HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

Number CBP 8916, 5 August 2020

Coronavirus: Returning to work

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Summary

This is a fast-moving area and the paper should be read as correct at the time of publication (05.08.2020).

In late March 2020, governments in all four nations of the UK made legislation to impose lockdowns in response to the Covid-19 pandemic.

All four governments have since published Covid-19 recovery strategies, setting out plans for the phased re-opening of the economy. As part of this process, the governments have at various stages been amending legislation and guidance that restricts which businesses can open and which workers can attend the workplace.

They have also each published guidance for businesses on working safely during Covid-19.

'Return to work'

The shutdown of work came about primarily through two sets of rules:

- The restrictions on movement and gatherings; and
- The closure of business premises.

Each of the four lockdown regulations initially made it an offence for a person to leave their house to go to work if their work could be done from home.

In England the legal restriction on going to work was effectively lifted on 1 June and removed entirely on 4 July. However, guidance said that workers should continue working from home if possible. On 1 August the UK Government lifted this guidance, saying that working from home is simply "one way" to operate safely.

The Scottish, Welsh and Northern Irish governments also lifted the legal restrictions on going to work. However, their guidance says working from home is remains the default.

Each of the four governments also had guidance advising those who are clinically extremely vulnerable to Covid-19 to shield at home. England, Scotland and Northern Ireland 'paused' their shielding guidance on 1 August. While extremely vulnerable people can now return to work, the guidance says they should work from home if possible. The Welsh Government is keeping its shielding arrangements in place until at least 16 August.

Each of the four governments have lifted most of the rules requiring businesses to close. In England, some restrictions have been retained or re-imposed in local lockdowns. This is discussed in the Library Briefing, Coronavirus: Business re-opening (CBP-8945).

Employers are under no obligation to instruct workers to return and can keep eligible employees on furlough. The Coronavirus Job Retention Scheme is set to remain in place until 31 October 2020, although with employer contributions required from 1 August.

Health and safety

Employers have to follow a vast and complex body of health and safety legislation. The Health and Safety Executive (HSE) publishes approved codes of practice and guidance on health and safety law. In summary, employers have to:

1 Undertake a risk assessment;

2 Set up safe systems of work, informed by the risk assessment;

3 Implement the safe systems of work; and

4 Keep the systems of work under review.

The UK Government's working safely guidance, first published on 11 May 2020, does not replace existing law. Rather, it provides examples of the sorts of measures an employer might take in order to comply with existing legal obligations in the context of Covid-19.

Refusing to go to work

All workers have an obligation to obey lawful and reasonable instructions given by their employer. However, employees who refuse to attend the workplace because they reasonably believe that there is a serious and imminent danger have certain protections under employment rights legislation. The protections also apply if an employee takes steps to protect others from such danger.

Whether an employee has a reasonable belief will always depend on the facts. The fact that an employer is complying with the Government's working safely guidance will be a relevant factor, although other factors, such as the employee's vulnerability to Covid-19 will also be relevant.

The Government's working safely guidance says that there are certain workers who should not be asked to attend the workplace, such as those required to self-isolate.

Employers must ensure that the measures they adopt do not discriminate on the basis of protected characteristics, including age, disability and pregnancy.

Health and safety law offers special protection to new and expectant mothers who must be suspended on full pay if they cannot be offered work that is safe.

Issues

Some issues have arisen with the approaches to returning to work, including:

- There is a prospect that disagreements will arise between employers and employees over whether it is safe to return to work, especially among those who used to be shielding. In most cases, these issue will be best addressed by discussion, including with health and safety representatives.
- The protection from detriment or dismissal does not appear to cover employees who refuse to go to work because they have fears about the safety of their commute.
- As public health is devolved, businesses in Scotland, Wales and NI will need to operate in accordance with the relevant devolved lockdown regulations and government guidance. Meanwhile, health and safety law is not devolved in Scotland and Wales. Ultimately, employers must undertake their own risk assessments and take account of all available guidance.
- While schools remain closed, workers with parental responsibilities may struggle to attend work. While employees do have a right to emergency time off for dependants, the time off does not need to be paid. While workers with caring responsibilities could ask to be furloughed, this is a decision for their employer.

Whistleblowing

Employment law offers a range of protections to whistleblowers who make 'protected disclosures'. However, there are detailed rules on what sorts of disclosures qualify for protection. The disclosure must relate to particular subject matter and must be made to one of a number of groups of people listed in legislation. This includes the Health and Safety Executive, local authorities and MPs.

There are additional tests that must be satisfied if a worker makes a disclosure otherwise than to a person listed in the legislation. These tests would need to be satisfied, for example, if a worker makes a disclosure to the press or on social media.

1. The lockdown

In March 2020, the UK Government and the devolved administrations each made legislation to implement lockdowns. This was achieved through restrictions on movement, restrictions on gatherings and the closure of a range of businesses.

These restrictions have gradually been relaxed, although in England some restrictions have been retained or re-imposed in local lockdowns.

Each government has also produced a range of guidance for employers setting out which workers can safely attend the workplace.

1.1 Who is allowed to attend the workplace?

In some cases it can be an offence for a worker to go to the workplace:

- Where they are required to quarantine; or
- Where their workplace is required to close.

In other cases guidance says workers should not attend the workplace:

- Where they can work from home (Scot; Wales; NI);
- Where they have to self-isolate in line with official guidelines; or
- Where they are shielding in line with official guidelines (Wales).

Restrictions on movement

Each of the four lockdown regulations initially made it an offence for a person to leave their house to go to work if it was reasonably possible for their work to be done from home.[1]

In England the legal restriction was effectively lifted on 1 June and was removed entirely on 4 July.[2] However, the Government's working safely guidance still said that employees should work from home if possible. On 1 August this guidance too was lifted. The Government's current guidance is that working from home is just "one way" of working safely and that employers have discretion to ask people to return to work.

The legal restriction was also lifted in Scotland on 10 July, in Northern Ireland on 23 July and in Wales on 25 July.[3] However, the Scottish, Welsh and Northern Irish government guidance each say that employees should still work from home if possible.

