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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 (06.07.2020).

Governments in all four nations of the UK have published Covid-19 recovery strategies, setting out plans for the phased re-opening of the economy. As part of this process, the governments will at various stages be amending legislation and guidance that currently restrict which businesses can open and which workers can attend the workplace.

On 11 May, the UK Government published detailed guidance on the steps that businesses can take to comply with their health and safety obligations in the context of Covid-19.

On 24 June, the UK Government amended the guidance on 2m social distancing saying that businesses can adopt 1m social distancing with mitigations if 2m was not viable. It also published new health and safety guides for close contact services, the visitor economy, hotels and heritage sites in advance of further business re-openings from 4 July.

'Return to work'

The shutdown of work has primarily been effected by two sets of rules:

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

Workers who could not work from home and whose workplaces were not required to close were always permitted to attend work.

From 1 June 2020, all workers in England were legally permitted to attend the workplace, even if their work could be done from home. However, UK Government guidance continues to say that employers should make every effort to facilitate home working.

At present, the positions in Scotland, Wales and Northern Ireland remain broadly unchanged. Under the relevant devolved legislation it is still an offence to go to work if it is reasonably possible to work from home.

In all four nations of the UK, rules on business closures are steadily being lifted. 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 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;
- Shielding workers who are clinically extremely vulnerable to Covid-19;
- Workers who are required 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 social distancing (2m or 1m with mitigations).

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).
- 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.
- 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.
- 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. 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. These have had an impact both on the ability of workers to attend the workplace and the ability of employers to operate from their business premises.

Public health is a devolved matter in Scotland, Wales and Northern Ireland. All four nations in the UK have their own lockdown regulations.

1.1 Who is allowed to attend the workplace?

There are a number of circumstances in which it is an offence for a worker to leave their home to attend the workplace:

- Where they can work from home (Scot; Wales; NI);
- Where they are required to quarantine; or
- Where their workplace is required to close.

In addition, there are circumstances in which workers should not be asked to attend the workplace:

- Where they have to self-isolate in line with official guidelines;
- Where they have to shield in line with official guidelines.

Restrictions on movement

In England, the *Health Protection (Coronavirus, Restriction) (England) Regulations 2020* initially made it an offence to leave the house to go to work if it was "reasonable possible" to work from home. However, this provision was effectively revoked on 1 June. The Regulations have now been replaced by the *Health Protection (Coronavirus, Restriction) (No. 2) (England) Regulations 2020*, which contain no general restriction on movement.

Cabinet Office guidance still says that employers should facilitate home working and that workers should only be asked to come in if they cannot work from home. However, this is guidance, not law.

By contrast, in Scotland, Wales and Northern Ireland it is still an offence for a person to leave their home to go and do work if it is reasonably possible for them to work from home.[1]

On 4 July, the UK Government legislated to retain certain lockdown rules in Leicester. It is an offence for a person living in Leicester to stay overnight outside of their home or for anyone else to stay overnight in Leicester without a reasonable excuse.[2] However, the legislation does not prevent anyone from going to work in Leicester. Furthermore, it is a reasonable excuse to stay overnight for the purposes of work.

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

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1 See reg. 8(5)(f) SSI 2020/103 (Scot); reg. 8A WSI 2020/353 (W.80) (Wales); reg. 5(2)(f) NISR 2020/55 (NI).
2 Reg. 5, SI 2020/658.

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.[3] 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. Guidance from the Department of Health & Social Care, which applies in England, clearly says that those who are isolating cannot go to work.

The UK Government has announced that from 10 July persons arriving into England from a number of listed countries will not be required to self-isolate. The relevant legislation has not yet been made.

Business closures

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

In some areas, restrictions have been lifted allowing businesses to re-open. However, this is happening at a different pace in the four nations of the UK. Many of the business closure rules have been retained in Leicester and a number have been re-introduced.

A full overview of the businesses that are required to close and those that have been permitted to re-open can be found in the Library Briefing, Coronavirus: Business re-opening (CBP-8945).

