Thomas More Chambers

Employers' Reasonably Practicable Duties during COVID-19

Introduction

The ongoing COVID-19 pandemic has created unprecedented disruption for businesses. Ever-changing working patterns force employers to reconsider their legal obligations under the Health and Safety at Work etc Act ('HSWA')1974. As more businesses and non-essential shops reopen, the need to implement every reasonably practicable measure to ensure the safety of both employees and non-employees is paramount.

Thomas More Chambers' Employment Law Team have published a series of articles addressing the rights of employees and workers in the context of health and safety law. This article will review the law in relation to what is 'reasonably practicable' under the HSWA 1974 and consider related health and safety obligations, suggest reasonably practicable measures that employers can implement, and discuss liability and enforcement action where employers fail to comply.

Employers' 'Reasonably Practicable' Duties

HSWA 1974

Section 2(1) HSWA 1974 imposes a general duty of care on every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees. This duty is not absolute.

Section (2)(2) directs employers to specifically ensure (so far as reasonably practicable) the:

- Safe provision and maintenance of plants and systems of work;

- Safe use, handling, storage and transport of articles and substances;
- Sufficient provision of information, instruction, training and supervision to ensure the health and safety of employees;
- Safe maintenance to ensure that any place of work is safe (including means of access to and egress from);
- Safe provision and maintenance of a safe working environment (with adequate facilities for employees' health and welfare at work).

Section 3 HSWA 1974 imposes a further duty on employers and the self-employed to protect the health and safety of non-employees (for example, contractors, visitors, clients, suppliers and security). The risk of exposure to COVID-19 will vary: employers will have greater duties in respect of employees compared to non-employees by virtue of contractual relationship and time spent on the premises.

Section 7 HSWA 1974 also creates duties on employees to take reasonable care for their own health and safety and to cooperate with their employer in relation to health and safety matters.

Employers bear a reverse burden under section 40 HSWA 1974 to prove that it was not reasonably practicable to do more than was in fact done, or that there were no better practicable means.

In deciding what is reasonably practicable during the pandemic, employees should consider:

- The nature of the work;
- Demands of the roles in question;
- Frequency with which the (non-)employee visits the premises;
- Characteristics of the (non-)employee;
- Likely risk of harm;
- The practical ease of enacting protective measures.

Employers must remember their obligation to make reasonable adjustments for employees who have protected characteristics under the Equality Act 2010. The pandemic has altered what a court will consider a reasonable adjustment. For example,

pregnant women must be supported to stay at home and workers who are particularly vulnerable by reason of their age or disability will require extra protection.

Case Law on the Meaning of 'Reasonably Practicable'

In *Edwards v National Coal Board* [1949] 1 All ER 743, Asquith LJ defined 'reasonably practicable' as:

> *"Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them.*

In *Baker v Quantum Clothing Group* [2011] UKSC 17, the Supreme Court considered that foreseeability was relevant to whether or not a material risk had been created (at paragraph 36). Where serious injury was foreseeable and an employer failed to do what was reasonably practicable to prevent it, this aggravates the offence, for criminal liability purposes (see 'Liability and Enforcement Action' below).

In *R v Chargot Ltd (t/a Contract Services)* [2008] UKHL 73, the House of Lords also held that the reverse burden of proof pursuant to HSWA 1974 s 40, is not disproportionate or incompatible with the presumption of innocence.

If inspectors propose solutions to remedy a risk of serious personal injury or after a breach of the law has been admitted, they may serve improvement or prohibition notices. Cost effectiveness is an important factor when assessing whether or not proposed measures are reasonably practicable to implement. However, the cost must be balanced against the health and safety risks. In *Associated Dairies v Hartley* [1979] IRLR 171, the Tribunal considered that regard must be had as to whether the Inspector's requirement is practicable, when considering all of the circumstances.

