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COVID-19, Risk Assessments and Implementing Health and Safety Measures for a Return to Work

Introduction

On 10 May 2020, the Prime Minister announced changes in the Government's guidance on working. All employees and workers who could work from home should continue to do so, but those who could not should return to their workplace.

On 11 May 2020, the Government published updated guidance on working safely during coronavirus in England. On 19 May further guidance was issued.

Many employers will now have to assess health and safety risks in the workplace to a depth and degree never previously considered. They will also have to implement health and safety measures that, only a few months ago, would have been viewed as draconian and unnecessary.

This article looks at the legal framework that employers must comply with in relation to risk assessments as well as health and safety measures that must be implemented in the workplace for workers and employees who are working in or will be returning to work in their normal places of work whilst the risk of infection from the COVID-19 virus remains live.

The Management of Health and Safety at Work Regulations 1999

Section 2(1) of the Health and Safety at Work Act 1974 provides that:



“It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.”

The principal statutory instrument that imposes duties on employers to carry out risk assessments in the workplace is the [Management of Health and Safety at Work Regulations 1999 SI 1999 No 3242](#) (“the 1999 Regulations”).

Principles

The purpose of the 1999 Regulations is to require employers to identify health and safety risks at work and adopt appropriate arrangements for the effective planning, organisation, control, monitoring and review of preventive and protective measures.¹

The 1999 Regulations are designed to implement the general principles of prevention set out in the Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.²

The general principles of prevention are:

- a. avoiding risks;
- b. evaluating the risks which cannot be avoided;
- c. combating the risks at source;
- d. adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;
- e. adapting to technical progress;
- f. replacing the dangerous by the non-dangerous or the less dangerous;
- g. developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;

¹ Regulation 5.

² Article 6(2) of Council Directive 89/391/EEC.



- h. giving collective protective measures priority over individual protective measures; and
- i. giving appropriate instructions to employees.³

Risk assessments

Regulation 3(1) requires that:

Every employer shall make a suitable and sufficient assessment of –

- a. the risks to the health and safety of his employees to which they are exposed whilst they are at work; and
- b. the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purposes of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.⁴

Employers are required to review risk assessments if:

- a. there is a reason to suspect that it is no longer valid; or
- b. there has been a significant change in the matters to which it relates.⁵

Where as a result of any such review changes to an assessment is required, the employer is required to make those changes.

³ Schedule 1 of the 1999 Regulations.

⁴ Regulation 3(2) imposes an identical duty upon relevant self-employed persons.

⁵ Regulation 3(3).



It is perfectly clear that the COVID-19 pandemic will have rendered pre-existing risk assessments invalid or, at the very least, created significant changes to the matters to which such risk assessments relate, necessitating thorough and comprehensive reviews.

Where the employer employs five or more employees, it must record the significant findings of the assessment and any group of its employees identified by it as being especially at risk.⁶

The recent Government guidance for returning to the workplace encourages all employers to share their risk assessments with their workforce. It also suggests they consider publishing those assessments online. The Government goes further for businesses with over 50 workers. Such employers are expected to publish the risk assessment online.

It should be noted that risk assessments must consider not only the potential health and safety risks to employees and workers but also other individuals who attend the workplace, such as visitors, customers, contractors and consultants.

Health and safety arrangements

As stated, once an employer has carried out a risk assessment it must make and give effect to such arrangements as are appropriate for the effective planning, organisation, control, monitoring and review of the preventive and protective measures.⁷ When undertaking these steps, the employer may have regard to the nature of its activities and the size of its undertaking. Where the employer employs five or more persons, it must record the arrangements.⁸

Health surveillance

Regulation 6 states that every employer shall ensure that its employees are provided with such health surveillance as is appropriate having regard to the risks to their health and safety which are identified by the risk assessment.

⁶ Regulation 3(6).

⁷ Regulation 5(1).

⁸ Regulation 5(2).



