

Insights

COVID - PANDEMIC TO ENDEMIC

EMPLOYMENT LAW HORIZON SCANNING - PUBLICATION #1

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SUMMARY

Welcome to our new 2022 blog, Employment Law Horizon Scanning, that will focus on issues that are likely to impact employers throughout 2022, anticipating developments and providing practical advice and insight. This first post covers COVID-19 evolving from pandemic to endemic, issues relating to vaccination status in the workplace, flexible working from day one and anticipated legislation later this year relating to sexual harassment.

COVID - PANDEMIC TO ENDEMIC

There is now a growing consensus that Covid-19 is moving from pandemic to endemic status. This transition coincides with the relaxation of Plan B measures, notably the advice to work from home and compulsory facemasks in public places (re-introduced in December 2021 in response to the Omicron variant). In addition, the minimum self-isolation period for those testing positive for Covid in England has been cut to five full days, provided that they receive two negative lateral flow tests on the fifth and sixth day. For employers, these changes should lead to less disruption in the workplace, not least in terms of staff absences.

The legal requirement to self-isolate when testing positive for Covid is set to expire on 24 March 2022. It appears likely that we will soon progress to a point where those who test positive for Covid may not even be legally required to isolate, merely encouraged, just as we see with the common cold, flu or other cold/flu-like illnesses. Effectively Covid-19 will be incorporated into our everyday lives, and the era of lockdowns, face-coverings and recommendations to work from home will come to an end.

Such developments will impact employers. They could lead to workplace disputes should an employee decide to attend the office whilst positive or showing symptoms of Covid. Employers should consider ways of minimising the risks. One option is to introduce a policy, going further than

the government rules, stating that employees should not attend the workplace if they have received a positive test or are displaying symptoms, and if they do, they may face disciplinary action.

VACCINATION STATUS

Vaccination status continues to be a difficult area, and we believe it will remain this way during 2022 and beyond. Unlike several other European countries, there is no legal requirement in the UK for the general population to be vaccinated against Covid. Employers have no legal power to compel employees to be vaccinated, with the majority simply advising employees to vaccinate and offering incentives to do so, such as paid time-off. Some employers have even offered cash incentives.

However, although compulsory vaccination policies seem highly unlikely, high profile employers such as Morrisons and IKEA have reduced sick pay for unvaccinated staff who are required to self-isolate as a result of Covid. However, and by contrast, other large employers (such as John Lewis) have recently announced they will continue to pay full sick pay regardless of vaccination status. It is possible that this divergence in approach will continue. Although there is a rationale in reducing sick pay for unvaccinated employees as they tend to be more seriously affected by Covid and off work for longer periods, in our view it is not advisable to reduce sick pay for unvaccinated employees or (in particular) make vaccination mandatory for all employees. This could lead to a number of challenges such as:

- a range of claims, including discrimination and human rights.
- Unvaccinated employees, when faced with reduced sick pay as a result of a positive test, may decide to attend work and not notify their employer. This could have the unintended consequence of increasing the spread of Covid amongst staff.
- Negative publicity (and personal consequences) attaching to the decision could result in employees seeking alternative employment. This could be especially problematic where there is currently a chronic labour shortage.

Employers should also be aware that now the government has axed vaccine passports in England, alongside lifting 'Plan B' restrictions, it will be even harder to justify mandatory vaccination in the workplace. In order to keep the workplace safe, we advise that employers continue to follow government guidance as further set out [here](#).

FLEXIBLE WORKING RIGHT FROM DAY ONE

The current position in the UK is that employees must wait until they have been in a job for 26 weeks before they are eligible to make a flexible working request and are limited to making one request every 12 months. Between September and December 2021, the government carried out a consultation on making flexible working the default setting for employees. The consultation set out

five proposals, one of which was making the right to request flexible working a right from day one. Whilst it is unlikely that the government will respond to the data collected from the consultation until the second half of 2022, it is likely that employers will continue to see an increase in flexible working requests as we move through the year, perhaps even requests to work flexibly abroad. Nearly two years of lockdowns and very substantial numbers of employees working from home has led to a cultural shift, with employees reluctant to return to a conventional 5-day week in the office. With flexible working becoming the norm in practice, the law is likely to follow suit.

It seems that currently, employers are reluctant to respond decisively to flexible working requests given we are still in a hybrid working environment. However, inevitably, employers will have to start making decisions and it will be important to strike a fine balance between business requirements, individual needs and the impact of the last two years, and to consider each request carefully on its own merits. It is clear however, that job vacancies that advertise flexible working arrangements will be more attractive to job seekers than those that do not - employers may risk losing talent to competitors if they are not willing to accommodate flexible working.

SEXUAL HARASSMENT IN THE WORKPLACE

In July 2021, the government published a response to its 2019 consultation on workplace sexual harassment arising out of the global #MeToo movement. The response confirmed the government's intention to introduce a new legal duty requiring employers to prevent sexual harassment. The government also intends to introduce explicit protections from third-party harassment such as from customers and clients. The defence that employers have taken "all reasonable steps" to prevent the harassment will still exist.

In response to the consultation, the government also acknowledged that a 3-month time limit for bringing claims under the Equality Act 2010 (under which sexual harassment claims are normally brought) might be too short and they have committed to looking "closely" at extending the limit for those claims from 3 to 6 months.

The new statutory duty on employers to prevent sexual harassment will come into force when Parliamentary time allows and it could be that draft legislation is published over the course of this year. Employers should be aware of these developments and would be well advised to take a proactive approach to preventing sexual harassment in the workplace. This is especially true with employees returning to the workplace in ever increasing numbers throughout the first part of 2022, which increases the chances of sexual harassment claims arising.

This article was co-written with Trainee Solicitor Jemma Green.

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