



Thomas More Chambers

Personal Protective Equipment and Liability

Introduction

Prior to the impact of the Covid19 pandemic, the issue of personal protective equipment (“PPE”) at work was a niche health and safety topic for specialists in the field. Today it dominates the media, with report after report of inadequate provision of PPE on the frontline, in hospitals, care homes and other essential places of work.

This article sets out the legislative framework that exists in the United Kingdom in relation to the provision of PPE in the workplace, the duties and other requirements imposed upon employers in relation to the use of PPE and the potential liabilities that employers may suffer if they breach these statutory requirements.

The Legislative Framework

The legislative starting point in relation to PPE, as it is with most health and safety legislative provisions, is the Health and Safety at Work 1974.

Sections 2(1) of the Act provides:

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 statutory instrument that implements this duty in relation to the provision and use of PPE is [the Personal Protective Equipment at Work Regulations 1992 SI 1992/2966](#), as amended by the Health and Safety (Miscellaneous Amendments) Regulations 2002 (“the PPE Regulations”). Regulation 3(3), however, provides that Regulations 4 and 6 to 12 will not



apply where other specified Regulations apply in respect of any risk to a person's health and safety for which any of them require the provision or use of PPE. One of the specified set of Regulations that takes precedence is [the Control of Substances Hazardous to Health Regulations 2002 SI 2002/2677](#) ("COSHH").

This raises the question whether the COSHH Regulations ("COSHH") are the principal health and safety regulations applicable to workplaces during the Covid19 pandemic.

COSHH is intended to address potential health and safety issues at work arising from substances hazardous to health. One of substances that these Regulations regulate are "biological agents". Biological agents are defined as:

"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 Covid19 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, debatable as to whether COSHH applies to all Covid19 affected workplaces, no Covid19 affected workplaces or only those where the risks of exposure to Covid19 infection are directly related to the work being done (such as in hospital wards and units dealing with Covid19 infections).

For the purposes of PPE, however, the question as to whether COSHH or the PPE Regulations apply is largely academic as there is an almost complete overlap between the PPE requirements in both statutory instruments. Regulation 7(9) of COSHH states:

PPE provided by an employer in accordance with this regulation shall be suitable for the purpose and shall:

- (a) comply with any provision in the Personal Protective Regulations 2002 which is applicable to that item of PPE; or
- (b) in the case of respiratory protective equipment, where no provision referred to in sub-paragraph (a) applies, be of a type approved or shall conform to a standard approved, in either case, by the Executive.

Workplace PPE for the purposes of addressing Covid19 risks of infection are, therefore, primarily regulated by the PPE Regulations.

The Health and Safety Executive (“HSE”) regulates and enforces health and safety law, including within workplaces. The HSE produces public guidance, undertakes site inspection visits, and pursues prosecutions of civil and criminal breaches of health and safety law. The HSE has produced [Guidance on the PPE Regulations](#) (“the Guidance”). Whilst predating the Covid19 pandemic and, therefore, not having the specific health and safety risks relating to a global infectious disease in mind, this Guidance still provides useful information as to how employers and the self-employed should implement PPE measures in a Covid19 world.



Measure of Last Resort

The duty imposed upon employers to provide employees with suitable PPE is set out in Regulation 4(1). That duty, however, is qualified. Regulation 4(1) states:

“Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health and safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.”

PPE is a “last resort” measure. It should only be used when other measures (such as risk assessments and alterations in systems of work) do not address or do not adequately address the risk at issue.

The Guidance explains, at paragraphs 26 to 28, the reasons why PPE is a last resort measure. Paragraph 28 states that there are a number of reasons for making PPE the last resort:

- (a) PPE only protects the person wearing it, whereas controlling the risk at source can protect everyone in the workplace.
- (b) Maximum levels of protection are seldom achieved with PPE in practice and the actual level of protection is difficult to assess.
- (c) Effective protection is only achieved by suitable PPE, correctly fitted and maintained and properly used.
- (d) PPE may restrict the wearer to some extent by limiting movement or visibility.

The PPE Regulations

Definition of Personal Protective Equipment

Regulation 2(1) defines PPE (unless the context otherwise requires) as all equipment (including clothing affording protection against the weather) which is intended to be worn

† Identical duties are imposed upon self-employed persons by Regulation 4(2).



or held by a person at work and which protects him against one or more risks to his health or safety, and any addition or accessory designed to meet that objective.