The term “health surveillance” is not defined in the 1999 Regulations. In Paterson v Surrey Police Authority [2008] EWHC 2693 (QB), it was held that the term covers a spectrum from keeping an eye on an employee to insisting that he or she has a medical check up. The requirements should derive from what has been identified in the Regulation 3 risk assessment.

In the context of the COVID-19 pandemic, health surveillance is clearly going to be a critical and ongoing factor in support of the aim of preventing the spread of the virus both in the workplace and generally. Employers will have to give consideration to adopting measures to ensure that efficient reporting mechanisms are in place in relation to any workers who begin displaying potential COVID-19 symptoms in the workplace so that they can be instructed to adopt the appropriate self isolating measures immediately.

Health and safety assistance

Employers are required to appoint one or more competent persons to assist it in undertaking the measures it needs to take to comply with the relevant statutory health and safety provisions.⁹ The employer must ensure that the number of persons appointed, the time available for them to fulfil their functions and the means at their disposal are adequate having regard to the size of the undertaking, the risks to which the employees are exposed and the distribution of those risks throughout the undertaking.¹⁰

Procedures for serious and imminent danger and for danger areas

Regulation 8 provides that appropriate procedures must be established and, where necessary, given effect to in the event of serious and imminent danger to persons at work in the employer’s undertaking.

Regulation 8 also imposes a duty on employers, so far as is reasonably practicable, to inform any persons at work who are exposed to serious and imminent danger of the nature of the hazard and of the steps to be taken to protect them from it.¹¹ It also requires the employer

⁹ Regulation 7(1).

¹⁰ Regulation 7(3).

¹¹ Regulation 8(2)(a).



to enable the persons concerned to stop work and immediately proceed to a place of safety in the event of their being exposed to serious, imminent and unavoidable danger.¹² It also requires (save in exceptional circumstances duly substantiated) the employer to prevent such persons from resuming work in any situation where there is still a serious and imminent danger.

Contacts with external services

All employers are required to ensure that any necessary contacts with external services are arranged, particularly in relation to first aid, emergency medical care and rescue work.¹³

Information for employees

All employers must provide their employees with comprehensible and relevant information on:

- a. the risks to their health and safety as identified in the risk assessment;
- b. the preventive and protective measures;
- c. emergency procedures and the persons nominated to implement those procedures; and
- d. risks notified to them by other employers in shared workplaces.¹⁴

The Guidance provided by the Health and Safety Executive (see below) states that the information should be provided at the appropriate level, given the level of training, knowledge and experience of the employee. It must be provided in a form that takes account of any language or disability difficulties. For employees with little or no understanding of the English language or who have learning difficulties, special arrangements may need to be made.

¹² Regulation 8(2)(b).

¹³ Regulation 9.

¹⁴ Regulation 10.



Co-operation and co-ordination

Regulation 11 imposes duties of co-operation and co-ordination in relation to compliance with the provisions of the 1999 Regulations where two or more employers share a workplace (whether temporarily or permanently).

Persons working in host employers' or self-employed persons' undertakings

Regulation 12 imposes duties on host employers to ensure that employers whose employees are working in their undertaking are provided with comprehensible information on:

- a. risks arising out of or in connection with the host's activities; and
- b. measures being taken by the host to comply with the law.

Hosts must also ensure that visiting employees are given instructions and information on the risks present and any emergency or evacuation procedures.

Capabilities and training

Employers must take into account employees' capabilities as regards health and safety when entrusting tasks to them.¹⁵

Employers must ensure that their employees are given adequate health and safety training:

- a. when they are recruited into the employer's undertaking; and
- b. on their being exposed to new and increased risks because of:
 1. their being transferred or given a change of responsibilities within the employer's undertaking;
 2. the introduction of new work equipment into or a change respecting work equipment already in use within the employer's undertaking,

¹⁵ Regulation 13(1).



3. the introduction of new technology into the employer's undertaking, or
4. the introduction of a new system of work into or a change respecting a system of work already in use within the employer's undertaking.

