

Lifting the Lockdown: Returning to the Workplace Under the UK Government's Recovery Plan and Safe Working Guidance

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On 11 May 2020, the UK government published its COVID-19 Recovery Plan that sets out its proposal to exit the COVID-19 lockdown.¹ Under the Recovery Plan, employees who can work from home should continue to do so, however employees who cannot work from home should, from 13 May, “travel to work if their workplace is open.” In light of this change in approach, the UK government also published detailed guidance for safe working in eight different workplace environments (the Safe Working Guidance).² This guidance will aid employers who should carefully consider how they adapt their workplace and working practices to protect their employees as they reopen with the risk of COVID-19 still present.

The UK government is proposing a phased approach to exiting the COVID-19 lockdown, recognising that it will take longer for some sectors such as retail and hospitality to open fully. In light of this, on 12 May UK Chancellor Rishi Sunak announced that the Coronavirus Job Retention Scheme (the Scheme), in place since 1 March 2020, will be extended for an additional four months, until the end of October 2020. Under the Scheme furloughed workers will continue to receive 80% of their monthly salary, up to a cap of £2,500, but employers may be required to share the cost from 1 August. Currently, workers on furlough are not permitted to perform any work for the employer that has furloughed them. However, the announcement on 12 May confirmed that from August, employers will have the flexibility to ask workers to return to work on a part-time basis, as long as the wages for the time worked are paid in full by the employer. The UK government hopes that this flexibility will encourage employees to return to work and provide a boost to the economy. Full details on the amendments to the Scheme will be published by the end of May.

While any return-to-work plan will vary significantly from business to business, we consider, in light of the UK government's latest guidance, the main employment law and other practical issues that employers should take into account when reopening the workplace. In particular, we will look at: (i) the duty of care that an employer owes to its employees; (ii) how an employer can prepare its workforce and the workplace for a return to work; and (iii) some practical tips for managing the workplace as workers return.

¹ “Our plan to rebuild: The UK Government's COVID-19 recovery strategy,” 11 May 2020.

² “Working safely during coronavirus (COVID-19),” 11 May 2020 (Safe Working Guidance) is made up of eight guides that cover: (i) construction and other outdoor work; (ii) factories, plants and warehouses; (iii) labs and research facilities; (iv) offices and contact centres; (v) other people's homes; (vi) restaurants offering takeaway or delivery; (vii) shops and branches; and (viii) vehicles.

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The Employer's Duty of Care

Under the Health and Safety at Work Act 1974, UK employers have a duty to ensure the health, safety and welfare of all of their employees so far as reasonably practicable. Employers have a general duty to take reasonable care of the health and safety of employees and to take reasonable steps to provide a safe workplace and a safe system of work. Employers are also required to follow UK government guidance in specific areas, including in relation to the COVID-19 pandemic.

Failure to comply with the duty of care in health and safety matters can lead to employment claims and potentially criminal liability. Employees who raise health and safety issues may also be subject to protection from detriment and dismissal as whistleblowers. In short, breaches of health and safety obligations can lead to significant liabilities for employers.

Preparing the Workforce and the Workplace

A considerable amount of preparation should be undertaken before allowing employees to return to the workplace following the COVID-19 lockdown. While not all of these steps will be relevant for every employer, and certain businesses, such as those in the hospitality sector, are not yet able to open their doors, we have set out below some of the key considerations for most industries as they plan to return.

