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Back to the office: the key legal risks and how to avoid them

Joanna Chatterton and Ed Livingstone discuss how employers can manage the return to the office following government guidance for businesses to bring an end to homeworking arrangements where possible

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'The main risk to re-opening the office on a mandatory basis arises from potential grievances and allegations of breach of contract by employees who are reluctant to return or to undergo new measures put in place by their employer.'

On 20 July, the government announced that from 1 August employees who have been working from home during the Covid-19 outbreak may be asked to return to their normal place of work, provided that the office (or other working environment) meets the 'Covid-secure' guidelines.

Although the easing of lockdown was recently halted, with plans to reopen certain indoor and outdoor leisure activities shelved on 31 July for the time being, the new guidance that employees should return to work if they can still applies. The recent increase in recorded cases, particularly in regions in the North West of England, has not altered the government's desire to bring an end to homeworking and furlough where possible.

This now leaves employers with a wider array of options on how to proceed. While many businesses will keep their offices wholly or mainly closed for the foreseeable future – and some have confirmed that staff need not return until 2021 – employers can now re-open the office, so long as they follow the government's Covid-secure guidance. Although the safest option may be to continue with working from home, employers should not ignore the risks this poses to employees' mental and physical health, as many staff members may be working in unsuitable conditions, or struggling with the isolation of working remotely.

Early indications following 1 August have not shown any great rush to return to the office. However, for businesses where working from home is difficult for most employees, the process may be quicker. This could be further accelerated by changes to the furlough scheme from September, which will require employers to start contributing towards the cost of furloughed staff.

Mandatory or voluntary attendance?

It is possible to require the return of employees, though this is a risky approach for a number of reasons, discussed below. For those reasons, we anticipate voluntary attendance will be the most common approach for employers in the coming weeks and months.

Workers may be reluctant to return for several reasons, including their perception of how safe their workplace has been made, their own health or that of their family, childcare arrangements or the travel required to attend the office. The main categories of staff who are likely to be reluctant to return are:

Clinically vulnerable

This category includes the over-70s, the seriously overweight and women who are pregnant. While the government's guidance does not require employers to treat these individuals differently, they may be particularly reluctant to return to the office. In some circumstances, they may be able to bring a discrimination claim if instructed to return to the workplace when working from home has been a viable alternative.

Clinically extremely vulnerable
This group includes people with certain cancers, immune system conditions and respiratory diseases. Prior to 1 August, the government recommended that this category should 'shield' by remaining at home. However, that recommendation is no longer in force except in areas subject to local lockdowns, so even extremely vulnerable employees may return to work. As of 1 August, they are no longer eligible for Statutory Sick Pay simply because they were previously advised to shield by the government (unless in local lockdown areas). However, new government advice for this category is to continue to work from home wherever possible. Moreover, it may be a reasonable adjustment in accordance with disability discrimination law to allow these employees to continue to work from home if they wish.

Those living with vulnerable relatives
Returning to the workplace will be a concern for employees whose household includes a clinically vulnerable person. If these employees can work from home, we suggest they continue to do so: while the employer does not owe the vulnerable relative a duty of care, government guidance is clear that employers should consider their health. A lack of flexibility in these cases may be unreasonable and, in certain circumstances, may amount to associative disability discrimination.

Those without arrangements for dependants
As a practical matter, staff with dependent children may struggle to arrange supervision for them, particularly during the summer. A lack of flexibility by employers may lead to claims of indirect sex discrimination (as women are, in general, the main carers for children and so will be less able to comply with an instruction to return than their male colleagues). There is much talk in the press about the disproportionate impact the lockdown is having on women.