There is currently local lockdown legislation in force for Leicester, Blackburn and Bradford and various parts of the North of England.[4] However, as the guidance on local lockdowns notes, these pieces of legislation do not prohibit workers from attending the workplace.

1 Reg. 6, SI 2020/350 (Eng); Reg. 8, SSI 2020/103 (Scot); Reg. 8, WSI 2020/353 (W.80) (Wales); Reg. 5, NISR 2020/55 (NI).
2 Reg. 2, SI 2020/684.
3 SSI 2020/210 (Scot); WSI 2020/803 (W.176) (Wales); NISR 2020/150 (NI).
4 SI 2020/824 (Leicester) and SI 2020/822 (Blackburn with Darwen and Bradford); SI 2020/828 (North of England).

Quarantine

From 8 June 2020, any person arriving into the UK from outside of the Common Travel Area has been required to self-isolate at a specified address for 14 days. The rules are set out in the *Health Protection (Coronavirus, International Travel) (England) Regulations 2020* and the equivalent legislation in the devolved nations.[5] In each of the regulations there are exceptional circumstances in which a person can leave their place of residence. However, it is not an excuse to leave to go to work.

Breaking these isolation rules is a criminal offence.

On 10 July, the UK Government and the devolved administrations lifted the quarantine restrictions for people arriving from a number of lower risk countries. Some countries, like Spain and Luxembourg, have been taken off the exempt list at very short notice.

The TUC has noted that workers who are quarantining are not entitled to statutory sick pay (SSP) and could face disciplinary action or even dismissal, especially if they are not covered by unfair dismissal rules.

Business closures

In addition to restricting movement and gatherings, the lockdown regulations in the four nations also required businesses in a range sectors to close their premises except for carrying out certain activities.

These restrictions are being lifted at different rates in England, Scotland, Wales and Northern Ireland. However, each of the four governments have now lifted most of the restrictions, allowing businesses to re-open.

The local lockdown legislation for Leicester and Blackburn and Bradford requires some businesses to remain closed which are open in the rest of England. Furthermore, local authorities in England have been given the power to close certain business premises or prohibit certain activities.

Further information can be found in the Library Briefing, Coronavirus: Business re-opening (CBP-8945).

Workers whose businesses are required to close completely will likely be unable to attend the workplace. Likewise, businesses that can only carry out certain activities may be operating at reduced capacity.

Workers who are unable to attend the workplace because of business closures can be flexibly furloughed if they are eligible.

For further information see the Library Briefing, FAQs: Coronavirus Job Retention Scheme (CBP-8880).

Self-isolation

The Government's guidance on self-isolation says that a person who is showing symptoms or who has tested positive for Covid-19 must isolate at home for a period of 10 days. In addition, everyone else in their household, and in a linked household, must isolate for 14 days, or, if they show symptoms or test positive, 10 days from that day.

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5 SSI 2020/169 (Scot); WSI 2020/574 (W.132) (Wales) and NISR 2020/90 (NI).

The UK Government and the governments Scotland, Wales and Northern Ireland have set up 'test and trace' systems. A person notified under these systems will be asked to self-isolate for 14 days.

The rules on self-isolation are largely set out in guidance. It is not an offence for a person who is required to self-isolate to attend the workplace. However, if an employer required or allowed a self-isolating person to come to work it would likely breach health and safety law.

Employees who are unable to work because they are self-isolating are entitled to statutory sick pay (SSP) if they meet the eligibility criteria.[6]

Employees who are self-isolating because they or someone in their household are showing symptoms can obtain an isolation note from NHS 111 online to provide as evidence to their employer.

The UK Government's Test and Trace guidance says that the notification to isolate can be given to employers as evidence.

Shielding

The UK Government and governments in Scotland, Wales and Northern Ireland each had guidance on 'shielding' for people who are clinically extremely vulnerable to Covid-19. Among other things, the guidance said that those who are shielding should not be asked to go to work. The guidance said that employers should facilitate home working, put them on furlough or, as a last resort, pay them SSP.

On 1 August the UK, Scottish and Northern Irish governments 'paused' their shielding guidance, including for areas subject to a local lockdown. This meant that employers could ask extremely vulnerable employees to return to work. However, the working safely guidance said they should continue to work from home if possible.

The Welsh Government has said that it will keep its shielding rules in place until at least 16 August.

As discussed below, employees who reasonably believe that going to work would pose a serious and imminent danger are protected if they refuse to go to work. While extremely vulnerable employees can now be asked to return to work, they may be able to show such a reasonable belief. As many extremely vulnerable employees have an underlying health condition that is a disability under the *Equality Act 2010*, employers will also need to make any necessary reasonable adjustments.

Employees who were unable to work because they are shielding in line with official guidelines are entitled to SSP but only during the shielding period set out in their notification letter.[7] As a result, most formerly shielding employees will no longer be eligible for SSP.

Government guidance on the Coronavirus Job Retention Scheme notes that they can still be furloughed if they are eligible.

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6 *Statutory Sick Pay (General) Regulations 1982 (SI 1982/894)* ('SSP Regulations') as amended by SI 2020/374, SI 2020/539 and SI 2020/681.

7 Schedule 2, SSP Regulations.

Summary of workers who can attend the workplace (5 August 2020)				
Type of worker	**England**	**Scotland**	**Wales**	**NI**
Those not able to work from home	✓	✓	✓	✓
Those able to work from home	✓	▲	▲	▲
Those who are quarantining	×	×	×	×
Those who are self-isolating	×	×	×	×
Those who are clinically vulnerable	✓	▲	▲	▲
Those who are clinically extremely vulnerable (shielding)	▲	▲	×	▲

✓ Can go to work if workplace is following Covid-secure guidelines
▲ Can go to work but advised to work from home if possible
× Offence to go to work / should not be asked to go to work for health and safety reasons

1.2 Further anticipated lifting of restrictions

Each of the four governments in the UK have published Covid-19 recovery strategies laying out plans for the future lifting of restrictions.

England

The UK Government published its Covid-19 recovery strategy on 11 May and has steadily been lifting restrictions. On 17 July, the Government announced the 'next chapter' in the UK's recovery strategy. As part of this the Government said it would re-open more businesses and lift the guidance on working from home from 1 August.

