HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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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 (18.05.2020).

On 10 May 2020, the Prime Minister addressed the nation to announce the Government's roadmap for lifting the coronavirus lockdown. On 11 May the Government published its Covid-19 recovery plan, setting out a three step plan for lifting restrictions.

As part of this plan, the Government announced that it was encouraging workers who cannot work from home to go to work. On 11 May, the Government published guidance on how eight different types of work can be undertaken safely in the context of Covid-19.

'Return to work'

The Government is now encouraging some workers in England to return to work. However, the underlying law has not changed as far as work is concerned.

On 26 March 2020 the *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020* came into effect. These made it an offence for a person to leave their house to go to work unless that work cannot reasonably be done from home. This rule has not changed.

In addition, the Regulations require businesses in a range of sectors to close their premises. These rules also remain in place and the Government has said that businesses will not start to re-open until the later stages of its recovery plan.

Furthermore, employers are under no obligation to instruct workers to return. Employers can keep eligible employees on furlough under the Coronavirus Job Retention Scheme. The Scheme was recently extended to cover the period until the end of October 2020.

All the same, the Government's approach does constitute a marked change in emphasis.

Devolution

The administration of public health is devolved in Scotland, Wales and Northern Ireland. The governments in the three nations have retained their own lockdown rules and have said that they are not yet following the UK Government's approach of encouraging more workers to go to work.

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 Government's guidance, 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 that are 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.

There are still a number of workers who should not be required to attend the workplace. These include:

- Workers who can work from home;
- Workers who are clinically extremely vulnerable to Covid-19;
- Workers who are required by public health guidance to self-isolate.

The Government's working safely guidance says that while workers who are simply clinically vulnerable can be asked to attend the workplace, they must be given the safest possible roles where they can maintain 2m social distancing.

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 approach, including:

- Employment lawyers have questioned whether the UK Government's working safely guidance properly reflects the legal position on the requirement to provide personal protective equipment (PPE).
- There is some confusion about the rules that apply to businesses in Scotland, Wales and Northern Ireland. As public health is devolved, businesses in these nations will need to operate in accordance with the relevant devolved lockdown regulations. 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, which will include the UK Government's working safely guidance and public health guidance issued by the devolved administrations.
- There is a prospect that disagreements will arise between employers and employees over whether it is safe to return to work. In most cases, these issues will be best addressed by discussion, including with health and safety representatives.
- As 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. The Prime Minister has said he would expect employers to be understanding.

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 light of the Covid-19 pandemic a number of pieces of legislation have been passed to restrict the movement of people across the UK. These have an impact both on the ability of workers to attend the workplace and the ability of employers to operate from their business premises.

1.1 Who is allowed to attend the workplace?

There are a number of circumstances in which a worker may not be able to go to their workplace:

- Where their work can reasonably be done from home;
- Where they have to self-isolate in line with official guidelines;
- Where they have to shield in line with official guidelines.

Restrictions on movement

The *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350)* ('the lockdown regulations'), and the equivalent regulations for the devolved nations, place restrictions on gatherings and peoples' movement.[1]

The Regulations are in force for six months but the restrictions only apply during the "emergency period" which can be brought to an end by a direction from the Secretary of State.

Under the Regulations it is an offence for a person to leave or be outside of their home unless they have a reasonable excuse. Leaving the house to attend work is a reasonable excuse but only if it is "not reasonably possible" for that work to be done from home. Government guidance says employers should "make every effort" to facilitate home working.[2]

Any worker can attend the workplace if their job cannot be done from home. This is not restricted to those who are 'critical workers'.[3]

Further details can be found in the Library Briefing, Coronavirus: the lockdown laws (CBP-8875).

Self-isolation

The Government's guidance on self-isolation says that a person who is showing symptoms of Covid-19 must isolate at home for a period of 7 days. In addition, everyone else in their household must isolate for 14 days (or, if they also start to show symptoms, 7 days from that day). Requiring or allowing a person who should be self-isolating to attend the workplace would likely be a breach of the employer's health and safety obligations (see below).