Assessment of PPE

Regulation 6 requires an employer or self-employed person to carry out an assessment to determine whether the PPE that he intends to be provided is suitable before choosing any PPE.²

The assessment must include the following:

- (a) an assessment of any risk or risks to health and safety which have not been avoided by other means;
- (b) the definition of the characteristics which PPE must have in order to be effective against the risks referred to in (a), taking into account any risks which the equipment itself may create;
- (c) comparison of the characteristics of the PPE available with the characteristics referred to in (b);
- (d) an assessment as to whether the PPE is compatible with other PPE which is in use and which an employee would be required to wear simultaneously.³

An ongoing duty to carry out review assessments is imposed upon employers and the self-employed if:

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

If the results of such a review mean that changes in the assessment are required, the employer or self-employed person shall ensure that those changes are made.⁴

It is, to put it mildly, highly likely that the Covid19 pandemic has rendered pre-existing PPE assessments invalid or, at the very least, in need of significant changes in the matters to

² Regulation 6(1).

³ Regulation 6(2)

⁴ Regulation 6(3).



which it relates. Employers and the self-employed across the country who never before had to consider the need for PPE for their employees or themselves now have to give that issue urgent and ongoing consideration.

Duty to provide suitable PPE

The duty on employers to provide PPE is contained in Regulation 4(1) which provides that:

“Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health and safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.”

Regulation 4(2) imposes an identical duty upon self-employed persons.⁵

PPE will not be suitable unless:

- (a) it is appropriate for the risk or risks involved, the conditions at the place where exposure to the risk may occur and the period for which it is worn;
- (b) takes account of ergonomic requirements, the state of health of the person or persons who may wear it and the characteristics of each such person;
- (c) is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed;
- (d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk;
- (e) it complies with any enactment (Act or Statutory Instrument) which implements in Great Britain any provision or design or manufacture with respect to health and safety in any relevant Community directive listed in Schedule I of the PPE Regulations which is applicable to that item of PPE.⁶

Employers are required to ensure that any PPE provided to his employees by virtue of the Regulation 4(1) duty is properly used.

⁵ Regulation 10(1).

⁶ Regulation 4(3).



Employers are also required to ensure that PPE is hygienic and otherwise free of risk to health. Employers must also ensure that PPE is provided to a person for use only by that person.⁷

Duty to provide compatible PPE

Employers must ensure that where the presence of more than one risk to health or safety makes it necessary for his employee to wear or use simultaneously more than one item of PPE, such equipment is compatible and continue to be effective against the risk or risks in question.⁸

Regulation 5(2) imposes an identical duty upon self-employed persons.

Paragraph 32 of the Guidance states:

“... PPE policy must be flexible enough to accommodate individual needs, for example someone with an allergy to latex or pre-existing medical conditions etc. Making requirements for every employee may be inappropriate, for example having in place a general requirement to wear overalls or headgear all the time may be inappropriate if there is no significant risk to be managed. There are times when wearing PPE can actually increase the risk to the employee and where it is inappropriate for the individual or for the task being carried out.”

Duty to maintain and replace PPE

All employers are required to ensure that any PPE provided to his employees is maintained in an efficient state, in efficient working order and in good repair.⁹ The Regulations expressly state that such maintenance includes replacement or cleaning as appropriate. Identical maintenance and replacement duties are imposed upon self-employed persons.¹⁰

⁷ Regulation 4(4).

⁸ Regulation 5(1).

⁹ Regulation 7(1).

¹⁰ Regulation 7(2).



Maintenance and replacement of PPE is addressed at paragraphs 58 to 63 of the Guidance. Paragraph 58 states:

An employer should ensure that PPE continues to provide protection and can do this by putting in place an effective maintenance system that should include the following:

- (a) examination – checking for faults, damage, wear and tear, dirt etc;
- (b) testing – to ensure PPE is operating as intended;
- (c) ready for use – for example if you're working in hot environments the PPE may lose effectiveness if it's wet internally from sweating either due to the temperature or the amount of activity or exertion; you may need to provide somewhere for drying the PPE so it retains its insulating properties;
- (d) cleaning – including disinfection if appropriate;
- (e) repair; and
- (f) replacement.

PPE should be examined before it is issued to the user to ensure that it is in good working order. Examinations should be carried out by appropriately trained staff. Arrangements should be put in place for cleaning and disinfecting PPE, to ensure that there are no health risk to the next person using it.¹¹

The Guidance states that the responsibility for carrying out maintenance together with details of the maintenance procedures and their frequency should be put down in writing.¹² Where appropriate, records of tests and examinations should also be kept. Manufacturers' maintenance schedules and instructions should be followed.