On 31 July the Prime Minister announced that the Government would be delaying most of these measures until at least 15 August. However, the Government went ahead with lifting the guidance on working from home and pausing shieling guidance on 1 August.

Scotland

The Scottish Government published its Framework for Decision Making on 21 May. On 30 July, the Scottish Government announced further indicative dates for Phase 3 of its recovery strategy. This included pausing shielding guidance on 1 August and further anticipated business re-openings in August and September.

The Scottish Government has not given an indication of when its guidance on working from home might be lifted further.

Wales

The Welsh Government published its Covid-19 recovery strategy on 15 May. It has been undertaking reviews of its lockdown restrictions every three weeks. The latest review took place on 31 July where a number of further business re-openings were announced.

The Welsh Government has also announced that guidance on shielding will be relaxed from 16 August. It has not given an indication of when its guidance on working from home will be relaxed.

Northern Ireland

The Northern Irish Executive published its Coronavirus recovery plan on 12 May. The Executive has published a detailed overview of the restrictions that have been lifted and those that remain in place. It also provides dates for further anticipated lifting of restrictions.

The guidance does not provide an indication of when full on-site working will resume in Northern Ireland.

1.3 Coronavirus Job Retention Scheme

While various businesses are being re-opened and employers are able to bring more employees back to work, there is no obligation on employers to do so.

Employers are still able to place employees on furlough and claim support under the Coronavirus Job Retention Scheme (CJRS), provided that employee was furloughed for a full three week period at least once prior to 1 July. Under the current rules employers can keep employees on furlough full time or flexibly furlough them, requiring them to work certain hours and claiming a grant for any usual hours not worked.[8]

The Scheme is set to last until 31 October. From 1 August employers will be required to make steadily increasing contributions towards the costs of furloughed employees.

If an employer instructs an employee to work this must be in accordance with the terms of the employment contract, as amended by any furlough agreement.

The Resolution Foundation has noted that as well as being an important form of financial support, the CJRS is an important tool for limiting social contact and safeguarding public health:

> As well as its role in limiting the economic impact of the measures taken to protect health, the JRS is also playing another more direct role in supporting the effectiveness of measures to curtail the virus, not least because it can be used by firms to pay the wages of some of those self-isolating. This dual function should be clearly communicated, and separated out from the 'economic' component of the scheme.
>
> This is important not just so employees are aware of the options available to them, but also because in the coming months the design of the economic component of the JRS is likely to be modified (and eventually withdrawn altogether) to facilitate returns to work. It would be counterproductive to mirror these changes for the health components of the JRS.[9]

The Government has clearly said that it will not be extending the CJRS beyond 31 October.[10]

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8 See FAQs: Coronavirus Job Retention Scheme, Commons Library Briefing Paper CBP-8880, 16 June 2020.

9 Torsten Bell, Laura Gardiner and Daniel Tomlinson, Getting Britain working (safely) again, Resolution Foundation, 12 May 2020, p. 21.

10 See PQ69569 [on Coronavirus Job Retention Scheme], 9 July 2020.

2. Health and safety at work

2.1 Legal framework

Health and safety law is vast and complex. It is made up of common law duties, primary and secondary legislation and EU legislation, as well as numerous codes of practice and pieces of guidance.

This section will set out the some of the key principles of health and safety law and highlight the most relevant pieces of legislation in the context of Covid-19.

Sources of law

The key piece of legislation in the UK is the *Health and Safety at Work etc. Act 1974* (HSWA). The HSWA is supplemented by a large number of pieces of secondary legislation.

In many areas of health and safety law, UK legislation gives effect to EU law. The key piece of EU legislation is the *Framework Directive* (Directive 89/391/EEC) which is also supplemented more detailed Directives.

The Health and Safety Executive (HSE) issues Approved Codes of Practice (ACOPs) as well as health and safety guidance. ACOPs have a special legal status. If in criminal proceedings it is shown that an employer did not follow a relevant APOC, the employer must prove it complied with its health and safety obligations.[11] HSE guidance does not have legal force but the HSE does note that employers who follow the guidance will "normally be doing enough to comply with the law."[12]

Guidance on working safely during Covid-19

On 11 May 2020, the Department for Business, Energy and Industrial Strategy (BEIS) published guidance for working safely during Covid-19. There is guidance for eight different types of working environments.

As with HSE guidance, this new guidance has no specific legal status. Rather, it is guidance for employers on how they can fulfil existing legal obligations in the context of Covid-19.

Employer's general obligations

An employer's general health and safety obligations are set out in section 2 of the HSWA. Employers must "so far as is reasonably practicable" provide and maintain safe places of work, safe systems of work and adequate facilities for welfare. In addition, employers must provide employees with sufficient information and training.

Employers only need to take steps that are reasonably practicable. HSE guidance on risk assessment explains:

> Generally, you need to do everything 'reasonably practicable' to protect people from harm. This means balancing the level of risk against the measures needed to control the real risk in terms of

11 s. 17, *Health and Safety at Work etc. Act 1974* ('HSWA').
12 HSE, Legal status of HSE guidance and ACOPs.

> money, time or trouble. However, you do not need to take action if it would be grossly disproportionate to the level of risk.

Barristers at Cloisters chambers summarised the employer's obligations in the following terms:

1 Assessing risks;

2 Setting up a safe system of work;

3 Implementing these system;

4 Reviewing these system.[13]

Risk assessment

A central feature of an employer's obligation is risk assessment. This is a specific obligation under many pieces of secondary legislation.

The Supreme Court, citing Smith LJ in an earlier Court of Appeal judgment, explained the importance of these assessments:

> Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse. Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para 59, cited by the Lord Ordinary in the present case, that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. We respectfully agree.[14]

HSE has produced basic guidance on risk assessment.

As noted, employers must also implement all the steps that it finds are necessary and reasonably practicable in light of its risk assessment.

Health and safety policies

Employers with five or more employees are obliged to prepare and, when appropriate, revise a written health and safety policy.[15]

HSE guidance on preparing health and safety policies says it should cover:

1 Statement of intent: an employer's general policy on health and safety in the workplace;

2 Responsibility: listing the names and positions of persons responsible for health and safety in the workplace;

3 Arrangements: listing practical steps that are being taken to ensure health and safety policies are satisfied.

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13 Cloisters – Employment, Seventh edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 17 July 2020.

