HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Coronavirus: Returning to work

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Summary

This is a fast-moving area and the paper should be read as correct at the time of publication (11.03.2021).

In late March 2020, the UK Government and devolved administrations made legislation to impose lockdowns in response to the COVID-19 pandemic. These rules prohibited people from going to work unless it was not reasonably possible to work from home.

The rules have changed over time and were relaxed over the summer of 2020. England, Scotland, Wales and Northern Ireland are currently under strict national lockdowns.

On 22 February 2021, the UK Government published the COVID-19 Response - Spring 2021, outlining its plans for lifting restrictions in England. The Scottish and Welsh and Northern Ireland governments and the have published similar documents.

Lockdown laws and guidance

There are a number of circumstances where a person may be prohibited from going to work by public health legislation (lockdown laws) or public health guidance, including:

- Those who are able to work from home;
- Those who are required to self-isolate;
- Those who are required to quarantine (self-isolating after travel);
- Those who are extremely vulnerable to COVID-19 (shielding); and
- Those whose workplace is required to close.

Public health is a devolved matter and the rules can vary across the UK.

In England, mainland Scotland, Wales and Northern Ireland people are legally prohibited from leaving their home without a reasonable excuse. It is a reasonable excuse to go to work but only if it is "not reasonably possible" to work from home (England and Northern Ireland), "not possible" to work from home (Scotland) or "reasonably necessary" (Wales).

When deciding whether to ask workers to go to work, employers will also need to consider other legal obligations under health and safety and equality law.

Workers who are unable to go to work may be able to work from home or, alternatively, may be eligible to be furloughed under the extended Coronavirus Job Retention Scheme.

Health and safety

Employers have to follow a range of health and safety legislation. The Health and Safety Executive (HSE) publishes approved codes of practice and guidance on health and safety law. In summary, employers have to:

1 Undertake a risk assessment;

2 Set up safe systems of work, informed by the risk assessment;

3 Implement the safe systems of work; and

4 Keep the systems of work under review.

The UK Government's guidance on working safely during COVID-19 does not replace existing law. Rather, it provides examples of the sorts of measures an employer might take in order to comply with existing legal obligations in the context of COVID-19. There is equivalent guidance in Scotland, Wales and Northern Ireland.

Refusing to go to work

All workers have an obligation to obey lawful and reasonable instructions given by their employer. However, employees who refuse to attend the workplace because they reasonably believe that there is a serious and imminent danger have certain protections under employment rights legislation. The protections also apply if an employee takes steps to protect others from such danger.

Whether an employee has a reasonable belief will always depend on the facts. The fact that an employer is complying with the Government's working safely guidance will be a relevant factor, although other factors, such as the employee's vulnerability to COVID-19 will also be relevant.

The Government's working safely guidance says that there are certain workers who should not be asked to attend the workplace, such as those required to self-isolate.

Employers must ensure that the measures they adopt do not discriminate on the basis of protected characteristics, including age, sex, disability and pregnancy.

Health and safety law offers special protection to new and expectant mothers who must be suspended on full pay if they cannot be offered work that is safe.

Issues

Some issues have arisen with the approaches to returning to work, including:

- The prospect that disagreements will arise between employers and employees over whether it is safe to go to work. Workers who live with or care for vulnerable people may also be concerned for their safety. The Advisory, Conciliation and Arbitration Service (Acas) say that these disagreements will be best addressed by discussion between employers, employees and health and safety representatives.
- Employees who refuse to go to work because of reasonable fears about serious and imminent danger are protected from detriments or dismissal. However, it is unclear whether this covers those who have fears about the safety of their commute.
- As public health is devolved, businesses in Scotland, Wales and NI will need to operate in accordance with the relevant devolved lockdown legislation and government guidance. Meanwhile, health and safety law is not devolved in Scotland and Wales. Ultimately, employers must undertake their own risk assessments and take account of all available guidance.
- Schools are currently closed across the UK, which will create increased childcare responsibilities for parents. While employees do have a right to emergency time off for dependants, the time off does not need to be paid. While workers with caring responsibilities could ask to be furloughed, this is a decision for their employer.
- Some employers have suggested that they will introduce "no jab, no job" policies. This could involve instructing existing employees to be vaccinated or making job offers conditional on a candidate being vaccinated. This could lead to discrimination claims from employees who cannot or who do not wish to be vaccinated.

Whistleblowing

Employment law offers a range of protections to whistleblowers who make 'protected disclosures'. However, there are detailed rules on what sorts of disclosures qualify for protection. The disclosure must relate to a particular subject matter and must be made to one of a number of groups of people listed in legislation. This includes the Health and Safety Executive, local authorities and MPs. There are additional tests if a worker makes a disclosure to someone not listed in the legislation, like the press or on social media.

1. The lockdown

Throughout the course of the COVID-19 pandemic, the UK Government and devolved administrations have each had various rules surrounding who can and cannot go to work. Some of these rules took the form of legislation. Some were set out in guidance.

In October 2020, each of the four nations began re-imposing stricter lockdown rules as rates of transmission began to increase.

There are currently national lockdowns in force in England, Scotland, Wales and Northern Ireland.

An overview of the lockdown rules can be found in the Library Briefing, Coronavirus: the lockdown laws (CBP-8875).

The UK, Scottish, Welsh and Northern Ireland governments each have guidance for workplaces which explain who is allowed to go to work.

On 22 February 2021, the UK Government published the COVID-19 Response – Spring 2021 (the roadmap) outlining when and on what basis it aims to lift lockdown restrictions. The Scottish and Welsh and Northern Ireland governments gave published their own documents.

