



RESUMING OPERATIONS AFTER COVID-19 LOCKDOWN: WHAT ARE THE EMPLOYMENT IMPLICATIONS?

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Introduction

UK businesses are turning their minds to how they will resume operations when the current COVID-19 lockdown begins to lift. What a “return to work” looks like will vary between different organisations (and even between different parts of the same organisation), as some businesses have shut down entirely during the lockdown, while others are operating more or less as usual, save that staff are working remotely.

The UK government has not yet published an “exit plan” for lifting the lockdown restrictions, although the Business Secretary has set out a five-point test which must be satisfied before the restrictions will be eased¹. Other countries where the effects of the pandemic were felt earlier than the UK (including China, Italy and Spain) have now published exit strategies. Until the UK exit plan is published, employers will need to plan based on existing law and guidance, as well as measures being taken in other countries.

This briefing outlines the main employment law issues and practical steps which employers should consider when planning how to move beyond the current lockdown. This will be a complex process, with no “one size fits all” solution. This means that employers are encouraged to take advice on tailoring their approach to fit their businesses.

Employers’ duty of care

Employers are under a duty to take reasonable care and steps to ensure the safety of their employees while at work. What is reasonable in the circumstances depends on the nature of the work environment, the likelihood and gravity of harm, the costs and practicability of preventing it, and the justifications for running any risk.

The novelty of COVID-19 and the absence of fully developed knowledge of how to contain and treat the illness puts employers in a difficult position. In short, employers should ensure that they follow any available government advice (and monitor it for updates), but should also consider what additional steps may be needed in their individual circumstances. Whilst it is inevitable that many businesses will adopt a principles-based approach and then regularly review the measures they are

¹ The five points are: 1. Ensuring the NHS has sufficient capacity; 2. A sustained and consistent fall in the daily death rate; 3. Decreasing rate of infection; 4. Supplies of testing and personal protective equipment (PPE) able to meet demand; and 5. No risk of a second peak of the virus

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adopting to see if they are fit for purpose, businesses are also focussed on “getting it right” first time, so as to avoid a second spike in infection rates.

Employee safety includes both physical and mental health. The impact of the COVID-19 outbreak on employees’ mental health has so far been little explored, but may become apparent on a return to work. Employers may need to perform something of a balancing act: some employees will be anxious about returning to the workplace because of what they perceive to be the threat to their health (or the health of others at home).

On the other hand, some employees will struggle with the isolation inherent in working remotely or being in lock-down. Others will be concerned about the difficulties of working from home and the possibility of losing their job. For these employees, a greater risk may be posed to their mental health the longer they are excluded from the workplace.

COVID-19 has been designated by the UK government as a “serious and imminent threat to public health”. This means that if an employer does not take adequate measures to protect its employees when returning to work, employees will have the right to walk out, or refuse to return, or to take any other appropriate action, to protect not only their own but other people’s health. If in response the employer takes any action which may amount to detrimental treatment, they may face a claim. Any dismissal of an employee in these circumstances would be automatically unfair and may attract uncapped compensation, as well as the potential for wider public criticism.

Preparatory steps

Before any employees are invited back to the workplace, the employer should carry out and record a comprehensive **risk assessment**, with a particular emphasis on the risk of contracting COVID-19 in the workplace. This will need to consider what adjustments may be needed to all usual methods of working to minimise risks to employees’ health.

Employee communication will be very important, and should be carried out well in advance of any return to the workplace. Ensuring that employees feel safe will have a positive effect on morale, productivity and willingness to work. The CBI has noted that, where cautious re-opening has already taken place, it has worked because of good communication with employees and the trust which this engenders.

As a matter of law, employees should be provided with specified information regarding identified risks to their health and safety, measures introduced to prevent and protect against those risks, and safety procedures. As a matter of good practice, employees should be given the chance to express their concerns about returning to the workplace, so that these can be addressed. Employees could also be asked to update their employer on any vulnerabilities they face with regard to coronavirus. They may also need time to put in place alternative arrangements for childcare or care of other dependants, if schools and nurseries remain closed.

Employers are recommended to formulate their plans by reference to the latest **government guidance**. Currently there is [guidance for employers](#) in England to follow to protect their workforce and customers whilst continuing to trade; the key points of this as reflected below. Further guidance is anticipated once the UK publishes its exit strategy.

Phased return

A phased return to full operations is likely to benefit both employers and employees. Businesses may consider a new or greater use of shift working, for example splitting staff into teams with alternate days and times for attending the workplace. Staggering on-premises hours will reduce public transport use during peak periods. Where staff are split into teams, the teams should be small and fixed as far as possible (this is often referred to as ‘cohorting’), so that where contact is unavoidable, it happens between the same individuals. Whether this is achievable will of course depend on the needs of the business.

Employers will need to develop a framework for return which takes into account not only the specifics of their own business, but the issues posed by other parts of the supply or support chain, including their workers’ reliance on schools and transport systems.