1 See also SSI 2020/103 (Scot); WSI 2020/353 (W.80) (Wales); and NISR 2020/55 (NI).
2 Cabinet Office, Coronavirus outbreak FAQs: what you can and can't do, GOV.UK, 11 May 2020 (accessed 11 May 2020)
3 Ibid.

If an employee is unable to work because they are self-isolating they will be deemed incapable for work and entitled to receive statutory sick pay (SSP), provided they meet the other eligibility criteria.[4] Employees who are on sick leave for more than seven days can obtain an isolation note through NHS 111 online.

Eligibility for SSP
A person is eligible for SSP if: i) they are an employee; ii) they earn above £120pw; iii) there is a 'period of incapacity for work' (sick for 4 days)

GOV.UK, Statutory Sick Pay (SSP): Eligibility

Shielding

The Government's guidance on shielding says that a person who is clinically extremely vulnerable to Covid-19 should not leave their home until the end of June. Those who are shielding should not be required to attend the workplace. They would likely have a right to refuse to attend the workplace (see below). They can be asked to work from home.

The Government guidance says that those living in the same household as a person who is shielding are not prohibited from leaving the home. Such people will be allowed to attend the workplace if their work cannot reasonably be done from home. The guidance says that they should carefully follow social distancing within their house.

If an employee is unable to work because they are shielding in accordance with official public health advice, they will be entitled to SSP provided they meet the other eligibility criteria.[5]

It may also be possible for those who are shielding to be designated as furloughed, allowing their employer to claim 80% of their wages through the Coronavirus Job Retention Scheme. However, there is some uncertainty over whether shielding employees can be furloughed if they are also eligible to receive SSP.[6]

1.2 Business closures

In addition to restricting movement and gatherings, the lockdown regulations also require businesses in a range of sectors to close their premises except for carrying out certain activities. Businesses must cease to admit anyone onto their premises, including workers, unless they are carrying out permitted activities.[7] The Government's guidance on business closures sets out which businesses must close and which activities can still be carried out.

Workers whose employers have had to close completely, such as sports facilities, hairdressers or arcades, will be unable to attend the workplace. Likewise, businesses that can only carry out certain activities may be operating at reduced capacity. Most workers in these circumstances can be put on furlough, allowing their employer to claim 80% of their wages through the Coronavirus Job Retention Scheme.

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

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4 *Statutory Sick Pay (General) Regulations 1982 (SI 1982/894)* ('SSP Regulations) as amended by SI 2020/374.
5 SSP Regulations as amended by SI 2020/427.
6 See Q19 in FAQs: Coronavirus Job Retention Scheme, Commons Library Briefing Paper CBP-8880, 28 April 2020.
7 Reg. 5, *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350).*

1.3 Roadmap for lifting restrictions

On 10 May 2020, the Prime Minister announced that the Government will now be 'encouraging' workers in England to go to work if they cannot work from home.

On 11 May, the Government published its Covid-19 recovery strategy, including a roadmap for lifting restrictions on movement. It states:

> **For the foreseeable future, workers should continue to work from home rather than their normal physical workplace, wherever possible**. This will help minimise the number of social contacts across the country and therefore keep transmissions as low as possible. […].
>
> **All workers who cannot work from home should travel to work if their workplace is open**. Sectors of the economy that are allowed to be open should be open, for example this includes food production, construction, manufacturing, logistics, distribution and scientific research in laboratories. The only exceptions to this are those workplaces such as hospitality and nonessential retail which during this first step the Government is requiring to remain closed.[8]

At this stage, it would not appear that any changes to the law would be necessary, at least as far as it relates to work. As noted above, workers who cannot work from home are already able to attend the workplace. Furthermore, the Government is not proposing to re-open sectors of the economy that are currently closed until a later date.[9]

On 12 May 2020 the Government made the *Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020 (SI 2020/500)*. These made no material changes to the rules on work.