1.1 Who is allowed to go to work?

In certain circumstances, lockdown legislation specifically prohibits people from attending the workplace. In other cases, public health guidance says that people should not attend the workplace, although they are not legally prohibited from doing so. Some of the groups of people who might be required or advised not to go to work include:

- People who can work from home;
- People who are self-isolating or quarantining;
- People who are extremely vulnerable to COVID-19 (shielding); and
- People whose workplaces are required to close.

It is important to note that public health legislation (the lockdown laws) and health and safety legislation are distinct. A person may be permitted to go to work under the lockdown legislation but it might still be a breach of health and safety law, or equality law, for an employer to require that person to attend the workplace.

For example, the lockdown legislation in Scotland does not require a person to self-isolate if they have tested positive for COVID-19. The public health guidance says they should self-isolate for 10 days. It could still be a breach of health and safety legislation for an employer to require or allow a self-isolating worker to attend the workplace during that 10-day period, even if it does not breach lockdown legislation.

Employees are also protected from detriments or being dismissed if they refuse to go to work because they reasonably believe there is a serious and imminent danger to themselves or to others (see Section 3 below).

Overview of workers who can go to work (11 March 2021)				
Type of worker	**England (Tier 4)***	**Scotland (Level 4)***	**Wales (Level 4)***	**NI**
Those not able to work from home	✓	✓	✓	✓
Those able to work from home	×	×	×	×
Those who are self-isolating	×	×	×	×
Those who are quarantining	×	×	×	×
Those who are clinically extremely vulnerable (shielding)	×	×	×	×
Those whose workplace is closed	×	×	×	×

✓ Can go to work if the workplace is following COVID-secure guidelines
▲ Can go to work but advised to work from home if possible
× Offence to go to work / should not be asked to go to work for health and safety reasons

*The whole of England, mainland Scotland and Wales are under Tier 4 / Level 4 restrictions

1.2 Workers who can work from home

Workers who are able to work from home may be prohibited from going to work by legislation or advised not to by guidance.

In **England**, in areas subject to Tier 4 restrictions people are prohibited from leaving their home without a reasonable excuse. People can leave their home for the purposes of work but only if it is "not reasonably possible" to work from home.[1] All of England is currently under Tier 4 as part of a national lockdown.

In **Scotland**, in areas subject to protection level 4, people are prohibited from leaving their home without a reasonable excuse. People can leave their home for the purposes of work but only if it is "not possible" to work from home.[2] There is no legal requirement to stay at home in protection levels 0 to 3, although Scottish Government guidance says they should work from home if they can. All of mainland Scotland is currently under protection level 4 as part of a national lockdown. Some islands, such as Orkney and Shetland, are under protection level 3.

In **Wales**, in areas subject to alert level 4 people are prohibited from leaving their home without a reasonable excuse. People can leave their home if it is "reasonably necessary" for the purposes of work.[3] All of Wales is currently under alert level 4 as part of a national lockdown.

1 Paras. 1-2 of Schedule 3A, *Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020/1374)*
2 Para. 17 of Schedule 5, *Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344)*
3 Para. 1 of Schedule 4, *Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (WSI 2020/1609)*

In **Northern Ireland** people are prohibited from leaving their home without a reasonable excuse. People can leave their home for the purposes of work but only if it is "not reasonably possible" for them to work from home.[4]

1.3 Workers who have to self-isolate

Workers who have to self-isolate may be required by legislation or guidance not to leave their home.

In **England**, a person is legally required to self-isolate for 10 days if they are told by NHS Test & Trace that they have tested positive for COVID-19 or that they have been in close contact with a person who has tested positive for COVID-19.[5]

The guidance for close contacts explains that where a person is told to self-isolate because they have been in close contact with someone who has tested positive, those who they live with do not have to self-isolate.

A person who is required to self-isolate may not go to work. They must inform their employer that they are required to self-isolate. It is also an offence for an employer to knowingly allow a self-isolating worker to leave their home for work-related reasons.[6]

The guidance on Test and Trace in the workplace says if an employer becomes aware that one of their staff has tested positive for COVID-19, they should contact NHS Test and Trace and provide details of any possible close contacts in the office.

The legal obligation to self-isolate does not apply if a person has been told to self-isolate via the NHS app. A person who only shows symptoms of COVID-19 is also not legally required to self-isolate. However, in both cases, the guidance on self-isolation is clear that the person must self-isolate. It may also be a breach of an employer's health and safety obligations to require or permit such a worker to go to work.

The parent of a child who has tested positive for COVID-19 will likely have to self-isolate themselves as they will have been in close contact with the child. By contrast, if the child is required to self-isolate because they came into close contact with someone who has tested positive, in school for example, the parent will not have to self-isolate.

These rules are covered in further detail in the Library Briefing, Coronavirus: Test and Trace Support Payments (CBP-9015).

In **Scotland**, there is no specific legal obligation to self-isolate. However, Scottish Government guidance on self-isolation says anyone who shows symptoms of COVID-19 should isolate immediately, along with those in their household, and take a test. If they test positive, they and any close contacts must self-isolate for 10 days.

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4 Reg. 6C, *Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020 (NISR 2020/150)*

5 Regs. 2-3, *Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020/1045)*

6 Ibid., regs. 6-9

While there is no specific legal obligation prohibiting a self-isolating worker from attending the workplace, requiring or permitting them to do so could be a breach of health and safety law. The guidance on self-isolation says employers should support employees to isolate if they are required to do so.

In **Wales**, there is a legal obligation to self-isolate.[7] As in England, a person is required to self-isolate for 10 days if they are notified that they have tested positive for COVID-19 or that they were in close contact with a person who has tested positive. The Welsh Government guidance provides a detailed overview of the rules.