14 *Kennedy v Cordia LLP* [2016] UKSC 6 at para. 89.

15 Reg. 2, *The Employers' Health and Safety Policy Statements (Exception) Regulations 1975 (SI 1975/1584)*.

An employer must bring the health and safety policy to the notice of all its employees.

Consultation of safety representatives

Employers have a duty to consult safety representatives. There are separate rules depending on whether there is a recognised trade union that represents employees.[16]

Employers must consult representatives about the introduction of any measures that could substantially affect the health and safety of employees and while undertaking any risk assessments.

HSE has guidance and an APOC on consulting safety representatives.

Consultation in the context of Covid-19 is discussed further below.

Employee's obligations

Health and safety law also applies to employees. Employees are required to take reasonable care of their health and safety and that of others. In particular, employees must cooperate with employers to enable them to fulfil their health and safety obligations.[17]

Criminal and civil liability

It is a criminal offence to fail to comply with health and safety law. On conviction on indictment an employer could face an unlimited fine.[18]

An employer's failure to comply with health and safety legislation does not give rise to civil liability.[19] A worker seeking to bring a claim against an employer would need to bring a personal injury claim and prove that the employer acted negligently.

The HSE provides an overview of criminal and civil liability on its website.

Enforcement of health and safety law

The enforcement of health and safety law is shared between the HSE and local authorities. The HSE covers sectors including factories and building sites. Local authorities cover sectors such as retail, offices and the hospitality industry. The HSE website has a list setting out which body is the appropriate enforcing authority.

Safety inspectors have a range of powers provided by the HSWA. This includes the power to enter and inspect premises and the power to take samples. Safety inspectors can issue 'improvement and prohibition notices' if they believe that an employer is failing to comply with its health and safety obligations.[20] In addition, if a safety inspector finds that an employer has failed to comply with its legal obligations, the HSE can charge the employer a fee for intervention (FFI).[21]

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16 Unionised workplaces: *The Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500)*; or non-unionised workplaces: *The Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)*.
17 Section 7, *Health and Safety at Work etc. Act 1974* ('HSWA').
18 Section 33, *HSWA*.
19 Section 47(2) and 47(2A), *HSWA*.
20 Sections 20 to 22, *HSWA*.
21 *Health and Safety (Fees) Regulations 2012 (SI 2012/1652)*.

HSE's Enforcement Policy Statement and the National Local Authority Enforcement Code set out the HSE and LAs approaches to regulation.

2.2 Regulations relevant to Covid-19

There are a number of key health and safety regulations that will be relevant in the context of Covid-19. They include

- The Management of Health and Safety at Work Regulations 1999
- The Workplaces (Health, Safety and Welfare) Regulations 1992
- The Control of Substances Hazardous to Health Regulations 2002
- The Personal Protective Equipment at Work Regulations 1992
- The Safety Representatives and Safety Committees Regulations 1977

Barristers at Cloisters chambers have published a detailed guide to returning to work that, among other things, considers the obligations employers have under these regulations in the context of Covid-19.

Management of health and safety at work

The Management of Health and Safety at Work Regulations 1999 (MHSW Regulations) set out general rules for the arrangements employers must put in place to manage health and safety risks in the workplace.

Key obligations under the Regulations include:

- Undertaking risk assessments;
- Implementing preventative and protective measures;
- Carrying out health surveillance;
- Appointing employees to assist in applying safe systems of work;
- Providing employees information about any the risk assessment preventative measures being taken.

Schedule 1 to the Regulations sets out a hierarchy of preventative and protective measures that can be taken, starting with avoiding a risk entirely and moving down through other measures such as seeking out less-dangerous options or prioritising collective protective measures.

The Regulations also require specific risk assessments to be made for new and expectant mothers. If there are risks cannot be avoided through alterations, new and expectant mothers must be offered a suitable alternative job or, failing that, be suspended on full pay.[22]

The HSE has produced detailed guidance on the MHSW Regulations.

Workplace health, safety and welfare

The Workplace (Health, Safety and Welfare) Regulations 1992 (WHSW Regulations) are concerned with the physical aspects of the workplace.

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22 See Maternity Action, Health and safety during pregnancy and on return to work, March 2019.

The key obligations under the Regulations include:

- Maintaining and cleaning the workplace;
- Ventilating the workplace;
- Providing rooms that are sufficiently big to work in safely;
- Providing suitable workstations and seating;
- Enabling safe circulation of people within the workplace;
- Providing suitable sanitary and washing facilities.

The HSE has an APOC and guidance on the WHSW Regulations.

Control of hazardous substances

The Control of Substances Hazardous to Health Regulations 2002 (COSHH Regulations) concern the spread of hazardous substances, including bacteria and viruses, within the workplace.

The key obligations under the Regulations include:

- Undertaking risk assessments;
- Preventing or controlling exposure to hazardous substances;
- Monitoring exposure in the workplace;
- Carrying out health surveillance.

In the context of Covid-19 it will be unlikely that an employer will be able to prevent exposure to the virus. Instead, it will need to control exposure.

The Regulations set out a hierarchy of measures that can be taken to control exposure to hazardous substances. The HSE APOC explains:

> There is a broad hierarchy of control options available, based on inherent reliability and likely effectiveness. COSHH regulation 7 refers to many of these options. They include:
>
> - elimination of the hazardous substance;
> - modification of the substance, process and/or workplace;
> - applying controls to the process, such as enclosures, splashguards and LEV;
> - working in ways that minimise exposure, such as using a safe working distance to avoid skin exposure;
> - equipment or devices worn by exposed individuals.[23]

If exposure to the hazardous substance cannot be adequately controlled, employers must provide employees with adequate PPE.[24]

Personal protective equipment (PPE)

The Personal Protective Equipment at Work Regulations 1992 (PPE Regulations) set out rules about the provision of PPE.

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23 HSE, The Control of Substances Hazardous to Health Regulations 2002. Approved Code of Practice and guidance, L5 (Sixth edition), 2013, para. 108.