'Suitable and Sufficient' Risk Assessments[1]

The employers' broad duty under section 2(1) HSWA 1974 is underpinned by Regulation 3(1), MHSWR 1999, which compels employers to conduct '*a suitable and sufficient assessment of:*

> *The risks to the health and safety of their employees to which they are exposed whilst they are at work; and*
>
> *The risks to the health and safety of persons not in their employment arising out of or in connection with the conduct by him of his undertaking, for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him.*

Similar to Section 2(1) HSWA 1974, the duty to conduct risk assessments is not absolute, as employers will discharge their obligation providing that the assessment is '*suitable and sufficient' (Regulation 3(1)).* Again, what is '*sufficient*' is subjective and will involve similar considerations to determining what is '*reasonably practicable*'.

Completing risk assessments will allow employers to identify the risks created by the COVID-19 pandemic and understand what reasonably practicable measures are required.

<u>'Reasonably Practicable' in the Context of COVID-19</u>

In order to comply with sections 2(1) and 3, employers must implement all reasonably practicable measures (which include supplying adequate information, training and systems) to address the health and safety risks that COVID-19 has created for both employees and non-employees. To reduce the risk of cross-infection, employers should consider implementing the following measures:

- Implementing an extensive cleaning programme, which applies to all touch-points (door handles, taps, doors, light switches, escalators, lifts etc), all public spaces, reception, canteen, staff rooms, changing rooms, toilets and lifts etc).
- Maintaining written cleaning rotas, which are publicly displayed to provide a record of the frequency of cleaning procedures for the reassurance of all.

[1] For more information, please see '*COVID-19, Risk Assessments and Implementing Health and Safety Measures for a Return to Work*'.

- Displaying posters advertising good hygiene and handwashing practices in all public spaces.
- Providing a hand sanitiser, tissue dispenser and waste bin at every threshold, to allow employees to open doors without touching handles etc.
- Implementing temperature checks at entrances to buildings. For more information, see the ICO's guidance. Employers cannot force employees to be tested but employees should not refuse unreasonably.
- Offering adequate PPE[2] depending on the work environment. It may be reasonable to provide employees with facemasks but ask non-employees to wear face coverings when visiting the premises.
- In line with government guidance, closing canteens where there are practical alternatives available. If no practical alternative is available, ensure that a rota is in place to limit the number of people in the canteen at any one time. All food should be covered, pre-packaged and not presented as self-service.
- Rearranging workstations to ensure they are each spaced two metres apart. Removing hot-desk arrangements and preventing employees sharing equipment.
- Restricting the number of employees in an office by operating a rota system, so that different teams form 'bubbles'.
- Adjusting working hours to allow employees who are using public transport to avoid commuting in rush hour.
- Restricting employees attending premises for non-essential work, meetings or social events.
- Imposing restrictions for confined public spaces (for example, limiting the number of people in an elevator or by a coffee machine).
- Placing periodic floor markers as a visible reminder of what two metres looks like.
- Controlling the movement of workers in the workplace (for example, one-way movement).
- Providing a comprehensive written policy document to all employees, which outlines all of the health and safety measures that have been implemented and explains how each measure can reduce the risk of infection.
- Creating a reporting procedure for anyone with symptoms and anyone who has been exposed to someone with symptoms.

[2] For more information, please see: 'Personal Protective Equipment and Liability'.

- Assigning a 'COVID-19 officer' to address specific issues that employees experience during the pandemic.

As well as introducing measures to reduce the physical risk of contracting COVID-19, employers should enact appropriate policies to address work-related stress, given that many employees are likely to experience increased levels of anxiety during this time.[3] These could include:

- Providing a wellbeing helpline for employees.
- Offering complimentary access to wellbeing apps, which have corporate subscriptions.
- Introducing virtual 'coffee catchups' or 'afternoon teas' during defined periods of the working day, to emphasise that employees should be taking breaks and to provide collaborative support.
- Signposting online services and programmes that might help employees cope with COVID-19 related stress, for example online yoga or drawing classes.
- Appointing a wellbeing officer or committee to organise and assess the success of such measures.
- Inform any employee, if an Employee Assistance Programme[4] is available.

Employers need to maintain accurate records of what measures they have taken to reduce the risk to employees and other affected individuals. Employers should also document the steps they decided not to take and provide the reasons. Detailed records could help employers justify the decisions taken in any ensuing regulatory investigation or litigation.

