

ELA Covid-19 Working Party

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

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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 health and safety and privacy matters arising from COVID-19 crisis. The sub group members are as follows and the full ELA Working Party is listed at the end of this paper.

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Background

There were a number of issues causing difficulties for employers and employees before the Government announced a full lockdown. This paper looks at two key issues namely health and safety concerns and data privacy issues relating to health data.

Employers are facing extremely difficult challenges in keeping their workplaces safe for their employees, contractors and visitors during the Covid-19 pandemic. Similarly, many employees are also feeling concerned about travelling to and from and being in the workplace given the possible impact on their health and that of their loved ones.

In relation to health and safety concerns, prior to lockdown, lack of clarity as to who was and was not meant to be at work was the main underlying issue and the extent to which employees could refuse to travel to work, attend work and engage in certain work activities.

Although the prevailing instinct is likely to be to protect and prevent the spread of the virus at all costs, under data protection laws an employer's responsibility to maintain a safe working environment still needs to be weighed against the privacy rights of employees.

As we, hopefully, move out of lockdown and employees return to work ELA believe that clear and consistent guidance from relevant government bodies such as the HSE and the ICO is vital to help employers and workers with these issues as it would be unfortunate if employers were hampered in their efforts to recover from the impact of the Covid-19 pandemic by concerns over either being in breach of health and safety or data protection law and if employees suffered unlawful detriment or dismissal as a result of raising concerns. Similarly, employees and workers would benefit from understanding what protections they can expect in respect of employer's duties to keep their personal medical information, and that of their family members, confidential.

Areas of particular concern for employers and workers include:

- The sharing of health data about workers with the wider workforce
- Requesting personal health information from workers
- Requiring workers to undergo health checks and tests relating to Covid-19
- Travelling to and from work on public transport
- Health and safety issues for those with underlying health conditions (both known and unknown to their employer) and those living with vulnerable people
- Those whose roles involve interacting with the public both in close proximity and at more of a distance
- Those whose roles involve interacting with people who have contracted or are more likely to have coronavirus
- Loss of pay if self-isolating (this has been somewhat resolved by clarification on entitlement to SSP)
- Risks associated with complying with employer's rules which may involve close contact with others and/or sharing of facilities
- The fear and risk of sanctions being imposed by employers, including disciplinary measures, deductions from wages and dismissal, in the event the worker either raised concerns or decided not to attend work.

Data privacy issues for employers relating to health data of workers

Obtaining and sharing employee health status information in a pandemic

Some workers may be wary of coming back to work and some may have particular reasons for those concerns such as their own or a family members' underlying health condition. Such workers may, in such circumstances, demand more information about their colleagues than those colleagues or their employer may be happy to share. Workers may also be reluctant to share with their employer data about their, or their family members' underlying health conditions. However, having such a worker in the workplace may be an unacceptable risk from a health and safety point of view.

We believe that the following are questions which both employers and workers are asking and on which guidance would be helpful.

Can employers ask their workers to self-declare Covid-19 symptoms?

We would take the view that this is possible, provided the employer were clear as to the reason for the self-reporting i.e. to protect the health and safety of others and has adequate privacy safeguards in place. However, as it currently stands, an employer could not insist that this information be provided. We believe that guidance as to what questions an employer could reasonably ask (which is likely to depend on the nature of their business) and what an employee or worker would reasonably have to expect to answer would be helpful.

Can employers temperature test on entry to a workplace?

This is a move we have seen in other jurisdictions and is recommended by the W.H.O. Even an initial yes/no temperature test would involve an employer processing sensitive data about their employees when they inevitably then have to notify their employer that they cannot come to work and have to self-isolate for a period. In addition, businesses may also end up with sensitive personal data about visitors etc. if meetings are cancelled as a result of a failed test on entry to the meeting place. The issues will be particularly acute in settings involving vulnerable people and we would anticipate that such institutions would be in the forefront of any general roll out of these arrangements. Again, guidance on the operation of such tests and the handling of the resultant data for both employers and workers would be welcome.

Can an employer force a worker to take a Covid-19 test if available through the Government?