Workers whose businesses are required to close completely, such as cinemas, will be unable to attend the workplace. Likewise, businesses that can only carry out certain activities may be operating at reduced capacity and will need fewer staff.

Workers who are unable to attend the workplace because of business closures will likely be able to be furloughed.

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 of Covid-19 must isolate at home for a period of 7 days. In addition, everyone else in their household, and in a linked household, must isolate for 14 days.

In addition, 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

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

person to come to work it would likely be a breach of its health and safety obligations.

Employees who are unable to work because they are self-isolating are entitled to statutory sick pay (SSP) if they meet the eligibility criteria.[4]

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 has made a number of significant changes to its guidance on shielding for the clinically extremely vulnerable. However, at present, the guidance on going to work remains the same. It says that employers are expected to make every effort to facilitate home working for extremely vulnerable employees, including by offering them alternative roles. If this is not possible it says employers should furlough shielding employees or, as a last resort, pay them SSP.

On 23 June, the guidance was amended to say that from 1 August shielding employees in England will be able to return to work if the workplace is compliant with the Government's health and safety guidance.

The guidance in Scotland, Wales and Northern Ireland has also been amended to lift some of the more restrictive advice for those who are shielding. However, all three nations continue to advice against shielding workers attending the workplace.

As with those who are self-isolating, it is not an offence for a person who is extremely vulnerable to attend the workplace. However, if an employer required them to do so there is a strong chance that this could be a breach of its health and safety and equality obligations (see below).

From 16 April 2020, employees who are unable to work because they are shielding have been entitled to be paid SSP, provided they meet the other eligibility criteria.[5] The Government guidance on the Coronavirus Job Retention Scheme says that shielding employees can be furloughed. Despite some initial uncertainty, the Treasury maintained that this was the position under the Treasury Direction (the legislation for the CJRS).[6]

1.2 Roadmaps for lifting restrictions

Each of the four nations have published Covid-19 recovery strategies, setting out when workers will be able to return to work and businesses will be able to re-open.[7]

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

5 SSP Regulations as amended by SI 2020/427 and SSP Regulations NI as amended by NISR 2020/66.

6 PQ47253 [on Coronavirus Job Retention Scheme], 21 May 2020.

7 Jess Sergeant and Alex Nice, Coronavirus lockdown rules in each part of the UK, Institute for Government, 23 June 2020 (accessed 25 June 2020).

England

On 11 May 2020, the UK Government published its Covid-19 recovery strategy, including a roadmap for lifting restrictions. As part of Step 1, the Government encouraged workers in England who cannot work from home to return to work. Such workers were already legally entitled to go to work but the announcement marked a change in emphasis.

This position only applies to workers whose employers are allowed to open their premises. As noted above, the Government lifted restrictions allowing non-essential retailers to re-open on 15 June and many parts of the hospitality industry on 4 July.

Any business that is re-opening will need to comply with health and safety law and the Government guidance (see below).

The recovery strategy says that workers who can work from home should continue to do so "for the foreseeable future". However it is no longer an offence in England for such people to go to work.

Scotland

On 21 May 2020, the Scottish Government published its Framework for Decision Making, outlining a phased lifting of its lockdown restrictions.

On 18 June, the Scottish Government published details on the timings for Phase 2 of its recovery strategy. As part of Phase 2, non-office workplaces (factories; labs etc.) will re-open from 29 June.

On 24 June, the Scottish Government published further indicative dates for the implementation of the remainder of Phase 2 and Phase 3. It says that non-essential retailers should be able to open from 13 July. Indoor hospitality, hotels, hairdressers and cultural and leisure facilities will be allowed to open from 15 July.

Guidance says that home working should remain the default and workers should only attend the workplace if they cannot work from home and their employer is allowed to open. The Scottish Government has published its own guidance on working safely for businesses in various different sectors.