While the law has not changed, the strategy does represent a change in emphasis. Lawyers at Farrer & Co., the law firm, explained:

> In one sense, this is not a seismic shift, since the government's position has always been that employees who cannot work from home, can still travel to work. However, as the Prime Minster indicated, there has been a definite change in emphasis – previously people were told they should only go to work if "absolutely necessary"; now people are being "actively encouraged" to return to work if they cannot work from home. This appears to be placing more of a positive obligation on such employees to go to work, and on employers to make it possible, and as a result it is likely that more people will be affected by this change.[10]

Position in Scotland, Wales and Northern Ireland

For now, the legal position on who can attend the workplace remains broadly the same across all four nations in the UK. In Scotland, Wales

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8 HM Government, Our Plan to Rebuild: The UK Government's COVID-19 recovery strategy, CP 239, 11 May 2020, p. 25.
9 Ibid., p. 30-32.
10 Kathleen Heycock and Amy Wren, Coronavirus: employees should return to work if they can't work from home, Farrer & Co., 11 May 2020 (accessed 11 May 2020).

and Northern Ireland it is lawful for a person to attend the workplace if it is not reasonably practicable for them to work from home.[11]

However, unlike in England, there has not been a change in emphasis in the devolved nations to encourage workers to go to work. The First Minister of Scotland said, "we are not currently encouraging more people to go back to work."[12] The First Minister of Wales said, "Our advice has not changed in Wales."[13] Meanwhile the Northern Ireland Executive's new recovery strategy says that at present "Remote working is the default position."[14]

1.4 Coronavirus Job Retention Scheme

While workers in England who cannot work from home are now being encouraged to go to work, the Government cannot compel employers to instruct their workers to return.

Employers can still to place employees on furlough and claim support under the Coronavirus Job Retention Scheme (CJRS).

An employer can make a claim for an employee that has been furloughed because of any "circumstances arising as a result of coronavirus or coronavirus disease."[15] Employers operating at reduced capacity or who have concerns about ensuring the safety of the workplace could continue to keep employees on furlough.

On 12 May the Chancellor announced that the CJRS will be extended until the end of October 2020. He said that the Scheme will operate in its current form until the end of July and in a more flexible form from August until the end of October.

The Resolution Foundation has argued that the Scheme 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.[16]

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11 Reg. 8(5), SSI 2020/103; reg. 8(2), WSI 2020/353 (W.80); reg. 5(2) NISR 2020/55.
12 Scottish Government, Coronavirus (COVID-19) update: First Minister's speech 12 May 2020, 12 May 2020.
13 Welsh Government, First Minister of Wales' message to the people of Wales, 10 May 2020.
14 Northern Ireland Executive, Coronavirus: Executive approach to decision-making, 12 May 2020, p. 10.
15 The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction ('Treasury Direction'), para. 6.1(c).
16 Torsten Bell, Laura Gardiner and Daniel Tomlinson, Getting Britain working (safely) again, Resolution Foundation, 12 May 2020, p. 21.

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.[17] 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."[18]

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

17 s. 17, *Health and Safety at Work etc. Act 1974* ('HSWA').
18 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.[19]

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.[20]

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.[21]

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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19 Cloisters – Employment, Second edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 12 May 2020.

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

21 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.[22]

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.[23]

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.[24]

An employer's failure to comply with health and safety legislation does not give rise to civil liability.[25] 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.[26] 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).[27]

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22 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)*.
23 Section 7, *Health and Safety at Work etc. Act 1974* ('HSWA').
24 Section 33, *HSWA*.
25 Section 47(2) and 47(2A), *HSWA*.
26 Sections 20 to 22, *HSWA*.
27 *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.[28]

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.

[28] 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.[29]

If exposure to the hazardous substance cannot be adequately controlled, employers must provide employees with adequate PPE.[30]

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

30 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.[31]

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.[32]

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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31 HSE, Personal protective equipment at work, L25 (Third edition), 2015, para. 27.
32 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.[33]

The Government's guidance on working safely covers eight types of working: offices, factories and warehouses, shops, construction sites, laboratories, restaurants, working in homes and working from vehicles.

The guidance across the eight areas is broadly similar, albeit with some modifications to reflect the different settings.

Status of the guidance

As noted above, the guidance is not law. Each of the eight 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.[34]

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.

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

There are core safety principles set out in all eight pieces of guidance:

- In every workplace, increasing the frequency of handwashing and surface cleaning.
- Businesses and workplaces should make every reasonable effort to enable working from home as a first option. Where working from home is not possible, workplaces should make every reasonable effort to comply with the social distancing guidelines

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

34 HM Government, Working safely during COVID-19 in offices and contact centres, 11 May 2020, p. 2 (replicated in the other seven guidance documents).

set out by the government (keeping people 2m apart wherever possible).