This would generally not be something an employer could do, but may be deemed reasonable in some circumstances, e.g. when it can be justified due to the specific nature of the worker's role, similar to drug and alcohol testing for those operating machinery and driving, for example. This may therefore be reasonable for those working in a healthcare setting, with vulnerable people. It is also possible that if tests become more widely available, employers and employees may wish to utilise them. Again, guidance for both workers and employers would be welcome.

Who can employers tell about affected workers?

Employee/worker consent, particularly in acute circumstances like these, is very unlikely to be deemed "freely given". Therefore, disclosure of the identity of an infected worker to others should only be undertaken on the grounds that it is necessary to provide a safe workplace or to

meet public health requirements. This is considered an extreme intrusion into an individual's private life with the possibility of stigma and recrimination (for example if the employee had not observed social distancing during their contagious phase) and so is generally only possible to those who are likely to have been in close contact with the infected worker. We believe that employers would welcome guidance on how to balance the interests of the general health and safety of its workforce against legitimate privacy concerns. Workers and employers would similarly welcome guidance about when it would be reasonable for them to consent to their employer making such disclosures.

What use are employers likely to be able to make of any tracing apps which are introduced?

Contact tracing apps are being introduced in a number of jurisdictions. If such an app were introduced in the UK, we believe it would be helpful for the ICO to give guidance on whether:

- an employer can insist on an employee having and using the app
- the employer's access (or not) to data on the app (particularly if held on a device owned by the employer) in order to ensure that the worker does not pose a risk to the rest of the workforce
- an employer's ability to have an employee self-declare the app is not showing them as having been within contagion proximity of an infected third party before allowing entry to the workplace
- when an employee or worker can reasonably object to the access to and use of such data or the requirement to have such an app at all.

Health and safety and whistleblowing issues

Current position

The Government and the Health and Safety Executive have both issued guidance for employers across various industries, not only healthcare, in relation to good practice during this time, including the following:

- Ensure that employees are able, where possible, to follow Public Health England guidelines on social distancing (including, where possible, maintaining a 2-metre distance from others);
- Where social distancing guidelines cannot be followed in full in relation to a particular activity, consider whether that activity needs to continue for the business to operate; if so, take all mitigating actions possible to reduce the risk of transmission between staff;
- Send any staff member who develops COVID-19 symptoms home for 7 days from the onset of symptoms; and
- Reiterate hygiene requirements.

It is not clear what will happen once strict lockdown measures are lifted. Business owners will be keen to get employees back to work to the extent that has not been possible from home. Even those who have been able to work from home may want to move employees back to the workplace, at least to a degree. Employees and businesses will have a number of concerns relating to returning to work, health and safety.

Businesses will therefore benefit from clear guidance from the Government as to what is and is not reasonable from a health and safety perspective for employers and employees.

The legal position

Employees and workers are protected in a number of circumstances where they are concerned about health and safety issues in the workplace.

Sections 44 and 100 of the Employment Rights Act 1996 (“ERA”) provides protection from detriment dismissal for employees who carry out certain health and safety activities. These include being designated to carry out certain activities; raising concerns and leaving or refusing to return to a place or work or taking appropriate steps to protect themselves in circumstances of “serious of imminent danger” (s44(1)/s100(1) ERA).

Sections 47B and 103A ERA also protect workers who make protected disclosures, from detriment and dismissal. Raising a concern relating to health and safety is likely, in most circumstances, to constitute a protected disclosure for the purposes of whistleblowing. Similarly, employees raising concerns about breaches of data protection legislation in relation to their, or another worker’s health and personal data would likely amount to a protected disclosure, provided the concern was raised in compliance with the relevant requirements of ERA.

A lack of consistency in approach towards workers requesting different working arrangements, may constitute discrimination, in particular giving rise to the possibility of disability, maternity or age discrimination claims under the Equality Act 2010. This is relevant because those with underlying health conditions, and those over 70, have been provided different guidance relating to shielding, to other workers. Covid-19 has also been found, for reasons yet unknown, to have had a disproportionate impact on those from black and minority ethnic (‘BAME’) backgrounds¹. The government has commissioned an inquiry into this issue to try and understand why this is the case.

