assessment to identify appropriate measures to keep employees safe in the workplace (see further below). The emphasis from the Health & Safety Executive and the Government remains on employees working from home unless they are unable to do so.

## 2. What is required by the health and safety legislation?

All UK employers have a legal obligation to protect their workers and others from risks to their health and safety in the workplace under health and safety legislation. This includes taking reasonable steps to protect workers and others from coronavirus. This will not necessarily prevent an employer from allowing or requiring employees to return to the office – but it will require the employer to consider whether a reasonable step would be to require or allow continued working from home, and if so on what basis and to what extent. The practicalities of enabling social distancing in office buildings is likely to mean that at least some continued home working may be required for some time to come.

The process of identifying the reasonable steps the employer should take is called a risk assessment. It is already a legal requirement for all employers to undertake risk assessments and, if they employ more than five people, the assessment must be recorded in a written document. The Government expects that any coronavirus risk assessment should be published on the employer’s website.

The Health and Safety Executive (“HSE”) has provided a step by step guide to working safely during the coronavirus (COVID 19) outbreak (<https://www.hse.gov.uk/coronavirus/working-safely/index.htm>) which guides an employer through the risk assessment process. The first substantive step in the process is to consider who should continue to work from home. The HSE does emphasise that everyone who can work from home should do so. It states “ *If through your risk assessment you have identified people who cannot work from home (for example people who operate machinery or work on a construction site), then you should consider what changes you might need in your workplace to reduce risk and make it COVID-secure*”.

The Government has also published guidance for 12 different workplaces including offices and contact centres (<https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>). This workplace guidance directs employers to carry out coronavirus specific risk assessments, and still provides that staff should work from home if at all possible, encouraging employers carefully to consider who needs to be on site, with specific examples given of workers in roles critical for business and operational continuity which cannot be performed remotely, and workers in critical roles which might be performed remotely but who are unable to work remotely due to “home circumstances” or the unavailability of equipment.

### **3. Is the HSE and Government workplace guidance supported by legislation? Where does the obligation to maintain a 2-metre (or 1-metre with risk mitigation) social distance arise from?**

The HSE and Government workplace guidance is not supported directly by specific legislation. However, while the guidance is not legally binding, it will still be extremely relevant when considering whether employers have complied with their existing health and safety obligations. The HSE guidance on completing the risk assessments specifically directs employers to consider the Government workplace guidance.

Requiring or allowing people to work from the office where they are able to work from home may in itself constitute a breach of health and safety obligations, or may contribute to a breach when considering the approach taken more widely to reopening workplaces and seeking to protect employees. A breach of health and safety obligations can be a criminal offence and enforcement can range from an enforcement notice up to an unlimited fine and even imprisonment for individuals guilty of the breach. Employers will therefore need to be comfortable and confident that they have carried out an appropriate and reasonable risk assessment, assessing working from home as a control measure, before permitting any return to the office (particularly where improved productivity is the reason for the return).

The social distancing guidance is also not legislated. However, the Government workplace guidance outlines that, where working from home is not possible, employers should make every reasonable effort to keep people 2-metres apart wherever possible, or 1-metre with risk mitigation where 2-metres is not viable. You should consider and set out the mitigations you will introduce in your risk assessments.

While the Government workplace and social distancing guidance is not directly supported by legislation, the reality is that employers will be vulnerable to health and safety breaches if they do not follow the guidance, until it is changed. Further, another practical reason for being able to demonstrate compliance with social distancing measures is that, if one employee tests positive for coronavirus, this should assist the employer in navigating the Government’s track and trace guidance (<https://www.gov.uk/guidance/nhs-test-and-trace-how-it-works>) (see question 8 below).

## **4. What about the legal risks associated with travel to the office – is an employer responsible for those?**

All workers who cannot work from home should travel to work if their workplace is open. It is a legal requirement under the Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 that all individuals must wear a face mask on public transport absent reasonable excuse. Government guidance on travel to work also states that individuals should avoid public transport if at all possible.

Health and safety legislation does not require an employer to protect employees' safety during their travel to work. However the reality is that forcing employees to travel on public transport when they are anxious about their safety will be an employee relations issue. It could also give rise to claims for constructive dismissal and an employee who complains about being required to travel will be protected from detriment and dismissal by UK employment legislation. See also below in relation to reputational risks.

## **5. If an employee wants to return to work, can we now let them come back to the office?**

In short, yes, as there is no ban on employees returning to the office. However, employers should be aware that an employee may still have claims, even if they have been the one pushing for an early return. Such claims are likely to arise out of concerns regarding the steps taken to manage the risk to their health and safety at work once they are back in the office environment.

To mitigate these risks, employers should ensure that they determine the reason the employee wants to return to work (to ensure that there is a good reason to move away from home working) and that they undertake a health and safety risk assessment that puts the safety of employees at the forefront.

There is also the possibility of employees bringing personal injury claims in the civil courts where the employer is argued to have been negligent in its duties to provide a safe workplace, even in circumstances where they readily agreed to return to work. Liability for such claims is potentially unlimited, but will reflect the injury or losses suffered by the individual. Proving causation will be an issue for employees if they decide to pursue such a claim – although the PR consequences of an employee (or a group of employees) contracting, or at least allegedly contracting COVID-19 at work should also be taken into consideration.