In **Northern Ireland**, there is no specific legal obligation to self-isolate. However, the Northern Ireland Executive guidance says that a person must self-isolate for 10 days if they show symptoms of COVID-19, they live with a symptomatic person or they are identified as a close contact. Again, requiring or allowing a self-isolating worker to attend the workplace could breach of health and safety law.

1.4 Workers who have to quarantine

In all four nations there are strict legal requirements on people entering the UK from outside of the Common Travel Area.[8] Travellers from certain 'red list' countries are banned from entering the UK unless they are British nationals or Irish nationals or have right of residence. All those who do enter the UK must either quarantine (self-isolate) at home or in a quarantine hotel for 10 days. It is an offence for a person who is quarantining to leave their place of quarantine except in certain limited circumstances. People cannot leave quarantine in order to go to work.

The UK, Scottish, Welsh and Northern Ireland governments have each produced guidance on travel and quarantine.

1.5 Workers who are vulnerable to COVID-19

The UK Government and devolved administrations classify some people as clinically vulnerable and clinically extremely vulnerable to COVID-19. Those who are clinically extremely vulnerable include people with certain health conditions and people who are told they are extremely vulnerable by their GP.

In **England**, people who are clinically extremely vulnerable are advised to shield in areas subject to Tier 4 restrictions (currently all of England). The guidance on shielding says that they are strongly advised not to attend the workplace, even if they are unable to work from home. The guidance says that they can be furloughed under the Coronavirus Job Retention Scheme (CJRS) or, failing that, claim statutory sick pay (SSP).

The UK Government has also published specific guidance for pregnant employees. This says that people who are 28 weeks pregnant or beyond are at an increased risk of becoming severely ill with COVID-19. It says

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7 Regs. 5-13, *Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (WSI 2020/1609)*

8 *Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (SI 2020/568)*. See also *SSI 2020/169* (Scot); *WSI 2020/574* (Wales); *NISR 2020/90* (NI)

that employers should ensure that such pregnant employees can strictly follow social distancing guidance and that this may require some flexible working. It notes that if a pregnant employee cannot do their job safely and adjustments or alternative roles are not available, employers have a duty to suspend the employee on paid leave (see Section 2 below).

In **Scotland**, people who are clinically extremely vulnerable are advised to shield in areas subject to protection level 4 (currently all of mainland Scotland). The new guidance for level 4 (stay at home) says that people who are extremely vulnerable should not go to work, even if they are unable to work from home. Guidance on support during shielding says those who are shielding may be eligible for furloughed or SSP.

In **Wales**, people who are clinically extremely vulnerable are advised to shield in areas subject to alert level 4 (currently all of Wales). The guidance on shielding says that they are strongly advised not to go to work, even if they are unable to work from home. The guidance says that those who are shielding could be furloughed or claim SSP.

In **Northern Ireland**, there is no general requirement to shield. However, the guidance on shielding says that people who are clinically extremely vulnerable are advised not to attend the workplace, even if they are unable to work from home. The guidance notes that those who are unable to work because they are shielding can be furloughed or claim SSP.

1.6 Workers whose workplaces are closed

In all four nations, legislation requires various businesses to close their premises. The list of businesses required to close has varied over time.

In **England**, in Tier 4 a broad range of businesses are required to close. This includes non-essential retail and the hospitality, accommodation and leisure sectors. Businesses can remain open for certain permitted activities, such as processing delivery or click-and-collect services. The Government has published detailed guidance on businesses closures.

In **Scotland**, in protection level 4 a broad range of businesses are required to close. This includes non-essential retail and the hospitality, accommodation and leisure sectors. As in England, businesses can remain open for certain permitted services. The Scottish Government has published detailed guidance on business closures.

In **Wales**, in alert level 4 a broad range of businesses are required to close. This includes non-essential retail and the hospitality, leisure and accommodation sectors. Again, businesses can remain open for certain permitted services. The Welsh Government has published detailed guidance on business closures.

In **Northern Ireland**, businesses in a range of sectors are required to close. This includes non-essential retail and the hospitality, leisure and accommodation sectors. Businesses can remain open for certain permitted activities. The Northern Ireland Executive has published detailed guidance on businesses closures.

1.7 Financial support for workers

A key question for many workers will be what pay or financial support they are entitled to if they are unable to attend the workplace.

Wages

A worker's entitlement to wages is governed, principally, by the terms of their employment contract. As a general rule, workers are entitled to be paid if they are 'ready, able and willing' to work.[9] There is some debate over whether a worker who refuses to attend the workplace for health and safety reasons is entitled to pay.

The Court of Appeal has held that if a worker is unable to work because of an unavoidable impediment imposed by a third party, it may be unlawful for the employer to deduct pay unless they have a specific contractual right to do so.[10] Workers who are unexpectedly required to hotel quarantine, for example, might be able to argue that they are still entitled to be paid. However, this will always depend on the facts.[11]

If a worker is unable to attend the workplace, they may be able to work from home and be paid as normal. As a general rule, workers do not have a right to work from home, although some will have a right to request flexible working.[12] The Advisory, Conciliation and Arbitration Service (Acas) suggest that employers should talk to employees and consider making any changes that could facilitate home working.

Furlough

The Coronavirus Job Retention Scheme (CJRS) is the UK Government's main income support scheme. It was set to end on 31 October 2020 but was extended until 30 April 2021. In Budget 2021 the Chancellor said that the CJRS would be extended further until 30 September 2021.

Under the CJRS, eligible employees can be 'furloughed'. This means employers can ask them to cease working or work any pattern and claim support from HMRC to cover any 'usual hours' they do not work. HMRC will provide a grant to cover 80% of an employee's wages for hours not worked (up to £2,500 per month). From 1 July 2021, employers will need to cover 10% of a furloughed employee's wages and 20% from 1 August 2021.

