

ELA Covid-19 Working Party

Staying alert and safe – the UK Government’s return to work guidance

29 May 2020

The law is constantly changing and the position set out in this paper may not be current. You should not rely on this or other ELA papers as a comprehensive statement of the law but should always seek advice if you require it from a qualified lawyer. ELA does not give legal advice.

Introduction

The Employment Lawyers Association’s (“ELA”) Legislative and Policy Committee has set up a standing working party to respond and make recommendations on measures relevant to employment law during the current coronavirus crisis.

ELA is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

A sub group of the working party has prepared the paper below to consider employment law issues relating to the closure of schools and working parents. The sub group members are as follows and the full ELA Working Party is listed at the end of this paper.

Kiran Daurka, Leigh Day
Caroline Stroud, Freshfields Bruckhaus Deringer LLP

ELA’s Covid-19 Working Party has identified issues in respect of which guidance was required to assist employers and employees/workers to re-enter the workplace. In this paper, we summarise the key areas of the most recent guidance and consider whether the issues we previously identified have been addressed. On 11 May 2020, the UK Government published a [guidance document](#) entitled “Our Plan to Rebuild: the UK Government’s COVID-19 strategy” (the “Recovery Strategy”). The Recovery Strategy outlines that, effective 13 May 2020, all workers who cannot work from home should travel to work if their workplace is open, but emphasises that “for the foreseeable future”, workers should continue to work from home wherever possible.

The Recovery Strategy also outlines that, as soon as practicable, workplaces should follow the [new COVID-19 Secure guidelines](#) (the “Guidelines”). These guidelines were also published on 11 May 2020, and set out best practice guidance for employers, employees and the self-

employed as to how to work safely. The 8 sets of Guidelines cover different types of work, including: construction; factories, plants, and warehouses; and offices and contact centres.

By issuing guidance, the government has not created a set of mandatory safety measures that must be put in place before workers can return to work. It remains up to an employer to interpret the guidelines in order to determine whether (for example) PPE must be provided to its workforce, and whether other facilities (such as hand sanitiser) must be made available.

Key themes from the Guidelines

- **Risk assessment** – the introductory section in each set of Guidelines focuses on the need for all employers to take seriously their legal responsibility to protect workers and others from risks to their health and safety, and the need for employers to undertake a COVID-19 risk assessment. Staff should be consulted as part of this risk assessment, and employers are urged to contact the relevant trade union representative(s) where the workforce is unionised. Where at least a part of the workforce is not unionised, employers must ensure that they consult with elected employee representatives, or otherwise directly with all employees (although the latter may be difficult depending on the size of the workforce). In circumstances where such an election may take some time to implement, it is hoped that a common sense approach will be taken, and consultation will be permitted with an unelected health and safety committee or representatives in the intervening period.

The results of any risk assessment should be shared with the workforce (and published on the website where the business engages over 50 workers), and a certificate (a template of which is included in the Guidelines) should be published in the workplace. The wording of the Guidelines does specify that the “results” need to be published rather than the full risk assessment, but many employers may consider that it would be best practice to publish the full risk assessment in the interests of transparency. While the guidance does not address existing legal protections for workers, it is possible that where a risk assessment is not conducted or where the workforce is not adequately consulted, employees could seek the protection of sections 44 and 100 of the Employment Rights Act 1996 (“ERA”). These sections protect employees from being subjected to detriment or dismissal where they hold a reasonable concern which places them in circumstances of serious and imminent danger.

- **Hygiene** – increasing levels of handwashing and surface cleaning is identified as the first key preventative that employers should take. Workspaces and equipment should be cleaned between uses, and high-touch items like printers or whiteboards avoided where possible. Signs and posters should be used to emphasise good hygiene practices throughout the workspace.
- **Working from home where possible** – both the Recovery Strategy and the Guidelines emphasise that staff should continue to work from home wherever possible. Employers should take steps to support their staff by, for example, providing equipment to enable people to work from home safely and effectively and ensuring open lines of communication between workers. The Guidelines emphasise that clinically extremely vulnerable people should not work outside the home. If clinically vulnerable people cannot work from home then they should be offered the safest on-site role (enabling them to maintain 2m distance) but a further risk assessment should be carried out, which may include consideration of how an individual will travel to and from work.

