

Employer's liability for employees returning to work.



As the lockdown continues throughout the UK, a comprehensive exit strategy remains unclear, despite being the topic of much political and social debate. As an effective vaccine remains (at least) months away, it seems inevitable that society in the UK will need to initiate steps towards phasing back the full lockdown restrictions before effective medical immunisation of the population is in place.

Different approaches are being taken across Europe. Of the countries which have started to lift their lockdown measures a common theme is emerging; a slow staggered easing of restrictions on a sector-by-sector or workplace environment basis, rather than by the demographic of workers. Media reports suggest that it is anticipated the UK will adopt a similar approach.

The Health and Safety Executive recognises that these are unprecedented times and stated that their regulatory approach will take a flexible and proportionate account of the risks and challenges arising from the pandemic. Employers nevertheless have a legislative duty to ensure, as far as they are reasonably able, the health, safety and welfare of those working for them. This will require implementing measures to try to prevent the virus from spreading in the workplace.

Looking to Scandinavia, where there have been some initial steps taken to ease the restrictions this week, guidelines have been issued by the government as to how businesses are expected to ensure that employees safely return to work. These include policies on the number of people permitted in a room, cleaning common surfaces (such as door handles, kitchen areas etc.) and encouraging flexible working hours including employees attending the workplace in smaller groups / shifts.

Similar guidelines are likely to be issued in the UK. We expect that a significant onus will be placed on businesses to implement and maintain policies in the workplace, having regard to the nature of the business, the number of employees, and the extent to which it is possible to maintain some form of social distancing. It will be important that the employer is able to demonstrate that they have considered their policies carefully and regularly having regard to the recommendations of public bodies, and any applicable professional advice available at the time.

Regardless of any official guidelines, working practices are likely to change significantly in any event post-lockdown. Identifying areas where the change to the normal regime has had a positive impact

may result in higher numbers of employees working flexible hours or remotely, less travel and fewer face-to-face meetings as well as more innovative ways of measuring productivity.

Employer's Liability and Causation

Causation is likely to be a significant factor in any potential Covid-19 claim brought against an employer.

A claimant may face difficulties establishing that the virus was contracted at work rather than, for example, on the commute into work. Considering the incubation time, it may also be difficult to determine when the virus was caught. This may be easier to establish whilst stringent lockdown rules remain in place as, where an individual is required to remain working, they are more likely to be able to establish:

- very little time was spent outside the workplace and own home,
- other members of the household were unlikely to have contracted and/or transferred it onwards,
- factors indicating that there was a high risk of contracting it at the workplace.

Whilst the knowledge of the virus continues to improve, it may become apparent that even the best efforts an employer could reasonably have put in place, could not have prevented the spread of the highly contagious Coronavirus. Hence, a year from now an employer may be able to point to ways the virus could have spread, which were impossible to foresee and protect against.

Finally, it is worth noting that although it is likely there will be some severe cases, the vast majority of employees infected may only have suffered small losses. For most employees, it will be undesirable to pursue claims against their employers for modest damages. Therefore, it is likely that, if any claims of this type are going to be brought, they will be those that are and high value and complex in nature.



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