Employees are eligible if they were employed on 30 October 2020 on a PAYE payroll notified to HMRC on or before that date. Employees who were employed on 23 September 2020 but who stopped working after that date can be re-employed and furloughed, although there is no obligation on the employer to do so. From 1 May 2021, employees will be eligible if they were employed on 2 March 2021 on a payroll notified to HMRC on or before that date.

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9 Recognised as an 'implied term' of the contract in *Beveridge v KLM* [2000] IRLR 765

10 *North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387, para. 52

11 Coronavirus: Quarantine and employment rights, Commons Library Briefing Paper CBP-8986, 20 August 2020 (Section 2.1)

12 See Flexible Working, Commons Library Briefing Paper SN-1086, 3 October 2018

The CJRS only covers those who are 'employees' for tax purposes. As such, many workers in the gig economy cannot be furloughed. They also have no entitlement to statutory sick pay.

The formal rules of the CJRS are set out in a Treasury Direction and the Government has also published a number of guidance documents.

Further information on the CJRS can be found in the Library Briefing, FAQs: Coronavirus Job Retention Scheme (CBP-8880).

Statutory Sick Pay

Statutory Sick Pay (SSP) is available to employees who are 'incapable for work' for four or more consecutive days. The employee must earn at least £120 per week on average.

In some circumstances employees are 'deemed incapable for work'. Anyone who is self-isolating in line with official guidance and anyone who has been notified to shield is deemed incapable for work.[13]

Employees can be furloughed instead of being put on SSP, which is paid at the rate of £95.85 per week. Employers can reclaim two weeks' worth of SSP from the Statutory Sick Pay Rebate Scheme.

Test and Trace Support Payments

Where a person who is in receipt of certain benefit payments is required to self-isolate, they may be entitled to Test and Trace Support Payments, or a similar payment under devolved schemes.

Further detail on these payments can be found in the Library Briefing, Coronavirus: Test and Trace Support Payments (CBP-9015).

13 Schedules 1-2, *Statutory Sick Pay (General) Regulations 1982 (SI 1982/894)*

2. Health and safety at work

2.1 Legal framework

The UK has a detailed body of health and safety law. It is made up of common law duties, primary and secondary legislation and retained EU law, as well as numerous codes of practice and pieces of guidance.

This section will set out the some of the key principles of health and safety law and highlight the most relevant pieces of legislation in the context of COVID-19.

Sources of law

The key piece of legislation in the UK is the *Health and Safety at Work etc. Act 1974* (HSWA). The HSWA is supplemented by a large number of pieces of secondary legislation.

In many areas of health and safety law, UK legislation gave effect to EU law. The key piece of EU legislation is the *Framework Directive* (Directive 89/391/EEC) which is also supplemented more detailed Directives.

The Health and Safety Executive (HSE) issues Approved Codes of Practice (ACOPs) as well as health and safety guidance. ACOPs have a special legal status. If in criminal proceedings it is shown that an employer did not follow a relevant ACOP, the employer must prove it complied with its health and safety obligations.[14] Guidance does not have legal force but the HSE notes that employers who follow the guidance will "normally be doing enough to comply with the law."[15]

Guidance on working safely during COVID-19

On 11 May 2020, the Department for Business, Energy and Industrial Strategy (BEIS) published guidance for working safely during COVID-19. There is guidance for eight different types of working environments.

As with HSE guidance, this new guidance has no specific legal status. Rather, it is guidance for employers on how they can fulfil existing legal obligations in the context of COVID-19.

Employer's general obligations

An employer's general health and safety obligations are set out in section 2 of the HSWA. Employers must "so far as is reasonably practicable" provide and maintain safe places of work, safe systems of work and adequate facilities for welfare. In addition, employers must provide employees with sufficient information and training.

Employers only need to take steps that are reasonably practicable. HSE guidance on risk assessment explains:

> Generally, you need to do everything 'reasonably practicable' to protect people from harm. This means balancing the level of risk against the measures needed to control the real risk in terms of money, time or trouble. However, you do not need to take action if it would be grossly disproportionate to the level of risk.

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14 s. 17, *Health and Safety at Work etc. Act 1974* ('HSWA')
15 HSE, Legal status of HSE guidance and ACOPs

Barristers at Cloisters chambers summarised the employer's obligations in the following terms:

1 Assessing risks;

2 Setting up a safe system of work;

3 Implementing these system;

4 Reviewing these system.[16]

Risk assessment

A central feature of an employer's obligation is risk assessment. This is a specific obligation under many pieces of secondary legislation.

The Supreme Court, citing Smith LJ in an earlier Court of Appeal judgment, explained the importance of these assessments:

> Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse. Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para 59, cited by the Lord Ordinary in the present case, that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. We respectfully agree.[17]

HSE has produced basic guidance on risk assessment.

As noted, employers must also implement all the steps that it finds are necessary and reasonably practicable in light of its risk assessment.

Health and safety policies

Employers with five or more employees are obliged to prepare and, when appropriate, revise a written health and safety policy.[18]

HSE guidance on preparing health and safety policies says it should cover:

1 Statement of intent: an employer's general policy on health and safety in the workplace;

2 Responsibility: listing the names and positions of persons responsible for health and safety in the workplace;

3 Arrangements: listing practical steps that are being taken to ensure health and safety policies are satisfied.

An employer must bring the health and safety policy to the notice of all its employees.