Wales

On 15 May 2020, the Welsh Government published its strategy for unlocking the economy, including a 'traffic light' system of when business will be allowed to re-open. Welsh Government guidance says that workers can only go to work if they cannot work from home, if their employer is permitted to open and if they can open safely.

The Welsh Government lifted legal restrictions to allow non-essential retailers to open on 22 June. The Welsh First Minister has said that discussions are ongoing about re-opening parts of the hospitality and personal care sectors.

Northern Ireland

On 12 May 2020, the Northern Irish Executive published its Coronavirus recovery plan which sets out a five-step strategy for lifting restrictions. In an update published on 22 June it notes that NI was in Step 3 for work.

It says that workers should only attend the workplace if it is not possible to work from home and if the workplace is allowed to open and can do so safely. The Executive has published guidance on working safely for businesses in a range of different sectors.

Northern Ireland has lifted restrictions on many businesses, including non-essential retail and the hospitality industry.

1.3 Coronavirus Job Retention Scheme

While the UK Government is now encouraging some workers in England to return to work and the devolved administrations may do so in later phases of their recovery plans, the decision to resume work is for the employer.

At present, 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."[8] Employers operating at reduced capacity or those who have concerns about ensuring the safety of the workplace can continue to keep employees on furlough.

On 22 May, the CJRS was legally extended until 30 June 2020. On 29 May, the Chancellor announced further details of how the Scheme will operate from 1 July to 30 October 2020. A HM Treasury factsheet says that from 1 July employers will be able to bring workers back on reduced hours while still claiming a grant under the CJRS for hours not worked. From August to October employers will be required contribute towards the costs of furloughed employees at a steadily increasing rate.

If an employer wants to take employees off furlough and resume working, they will need to do so in accordance with the employment contract and any furlough agreement reached with the employee.

The Resolution Foundation has argued 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]

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8 The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction ('Treasury Direction'), para. 6.1(c).

9 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.[10] 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."[11]

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

[10] s. 17, *Health and Safety at Work etc. Act 1974* ('HSWA').
[11] 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.[12]

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.[13]

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.[14]

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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12 Cloisters – Employment, Third edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 26 May 2020.

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

14 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.[15]

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.[16]

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.[17]

An employer's failure to comply with health and safety legislation does not give rise to civil liability.[18] 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.[19] 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).[20]

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15 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)*.
16 Section 7, *Health and Safety at Work etc. Act 1974* ('HSWA').
17 Section 33, *HSWA*.
18 Section 47(2) and 47(2A), *HSWA*.
19 Sections 20 to 22, *HSWA*.
20 *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.[21]

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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[21] 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.[22]

If exposure to the hazardous substance cannot be adequately controlled, employers must provide employees with adequate PPE.[23]

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

23 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.[24]

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.[25]

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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24 HSE, Personal protective equipment at work, L25 (Third edition), 2015, para. 27.
25 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.[26]

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).

The twelve guides are all broadly similar, albeit with some modifications to reflect different settings. There are some significant differences around social distancing and PPE, especially for close contact services.

Status of the guidance

As noted above, the guidance is not law. Each of the twelve 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.[27]

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.

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

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

Core health and safety principles

Eleven of the twelve guides are centred on the same risk management principles:

- Ensuring both workers and visitors who feel unwell stay at home and do not attend the premise.
- 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 set out by the government (2m, or 1m with risk mitigation where 2m is not viable, is acceptable. You should consider and set out the mitigations you will introduce in your risk assessments).
- 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:
    - Further 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.[28]

The twelfth guide – close contact services – is centred around similar principles but notes that sustained close face-to-face contact will be necessary and advises the use of PPE (see below).

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.

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[28] HM Government, Working safely during COVID-19 in offices and contact centres, 24 June 2020, Section 1.1 (replicated in ten of the other eleven guidance documents).

Who can attend the workplace?

Each of the twelve guides note that those who are clinically extremely vulnerable have been advised to shield and should not be required to attend the workplace.

The guides say 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.