24 Reg. 7(3)(c), *The Control of Substances Hazardous to Health Regulations 2002 (SI 2002/2677)*.

As noted above, the provision of PPE should be a last resort. Employers are expected to first take other measures to prevent or control risks.

HSE guidance on the PPE Regulations explains:

> In controlling risks the following principles should be applied, if possible in the following order:
>
> (a) Try a less risky option, for example use lower voltage tools.
>
> (b) Prevent access to the hazard, for example by guarding.
>
> (c) Organise work to reduce exposure to the hazard, for example if there is a risk of falling objects, ensure restricted entry to that area if possible.
>
> (d) If after all the above steps have been followed there is still a residual risk, you may be required to provide PPE, but only if it will further minimise the risk, for example the provision of head protection where there is a risk from falling objects, such as carrying out construction work or providing appropriate PPE where chemicals are handled.[25]

Where PPE is provided it must fit and must, so far as possible, effectively control the risk. PPE must be maintained and replaced as necessary. Further, employees must be given training in the use of the PPE.

Employers must ensure that they do not discriminate in the provision of PPE, in particular by taking account of different body types. Dee Masters and Jen Danvers, barristers at Cloisters chambers, have highlighted that employers who provide larger PPE, more suitable for men, could face claims of indirect discrimination.[26]

Consultation

As noted above, employers have a duty to consult safety representatives on health and safety issues. There are separate rules depending on whether an employer has recognised a union for the purposes of collective bargaining.

The legislation does not place any restrictions on the nature of the consultation. Further, employers are not required to give effect to recommendations made by safety representatives. However, the consultation must be genuine.

HSE guidance outlines how employers should consult representatives:

> Consultation involves you not only giving information to your employees but also listening to them and taking account of what they say before making any health and safety decisions.
>
> The law does not state when you must consult, or for how long, but does say it must be 'in good time'. In practice, this means you have to allow enough time for your employees to consider the matters being raised and provide them with informed responses.
>
> Consultation does not remove your right to manage. You will still make the final decision, but talking to your employees is an important part of successfully managing health and safety.

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25 HSE, Personal protective equipment at work, L25 (Third edition), 2015, para. 27.
26 Dee Masters and Jen Danvers, PPE & sex discrimination claims, Cloisters, 29 April 2020 (accessed 13 May 2020).

The HSE has produced specific guidance on the issues employers will need to discuss with safety representatives in the context of Covid-19.

2.3 Government guidance on working safely

On 11 May 2020, the Department for Business, Energy and Industrial Strategy (BEIS) published guidance for working safely during Covid-19. The guidance is an essential part of the UK Government's recovery strategy. The roadmap for lifting restrictions says:

> As soon as practicable, workplaces should follow the new "COVID-19 Secure" guidelines, as set out in the previous chapter, which will be published this week. These will ensure the risk of infection is as low as possible, while allowing as many people as possible to resume their livelihoods.[27]

The Government's guidance on working safely initially covered eight places of work: offices, factories and warehouses, shops, construction sites, laboratories, restaurants, homes and vehicles.

The Government guidance has been updated a number of times.

On 23 and 24 June, the Government published four new guides: close contact services, visitor economy, hotels and heritage sites.

On 24 June, the Government also updated all of the guides to change the 2m distancing rule to '2m or 1m with risk mitigation' (see below).

On 9 July, the Government published two further guides: gyms / leisure facilities and performing arts.

The guides are broadly similar, albeit with modifications to reflect different settings. There are some significant differences around social distancing and PPE, especially for close contact services. The guidance on performing arts also contains a five-stage roadmap for re-opening.

Status of the guidance

As noted above, the guidance is not law. Each of the 14 pieces of guidance explains at the outset:

> This guidance does not supersede any legal obligations relating to health and safety, employment or equalities and it is important that as a business or an employer you continue to comply with your existing obligations, including those relating to individuals with protected characteristics. It contains non-statutory guidance to take into account when complying with these existing obligations. When considering how to apply this guidance, take into account agency workers, contractors and other people, as well as your employees.[28]

Ultimately it is for employers to undertake their own risk assessments and to determine what steps they must take to comply with the legislation discussed above.

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27 HM Government, Our Plan to Rebuild: The UK Government's COVID-19 recovery strategy, CP 239, 11 May 2020, p. 25.

28 HM Government, Working safely during COVID-19 in offices and contact centres, 31 July 2020, Introduction (replicated in the other thirteen guidance documents).

The guidance says that the Government "expects" employers with more than 50 employees to publish their risk assessments. The TUC has called for this to be made a mandatory legal obligation.

Core health and safety principles

The guides are based on the same core risk management principles set out in the Government's 5 steps to working safely:

1. Carry out a COVID-19 risk assessment
2. Develop cleaning, handwashing and hygiene procedures
3. Help people to work from home
4. Maintain 2m social distancing, where possible
5. Where people cannot be 2m apart, manage transmission risk

Each of the guides provides detail on how these principles can be put into practice in different work contexts. This includes suggestions on managing arrivals at work, moving around the building, workstations, meetings, common areas, cleaning the workplace and accidents. Most of the guides discuss managing contractors and visitors and some of the guides include steps to keeping customers safe.

Working from home

As noted above, the guidance initially said that employers should make every effort to facilitate employees working from home. On 17 July the Prime Minister announced that this requirement was being lifted in England from 1 August with employers being given more discretion.

Each of the 14 guides now states:

> In order to keep the virus under control, it is important that people work safely. Working from home remains one way to do this. However, the risk of transmission can be substantially reduced if COVID-19 secure guidelines are followed closely. Employers should consult with their employees to determine who, from the 1 August 2020, can come into the workplace safely taking account of a person's journey, caring responsibilities, protected characteristics, and other individual circumstances. Extra consideration should be given to those people at higher risk.[29]

The position is different in Scotland, Wales and Northern Ireland where the guidance still says that working from home should be the default.

Who can attend the workplace?

Each of the 14 guides initially said that those who are clinically extremely vulnerable should not be required to attend the workplace because they have been advised to shield.

The guidance has now been amended to reflect the fact that the rules on shielding have been lifted in England, Scotland and Northern Ireland. The guidance says that clinically extremely vulnerable workers can be asked to attend to workplace but should work from home if possible.