- **Guidance:** National guidance from the UK government, as well as international guidance from bodies such as the World Health Organisation, should be followed. In particular, employers should follow the appropriate Safe Working Guidance for their workplace. This guidance includes a number of practical steps set out in the form of a checklist, along with a printable notice to confirm to employees that the employer is following the guidance. Trade bodies and trade unions may also publish their own guidance, which could provide further tailored, industry-specific solutions.
- **Risk Assessments:** The Safe Working Guidance makes clear that employers must undertake a risk assessment addressing COVID-19 issues in the workplace. Such assessments will help to establish whether a return to the workplace is feasible in light of the employer's duty of care and what is known about the COVID-19 risk. Where the results of the risk assessments indicate that a return to the workplace is feasible, these will also help to guide how and the extent to which those risks can be mitigated. The Safe Working Guidance strongly encourages employers to be open about the results of their risk assessment and includes an expectation that employers with over 50 employees will publicly share COVID-19 risk assessment results by publishing them online.
- **Employee Engagement:** Engaging with the workforce to develop a return-to-work plan will likely lead to a better assessment of the risks as those undertaking the work are often best placed to understand the potential dangers. In light of this, the Safe Working Guidance requires that employers develop their COVID-19 risk assessment in consultation with workers. This will require the election of a health and safety representative by workers where there is not already such a representative selected by a recognized union. While not formally part of an employer's duty of care, transparency will enable employers to factor in personal employee concerns separately from health and safety issues. For example, knowing which employees wish to return to the workplace sooner (for instance because of financial pressures as a result of receiving a reduced salary while on furlough) or later (for instance because of childcare concerns) may be valuable when tailoring a phased return to work (see below).
- **Employee Communication:** Once plans are formalised, their early communication to employees is paramount. Clear methods of communication such as photographs or videos setting out the new workplace environment and practices may be helpful to convey key messages.
- **Personal Protective Equipment (PPE):** The Safe Working Guidance strongly recommends that employers not use PPE as a precautionary measure against COVID-19 unless in a clinical setting. This is on the basis that good hygiene and social distancing measures are adequate and scarce PPE supplies should be reserved for health workers. However, if the employer's risk assessment establishes that PPE is required, then this must be provided free of charge and must fit properly.
- **Unravelling Furlough:** Employers will need to tread carefully when bringing employees back from furlough. Employers should be aware of the risk that they will lose the ability to claim under the Scheme if they bring an employee back to work before they have been on furlough for three continuous weeks. Employers will also need to consider the risk of discrimination and ensure procedural fairness when determining the order in which employees return to work. Unravelling furlough in phases may strain employee relations where some employees remain on furlough while others return, potentially creating the perception of a two-tier workforce.
- **Data Protection:** Any decision by employers to collect additional personal data with the intention of fulfilling their duty of care toward their employees must be made within the parameters of data protection law. The processing of sensitive personal data such as health information is subject to particularly stringent protections and the handling of such data to combat COVID-19 may best be left to the UK government, e.g., by

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encouraging employees to download the app the government is currently developing. We have previously published an article considering the interaction of data protection law and contact-tracing in the workplace.³

Practical Tips for Managing the Workplace

Reopening workplaces safely will mean different things for different employers, and employers should read the relevant Safe Working Guidance and any other available guidance with their workplaces' specific challenges in mind. Offices and retail shops will have different demands from factories, but some key areas are likely to be common across most workplaces.

- **Phased Return:** In all areas of the economy, employees are most likely to go back to work in stages, without an immediate return to pre-COVID-19 work practices. In order to maintain social distancing and reduce pressure on public transport, a central feature of the Safe Working Guidance is that employers should first consider whether employees can continue working from home. Under the COVID-19 Recovery Plan, employees should continue working from home if they can, and employers are required to make "reasonable adjustments" to facilitate homeworking. If employees cannot work from home, social distancing will need to be observed in the workplace. This is likely to mean small numbers of employees returning to work initially, with additional employees returning once social distancing protocols have been tested. Over time and dependent on the business, this could mean employees working in shifts or on different days to ensure that social distancing guidelines are observed in the workplace at all times. The Safe Working Guidance is clear that rotation of jobs and workstations should be kept to a minimum, meaning that the same people should be working together for as long as possible. This may require long-term thinking with regard to how operations are scaled up and which employees are brought back to the workplace at a given time.
 - **Commuting:** The COVID-19 Recovery Plan makes clear that people should continue to avoid using public transport where possible. In light of this, both the COVID-19 Recovery Plan and the Safe Working Guidance suggest providing additional parking (for cars, motorbikes and bicycles) and changing facilities to encourage people to walk, run, cycle or drive to work. The staggering of arrival and leave times is also suggested to help ease congestion on public transport as well as ease crowding at entry and exit points to the workplace.
 - **Workplace Adjustments:** In addition to reducing the number of employees at work at any one time, employers will need to adjust workplaces to ensure social distancing is possible and follow public health guidance. Suggestions in the Safe Working Guidance include:
 - placing workstations and desks further apart or at least rearranging them to avoid face-to-face working (side-to-side is better and back-to-back is preferable);
 - installing screens or barriers to protect people from one another;
 - adding floor markings to ensure that employees can clearly observe social distancing at all times;
 - staggering break times to reduce pressure on communal areas such as meeting rooms, breakout areas and canteens;
 - managing flows of employees at entrances and exits, particularly at busy times of the day;
 - washing clothes and uniforms as frequently as possible;
 - ensuring workplaces are well ventilated (either manually or mechanically); and
 - establishing protocols for use of enclosed spaces such as lifts.
- All of these measures will require appropriate enforcement and clear communication to employees to ensure the measures are understood and followed. Some of them may also require coordination with third parties such as other employers and landlords.
- **Hygiene:** Employers will need to take additional steps to ensure workplace hygiene is maintained to a high standard. For most employers, additional and regular cleaning rotas will be the easiest way to address hygiene concerns. In addition, employers can encourage good hygiene by providing soap, hand sanitiser at stations throughout the workplace and potentially antibacterial wipes to enable employees to keep workstations clean during the working day. The COVID-19 Recovery Plan recommends that face coverings (not face masks) be worn in public spaces where socially distancing is not possible and where individuals come into contact with other people. The Safe Working Guidance encourages the extension of this into the workplace by stating that employers should support workers in using face coverings safely if they wish to wear them.
 - **Work Travel and Meetings:** Work travel (particularly international travel) is subject to continuing and hardening restrictions, with the UK government due to impose a 14-day quarantine on arrivals by air into the UK from countries other than the Republic of Ireland and France. Remote options for meeting should be supported if feasible and preferred over work travel and face-to-face meetings wherever possible.