- Where the social distancing guidelines cannot be followed in full, in relation to a particular activity, businesses should consider whether that activity needs to continue for the business to operate, and if so, take all the mitigating actions possible to reduce the risk of transmission between their staff.
- Further mitigating actions include:
    - Increasing the frequency of hand washing and surface cleaning.
    - Keeping the activity time involved as short as possible.
    - Using screens or barriers to separate people from each other.
    - Using back-to-back or side-to-side working (rather than face-to-face) whenever possible.
    - Reducing the number of people each person has contact with by using 'fixed teams or partnering' (so each person works with only a few others).
- Finally, if people must work face-to-face for a sustained period with more than a small group of fixed partners, then you will need to assess whether the activity can safely go ahead. No one is obliged to work in an unsafe work environment.
- In your assessment you should have particular regard to whether the people doing the work are especially vulnerable to COVID-19.[35]

The guidance provides further detail on how these principles can be put into practice in various work contexts. This includes suggestions on managing arrivals at work, moving around the building, workstations, meetings, common areas and accidents. It also provides guidance on managing visitors and contractors and cleaning the workplace.

Who can attend the workplace?

The guidance notes that those who are clinically extremely vulnerable have been advised to shield and should not be required to attend the workplace.

The guidance notes that those who are only clinically vulnerable do not have to shield and can attend the workplace but that they must be given the safest positions where they can maintain 2m social distancing. As the clinically vulnerable include the over-70s, people with health conditions and pregnant women, employers will also need to ensure that they comply with equality legislation, particularly as it relates to the protected characteristics of age, disability and pregnancy. 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.

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[35] HM Government, Working safely during COVID-19 in offices and contact centres, 11 May 2020, Section 1.1 (replicated in the other seven guidance documents).

Personal protective equipment

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

All eight pieces of guidance 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.[36]

The guidance suggests that workers should use masks or face coverings.

Barristers from Cloisters chambers note that this issue is "particularly controversial". They highlight that scientific opinion on the effectiveness of face coverings is mixed, citing research from the World Health Organisation and in medical journal the Lancet.

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.[37]

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.[38]

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.

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36 Ibid., Section 6.

37 Cloisters – Employment, Second edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 12 May 2020.

38 HL Deb 13 May 2020 vol. 803 c781.

Health monitoring

The Government guidance does not address health motoring, including issues such as temperature checks or the collection of health data.

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

> 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.[39]

The Information Commissioner's Office (ICO) has issued guidance on data protection and workplace health monitoring. It says that while data protection laws do not prevent employers from monitoring health data, they must ensure that they have a lawful basis for processing the data, taking account of the fact that health data is classed as 'sensitive 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, much of the health and safety legislation is substantively similar to the legislation in Great Britain.[40]

By contrast, the administration of public health is largely devolved in Scotland, Wales and Northern Ireland. The Scottish Government, Welsh Government and Northern Irish Executive have each issued their own guidance to businesses and workers. As noted above, the devolved administrations have not followed the UK Government's approach of 'encouraging' workers to go to work.

The First Minister of Scotland has said the UK Government's guidance is not currently "operational" in Scotland and that employers should follow the Scottish Government's guidance.[41] The Scottish Government guidance says that all business premises must close unless they are providing essential services, even if they are not legally required to close.

In Wales, employers are under a specific legal obligation to take all reasonable steps to enable social distancing within the workplace.

Ultimately, employers must undertake their own risk assessments and take account of any relevant guidance. For employers in Scotland and Wales whose premises are open, 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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39 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.

40 See Health and Safety Executive (Northern Ireland), Legislation.

41 Scottish Government, Coronavirus (COVID-19) update: First Minister's speech 12 May 2020, 12 May 2020.

3. Refusing to attend work

3.1 Refusing to attend work for health and safety reasons

While the UK Government is now encouraging those who cannot work from home to go to work, many employees in the UK remain fearful about returning to the workplace. A recent survey conducted by the Chartered Institute of Personnel and Development found that 44% 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.