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29 HM Government, Working safely during COVID-19 in offices and contact centres, 31 July 2020, Section 2.1 (replicated in the other thirteen guidance documents).

Those who do come to work must be given the safest possible roles where they can maintain social distancing.

The guidance no longer specifically addresses workers who are just clinically vulnerable, including all those over 70. However, it does say that employers must take account of the fact they are vulnerable.

The guidance also highlights the specific health and safety obligations owed to new and expectant mothers, discussed above.

Finally, the guidance notes that employers need to ensure that those who are self-isolating are not required to attend the workplace.

Social distancing in the workplace

On 24 June, the UK Government revised the working safely guidance to say that that employers should maintain 2m social distancing "or 1m with risk mitigation where 2m is not viable."

It is not clear whether this marks a significant change for non-customer facing employers. Even under the old guidance employers were only expected to maintain 2m distancing where reasonably possible. The old guidance already recognised that where 2m distancing was not possible employers should take risk mitigation measures such as using screens, side-by-side working, fixed-team working and reduced contact time.

The new rule could, however, have a significant impact on customer-facing businesses by allowing more customers onto the premises. When announcing the new "1-metre-plus" rule, the Prime Minister specifically noted the economic difficulties faced by the hospitality industry.

The Government has published guidance on the 'mitigating measures' that can be taken alongside 1m distancing, including improved ventilation, reduced contact time and facing different directions.

Personal protective equipment

The position the guidance takes on an employer's duty to provide PPE has been a particular point of contention.

13 out of the 14 guides state PPE should be reserved for workers in the health and social care sectors. The guidance suggests that PPE is not required for other workers and that social distancing is sufficient:

> At the start of this document we described the steps you need to take to manage COVID-19 risk in the workplace. This includes working from home and staying 2m away from each other in the workplace if at all possible. When managing the risk of COVID-19, additional PPE beyond what you usually wear is not beneficial. This is because COVID-19 is a different type of risk to the risks you normally face in a workplace, and needs to be managed through social distancing, hygiene and fixed teams or partnering, not through the use of PPE.[30]

The guidance says that there is growing evidence that wearing face coverings in enclosed spaces can help prevent transmission. It notes the legal requirement to wear coverings in shops and on public transport.

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[30] HM Government, Working safely during COVID-19 in offices and contact centres, 31 July 2020, Section 6.1 (replicated in twelve of the other guidance documents).

However, it says that wearing a face covering is not a substitute for other measures, such as social distancing.

The one situation in which the guidance says PPE is required is close contact services such as hairdressers, beauticians or tattoo artists. The guidance notes that these services require prolonged close contact and that workers should be provided with plastic visors. However, it says that activities that require prolonged face-to-face contact, such as eyelash extensions, should not currently be carried out.

Barristers at Cloisters chambers note that the issue of PPE is "particularly controversial". While noting that the Government may wish to reduce demand on PPE from non-clinical settings, they argue that employers could be under a legal obligation to provide PPE in certain contexts:

> If an employer wants to restart their business and that business must carry out work involving, for instance, high numbers of people in a poorly ventilated enclosed space who are densely packed then it may be that only high quality PPE can adequately control that risk. In this scenario, an employer would need to consider whether the Government guidance adequately ensures the safety of employees so far as is reasonably practicable and may well need to consider the use of Covid-19 PPE.[31]

This issue was raised by Lord Hendy QC, an employment barrister and Labour peer, in a debate in the House of Lords on 13 May 2020:

> That advice is surely contrary to the clear statutory duty set out in the Personal Protective Equipment at Work Regulations 1992 to provide PPE to any employee in respect of whom risk has not been eliminated by other measures. The importance of this duty is magnified in the light of the Office for National Statistics report to which my noble friend Lord Stevenson referred, which identifies various occupations at an increased risk of death from Covid-19.[32]

Lord Callanan, the Parliamentary Under-Secretary for BEIS, responded:

> Where workers already wear PPE for protection against non-Covid risks such as dust, they should of course continue to wear this. In relation to Covid-19 specifically, we have worked very closely with the medical community to develop this guidance and we will of course be guided by the science so that we do not put lives at risk in future.

The guidance does note that if an employer's risk assessment shows that PPE is necessary in the workplace, they have a legal obligation to provide that PPE free of charge.

Health monitoring

The Government guidance does not address health motoring. While all 14 guides do say that employers should retain data of shift patterns to assist with NHS track and trace, they do not address issues such as temperature checks or the collection of health employee data.

Lawyers at Farrer & Co., have said that this will mean employers may struggle to justify using such measures:

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31 Cloisters – Employment, Seventh edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 17 July 2020.

32 HL Deb 13 May 2020 vol. 803 c781.

> So far there is no requirement or expectation (as in some other countries) that employers should take steps to monitor employee health, such as requiring temperature checks before employees or visitors are allowed into the office. Without this, it will be very difficult to justify implementing such measures.[33]

The Information Commissioner's Office (ICO) has issued guidance on data protection and workplace health monitoring. It says that employers must ensure that they have a lawful basis for processing the health data, and take account of the fact that it is 'special category data'.

2.4 Devolution

Health and safety law is a reserved matter for Scotland and Wales. While health and safety law, and employment law as a whole, is devolved in Northern Ireland, its health and safety law is substantively similar to health and safety law in Great Britain.

By contrast, as noted above, public health is devolved in Scotland, Wales and Northern Ireland. The devolved administrations have adopted public health guidance which differs in places from the guidance in England.

The Scottish, Welsh and Northern Irish governments have each published their own set of guidance on working safely during Covid-19. Scotland and Wales have legislated to require businesses to take all reasonably steps to maintain 2m social distancing on their premises.[34] Wales has also not yet paused its guidance on shielding.

Ultimately, employers must undertake their own risk assessments and take account of any relevant guidance. For employers in Scotland and Wales, the UK Government's working safely guidance may be relevant to the extent that it provides examples of the sorts of measures that can be taken to comply with health and safety legislation. Equally, employers will need to take account of devolved governments' laws and guidance as it will be based on their assessment of the public health situation in that part of the UK.