³ "COVID-19, Contact Tracing and Data Protection in the Workplace," March 2020.

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Managing Employee Concerns About Returning to Work and HR Processes

The COVID-19 pandemic and the return to the workplace will present employers with significant practical challenges in managing employees' day-to-day HR issues. We consider some of these issues, how they might be addressed and where the pitfalls may be.

- **Vulnerable Employees:** Employers will need to consider the needs of those employees who are particularly vulnerable to COVID-19. Employers will need to carry out individual risk assessments for employees who are subject to the UK government's enhanced shielding advice. The UK government has strongly urged those classified as clinically extremely vulnerable (such as those on certain types of immunosuppression therapies) not to work outside the home. The government has asked those classified as clinically vulnerable (such as those aged 70 and over or who are pregnant) to take extra care. Clinically vulnerable individuals should ideally work from home; where this is not possible, they should be offered the safest available on-site role. Insisting on a return to work for vulnerable groups is likely to breach the employer's health and safety obligations and, dependent on the employee's underlying condition, could amount to disability discrimination. Employees in these categories do not necessarily have to be paid at their full rate and may be entitled to statutory or contractual sick pay if they are unable to work. Similar considerations will also apply to employees who are fit themselves, but who live with someone who is vulnerable.
- **Employees Who Refuse To Come to Work:** There may be some employees who are otherwise well but refuse to come to work, either out of concern for their health and safety or because they would prefer to work from home. While, in certain limited cases, employers may have the right to take disciplinary action against an employee who is refusing to go to work, there are a number of risks in doing so.
 - Before taking disciplinary action, employers should have an open dialogue with employees to ascertain their concerns and seek to allay those fears where possible, for example by communicating clearly the health and safety protocols that the employer has put in place to manage risks. This conversation should also establish whether employees have underlying health conditions that might have arisen during the pandemic

and which might prevent a return to work. Employers should also be sensitive to the mental health of their workers who may have been under additional pressure as a result of the pandemic and resulting lockdown.

- If employees raise genuine concerns about workplace safety, then a dismissal for a reasonable refusal to attend work can be automatically unfair. In addition, employees who raise health and safety concerns may have protection from detriment and dismissal under the whistleblowing regime.
- If employees do not want to return to work, employers could consider offering unpaid leave or allowing the employee to take some of their annual leave during this period.
- **Managing HR Processes:** Where possible, employers should continue with existing HR processes, including dealing with disciplinaries and grievances, managing sickness absence and conducting workplace investigations. Public health guidance should be followed and technology used when feasible to ensure that HR functions can proceed while observing social distancing so that workplace issues can continue to be addressed and dealt with if possible.

Maintaining Workplace Flexibility

Employers face significant challenges and substantial legal risks if the return to the workplace is not managed effectively. The key to a successful return is putting in place processes and procedures to ensure workplace safety and then effectively communicating those measures to employees who might be anxious about going back to work.

The Safe Working Guidance states that updates to it should be expected and employers should keep up to date with changes as they are announced. Future updates are likely to require further changes to the workplace.

Any measures should be communicated as temporary and employers should be wary about making long-term promises to employees about returning to work and any conditions that might be attached to that return. The COVID-19 pandemic and the UK government's response to it continue to evolve and employers will need to ensure that they have the ability and flexibility to close again at short notice in the event that the public health situation deteriorates.

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