In the context of the Covid19 pandemic and the potential consequences of a failure in health and safety procedures (PPE or otherwise), it is strongly advisable that all employers keep detailed records of the procedures that they have or are adopting to minimise the risk of infection to their employees and other parties.

¹¹ Paragraph 59 of the Guidance.

¹² Paragraph 60 of the Guidance.



The Guidance states that the Regulations do not forbid employers from asking employees to clean their own PPE but that this should be clearly stated in the employee's contract of employment. Further, the employer must ensure that proper cleaning instructions are provided so that there is no damage and the employer should arrange for spot checks to ensure that PPE is suitable.¹³

Duty to provide suitable accommodation for PPE

Where the duty to provide suitable PPE under Regulation 4 exists, employers and self-employed persons must also ensure that appropriate accommodation is provided for that PPE when it is not being used.¹⁴

Duty to provide information and training

Where the duty to provide PPE to employees exists, the employer must also ensure that the employee is provided with such information, instruction and training as is adequate and appropriate to enable the employee to know:

- (a) the risk or risks which the PPE will avoid or limit;
- (b) the purpose for which and the manner in which PPE is to be used; and
- (c) any action to be taken by the employee to ensure that the PPE remains in an efficient state, in efficient working order and in good repair as required by the maintenance obligations.¹⁵

Employers must ensure that such information is kept available to employees.

If the information, instruction and training provided is not comprehensible to the persons to whom it is provided it does not comply with this duty.¹⁶

Employers are also required, where appropriate and at suitable intervals, to organise demonstrations in the wearing of PPE.¹⁷

¹³ Paragraph 61 of the Guidance.

¹⁴ Regulation 8.

¹⁵ Regulation 9(1).

¹⁶ Regulation 9(2).

¹⁷ Regulation 9(3).



The Guidance addresses information and training at paragraphs 66 to 68. Users must be trained in the proper use of PPE, how to correctly fit and wear it, and what its limitations are. Managers and supervisors must also be aware of why PPE is being used and how to use it properly. Those involved in maintaining, repairing and testing the PPE and its selection for use should also receive training.

Training should include elements of theory as well as practice in using the equipment and should be carried out in accordance with any recommendations and instructions supplied by the manufacturer.

Duties imposed upon employees

The Regulations do not only impose duties upon employers and the self-employed, they impose duties upon employees who have to use the PPE provided to them. Employees must use PPE in accordance with the training and instructions provided to them,¹⁸ return all PPE to the appropriate accommodation provided after use¹⁹ and report forthwith any defect in or loss of PPE to the employer.²⁰

Areas not covered by the PPE Regulations

Some or all of the provisions contained in the Regulations do not apply to certain work related activities.

The Regulations do not apply at all to or in relation to the master or crew of a sea-going ship or to the employer of such persons in respect of the normal ship-board activities of a ship's crew under the direction of the master.

Regulations 4 to 12 do not apply in respect of PPE which is:

- (a) ordinary working clothes and uniforms which do not specifically protect the health and safety of the wearer;
- (b) an offensive weapon²¹ used as self-defence or as deterrent equipment;
- (c) portable device for detecting and signalling risks and nuisances;

¹⁸ Regulation 10(2).

¹⁹ Regulation 10(4).

²⁰ Regulation 11.

²¹ As defined in section 1(4) of the Prevention of Crime Act 1953.



- (d) PPE used for protection while travelling on a road²²;
- (e) equipment used during the playing of competitive sports.

Prohibition on Charges for PPE

Section 9 of the 1974 Act prohibits employers from charging employees for PPE where the PPE is a necessary control measure to meet a specific statutory requirement or following a risk assessment. Paragraph 37 of the Guidance states:

An employer cannot ask for money to be paid to them by an employee for the provision of PPE whether returnable or otherwise; this also relates to returnable deposits. Section 9 of the HSW Act prohibits an employer from charging for anything done or provided by them to employees where it is done or provided because there is a specific statutory requirement on the employer. This provision relates to PPE because these regulations impose such a ‘specific requirement’.

The Personal Protective Equipment Regulations 2002 SI 2002/1144

The PPE Regulations 2002 impose a duty on responsible persons who put PPE on the market to comply with the following requirements:

- (a) the PPE must satisfy the basic health and safety requirements that are applicable to that type or class of PPE;
- (b) the appropriate conformity assessment procedure must be carried out; and
- (c) a CE mark must be affixed on the PPE.