As noted above, it is still a criminal offence for a person to leave their house to attend work if that work can be done from home. In these circumstances, an instruction to attend the workplace may be unlawful.

In addition, 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.[42]

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.

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

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 economy workers.[43] 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.[44]

Scope of the protection

As noted above, 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.[45]

Second, the key question is whether an employee's belief was reasonable. The fact that an employer disagrees with this assessment does not matter.[46] 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.[47]

Third, employees can take steps to protect 'others' from serious and imminent danger. This is not confined to other workers.[48] Stuart Brittenden, a barrister at Old Square Chambers, has suggested that this might extend to steps taken to protecting family members.[49]

Finally, it is unclear whether the protection covers danger arising from a commute or whether it is limited to dangers in the workplace. There is case law which suggests that the danger can arise from travelling to work but that judgment was based on specific facts and arguments.[50]

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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43 Employment Status, Commons Library Briefing Paper CBP-8045, 28 March 2018.
44 Section 108(3)(c), *Employment Rights Act 1996*.
45 *Harvest Press Ltd v McCaffrey* [1999] IRLR 778.
46 *Oudahar v Esporta Group Ltd* [2011] IRLR 730.
47 *Akintola v Capita Symonds Ltd* [2010] EWCA Civ. 405.
48 *Masiak v City Restaurants* [1999] IRLR 780.
49 Stuart Brittenden, The Coronavirus: Rights to Leave the Workplace and Strikes, UK Labour Law Blog, 27 March 2020.
50 *Edwards and others v Secretary of State for Justice UKEAT/0123/14/DM*.

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. As noted above, in light of the Government's guidance concerning extremely vulnerable and vulnerable individuals, employers will need to take particular account of the protected characteristics of age, disability and pregnancy.

The *Equality Act 2010* prohibits discrimination on the basis of a protected characteristic. An employee who suffers a detriment because they refused to attend work due to concerns about health and safety relating to their protected characteristic might be able to bring a discrimination claim.[51]

The term 'employee' has a broad meaning under the 2010 Act and includes those who are 'limb (b)' workers.[52]

The Equality and Human Rights Commission has published guidance for employers in the context of Covid-19. It gives the following example of something that could 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.

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.[53]

3.3 Employees with caring responsibilities

While the UK Government is now encouraging workers in England to go to work, the Covid-19 recovery strategy notes that pupils will not yet be able to return to school.

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 but this is unpaid.

Rachel Crasnow QC, a barrister at Cloisters chambers, has noted that as parental responsibilities fall disproportionately on women, an employer could face a claim of indirect discrimination if its policy had a negative impact on those with caring responsibilities.[54]

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

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51 Section 39, *Equality Act 2010*.
52 Section 83, *Equality Act 2010*.
53 Cloisters – Employment, Second edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 12 May 2020, Qs. 2.14 and 2.15.
54 Rachel Crasnow QC, Covid-19: Pay for working parents forced to look after their children, Cloisters, 27 March 2020.

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 want to stress again for the benefit of the House and country: if we can, we want to bring primary schools back at the beginning of next month—reception, year 1 and year 6—and then to have all primary school children getting at least a month of education before the holidays in July. 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.[55]

Further detail can be found in the Library Briefing, Coronavirus: Childcare FAQs (CBP-8872).

[55] 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.[56]

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.[57] This is also supplemented by the right to freedom of expression.[58]

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.[59]

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.[60]

The term 'public interest' is interpreted broadly and the test can be satisfied even if the disclosure is partially motivated by self-interest.[61]

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56 "170 care workers call UK whistleblower helpline during Covid-19 crisis" *Guardian* [online], 6 May 2020.
57 Sections 47B and 103A, *Employment Rights Act 1996*.
58 See George Letsas and Virginia Mantouvalou, Is Gagging NHS Workers Lawful? Coronavirus and Freedom of Speech, UK Labour Law Blog, 14 April 2020.
59 Part 4A, *Employment Rights Act 1996*.
60 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
61 *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.[62]

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.[63]

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

62 Section 43G and 43H, *Employment Rights Act 1996*.
63 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.

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