The 'worried well'
Employers seeking to implement a mandatory return should consider whether they will allow anyone who is concerned about exposure to Covid-19, even if they are not in one of the vulnerable categories, to continue working from home. Employers who want to insist that this group returns to the workplace should first ensure that they have taken all reasonable health and safety measures to control the virus in the workplace. Employees who are dismissed for refusing to attend the workplace will have an unfair dismissal claim if they can show that the office environment presented dangerous circumstances which they reasonably believed to be 'serious and imminent'. There may also be a breach of the implied term of trust and confidence if the employer treats them in a high-handed manner or fails to listen properly to their concerns (see box below).

Breaches of the employment contract

The implied duty of trust and confidence, which arises in every employment contract, requires that employers refrain from doing anything which is:

> … calculated or likely to destroy or seriously damage the relationship of trust and confidence without reasonable and proper cause.

This is a very broad duty which applies to a wide array of situations in the employment relationship. Courts and tribunals have found a breach of the implied term to have occurred in the following circumstances which are potentially relevant to office life during Covid-19:

- A failure to reassure the employee about certain changes to workplace arrangements: *Euro-Die (UK) Ltd v Skidmore* [1998]. This was a constructive dismissal claim which arose in the context of TUPE transfer, where the employer's failure to respond to the employee's requests for assurances about his position was found to be a breach of the implied term. It is possible that a similar principle will apply to an employer which does not give adequate reassurance about health and safety measures taken in the office before instructing an employee to return.
- Treating employees in an uneven and differential manner: *Transco plc v O'Brien* [2002]. This will be relevant when an employer makes allowances for only certain staff members on an arbitrary basis.
- A failure to engage with an employee's grievance in a full and fair way: *Nicholson v Hazel House Nursing Home Ltd* [2015]. This may be relevant if staff complain of insufficient health and safety measures to prevent the transmission of the disease.
- Taking oppressive, arbitrary or disproportionate disciplinary action: *Alexander Russell plc v Holness* [1993]. This might be applicable if employees who refuse to return to the workplace on reasonable grounds (such as underlying health conditions) are subject to disciplinary action.

The implied term therefore – in effect – provides a general obligation on employers to act reasonably and in an even-handed way when implementing Covid-19 safety measures.

In addition, employees are only required to follow 'reasonable and lawful' instructions issued by their employer. They are entitled to refuse to comply with orders which are damaging to their health or otherwise illegal. For example, in *Johnstone v Bloomsbury Health Authority* [1991], a junior hospital doctor was entitled to refuse to work an amount of overtime that was foreseeably damaging to his health.

Those concerned about exposure on public transport

Commuting on buses and trains has been a fact of life for millions of working people. However, since the outbreak of Covid-19, it now appears a much more risky prospect, particularly at the busier times of the day. The government has now lifted all restrictions on who can use public transport, so a commute is possible provided that commuters wear face masks. However, employers should consider making allowances by changing start and finish times or helping employees find other ways to avoid bus, tube and train travel at the busiest times of the day.

Weigh up the risks

If few of a firm's employees appear to fall into the above categories, then a mandatory return to the office may be more justified. However, employers should still carefully consider each reluctant employee's reasons for not wanting to return.

Employees should be encouraged to consider their personal circumstances and whether or not they should (or can) return to work by visiting the government's 'check if you should go back to work' tool at www.gov.uk/coronavirus-employee-risk-assessment.

The main risk to re-opening the office on a mandatory basis arises from potential grievances and allegations of breach of contract by employees who are reluctant to return or to undergo new measures put in place by their employer, such as temperature checks. As described above, there are a number of potential allegations, such as unfair dismissal relating to health and safety or indirect discrimination, depending on the employee's individual circumstances.

However, even if most of the workforce are (at least in principle) willing and able to return, there are still a number of legal and operational risks to employers in re-opening the office, including the risks to staff health.

Covid-secure health and safety measures

Although an employee who contracts Covid-19 in the workplace may try to bring a personal injury claim, this would be very difficult to establish. While the injury would have been clearly foreseeable, it would be hard to prove that the disease was contracted due to a failure by the employer, so long as it took all reasonable steps to prevent transmission in the workplace. These steps will include following the government's Covid-secure guidance and taking other measures which we discuss in this section.