Given that COVID-19 undoubtedly represents a 'significant change' to working patterns, employers should review all current risk assessments in order to comply with Regulation 3(3) MHSWR 1999. However, because of previously unidentified risks, employers should consider conducting new risk assessments.

[3] A separate article on work-related stress will be published by the TMC Employment Team.
[4] An Employee Assistance Program is a programme designed to assist employees with work-related and personal issues which may affect their job performance or well-being.

Liability and Enforcement Action

Employers who fail to enact all reasonably practicable measures, expose themselves to potential criminal/civil liability and possible enforcement action.

Criminal Liability

It is a criminal offence for employers to breach their HSWA 1974 duties. Health and safety offences are strict liability offences, which means that employers can be prosecuted more easily as specific intent does not need to be proven. Under the Sentencing Council's Definitive Guideline, serious or repeated breaches can be punished by periods in custody, but financial penalties are more likely. Actual injury or ill health are not required to prove breaches; exposing employees to risk is sufficient. The case of *R v Nelson Group Services (Maintenance) Limited* [1999] IRLR 646, CA confirms that employers have a defence to criminal charges, where they can demonstrate that preventative and protective measures would not have been reasonably practicable to implement.

Employers should keep records of all advice that has been issued to employees. This paper trail could help to demonstrate that the employer is appropriately managing the risk of COVID-19, but this, by itself, is unlikely to be sufficient, in the absence of protective measures.

Civil Liability

Under civil law, employers could be found to be negligent if an employee has been physically injured as a result of a foreseeable physical or psychiatric injury. The burden of proof is on the Clamant. In the context of the COVID-19 pandemic, it is likely that causation will be a key difficulty for employee claimants seeking to argue that any COVID-19 infection was due to health and safety failures by the employer in the workplace. How will one prove that any such failure or failures caused the employee to be infected by the virus?

Enforcement of Legislation

HSE has recently published guidance as to when COVID-19 cases become reportable under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations ('RIDDOR') 2013. In their accompanying guidance, HSE explain that reports must only be made when:

- An unintended incident at work caused possible or actual exposure to COVID-19. This must be reported as a dangerous occurrence.
- A worker was diagnosed with COVID-19, and there is reasonable evidence that it was caused by exposure at work. This must be reported as a case of the disease.
- A worker dies as a result of occupational exposure to COVID-19. This must be reported as a work-related death due to exposure to a biological agent.

However, enforcement action will be unlikely given the causation issues as work-related exposure to the virus would have to be proven. Even in seemingly clear cases, such as where a health worker is diagnosed with COVID-19 after treating patients who had the virus, that employee would struggle to prove when, how and where they were infected. Further, there is no guarantee that even when hygienic, social distancing and PPE measures have been implemented that COVID-19 will not spread. Consequently, unless a direct link can be established, the reporting condition is unlikely to be triggered.

Conclusion

During these times, businesses have had to adapt at a previously unimaginable speed. Some employers have significantly reduced their workforce, some have redeployed their employees to unfamiliar areas and others have recruited more employees due to a surge in demand. The pace of these changes has created additional risk and employers need to remember their statutory and regulatory duties, and implement every 'reasonably practicable' measure to protect the health and safety of their employees and non-employees. As our understanding of the disease increases and as businesses gradually reopen, employers must continually reassess what is reasonably practicable to keep their employees safe.

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In these unprecedented times the Thomas More Chambers Employment Law Team understands the importance of working closely with all our professional clients to best serve the needs of our mutual clients under difficult circumstances.

The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues, including those arising from the COVID-19 pandemic. We are well used to working remotely and can arrange for confidential telephone or video conferences and meetings on a variety of platforms with you and our mutual clients. In addition, we all are well used to paperless working and to dealing with remote hearings and are always happy to assist in setting them up.

The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues arising from the COVID-19 crisis. If you need such assistance, please contact Craig Brown, Senior Civil Clerk on 020 7404 7000 or at cbrown@thomasmore.co.uk.

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