

**COVID19 - Teleconference Returning to the office after lockdown considerations for UK employers**

Speaker	Dialogue
Rebecca Harding-Hill	<p>Good Morning everyone. My name is Rebecca Harding hill, partner and co leader of BCLP's Employment and Labor Group. Welcome to our next covid-19 in '19 UK Employment Law Teleconference. Today's topic is returning to the office after lockdown considerations for UK employers. As the UK government relaxes lockdown restrictions, many employers are focusing on revitalizing their businesses and getting back to the semblance of normality.</p> <p>An important element of this involves reopening workplace and encouraging staff to come back to the workplace. This is not a simple task as it raises a j host of health and safety employment law and employee relation issues. Today BCLP lawyers Lydia Moore and Katherine Pope are going to share some key employment related considerations. You need to bear in mind as you look at getting your staff back into the workplace. We hope you find this useful and now over to Lydia to begin our program.</p>
Lydia Moore	<p>Great. Thanks Rebecca. As lockdown measures continue to ease, employers are making preparations for a return to the office. The purposes of this talk Katherine and I will be focusing on the office environment as opposed to other types of work places such as factories or shops also, the majority of what we say today is just as relevant to those other types of environments. Health and safety considerations are key when planning on how to bring the workforce back. This will be a gradual process and many of us can expect to continue to work from home for some time employers have both statutory and common law duties to look after the health and safety of their employees. Employees health and safety obligations on non-delegable. This just means that an employer constantly delegates them someone else to carry out.</p> <p>An employer may also be liable for personal injury claims if they fail to meet the required health and safety standards. An employer that statutory health and safety duty is to ensure employee safety. As far as reasonably practicable. This just means that employers will need to be or need to consider the risk to their office environment and then they'll need to do everything that is reasonably practicable in their circumstances to minimize the stress. Government guidance admits that employers cannot completely eliminate the risks of Covid-19, but through the use of all drafted risk assessment employers will be able to identify sensible measures to control the risks in their workplace. An employer can then take that risk assessment to make its workplace to Covid secure and then having done that the employer needs to adopt a watching brief to ensure that its Covid secure arrangements are properly followed. This is a matter that Katherine will touch on later on.</p> <p>The government's recently published Covid secure guidelines for eight different workplace settings make practical suggestions on how work can be undertaken safely and set out a number of steps that should be implemented as soon as possible. These include: carrying out a Covid-19 risk assessment, developing cleaning hand washing and hygiene procedures, helping people to work from home, and then where office work is necessary helping to maintain the relevant social distancing rules, and then lastly considering whether there are any other litigation actions. It's really important to note that there are a</p>

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	<p>whole host of detailed statutory health and safety regulations that employers need to satisfy and these cover different aspects of health and safety such as obligations to ensure proper ventilation, control hazardous substances, and if appropriate to provide PPE and please following the government's Covid secure guidance won't necessarily cover off all of these statutory requirements. So, an employer should make sure that they take additional steps required to ensure that they stay by the health and safety duties. I'm conscious that many of you will already be well underway in doing your risk assessment, so I'm just going to highlight several practical implementation steps that stand right now.</p> <p>They wanted the first key questions to consider is who may need to return to the workplace and why this may require employers to look at whether there's a maximum percentage occupancy that needs to be complied with, whether there are certain departments or teams that ideally should be in the office, how do you deal with vulnerable workers, and then are there some people whose personal preferences would be maybe to work from home due to transport or childcare reasons? It's new to this particular question is to make sure that and is properly consult with their Workforce and then document all of those possible factors so that then they can make an informed decision once they've collected this information.</p> <p>Secondly, looking at working patterns. Can you still get employees start and finish times or maybe stagger day's work, limit the number of people in the office at once and then from a risk perspective is there a strategy for ensuring that businesses or business can return to normal if there is a Covid outbreak. This may require employers to consider maybe not just splitting up the team of people into that day, team A and team B. But also people of particular levels and rolls. So then there's always enough people to do a particular role at any given time. In terms of commuting, it's really important to consider how self will travel to work; government guidance is to avoid public transport if possible. The staff has to take public transport then with effect from this week they need to have a face covering. So consider if there might be different needs for those that are able to walk, cycle or drive compared to those who need to take public transport. And for those that ask to cycle, will feel at ease such as bicycle racks and showers be available. And then how will these be clean properly.</p> <p>The government will recover my strategy also referred to car parking facilities. So also considering whether you have access to car parking and how this will be charged for. Looking at cleaning hand-washing hygiene procedures employers will need to ensure that these are carried out at the right level. This point in particular will require a systematic approach to understanding how often commune items will be cleaned and also by who and were hand-washing and anti-bacterial points will be located.</p> <p>It's eminently considering what items within the building are frequently touched and then whether this can be removed. So just for an example or considering whether there's ways to prevent people from touching left buttons, turnstiles, bathroom taps, maybe even propping open doors so that people don't have to touch something door handle. Considering in-person</p>

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Katherine Pope	<p>Thank you Lydia. Now in addition to considering their general approach, employers will also need to think about the needs of different types of employee when planning a return to the office. Now, this includes those who are vulnerable or even extremely clinically vulnerable, the such individuals may well qualify as disabled under the equality act or have some other protected characteristics such as pregnancy. And if these employees are treated detrimentally because of their health condition, they may be able to claim direct disability discrimination or discrimination arising from disability. And bear in mind also the duty to make reasonable adjustments which could</p>