To assuage concerns, it is important to consult with employees before they return and to involve a broad range of staff in introducing and trialling health and safety measures.

However, reducing the risk of personal injury claims is by no means the main reason why employers should implement comprehensive safety measures. It is also important for workplace morale and to maximise employees' trust that it is safe to return.

Key measures for an office environment might include:

- carrying out a risk assessment focused on Covid-19 hazards (for example, the risk posed by frequently touched items such as printers, taps and door handles): this is a requirement of health and safety law and any firms with more than five employees should record the assessment in writing and circulate it to staff;
- providing face masks and requiring employees to use them in enclosed spaces such as lifts and staircases;
- requiring employees to answer a brief health questionnaire before attending the office, to ensure that they actively consider whether they are suffering from any relevant symptoms;
- introducing distancing measures such as rearranging workstations, marking out one-way systems and rotating groups of employees between home and work in shift patterns;
- establishing a response protocol for dealing with outbreaks of the virus, including setting out what an employee should do if they (or someone in their household) develop symptoms or test positive; and
- dividing staff into teams which stay apart from other teams, so that any symptoms suffered by a member of one team are less likely to be passed on to members of other teams.

Consultation

To assuage concerns, it is important to consult with employees before they return and to involve a broad range of staff in introducing and trialling health and safety measures.

Open and clear communications with staff members will ensure maximum buy-in for the return to work. Employers must pay full attention to any concerns or queries which staff may have, including about the risks of commuting to and from the office and any individual vulnerabilities.

In addition, employers have a statutory health and safety duty to consult with employees on certain measures. They should where necessary (such as where there is a large workforce without union representation) establish a body of employee representatives to be consulted on the proposed arrangements for the return to work. This will help to address particular concerns, support staff morale and demonstrate that the employer is doing its utmost to protect employees.

Flexible working requests

The unplanned experiment of full-time homeworking has undoubtedly left many workers, particularly professionals, with a greater appetite to work from home more regularly. We expect employers will see an increase in requests under the Employment Rights Act 1996 for permanent homeworking or other types of flexible working arrangements.

Any employee with at least 26 weeks' service is entitled to make such a request.

Employers can refuse these requests on certain grounds, such as when the arrangements would have a detrimental impact on employee work quality or performance. However, they must deal with requests in a 'reasonable manner', by fully considering their advantages and disadvantages, discussing the request with the employee and offering an appeal process.

Data protection

As highlighted above, employers may consider measures such as temperature checks and health questionnaires to ensure the return to the workplace is as safe as possible. These measures will involve the processing of employee personal information, including health data, which is subject to particular safeguards as 'special category' data under the GDPR.

If employers decide to check symptoms or carry out tests, they must identify a lawful basis for using the information collected.

If employers decide to check symptoms or carry out tests, they must identify a lawful basis for using the information collected. Simply asking for employee consent is unlikely to be valid under the GDPR, as it is recognised that employees do not have a free and genuine choice to refuse. The most appropriate legal basis will likely be that the processing is in the 'legitimate interests' of the employer and necessary to comply with its health and safety obligations.

If employers process health data on a 'large scale', they will also need to conduct a data protection impact assessment. Even if not strictly required under the GDPR, it is nevertheless good practice to carry out such an assessment.

We also recommend that firms provide their employees with a specific Covid-19 privacy notice which fully describes how they process and store their health data and how long they retain it for. ■

Alexander Russell plc v Holness [1993] UKEAT 677/93

Euro-Die (UK) Ltd v Skidmore & anor [1998] UKEAT 1158/98

Johnstone v Bloomsbury Health Authority [1991] ICR 269 (CA)

Nicholson v Hazel House Nursing Home Ltd [2015] UKEAT/0241/15/LA

Transco plc v O'Brien [2002] EWCA Civ 379