If an employee does not want to come back to work, this will substantially impact the assessment and it is unlikely that an employer could reasonably force them to return to work, at least without extensive discussion and extremely good reason, whilst the Government guidance remains if you can work from home you should work from home (and particularly if they have been advised that they should be shielding). If an employer is considering forcing an employee to attend work, it should document carefully its reasons for doing so, and ensure it has conducted a detailed health and safety risk assessment; but even then, the employer should be cognisant of the risks of the employee raising issues with the HSE, and any discrimination, personal injury or breach of employment contract claims they might bring.

## **6. Will a waiver of claims by the employee protect the employer?**

Employers could ask employees who wish to return to the office to sign a waiver of all claims relating to them doing so. However, this would be largely ineffective. The Unfair Contract Terms Act 1977 prohibits the waiver of personal injury claims including those arising from disease and relating to death. Insisting that an employee sign an unenforceable waiver is likely to be an unreasonable act by the employer and continued insistence could ultimately give rise to a claim for constructive dismissal. It will also undermine the

employer's assertions that the workplace is safe and will not assist with the management of reputational issues should an employee unfortunately contract the virus and claim against the employer.

## **7. Will allowing employees who could work from home to return to the office invalidate cover under any employers' liability insurance policy should they claim?**

This will depend on the terms of the policy, but most policies would cover injury arising during the course of employment even where the injury was arguably caused by a breach of duty by the employer.

## **8. What if an employee who has returned to the workplace tests positive for coronavirus or is told to self-isolate by track and trace – do I have to send everyone home?**

If an employee has the symptoms of coronavirus or tests positive for it, Government guidance states that they should self-isolate for at least 7 days and consider who they have been in contact with in the previous 48 hours and notify them that they have symptoms. If they test positive they should also log on to the Government's track and trace website and complete information about those with whom they have been in contact there. Those in their household should self-isolate for 14 days.

It is clear that those who display symptoms, test positive or are in a household with anyone who displays symptoms or who has tested positive must stay at home in accordance with the Government guidance. This is guidance, not law – however employers who force employees to attend the workplace who should be self-isolating in accordance with Government guidance will clearly breach their health and safety obligations to protect the safety of their employees even where otherwise they have conducted an appropriate risk and implemented social distancing measures. In addition to the enforcement risks this poses, the reputational risk will be significant.

Where an employee has been contacted by someone who has coronavirus symptoms or tested positive, or by someone from the Government's track and trace service, they are not obliged to self-isolate where they don't display symptoms. But is an employer obliged to take steps as part of its health and safety obligations to have those employees self-identify and/or stay away from the workplace? If the source of the outbreak is another employee, this could lead to a workplace or part of a workplace closing.

Each case will depend on its facts and the steps an employer has implemented as part of its risk assessment. As part of the risk assessment, employers should consider requiring employees to notify the fact of their contact with an infected individual in these circumstances and mandating working from home. Other steps would include tests to identify symptoms, such as temperature checking, the use of rotas to allow part of the workforce to attend the workplace and segregation between different parts of the building to minimise contact between different parts of the workforce.

Government guidance requires that as part of their risk assessment employers should have a clear incident plan where an employee displays symptoms or tests positive, or is in a household with someone who has, including leadership responsibility for decisions, and a documented action plan which must then be followed.

Where there has been more than one case of an employee contracting coronavirus in a workplace, a specified point of contact at the employer must notify the local Public Health England office and follow their instructions including assisting with tracing. Employee records should be kept up to date to assist with this.

If there is reasonable evidence that an employee has contracted coronavirus at work, there may be additional reporting requirements under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013. A failure to comply with these regulations will be a criminal offence.

Finally an approach to notifying other employees of cases of coronavirus or suspected coronavirus should be agreed. Although normally the confidentiality owed to employees would mean information of their infection (actual or suspected) should be limited, here the public health considerations and the anxiety that other employees may suffer if rumours spread means that wider notification than normal will be justified.

Training should be put in place so all those in senior positions are aware of what should happen where an incident occurs.

Finally there are specific cleaning requirements where someone has tested positive for coronavirus and been in the workplace which must be adhered to.

## **8. When is the position in the UK likely to change, or when will additional guidance be published?**

A review of the restrictions set out in the Regulations by the Secretary of State (including business closures) must take place at least every 28 days, with the first review taking place by 31 July 2020. With the Government coming under increasing pressure to open up city centres and encourage people to return to work, employers should continue to review the Government guidance and legislation to ensure they remain informed of their rights and obligations. Separate regulations apply to areas subject to local lock-down, and they will be reviewed every 14 days with the Regulations applying to Leicester to be reviewed by 18 July 2020 at the latest.

## **9. Is the position the same in Wales or Scotland?**

No, both Wales and Scotland have introduced separate legislation to deal with the coronavirus pandemic. The legislation in both Wales and Scotland is much more specific about employer obligations than the English legislation, for example the 2-metre rule is legislated in both countries. As a result, if you have a workplace in these jurisdictions you should undertake a separate review of your legislative obligations.

## **10. What about where a workplace is situated in an area where local lock down applies?**

There are specific Regulations applying to Leicester which replicate the pre-4 July 2020 position in relation to the restrictions on a wider category of businesses opening and gatherings of more than 6 people outdoors and two or more people indoors unless it would be reasonably necessary for work purposes. For the position pre-4 July 2020, see our previous note of advice [here](#).



**Catherine Taylor**  
**Partner**  
T +44 20 7067 3588  
E [catherine.taylor@cms-cmno.com](mailto:catherine.taylor@cms-cmno.com)



**Melanie Lane**  
**Partner**  
T +44 20 7067 3653  
E [melanie.lane@cms-cmno.com](mailto:melanie.lane@cms-cmno.com)

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