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33 Kathleen Heycock and Amy Wren, Coronavirus: the government has published new guidance on making workplaces safe for employees told they "should go to work" - 10 key takeaways, Farrer & Co., 12 May 2020.

34 Reg. 4(1), SSI 2020/103; Reg. 12, WSI 2020/725 (W.162).

3. Refusing to attend work

3.1 Refusing to attend work for health and safety reasons

While the UK Government is now encouraging workers in England to return to work, many employees in the UK remain fearful about returning to the workplace. A conducted by the Chartered Institute of Personnel and Development in July found that 45% of employees were anxious about returning to work.

Duty to obey lawful and reasonable instructions

It is an implied term in every employment contract that the employee will obey lawful and reasonable instructions given by their employer.

However, employees have certain protections when they refuse to attend the workplace because of a reasonable fear of serious and imminent danger (discussed below). Schona Jolly QC, a barrister at Cloisters chambers, has highlighted that there could be difficult situations where an employer's instruction to attend the workplace is lawful and reasonable but the employee may have grounds to refuse:

> So, in essence, we may find ourselves extraordinarily in the situation where the employer's instruction is likely to be reasonable, and the employee's refusal to attend the place of work fearing serious and imminent danger may also be reasonable. In employment law terms, that leaves both decent employers and fearful employees with difficult questions about what steps they take in such circumstances. If an impasse is reached, both sides need a solution.[35]

Employers may need to find solutions on an ad hoc basis, such as putting workers on furlough and claiming under the CJRS.

Protections from detriments and dismissal

Sections 44 and 100 of the *Employment Rights Act 1996* protect employees from detriments or dismissal if they leave or refuse to attend the workplace for health and safety reasons. Detriment usually includes loss of pay, although some employment lawyers disagree in this context.

The protections under sections 44 and 100 apply if:

- The employee left or refused to attend the workplace because they reasonably believed there was a serious and imminent danger that they could not reasonably avoid; or
- The employee took appropriate steps to protect themselves or others because they reasonably believed there was such danger.

Who is protected?

The protections in section 44 and 100 apply to 'employees' as defined in the 1996 Act. This definition would exclude those who are 'limb (b)' workers, including many agency workers, zero-hours workers and gig

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35 Schona Jolly QC, Covid-19: Critical workers refusing work – What if everyone is being reasonable?, Cloisters, 26 March 2020.

economy workers. However, as this right gives effect EU law, it could be argued that it must extend to all those who are 'workers' under EU law (which includes many 'limb (b)' workers). The IWGB, the union, is seeking to bring legal action against the UK Government on this issue.

Employees do not need to have worked for their employer for any specified length of time in order to be covered by these protections.

Scope of the protection

The protections apply if an employee has a reasonable belief that there is a serious and imminent danger that they cannot reasonably avoid.

Gus Baker, a barrister at Outer Temple Chambers, has written a detailed paper on health and safety dismissals. There are a number of key points.

First, courts and tribunals have interpreted the term 'danger' broadly. It is clear that the danger can arise from another employee, which could be relevant if an employee believes that a colleague is symptomatic.[36]

Second, the key question is whether an employee's belief was reasonable. The fact that an employer disagrees with this assessment does not matter.[37] As noted above, even if an employer's instruction to attend work was reasonable, an employee may be able to show that they have a reasonable fear. However, it is for the employee to prove, on the facts, that their belief was reasonable.[38]

Third, employees can take steps to protect 'others' from serious and imminent danger. This is not confined to other workers.[39] Stuart Brittenden, a barrister at Old Square Chambers, has suggested that this might extend to steps taken to protecting family members.[40]

Health and safety during the commute

The Department for Transport has published guidance on safe travelling which says workers should only use public transport if truly necessary.

It is unclear whether an employee's protection from detriment covers dangers arising from a commute or whether it is limited to dangers in the workplace. Lewis Silkin LLP, the law firm, highlight that the case law is not settled and that employers would be best advised to assess the circumstances of each employee individually and provide support for alternative means of travel if possible.[41]

Application to specific categories of workers

What constitutes a serious and imminent danger will differ from one employee to another. For example, employees who are clinically vulnerable or who have family who are clinically vulnerable may be in a different position from employees who are less at risk from Covid-19.

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36 *Harvest Press Ltd v McCaffrey* [1999] IRLR 778.
37 *Oudahar v Esporta Group Ltd* [2011] IRLR 730.
38 *Akintola v Capita Symonds Ltd* [2010] EWCA Civ. 405.
39 *Masiak v City Restaurants* [1999] IRLR 780.
40 Stuart Brittenden, The Coronavirus: Rights to Leave the Workplace and Strikes, UK Labour Law Blog, 27 March 2020.
41 Shalina Crossly and Lucy Lewis, Does an employer's duty of care extend to commuting to work?, Lewis Silkin LLP, 21 May 2020 (accessed 4 August 2020).

3.2 Discrimination law

As noted above, when undertaking risk assessments and implementing safe systems of work employers must take account of their obligations under equality legislation. In light of the Government's guidance on extremely vulnerable and vulnerable individuals, employers will need to take particular account of the protected characteristics of age, disability and pregnancy. On 2 June 2020, Public Health England published a report on the disparities of risk in the context of Covid-19, finding increased risk on the basis of age, ethnicity and existing health conditions, among other things.

The *Equality Act 2010* prohibits discrimination on the basis of a protected characteristic. If an employee is particularly vulnerable to Covid-19 because of a protected characteristic, they may be able to bring a claim for discrimination if they suffer a detriment for refusing to attend the workplace.[42]

The Equality and Human Rights Commission has published guidance for employers in the context of Covid-19. It gives an example of how blanket return to work policies might constitute indirect discrimination:

> Requiring all employees to continue to work in front line, key worker roles. This would have a greater impact on those who need to self-isolate or follow the social distancing guidance more strictly, such as disabled, older or pregnant employees. If you cannot objectively justify this approach, it is likely to be unlawful indirect discrimination against those employees.