The training must:

- a. be repeated periodically where appropriate;
- b. be adapted to take account of any new or changed risks to the health and safety of the employees concerned; and
- c. take place during working hours.¹⁶

The changes in work systems and the new risks to the health and safety of employees arising from the COVID-19 pandemic mean that adequate and appropriate health and safety training is provided by all employees to their employees to minimise the risk of infection in the workplace.

Employees' duties

Regulation 14 of the 1999 Regulations impose duties upon employees. Employees must use any machinery, equipment, dangerous substance, transport equipment, means of production or safety device provided to them by their employer in accordance both with any training in the use of the equipment by them and the instructions respecting that use which have been provided to them by the employer in compliance with the requirements and prohibitions imposed upon that employer by the relevant health and safety statutory provisions. Employees must also inform their employers of situations which they reasonably consider represent a serious and immediate danger to health and safety and of any matter which an appropriately trained and instructed employee would reasonably consider represented a shortcoming in the employer's protection arrangements for health and safety.

¹⁶ Regulation 13(2).



Temporary and agency workers

Regulation 15 sets out several detailed requirements in relation to employees on fixed-term contracts and agency workers as well as the provision of information to such workers. It should be noted that such workers also benefit from most of the other health and safety protections set out in the 1999 Regulations.

Protections for young persons and new or expectant mothers

The 1999 Regulations contain several provisions that set out additional health and safety protective measures in relation to both young persons and new or expectant mothers.¹⁷

Do other Regulations apply? The Control of Substances Hazardous to Health Regulations 2002 (COSHH)

Other Regulations containing provisions relating to the carrying out of risk assessments. One of these is [the Control of Substances Hazardous to Health Regulations 2002 SI 2002/2677](#) (“COSHH”). At the beginning of the lockdown there was debate as to whether COSHH were the principal health and safety regulations applicable to workplaces during the COVID-19 pandemic.

COSHH is intended to address potential health and safety issues at work arising from substances hazardous to health. Regulation 6 requires employers to make a suitable and sufficient assessment of the risks created by work that is liable to expose any employees to any substance hazardous to health as well as the steps that need to be taken to meet the requirements of the COSHH Regulations. The required risk assessment and subsequent measures are far more onerous than those set out in the 1999 Regulations.

One of substances that the COSHH Regulations regulate is “biological agents”. Biological agents are defined as:

¹⁷ Including Regulations 16, 16A, 17, 18 and 19.



“a micro-organism, cell culture, or human endoparasite, whether or not genetically modified, which may cause infection, allergy, toxicity or otherwise create a hazard to human health”

There can be little doubt that the COVID-19 virus falls within the COSHH definition of “biological agent”.

As stated, however, the primary purpose of COSHH is to reduce health risks arising from substances that are connected to the actual work being carried out. Regulation 2(2) states:

“In these Regulations, a reference to an employee being exposed to a substance hazardous to health is a reference to the exposure of that employee to a substance hazardous to health arising out of or in connection with work at the workplace..”

In relation to this Regulation, section 18 of the Health and Safety Executive’s (“HSE”) Approved Code of Practice on COSHH states:

“However, COSHH does not cover a situation where, for example, one employee catches a respiratory infection from another. This is because regulation 2(2) specifies that COSHH only applies in those circumstances where risks of exposure are work related, and not those where they have no direct connection with the work being done.”

It is, therefore, materially more likely than not that the COSHH Regulations only apply to those workplaces where the risks of exposure to COVID-19 are directly related to the work being done (such as in hospital wards and units dealing with COVID-19 infections and laboratories working on a vaccine to the virus).

Health and Safety Executive (HSE) guidance

The Health and Safety Executive (HSE) is the statutory body empowered to provide guidance on, and enforce compliance with, health and safety law. It provides extensive guidance on the



mechanics of how to carry out risk assessments. This guidance can be read in full here: <https://www.hse.gov.uk/simple-health-safety/risk/index.htm>.