Regulation (EU) 2016/425 and the Personal Protective Equipment (Enforcement) Regulations 2018 SI 2018/390

The Personal Protective Equipment (Enforcement) Regulations 2018 provide an enforcement and penalty regime for Regulation (EU) 2016/425 (“the Regulation”).

²² Within the meaning, in England and Wales, of section 192(1) of the Road Traffic Act 1988 and, in Scotland, of section 151 of the Roads (Scotland) Act 1984.



The Regulation applies to the whole supply chain for PPE. Everyone involved in the manufacture, supply and distribution of PPE must ensure that it meets with standard requirements. These requirements include:

- (a) making sure PPE complies with essential health and safety requirements;
- (b) making sure the relevant technical documentation has been drawn up;
- (c) after compliance has been demonstrated, making sure that the EU declaration of conformity has been drawn up and a CE mark affixed;
- (d) retention of documentation for 10 years;
- (e) sample testing;
- (f) compliance with a duty to take action in relation to non-conforming PPE;
- (g) appropriate labelling;
- (h) provision of instructions; and
- (i) cooperation with the national authority.

Parties who breach the Regulation may face criminal proceedings. If convicted they may be subjected to a fine or a term of imprisonment up to three months, or both.

Covid19 and PPE

Although a last resort health and safety measure, PPE has played a vital role in addressing the Covid19 pandemic, especially on the frontline.

The Health and Safety Executive has produced a review of PPE provided in health care settings to manage risk during the Covid10 pandemic which can be found [here](#).

Public Health England has produced guidance, regularly updated, on Covid19 PPE which can be found [here](#).

PHE has also produced more detailed guidance, also regularly updated, entitled Covid19: infection prevention and control guidance which can be found [here](#). This guidance outlines



the infection prevention and control advice for health and social care workers involved in receiving, assessing and caring for patients who are a possible or confirmed case of Covid19. On 11 May 2020, the Government issued guidance for the return to work. It has produced eight workplace guidance documents which can be found at [Working safely during coronavirus \(COVID-19\) guidance](#).

In relation to PPE, this guidance states the following:

When managing the risk of COVID-19, additional PPE beyond what you usually wear is not beneficial. This is because COVID-19 is a different type of risk to the risks you normally face in a workplace, and needs to be managed through social distancing, hygiene and fixed teams or partnering, not through the use of PPE.

The exception is clinical settings, like a hospital, or a small handful of other roles for which Public Health England advises use of PPE, for example, first responders and immigration enforcement officers. If you are in one of these groups you should refer to the advice at:

- (a) [Coronavirus \(COVID-19\): personal protective equipment \(PPE\) plan](#)
- (b) [Coronavirus \(COVID-19\): cleaning in non-healthcare settings](#)

Workplaces should not encourage the precautionary use of extra PPE to protect against COVID-19 outside clinical settings or when responding to a suspected or confirmed case of COVID-19.

Unless you are in a situation where the risk of COVID-19 transmission is very high, your risk assessment should reflect the fact that the role of PPE in providing additional protection is extremely limited. However, if your risk assessment does show that PPE is required, then you must provide this PPE free of charge to workers who need it. Any PPE provided must fit properly.

The Government, therefore, is actively discouraging the use of PPE (with the qualified exception of face masks) in most workplace settings.



Breach of PPE Regulations

Employers who breach PPE statutory requirements may face criminal prosecution by the HSE and, potentially, civil claims for negligence.

Any employer who does face criminal prosecution for their failure to provide adequate PPE during the Covid19 pandemic (and there has been ample news coverage of such failings) may be able to rely upon the “reasonably practicable” defence referred in section 2(1) of the 1974 Act.²³ These unique times are likely to raise unique arguments in relation to this issue.

Employees who are infected by Covid19 as a result of failings by their employer in relation to the provision of adequate PPE may be able to bring civil claims for compensation. Employers will be liable if it can be established that their failings in relation to the provision of PPE (and/or other health and safety failings in the workplace) led to the employee suffering a foreseeable disease. Whilst, in the present circumstances, it may be relatively easy to establish that it is reasonably foreseeable that a failing on the part of an employer to provide adequate PPE creates an increased risk of Covid19 infection, given the prevalence of the virus throughout the country it is likely that there will be significant problems in establishing that any PPE (and/or other health and safety) failure on the part of an employer caused the employee to be infected.

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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.

²³What is “reasonably practicable” under the 1974 Act will be the subject of a separate article by the TMC Employment Law and Criminal Law Teams.



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 Coronavirus 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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