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16 Cloisters – Employment, Ninth edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 9 October 2020

17 *Kennedy v Cordia LLP* [2016] UKSC 6 at para. 89

18 Reg. 2, *The Employers' Health and Safety Policy Statements (Exception) Regulations 1975 (SI 1975/1584)*

Consultation of safety representatives

Employers have a duty to consult safety representatives. There are separate rules depending on whether there is a recognised trade union that represents employees.[19]

Employers must consult representatives about the introduction of any measures that could substantially affect the health and safety of employees and while undertaking any risk assessments.

HSE has guidance and an ACOP on consulting safety representatives.

Consultation in the context of COVID-19 is discussed further below.

Employee's obligations

Health and safety law also applies to employees. Employees are required to take reasonable care of their health and safety and that of others. In particular, employees must cooperate with employers to enable them to fulfil their health and safety obligations.[20]

Criminal and civil liability

It is a criminal offence to fail to comply with health and safety law. On conviction on indictment an employer could face an unlimited fine.[21]

An employer's failure to comply with health and safety legislation does not give rise to civil liability.[22] A worker seeking to bring a claim against an employer would need to bring a personal injury claim and prove that the employer acted negligently.

The HSE provides an overview of criminal and civil liability on its website.

Enforcement of health and safety law

The enforcement of health and safety law is shared between the HSE and local authorities. The HSE covers sectors including factories and building sites. Local authorities cover sectors such as retail, offices and the hospitality industry. The HSE website has a list setting out which body is the appropriate enforcing authority.

Inspectors have a range of powers provided by the HSWA. This includes the power to enter and inspect premises and the power to take samples. Inspectors can issue 'improvement and prohibition notices' if they believe that an employer is failing to comply with its health and safety obligations.[23] In addition, if a safety inspector finds that an employer has failed to comply with its legal obligations, the HSE can charge the employer a fee for intervention (FFI).[24]

HSE's Enforcement Policy Statement and the National Local Authority Enforcement Code set out the HSE and LAs approaches to regulation.

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19 Unionised workplaces: *The Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500)*; or non-unionised workplaces: *The Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)*

20 Section 7, *Health and Safety at Work etc. Act 1974* ('HSWA')

21 Section 33, *HSWA*

22 Section 47(2) and 47(2A), *HSWA*

23 Sections 20 to 22, *HSWA*

24 *Health and Safety (Fees) Regulations 2012 (SI 2012/1652)*

2.2 Regulations relevant to COVID-19

There are a number of key health and safety regulations that will be relevant in the context of COVID-19. They include

- The Management of Health and Safety at Work Regulations 1999
- The Workplaces (Health, Safety and Welfare) Regulations 1992
- The Control of Substances Hazardous to Health Regulations 2002
- The Personal Protective Equipment at Work Regulations 1992
- The Safety Representatives and Safety Committees Regulations 1977

Barristers at Cloisters chambers have published a detailed guide to returning to work that, among other things, considers the obligations employers have under these regulations in the context of COVID-19.

Management of health and safety at work

The Management of Health and Safety at Work Regulations 1999 (MHSW Regulations) set out general rules for the arrangements employers must put in place to manage health and safety risks in the workplace.

Key obligations under the Regulations include:

- Undertaking risk assessments;
- Implementing preventative and protective measures;
- Carrying out health surveillance;
- Appointing employees to assist in applying safe systems of work;
- Providing employees information about any the risk assessment preventative measures being taken.

Schedule 1 to the Regulations sets out a hierarchy of preventative and protective measures that can be taken, starting with avoiding a risk entirely and moving down through other measures such as seeking out less-dangerous options or prioritising collective protective measures.

The Regulations also require specific risk assessments to be made for new and expectant mothers. If there are risks cannot be avoided through alterations, new and expectant mothers must be offered a suitable alternative job or, failing that, be suspended on full pay.[25]

The HSE has produced detailed guidance on the MHSW Regulations.

Workplace health, safety and welfare

The Workplace (Health, Safety and Welfare) Regulations 1992 (WHSW Regulations) are concerned with the physical aspects of the workplace.

The key obligations under the Regulations include:

- Maintaining and cleaning the workplace;

[25] See Maternity Action, Health and safety during pregnancy and on return to work, March 2019

- Ventilating the workplace;
- Providing rooms that are sufficiently big to work in safely;
- Providing suitable workstations and seating;
- Enabling safe circulation of people within the workplace;
- Providing suitable sanitary and washing facilities.

The HSE has an ACOP and guidance on the WHSW Regulations.

Control of hazardous substances

The Control of Substances Hazardous to Health Regulations 2002 (COSHH Regulations) concern the spread of hazardous substances, including bacteria and viruses, within the workplace.

The key obligations under the Regulations include:

- Undertaking risk assessments;
- Preventing or controlling exposure to hazardous substances;
- Monitoring exposure in the workplace.

HSE guidance on pandemic flus explains that the COSHH Regulations apply to workers who are exposed to a virus as a direct consequence of their work (e.g. healthcare workers) but not in cases where a virus is in general circulation and also happens to be in the workplace. The guide lists some general steps that employers can take in cases of pandemic flus, in particular requiring symptomatic workers to stay at home.

The Regulations set out a hierarchy of measures that can be taken to control transmission of hazardous substances. The HSE ACOP explains:

> There is a broad hierarchy of control options available, based on inherent reliability and likely effectiveness. COSHH regulation 7 refers to many of these options. They include:
>
> - elimination of the hazardous substance;
> - modification of the substance, process and/or workplace;
> - applying controls to the process, such as enclosures, splashguards and LEV;
> - working in ways that minimise exposure, such as using a safe working distance to avoid skin exposure;
> - equipment or devices worn by exposed individuals.[26]

If exposure to the hazardous substance cannot be adequately controlled, employers must provide employees with adequate PPE.[27]

Personal protective equipment (PPE)

The *Personal Protective Equipment at Work Regulations 1992* (PPE Regulations) set out rules about the provision of PPE.