The term 'employee' has a broad meaning under the 2010 Act and includes those who are 'limb (b)' workers.[43]

Barristers at Cloisters chambers have highlighted the specific protections that are available for disabled employees. This includes the protection from discrimination arising from a disability (e.g. discrimination because they are shielding) and the duty to make reasonable adjustments.[44]

3.3 Employees with caring responsibilities

Despite a number of workplaces now re-opening, in many cases schools remain shut for many pupils.

Employees do not have a statutory right to refuse to attend work because they have childcare responsibilities. Employees do have a right to a reasonable amount of time off for dependants and a right to four weeks of parental leave per child but both of these are unpaid.

Government guidance on the Job Retention Scheme says that employers can choose to furlough employees who have caring responsibilities.

Rachel Crasnow QC, a barrister at Cloisters chambers, has noted that as parental responsibilities fall disproportionately on women, an employer

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42 Section 39, *Equality Act 2010*.
43 Section 83, *Equality Act 2010*.
44 Cloisters – Employment, Seventh edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 17 July 2020, Qs. 2.14 and 2.15.

could face a claim of indirect discrimination if its policy on returning to work had a negative impact on those with caring responsibilities.[45]

On 11 May the Prime Minister was asked about the issue of working parents during a debate in the House of Commons. He said:

> My hon. Friend raises a very important point that I addressed earlier a couple of times. […] I appreciate that in that process not everybody will be able to get their kids into school as fast as they would like in order to get back to work. There will be childcare needs. My right hon. Friend the Secretary of State for Education will be setting out in further detail how we propose to help those with particular childcare needs, but I want to stress that if people cannot get the childcare they need to get to work, that is plainly an impediment on their ability to work, and their employer should recognise that.[46]

Further detail can be found in the Library Briefings, Coronavirus: Childcare FAQs (CBP-8872) and Coronavirus and schools: FAQs (CBP-8915).

45 Rachel Crasnow QC, Covid-19: Pay for working parents forced to look after their children, Cloisters, 27 March 2020.
46 HC Deb 11 May 2020 vol. 676 c36.

4. Whistleblowing

In light of the Covid-19 pandemic, a number of workers have raised concerns about their workplace. For example, on 6 May 2020 the Guardian reported that 170 care workers had called a whistleblowing hotline to raise concerns about health and safety issues.[47]

Protected disclosures

The law on whistleblowing is found in the *Employment Rights Act 1996*. Under the 1996 Act, workers who make "protected disclosures" are protected from suffering any detriment or being dismissed.[48] This is also supplemented by the right to freedom of expression.[49]

The rules on protected disclosures apply to both employees and 'limb (b)' workers, including agency and zero-hours workers. However, with some exception for the NHS, it does not cover to job applicants.

There are two broad requirements that a disclosure must satisfy in order for it to be protected.[50]

First, it must be a 'qualifying disclosure'. This means that the worker must have a reasonable belief that the disclosure shows one of the things listed in the legislation, such as the breach of a legal obligation. The worker must also believe that disclosure is in the public interest.

Second, if a disclosure is a 'qualifying disclosure' it must be made to one of the groups of people listed in the legislation.

Qualifying disclosures

A disclosure can be a 'qualifying disclosure' if it tends to show, among other things, a breach of a legal obligation or that an individual's health and safety is being endangered.

Schona Jolly QC and Dee Masters, barristers at Cloisters chambers, highlight that the test is whether a worker had a reasonable belief that the disclosure showed that one of these things was happening:

> Importantly, it is not necessary for a whistleblower to show that a legal obligation has been breached; they must only show that they reasonably believed this to be the case. This is important because ordinary people at the front-line will not necessarily know, and should not be expected to know, the intricacies of complex health and safety law and other legal obligations.[51]

The term 'public interest' is interpreted broadly and the test can be satisfied even if the disclosure is partially motivated by self-interest.[52]

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47 "170 care workers call UK whistleblower helpline during Covid-19 crisis" *Guardian* [online], 6 May 2020.
48 Sections 47B and 103A, *Employment Rights Act 1996*.
49 See George Letsas and Virginia Mantouvalou, Is Gagging NHS Workers Lawful? Coronavirus and Freedom of Speech, UK Labour Law Blog, 14 April 2020.
50 Part 4A, *Employment Rights Act 1996*.
51 Schona Jolly QC and Dee Masters, How effective is whistleblowing protection for workers at the centre of the Covid-19 pandemic?, UK Labour Law Blog, 4 May 2020
52 *Chesterton Global Limited (t/a Chestertons) v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA Civ. 979.

Method of disclosure

If a disclosure is a qualifying disclosure, it must be disclosed in a certain way in order to be protected.

The legislation lists a number of different groups of people to whom workers can make disclosures. This includes their employer, a legal adviser and a prescribed person. A full list of prescribed persons can be found on the GOV.UK website. In the context of health and safety prescribed persons include the HSE, local authorities and MPs.

The HSE has an online portal though which workers can make protected disclosures, including disclosures related to Covid-19.

There are only certain circumstances in which a worker can make a disclosure to a person that is not specifically listed in the legislation, such as a journalist. This includes where they believe they will suffer a detriment if they make the disclosure to their employer or where there is no prescribed person and they believe that evidence would be destroyed if they made the disclosure to their employer.[53]

In addition, there are a number of onerous tests that must be satisfied:

- The worker must believe that the information disclosed is substantially true;
- The worker does not make the disclosure for personal gain; and
- It was reasonable in the circumstances for the worker to make the disclosure.

Protect, the whistleblowing organisation, has issued specific guidance on making Covid-related disclosures on social media, noting that the rules are "stringent" and "not straight forward".

The Employment Lawyers Association's Covid-19 Working Party has said that the law on protected disclosures is "broadly sufficient" but that the Government should take steps to increase awareness among workers and to provide clear paths for raising concerns about health and safety.[54]

Further information on protected disclosures can be found in Section 29 of the Library Briefing, Key Employment Rights (CBP-7245).

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53 Section 43G and 43H, *Employment Rights Act 1996*.

54 ELA Covid-19 Working Party, Issues in respect of which guidance is required to assist employers and employees/workers coming out of lockdown, relating to health and safety concerns and data privacy, ELA, 1 May 2020.

BRIEFING PAPER
Number CBP 8916
5 August 2020

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