Employers will need to consider carefully how best to manage those in the workforce who are particularly vulnerable, or who live with or care for vulnerable people in society without discriminating against them.

Risks for employees and workers

Without clear guidance from the Government, ELA is concerned that employers may take action against employees and workers, including dismissal and deduction from pay, and other detriments, in circumstances where the employees refuse to work due to health and safety concerns. Employers may do this because they are unaware of and confused as to what is and is not reasonable and safe to require of employees and workers, unless there is clear guidance. There is a further concern that these employees and workers will either attend work and therefore expose themselves to unacceptable risk and/or if they do not attend work, lose income with no easy, fast and accessible redress against their employer. Most employees and workers cannot wait months or even years to access an employment tribunal, even in

¹ <https://www.nhsconfed.org/resources/2020/04/the-impact-of-covid19-on-bme-communities-and-staff>

circumstances where they may ultimately succeed in a claim for compensation, unpaid wages or unfair dismissal compensation.

These risks may be exacerbated for those on zero hours contracts. These workers are typically in less secure employment relationships and may therefore be more at risk from loss of income if they refuse to work due to health and safety concerns.

There is also a concern that women are more likely to be in low paid roles and also more likely to fulfil caring responsibilities for vulnerable people outside of work, in families for example, and will therefore be disproportionately affected.

Does the current law offer sufficient protection?

There is already a legal framework which protects workers and employees seeking either to raise concerns or refuse to work in unsafe environments. In our view the legal framework is broadly sufficient but what is lacking is an awareness amongst the public/employers as to when workers will be protected and what a worker can do if they consider they are suffering an unlawful detriment.

Workers, as opposed to employees, are not protected in respect of health and safety activities but they are protected if they blow the whistle. In this context, the whistleblowing protection is likely to cover most circumstances of a worker raising a concern however, it is noted that many vulnerable members of the workforce, including zero hours workers, will often be workers and will only have protected under whistleblowing legislation and not s44 and s100 ERA.

Where Government guidance is required is in four main areas:

1. For employers to make the legal position clear, i.e. that they must not subject employees and workers to detriment or dismissal for raising genuine health and safety concerns.
2. For workers to be provided a clear and easy path to raise concerns, and so that they know what concerns they can and should be raising and the process to do this.
3. What arrangements, behaviours and practices are considered safe and unsafe in different sectors and workplace environments, based on science backed Government advice, so that both employers and workers have a framework within which to assess the safety of their own situation.
4. The external agencies and bodies to whom should workers can raise concerns about health and safety or seek advice if they believe their employer is undertaking unsafe practices and exposing workers to unnecessary risk and/or unlawful detriment.

Specific issues on which employers require clear guidance relating to health and safety

1. Which employees, and in which sectors can be required to physically attend a workplace;
2. Which employees, and in which sectors, and in which circumstances can refuse to attend work and why;
3. Which employees, and in which sectors, should continue to work at home wherever possible, or continue not to work;
4. If an employee should not be attending work, and cannot work from home, in which circumstances are they entitled to statutory sick pay;

5. What constitutes a reasonable concern relating to health and safety which could, for example, justify an employee refusing to come to work;
6. Can an employee refuse to attend work and in which circumstances will this be considered reasonable i.e. when, if ever, can an employer consider disciplining an employee for a refusal to attend work in circumstances where that employee might consider they have a valid health and safety concern relating to coronavirus;
7. Are there are safety measures employers must put in place, on a mandatory basis, before requiring employees to attend work;
8. What is the position on the wearing of PPE in the workplace, in different sectors, including whether an employer can and should require an employee to wear PPE in the workplace, and what PPE can be considered mandatory;
9. What must employers put in place relating to social distancing;
10. Do employers have a mandatory duty to provide other safety equipment or facilities such as screens, hand sanitiser, food so employees can avoid going in and out of the workplace during the day;
11. Is there a limit on the number of employees in a workplace at any time;
12. To whom should an employee report concerns relating to health and safety in circumstances where their employer is not listening to their concerns and insisting they attend work/participate in unsafe practices; and
13. The data privacy issues outlined above.

Members of ELA Covid-19 Working Party

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