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26 HSE, The Control of Substances Hazardous to Health Regulations 2002. Approved Code of Practice and guidance, L5 (Sixth edition), 2013, para. 108

27 Reg. 7(3)(c), *The Control of Substances Hazardous to Health Regulations 2002 (SI 2002/2677)*

HSE guidance on the PPE Regulations explains that the provision of PPE should be a measure of last resort. Employers are expected to first take other measures to prevent or control risks.

Where PPE is provided it must fit and must, so far as possible, effectively control the risk. PPE must be maintained and replaced as necessary. Further, employees must be given training in the use of the PPE.

Employers must ensure that they do not discriminate in the provision of PPE, in particular by taking account of different body types. Dee Masters and Jen Danvers, barristers at Cloisters chambers, have highlighted that employers who provide larger PPE, more suitable for men, could face claims of indirect discrimination under the *Equality Act 2010*.[28]

Consultation

As noted above, employers have a duty to consult safety representatives on health and safety issues. There are separate rules depending on whether an employer has recognised a union for the purposes of collective bargaining.

The legislation does not place any restrictions on the nature of the consultation. Further, employers are not required to give effect to recommendations made by safety representatives. However, the consultation must be genuine.

HSE guidance outlines how employers should consult representatives:

> Consultation involves you not only giving information to your employees but also listening to them and taking account of what they say before making any health and safety decisions.
>
> The law does not state when you must consult, or for how long, but does say it must be 'in good time'. In practice, this means you have to allow enough time for your employees to consider the matters being raised and provide them with informed responses.
>
> Consultation does not remove your right to manage. You will still make the final decision, but talking to your employees is an important part of successfully managing health and safety.

The HSE has produced specific guidance on the issues employers will need to discuss with safety representatives in the context of COVID-19.

2.3 Government guidance on working safely

On 11 May 2020, the Department for Business, Energy and Industrial Strategy (BEIS) published guidance for working safely during COVID-19.

The Government's guidance on working safely initially covered eight places of work: offices, factories and warehouses, shops, construction sites, laboratories, restaurants, homes and vehicles.

On 23 and 24 June, the Government published four new guides: close contact services, visitor economy, hotels and heritage sites.

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[28] Dee Masters and Jen Danvers, PPE & sex discrimination claims, Cloisters, 29 April 2020 (accessed 13 May 2020)

On 9 July 2020, the Government published two further guides: gyms / leisure facilities and performing arts.

The guides are broadly similar, albeit with modifications to reflect different settings. There are some significant differences around social distancing and PPE, especially for close contact services. The guidance on performing arts also contains a five-stage roadmap for re-opening.

The HSE has also produced some general guidance for employers on making workplaces COVID-secure.

Status of the guidance

As noted above, the BEIS guidance is not law. Each of the 14 pieces of guidance explains at the outset:

> This guidance does not supersede any legal obligations relating to health and safety, employment or equalities and it is important that as a business or an employer you continue to comply with your existing obligations, including those relating to individuals with protected characteristics. It contains non-statutory guidance to take into account when complying with these existing obligations. When considering how to apply this guidance, take into account agency workers, contractors and other people, as well as your employees.[29]

Ultimately, it is for employers to undertake their own risk assessments to determine what steps they must take to comply with legal obligations.

The guidance says that the Government "expects" employers with more than 50 employees to publish their risk assessments. The TUC has called for this to be made a mandatory legal obligation.

Priority actions

Each of the BEIS guides lists eight 'priority actions' that businesses should take to keep staff and customers safe:

1 Complete a COVID-19 risk assessment

2 Clean more often

3 Ask customers to wear face coverings

4 Make sure everyone is social distancing

5 Consider ventilation

6 Take part in NHS Test and Trace

7 Turn away people with coronavirus symptoms

8 Consider the mental health and wellbeing aspects of COVID-19

Who can attend the workplace?

The BEIS guidance has not yet been updated to reflect the new national lockdown. However, it does link to the guidance on the restrictions in Tiers 1 to 4. It notes, as a general matter, that employees should work from home if possible. Furthermore, it says that if employers do ask staff to come to the workplace, this must be reflected in the risk assessment.

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[29] Department for Business, Energy and Industrial Strategy (BEIS), Working safely during COVID-19 in offices and contact centres, 9 November 2020, (replicated in the other guidance documents)

The guidance notes that employers should pay particular attention to protected characteristics, including disability, age and pregnancy, when deciding who to ask to attend the workplace.

In particular, the guidance highlights the health and safety obligations owed to new and expectant mothers, discussed above.

Social distancing in the workplace

On 24 June, the UK Government revised the guidance to say that that employers should maintain 2m social distancing "or 1m with risk mitigation where 2m is not viable."

The old guidance already recognised that where 2m distancing was not possible employers should take risk mitigation measures such as using screens, side-by-side working and reduced contact time.

The new rule could, however, have a significant impact on customer-facing businesses by allowing more customers onto the premises. When announcing the new "1-metre-plus" rule, the Prime Minister specifically noted the economic difficulties faced by the hospitality industry.

The Government has published guidance on the 'mitigating measures' that can be taken alongside 1m distancing.

Personal protective equipment

13 out of the 14 guides states that in most cases the risks of COVID-19 should be managed by social distancing and workforce management, not the provision of PEE:

> At the start of this document we described the steps you need to take to manage COVID-19 risk in the workplace. This includes working from home and staying 2m away from each other in the workplace if at all possible. 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.[30]

The only situation in which the guidance says PPE is required is close contact services such as hairdressers, beauticians or tattoo artists. The guidance notes that these services require prolonged close contact and that workers should be provided with masks and plastic visors.