The HSE describe five steps that all employers should take to manage risk by carrying out risk assessments:

- (i) Identify hazards: which involves considering the way in which people work, what safe or unsafe work practices exist, and a genuine critical engagement with the accident and ill health records that exist. Potential hazards include work-related stress, as well as physical harms such as chemical burns. Vulnerable workers – young workers, migrant workers, new or expectant mothers and people with disabilities – may have particular requirements.
- (ii) Assess the risks: once a hazard is identified, the employer must decide how likely it is that someone could be harmed and how seriously. This requires consideration of what further actions are needed to control the risk and when the action is needed by.
- (iii) Control the risks: employers must consider if the hazard can be removed completely, or how to control the risks so that harm is unlikely. This may involve extensive steps, such as redesigning the job, or replacing plant or other machinery. Or it may include PPE. This is part of discharging the duty to do everything “reasonably practicable” to protect people from harm.
- (iv) Record your findings: where five or more people are employed, employers must record their significant findings. This must include the hazards, who might be harmed and how, and what the employer is doing to control the risks. The HSE has provided a template here: <https://www.hse.gov.uk/simple-health-safety/risk/risk-assessment-template-and-examples.htm>
- (v) Review the controls: these must be reviewed to ensure they are working. They should also be reviewed if they may no longer be effective, for example where



workers have reported problems or if there have been accidents or near misses. The risk assessment should be updated with any changes made.

COVID-19 guidance issued by the Government

On 11 May 2020, the Government published its updated guidance on working safely during coronavirus in England. (Note: the devolved governments in Wales, Scotland and Northern Ireland have responsibility for issuing their own guidance.)

Although this guidance has been issued by the Government, not the HSE, the courts are likely to treat this guidance in broadly similar manner to HSE guidance.

Eight different guides published. These can be read in full here: <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>

They divide into the following areas:

- (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 and delivery.
- (vii) Shops and branches.
- (viii) Vehicles.

Although each guide relates to different sectors of and activities within the economy, there are many areas in common. These include the sections relating to risk assessments. Each begins with a section entitled "Thinking about risk", which states employers' legal requirements clearly:

"As an employer, you...have a legal responsibility to protect workers and others from risk to their health and safety. This means you need to think about the risks



they face and do everything reasonably practicable to minimise them, recognising you cannot completely eliminate the risk of COVID-19.”

Employers are required to ensure that their risk assessments take into account the specific risks posed by the pandemic. All employers are therefore encouraged to carry out fresh risk assessments, in light of the new and emerging risks.

There is a duty to consult workers as part of the process.

The COVID-19 context and managing risk

Risk assessments must take account of effective measures for managing risk. Common essential requirements in the recent guides include:

- Increasing frequency of handwashing and surface cleaning.
- Making every reasonable effort to enable working from home as a first option. Where this is not possible, social distancing measures should be adopted.
- Where social distancing measures cannot be adopted in full due to a particular activity, businesses should consider whether that activity needs to continue for business to operate. If it does need to continue, businesses should adopt further mitigation. Measures may include shortening activity time, using screens, and reducing the number of people each person has contact with.
- If people must work face-to-face for a sustained period, businesses need to assess whether activity can safely go ahead as, “no one is obliged to work in an unsafe work environment”.

The COVID-19 risk assessment must have particular regard to whether the people doing the work are especially vulnerable to the virus.

Updated guidance

On 19 May 2020, the Government published an update to the ‘Working safely during coronavirus (COVID-19)’ guidance, consisting of a new section entitled ‘5 steps to working



safely'. This can be read here: <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/5-steps-to-working-safely>

It consists of five steps, each with their own sub-sections. In summary:

- (1) Carry out a COVID-19 risk assessment (in line with HSE guidance).
- (2) Develop cleaning, handwashing and hygiene procedures (including provision of hand sanitiser and enhancing cleaning in busy areas).
- (3) Help people to work from home (including “looking after” staff physical and mental wellbeing).
- (4) Maintain two metre social distancing where possible (including physical measures and switching to visitors by appointment only if possible).
- (5) Where people cannot be two metres' apart, manage transmission risk (including keeping such working at a minimum and staggering arrival times to work).

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