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	<p>require employers to look at an extended period of home working for these individuals even as others return to the workplace.</p> <p>And discrimination law considerations can also arise even where employees do not possess the protected characteristic themselves, but live in a household or close family relationship with someone who's vulnerable. Some of these employees may be reluctant to return to work, if they have concerns that this could increase the risk that they will infect the vulnerable person. One possible claim they might try to argue is direct discrimination by association. However, this is likely to be a difficult claim to make in these circumstances and it's also theoretically possible that they could raise indirect associative discrimination. But again, that really is a nuanced and tricky argument to make out.</p> <p>Pregnant workers are a particular type of employee who have their own special health and safety protections and employers have a duty to assess health risks in the workplace for pregnant worker. And if it's not possible to safely accommodate them in the workplace and if they cannot work from home pregnant workers may need to be suspended on full pay. Proper dialogue with staff about returning to work is key, this important to properly address health and safety concerns that employees may raise about coming back to the office. An employee who refuses to come back may argue protection under little-used sections 441D and 101D of the employment Rights Act and these sections protect an employee from detriment or dismissal where the employee reasonably believes that they are in serious and imminent circumstances of danger which cannot reasonably be controlled. Now putting an employee on unpaid leave or disciplining them for leaving the workplace or not returning to work in such circumstances may amount to a detriment and dismissing them could be automatic unfair dismissal. Now, these are day 1 rights. So there's no qualified period of service and compensation is uncapped. However, whether or not employees could succeed in such claim is really going to be very fact-specific not least because the statutory test depends on their reasonable belief about the health and safety situation and this is why having this Open dialogue to really understand and address concerns is so important.</p> <p>Although in extreme situations an employer could well be acting reasonably by asking it's staff to return to work having complied with health and safety obligations to create a Covid secure workplace and yet an employee might still have a reasonable belief that the workplace is unsafe and try to rely on these provisions. Now, it's not clear whether an employee might be able to rely on these Provisions where it's not the workplace itself, they consider unsafe but rather the commute Lydia mentioned the health assessment and discussion with employees should consider the journey to work and risks of infection on the on public transport. And the question of compensation for lost wages during such a period is also unclear and is likely to be very fact-specific.</p> <p>You may find some employees who are not vulnerable are also concerned that it isn't safer than to return to work and those sections I mentioned can come into play in such circumstances as well. So do give careful consideration</p>

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	<p>to the approach for dealing with this and also there may be implications for the implied term of trust and confidence here as well and such employees might even argue indirect discrimination on the basis that there statistical evidence that Covid-19 has a more severe impact on particular groups for example those over sixty five or bane employees. Now, there is a defense to such an indirect discrimination claim if employers can show their approaches objectively justified and given the health and safety context it will be important for the employer to demonstrate that it's properly considered and dealt with the heightened risks of such groups. And again, much of this analysis can be wrapped up into the overall assessment. So to emphasize again the key to minimizing these situations involves complying with health and safety obligations, including the Covid secure guidance and importantly communicating the findings of the risk assessment and the steps that are being taken.</p> <p>How to deal with breaches of social distancing or other health and safety once employees are back at work. An important point here is to require employees to comply with a Covid secure requirements as part of the return to work policies. Depending on the severity of the breach it may be appropriate either to treat incidents as a flag for further training or as a potential disciplinary matter. And these kind of breaches could also lead to employee grievances which will need to be responded to in a usual way. And one point here that might otherwise be easy to miss is that whistle blowing you might also come into play where an employee notifies their employer of risk or perceived risk to health and safety. So employers may need to invoke the whistleblowing policy as well as potentially treat in the latter as a grievance. Finally, once employees are back in the workplace what should employers do if someone displays symptoms and it really have an incident response plan ready for this event or for the event that an employee has notified at work to self-isolate under the government's test and trace scheme. And this is likely to involve a number of practical steps.</p> <p>So step one; isolate the employee and Lydia mentioned having a designated place where an employee can be isolated from others either whilst awaiting medical assistance or returning home immediately as appropriate. Step two; contact tracing protocol so identify the individuals the employee have been in contact with workplaces they may have been present at. Now when speaking to the employee avoid seeking any medical evidence beyond that which strictly necessary. Data about health status is special category personal data and there are additional data protection requirements. So do keep data protection at the front of your mind when considering this aspect and two particular points are that employers should check and if necessary updates their privacy notice to ensure its broad enough to deal with Health Data in this way and also carry out a data protection impact assessment which can feed into the creation of the contact tracing protocol. Step three; contact potential expose persons again, being mindful of data protection so avoid naming the potentially affected employees simply let others know they may have been exposed and that they should go home and monitor any symptoms. Step four; disinfect any potentially exposed workplace having regards to health and safety. And finally step five; consider any reporting obligations. Now an employer has a duty to report if an employee contracts</p>

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	Covid-19 and further if the employee dies as a result of occupational exposure i.e. if there's reasonable evidence linking the nature of the person's work with an increased risk of becoming exposed. The health and safety executive has published guidance on this and importantly work with the general public as opposed to work with persons known to be infected is not considered sufficient evidence for these purposes and such cases do not require a report. So that's all I have time for now. So I will hand back to Rebecca.
Rebecca Harding-Hill	Thank you very much Katherine and Lydia for highlighting those key issues to bear in mind. And thank you to all of you for joining our call today. For more information about today's topic. You can contact Katherine or Lydia through our websites at <a href="http://bclplaw.com">bclplaw.com</a> and please do feel free to visit our coronavirus resource pages. We're hosting a regular series of these calls with different employment related Covid-19 topics. We hope you'll join us in the future further sessions. Thank you. Stay safe and enjoy the rest of your day.
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