The guidance says that there is growing evidence that wearing face coverings (which are not PPE) in enclosed spaces can help prevent transmission. It notes the legal requirement to wear coverings in shops and on public transport.

However, a number of employment lawyers have questioned the position the guidance takes on PPE.

Barristers at Cloisters chambers note that the issue of PPE is "particularly controversial". While noting that the Government may wish to reduce

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30 BEIS, Working safely during COVID-19 in offices and contact centres, 9 November 2020, Section 6.1 (replicated in twelve other guidance documents)

demand on PPE from non-clinical settings, they argue that employers could be under a legal obligation to provide PPE in certain contexts:

> If an employer wants to restart their business and that business must carry out work involving, for instance, high numbers of people in a poorly ventilated enclosed space who are densely packed then it may be that only high quality PPE can adequately control that risk. In this scenario, an employer would need to consider whether the Government guidance adequately ensures the safety of employees so far as is reasonably practicable and may well need to consider the use of COVID-19 PPE.[31]

This issue was raised by Lord Hendy QC, an employment barrister and Labour peer, in a debate in the House of Lords on 13 May 2020:

> That advice is surely contrary to the clear statutory duty set out in the Personal Protective Equipment at Work Regulations 1992 to provide PPE to any employee in respect of whom risk has not been eliminated by other measures. The importance of this duty is magnified in the light of the Office for National Statistics report to which my noble friend Lord Stevenson referred, which identifies various occupations at an increased risk of death from COVID-19.[32]

Lord Callanan, the Parliamentary Under-Secretary for BEIS, responded:

> Where workers already wear PPE for protection against non-Covid risks such as dust, they should of course continue to wear this. In relation to COVID-19 specifically, we have worked very closely with the medical community to develop this guidance and we will of course be guided by the science so that we do not put lives at risk in future.

The guidance does note that if an employer's risk assessment shows that PPE is necessary in the workplace, they have a legal obligation to provide that PPE free of charge.

2.4 Additional COVID-19 legislation

In addition to general health and safety law and guidance specific to COVID-19, the UK Government has made a number of regulations that place additional obligations on certain businesses. These include:

- Employers in the retail, hospitality and leisure sectors must ensure that staff wear face coverings if they are likely to come into close contact with members of the public (unless they are exempt).[33]
- Employers in the hospitality sector (restaurants, pubs, cafes etc.) must collect staff and customer data for NHS Test & Trace.[34]
- Employers must display signs to remind people of their obligation to wear face coverings.[35]

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31 Cloisters – Employment, Ninth edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 9 October 2020

32 HL Deb 13 May 2020 vol. 803 c781

33 Reg. 3(2A), *Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 (SI 2020/791)*

34 Regs. 7-11, *Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020 (SI 2020/1005)*

35 Reg. 2A, *Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) Regulations 2020 (SI 2020/1008)*

- Employers must not knowingly allow a self-isolating employee to leave their home for work-related reasons.[36]

Under the *Health Protection (Coronavirus, Restrictions) (Local Authority Enforcement Powers and Amendment) (England) Regulations 2020*, which came into force on 2 December, local authorities have powers to enforce coronavirus-related business restrictions. This includes the restrictions listed above as well as the curfew rules and the requirement to close business premises under the different Tiers (discussed above).[37]

The Regulations enable local authorities to issue three types of notices:

- **Coronavirus Improvement Notice:** A CIN can be issued if an officer considers that a business is breaching, or has breached, a relevant restriction. The notice will instruct the business to remedy the breach within a certain timeframe, which must be at least 48 hours. The CIN may include suggestions for how to remedy the breach. Failure to comply with a CIN during its operational period can lead to a fixed penalty notice (FPN) of £2,000 and / or the issuing of a Coronavirus Restrictions Notice (see below).
- **Coronavirus Immediate Restrictions Notice:** A CIRN can be issued if an officer considers that a business is breaching, or has breached, a relevant restriction, that breaches are likely to continue and that it will lead to a risk of exposure to coronavirus. The notice can either instruct a business to close its premises or to remedy the breach. A CIRN ceases to have effect after 48 hours. The officer must review the CIRN before it ceases to have effect and can either withdraw the notice or issue a new notice. The Explanatory Memorandum says that, if it is necessary, an officer can issue a Coronavirus Restriction Notice (see below) to close the business for up to seven more days. Failure to comply with a CIRN during its operational period can lead to an FPN of £4,000.
- **Coronavirus Restriction Notice:** A CRN can be issued if an officer considers that a business has failed to comply with the terms of a CIN and that the non-compliance involves a risk of exposure to coronavirus. The notice can either instruct a business to close its premises or to remedy the breach. A CRN ceases to have affect after seven days. The officer must review the CRN before it ceases to have effect and can either withdraw the notice or issue a new notice. Failure to comply with a CNR during its operational period can lead to an FPN of £4,000.

The Government has produced guidance on these enforcement powers.

The Explanatory Memorandum accompanying the Regulations explains that in the first instance, local authority enforcement officers should use CINs – which cannot close a business. It notes that CIRNs should only be used where rapid action is needed to stop the spread of virus. In any case, the Regulations provide that CINs and CIRNs should only be issued if it is necessary and proportionate to do so.

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36 Regs. 6-9, *Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020/1045)*

37 Reg. 2, *Health Protection (Coronavirus, Restrictions) (Local Authority Enforcement Powers and Amendment) (England) Regulations 2020 (SI 2020/1375)*

A business can ask the officer to review the CIN, CIRN or CNR during its operational period if they believe that they have complied with its terms. Businesses can also appeal the decision to the Magistrates Court.