- **Social distancing** – where staff are required to attend work, workplaces should make every reasonable effort to comply with social distancing guidelines (crucially, keeping 2m apart wherever possible). The Guidelines emphasise that social distancing guidelines should be applied throughout a workspace, including at workstations, exits / entrances, canteens and break rooms. Steps to ensure social distancing at workstations might include:
 - reviewing layouts and processes to allow people to work further apart;
 - using floor tape / paint to mark out distances;
 - in an office context, avoiding “hot-desking” where possible;
 - using screens or side-to-side / back-to-back work arrangements; and
 - using a pairing system if people have to work in close proximity to limit wider social contact.

Where it is not possible to maintain social distancing in a workplace, employees may decide not to return to work if they hold a reasonable concern that proposed measures place them in circumstances of serious and imminent danger.

- **Mitigating steps** – where social distancing guidelines cannot be followed in full, businesses should first consider whether that activity needs to continue for the business to operate. If businesses decide that the activity should continue, they should take all mitigating actions possible to reduce the risk of COVID-19 transmission, for example:
 - further increasing the frequency of hand washing and surface cleaning;
 - keeping the period of time for which the activity is undertaken as short as possible.
 - using screens or barriers to separate people from each other, or using back-to-back or side-to-side (rather than face-to-face) working arrangements; and
 - using fixed teams or partnering to limit social contact.
- **Moving to / from work and around buildings** – employers should stagger arrival and departure times, implement arrangements to encourage cycling, walking or running to work, and implement one-way systems. Hygiene steps (such as hand sanitizer stations) should be implemented at entrances and exits. Maximum lift occupancy should be reduced, and the use of stairs encouraged.
- **PPE / face coverings** – apart from in healthcare contexts, where PPE is already used in the workplace, or if cleaning following a known or suspected COVID-19 case, the Guidelines emphasise that PPE should not generally be used in the workplace – it should be reserved for those who truly need it. Transmission risk in the workplace should generally be managed through social distancing, hygiene and fixed-teams / partners, not PPE. If PPE is required, it should be provided by employers free of charge. The Guidelines outline that face coverings may be marginally beneficial as a precautionary measure in enclosed spaces where social distancing is not possible, but do not ultimately encourage employers to endorse their use. This is likely to be of concern to many workers working in public-facing roles (such as public transport) who have been disproportionately impacted by the

virus. Of notable concern is the impact of the virus on BAME workers within frontline roles.

- **Mental health** – the Guidelines all mention the importance of a focus on mental health, and the Government has published [separate guidance](#) on this.

Areas which require guidance

There are some areas around return to work on which businesses and workers would appreciate further guidance / clarification. For example:

- **“Critical roles”** – workers in offices / contact centres are advised to continue to work from home unless they are needed on-site. The only examples given of those who may be required on-site are those in roles “critical for business and operational continuity, safe facility management, or regulatory requirements”. It is unclear from the guidance (i) which roles would meet that threshold; and (ii) whether those in non-critical roles, but who wished to attend the office for other potentially legitimate reasons (for example, due to mental health) may do so. Further guidance containing scenario examples is required on what business and operational continuity means to assist employers in assessing requests from employees to return to the office.
- **Self-certification / testing** – there is no mention in the Recovery Strategy or Guidelines of employers being required or encouraged to organise health questionnaires / temperature tests for staff in order to ensure infected staff do not come into the office. We await with interest whether such guidance does emerge, as well as how employers approach the issue. Such testing also raises difficult employee consent and data protection issues.
- **Public transport** – the Guidelines do not directly address businesses’ duties to staff who need to travel on public transport to get to work. Whilst the Government has published separate travel guidance, to which business should direct their staff, it remains to be seen whether more specific guidance for employers might be published in due course.
- **Clinically extremely vulnerable individuals and clinically vulnerable individuals** – it may not be possible for some people to return to work at all and measures may be needed to avoid them being discriminated against if not covered by existing discrimination protections.

Members of ELA Covid-19 Working Party

Co-chairs: Paul McFarlane, Weightmans; Kiran Daurka, Leigh Day
Shubha Banerjee, Leigh Day
Emma Burrows, Trowers & Hamlin
Sarah Chilton, CM Murray
Shantha David, Unison
Peter Edwards, Devereux Chambers
Beth Hale, CM Murray
Howard Hymanson, Harbottle & Lewis
Nadia Motraghi, Old Square Chambers

Louise Skinner, Louise Skinner, Morgan Lewis & Bockius UK
Catrina Smith, Norton Rose Fulbright
Caroline Stroud, Freshfields Bruckhaus Deringer
David Widdowson, Abbiss Cadres