Social distancing in the workplace

When the working safely guides were first published, each guide said that employers should make every reasonable effort to maintain 2m social distancing within the workplace.

On 24 June, the UK Government revised this 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.

Eleven out of the twelve 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.[29]

These guides say that the use of face coverings may have a marginal benefit in preventing a person from spreading coronavirus to another. However, they note that the scientific evidence is limited and that face coverings do not stop a person from contracting the virus.

The one exception is the guide on 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. In addition, it says that activities that require prolonged face-to-face contact, such as eyelash extensions, should not be carried out unless they can be adapted to be done safely.

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.[30]

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.[31]

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.

Health monitoring

The Government guidance does not address health motoring. While all twelve guides do say that employers should retain data of shift patterns

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29 Ibid., Section 6.

30 Cloisters – Employment, Third edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 26 May 2020.

31 HL Deb 13 May 2020 vol. 803 c781.

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:

> 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.[32]

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 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.[33]

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.

As noted above, the Scottish, Welsh and Northern Irish governments have each published their own guidance on working safely during Covid-19. In addition, Scotland and Wales have legislated to require businesses to take all reasonably steps to maintain 2m social distancing on their premises.[34]

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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32 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.

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

34 Reg. 4(1), SSI 2020/103; Reg. 7A, WSI 2020/353 (W.80).

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, in Scotland, Wales and NI it is a criminal offence for a person to leave their house to attend work if that work can be done at home. In such cases, an instruction to go to work could 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.[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.

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35 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.[36] 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.[37]

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.[38]

Second, the key question is whether an employee's belief was reasonable. The fact that an employer disagrees with this assessment does not matter.[39] 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.[40]

Third, employees can take steps to protect 'others' from serious and imminent danger. This is not confined to other workers.[41] Stuart Brittenden, a barrister at Old Square Chambers, has suggested that this might extend to steps taken to protecting family members.[42]

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.[43]

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36 Employment Status, Commons Library Briefing Paper CBP-8045, 28 March 2018.
37 Section 108(3)(c), *Employment Rights Act 1996*.
38 *Harvest Press Ltd v McCaffrey* [1999] IRLR 778.
39 *Oudahar v Esporta Group Ltd* [2011] IRLR 730.
40 *Akintola v Capita Symonds Ltd* [2010] EWCA Civ. 405.
41 *Masiak v City Restaurants* [1999] IRLR 780.
42 Stuart Brittenden, The Coronavirus: Rights to Leave the Workplace and Strikes, UK Labour Law Blog, 27 March 2020.
43 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 June 2020).

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.

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 concerning 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. 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.[44]

The term 'employee' has a broad meaning under the 2010 Act and includes those who are 'limb (b)' workers.[45]

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.[46]

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.

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44 Section 39, *Equality Act 2010*.
45 Section 83, *Equality Act 2010*.
46 Cloisters – Employment, Third edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 26 May 2020, Qs. 2.14 and 2.15.

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 could face a claim of indirect discrimination if its policy on returning to work had a negative impact on those with caring responsibilities.[47]

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.[48]

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

47 Rachel Crasnow QC, Covid-19: Pay for working parents forced to look after their children, Cloisters, 27 March 2020.
48 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.[49]

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.[50] This is also supplemented by the right to freedom of expression.[51]

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.[52]

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.[53]

The term 'public interest' is interpreted broadly and the test can be satisfied even if the disclosure is partially motivated by self-interest.[54]

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49 "170 care workers call UK whistleblower helpline during Covid-19 crisis" *Guardian* [online], 6 May 2020.
50 Sections 47B and 103A, *Employment Rights Act 1996*.
51 See George Letsas and Virginia Mantouvalou, Is Gagging NHS Workers Lawful? Coronavirus and Freedom of Speech, UK Labour Law Blog, 14 April 2020.
52 Part 4A, *Employment Rights Act 1996*.
53 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
54 *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.[55]

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.[56]

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

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

56 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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