Which employees?

Employers will need to consider carefully which employees are asked to return to work, and at what stage. Some employees will be very keen to return, given their own personal health and financial circumstances, while others will find the return more challenging, in terms of childcare commitments or travel arrangements for instance.

Where employees have been furloughed, their furlough will need to be brought to an end before they can be asked to undertake any work. The employer will need to ensure that their final period of furlough lasts at least three weeks, in order to remain eligible to claim for their wages under the Coronavirus Job Retention Scheme (CJRS). The manner of their return will then depend on how furlough was introduced; it may be necessary to engage with a recognised trade union and/or employees directly in order to reach agreement about the terms on which employees will return to work.

There is mounting pressure for the government to make the CJRS more flexible, in order to allow for employers to make a smaller claim for employees working reduced hours, in order to incentivise people back to work. If and when any such flexibility is announced, employers should factor this in to their reactivation plans.

Employees on certain types of statutory leave (excluding furlough) have the right to return to either the same job, or if that is not reasonably practicable, to another suitable and appropriate job at the end of that leave. Which right applies depends on the type and duration of leave, but would include most types of family leave, and also the new right to emergency volunteering leave introduced by the Coronavirus Act 2020. This right to return does not however apply to furloughed employees, employees on sick leave or employees on unpaid dependants leave.

Employers will also need to consider how their plan to bring employees back to the workplace may impact on individuals who are at higher risk. For example, it is clear that COVID-19 is more dangerous for those over the age of 70 and/or with serious underlying health conditions, so following the shielding guidelines to protect them will be crucial.

Employees who are extremely vulnerable, as well as individuals they live with, should continue to follow the [government’s guidance on shielding](#). They will therefore not be in a position to return to

the workplace until at least the end of June 2020, based on current guidance. These individuals will also be entitled to statutory sick pay (SSP), if they are unable to work.

Employers are advised to continue supporting employees who are shielding but who are able to work from home. Consideration may need to be given to implementing suitable arrangements to ensure these employees are not disadvantaged compared to those that are able to return to the workplace.

Employees are likely to continue to become ill with COVID-19 at least in the short- to medium term. Employers are recommended to have robust HR processes in place to monitor the health of the workforce, respond to a workplace COVID-19 outbreak, and record and maintain contact with employees who exhibit symptoms of COVID-19 or are self-isolating in accordance with government guidance. For example, any member of staff who develops symptoms of COVID-19 should follow the [government's guidance on self-isolating](#). Employees who are self-isolating in these circumstances will continue to be entitled to SSP.

Adjustments to the workplace

Current government guidance states that businesses should make every possible effort to enable **working from home** as a first option. Where employees cannot work from home, adjustments will be needed to the workplace in order to comply with **social distancing** guidelines. The current indication is that the two-metre social distancing guidelines will continue for several months, and businesses are being encouraged to plan on that basis.

There is [specific guidance on social distancing in the workplace](#) for the manufacturing, construction logistics and transport sectors. More generally, the government's guidance for employers provides some suggested steps that will be relevant to the majority of business settings, once employees return to the workplace:

- Make regular announcements to remind staff to follow social distancing advice and wash their hands regularly.
- Encourage the use of digital and remote transfers of material where possible rather than paper format, such as using e-forms, emails and e-banking.
- Provide additional pop-up handwashing stations or facilities if possible, providing soap, water, hand sanitiser and tissues, and encourage staff to use them.
- Where it is possible to remain two metres apart, use floor markings to mark the distance, particularly in the most crowded areas (for example, entry points to buildings, toilets and communal break areas). Move workstations where possible to comply with the two metre distancing rules.
- Where it is not possible to remain two metres apart, staff should work side by side, or facing away from each other, rather than face to face if possible. Where face-to-face contact is essential, this should be kept to 15 minutes or less wherever possible.

- Objects and surfaces that are touched regularly should be cleaned and disinfected frequently. The current evidence is that the virus survives on most hard surfaces for about 48 hours (and for much shorter periods on softer surfaces). Businesses are being encouraged to operate on the basis of a 72 hour survival period.

The UK does not currently advise using **face masks** outside of care settings, in line with [PPE guidance](#). However, other countries take a different view, and the guidance is being regularly reviewed. Employers are recommended to monitor and follow the latest guidance for their jurisdiction. They may also consider how they would obtain face masks for their staff, if the government guidance were to change and recommend that masks be worn.

Looking ahead

The return to work needs to be carefully managed in order to secure maximum employee engagement, minimise risks to their health and well-being, and mitigate the risk of liability attaching to employers. High media focus can be expected, both in terms of success stories and any notable failures.

There are significant benefits for the business in getting this right, not just from the perspective of reducing legal liability, but in order to put themselves in the best possible position for weathering the continuing COVID-19 storm.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



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