Notices cannot be served to businesses which form part of "essential infrastructure". This term is not defined in the Regulations or guidance. The term is also used in the *Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020*. The statutory guidance for these regulations lists examples of businesses that are essential infrastructure. Examples include buildings occupied by government bodies, registered childcare providers, educational institutions and facilities that produce, distribute or sell food (except facilities smaller than 280sqm).[38]

The *Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020*, which came into force on 18 July 2020, also give local authorities the power to close businesses. However, those powers can only be exercised if there is a "serious and imminent threat to public health". By contrast, the new Regulations can be used for any breach of the relevant coronavirus-related business restrictions.

2.5 Workplace testing

The UK Government encourages private sector employers to provide lateral flow tests to employees who are working on-site. The guidance on workplace testing says that employers should aim to test each employee at least twice a week. All businesses in England can register to receive free lateral flow tests from the Government. There are similar schemes in Scotland, Wales and Northern Ireland, although these are more targeted towards certain key sectors.

The Information Commissioner's Office (ICO) has published guidance on workplace testing. It highlights that testing involves the processing of health data and that employers must therefore have a lawful basis for doing this under data protection law. The guidance explains:

> To help you decide whether measures such as collecting employee health information or asking staff to be tested for COVID-19 are necessary, you should consider the specific circumstances of your organisation and workplace. These include:
>
> - the type of work you do;
> - the type of premises you have; and
> - whether working from home is possible.
>
> You should consider whether specific regulations or health and safety requirements apply to your organisation or staff. You should also take into account whether you have a specific duty of care to employees. This wider legal framework will help in informing how you apply data protection law.[39]

Acas guidance on testing says testing arrangements should be agreed with staff and employers should listen to and resolve any staff concerns.

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38 Department for Health and Social Care, Statutory Guidance: Local authority powers to impose restrictions: Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020, 12 October 2020

39 Information Commissioner's Office, Testing

2.6 Vaccinations and employment law

As the UK Government has been implementing its vaccine delivery plan, some employers have said they may require existing or prospective employees to be vaccinated (so-called 'no jab, no job' policies).[40]

Government policy

The UK Government has said that it has no intention of making vaccines mandatory. In response to a Parliamentary Question on employers' mandatory vaccine policies, Paul Scully, Minister for Small Business, said:

> **Dr Matthew Offord**
>
> To ask the Secretary of State for Business, Energy and Industrial Strategy, what his policy is on employers insisting that employees receive a covid-19 vaccination to (a) remain employed and (b) receive employment.
>
> **Paul Scully**
>
> Scientists are united that the vaccine offers the best form of protection against the virus but it is not compulsory - the UK operates a system of informed consent for vaccinations. Demand has been extremely high with more than 13 million people having been vaccinated by 10 February.[41]

In the new COVID-19 roadmap the UK Government said it would consider whether it should issue certificates confirming that a person has been vaccinated (COVID-status certification):

> The Government will review whether COVID-status certification could play a role in reopening our economy, reducing restrictions on social contact and improving safety. This will include assessing to what extent certification would be effective in reducing risk, and the potential uses to enable access to settings or a relaxation of COVID Secure mitigations. The Government will also consider the ethical, equalities, privacy, legal and operational aspects of this approach and what limits, if any, should be placed on organisations using certification.[42]

The Government said it will announce its decision before it implements Step 4 (lifting the advice on working from home), set for 21 June 2021.

The Government has updated its working safely guidance, adding a new section on "tests and vaccinations". For now, the guidance simply says that employers should continue to implement the health and safety measures even if employees have been vaccinated.[43]

While the Government has said that it would not make vaccination mandatory, employers may decide to adopt their own vaccine policies.

This raises questions about whether employers can lawfully require existing employees or new recruits to get vaccinated.

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40 "UK companies look to make Covid-19 vaccinations mandatory", *Financial Times* [online], 16 February 2021 (paywall); "Coronavirus: 'No jab, no job' policies may be legal for new staff", *BBC* [online], 18 February 2021

41 PQ151685 [on Conditions of Employment: Coronavirus], 17 February 2021

42 HM Government, COVID-19 Response - Spring 2021, CP398, 22 February 2021, para. 131

43 BEIS, Working safely during COVID-19 in offices and contact centres, 9 November 2020, Section 9.1 (replicated in the other guidance documents)

Existing employees

For existing employees, the question is whether employers can instruct them to get vaccinated and discipline them if they refuse to do so.

Duty to obey reasonable instructions

An employment contract is made up of express terms that are written into the contract, and terms that courts will imply into the contract.

It is an implied term in every employment contract that employees must obey reasonable management instructions given by their employer. It is an open question whether an instruction to be vaccinated would be reasonable. Law firm Lewis Silkin argue that it is "highly likely" to be reasonable for employers to ask their staff to get vaccinated, given an employer's health and safety obligations towards its employees.[44] Law firm Pinsent Mason suggest it might be easier to argue an instruction is reasonable in some sectors, like social care, rather than in others.[45]

Acas guidance on vaccinations says that employers should discuss any vaccination policy with unions or employee representatives. It also says employers should aim to resolve any issues informally and confidentially and be mindful of potential discrimination issues (see below).

Right to pay

If an employee is not permitted to work because they have not been vaccinated there may be questions about their entitlement to pay.

It is an implied term of the employment contract that employees are entitled to be paid if they are ready, able and willing to work.

The Court of Appeal has held that if an employee's inability to work is involuntary or due to some unavoidable impediment, they may still have a right to be paid.[46] This could apply to an employee who is suspended pending further disciplinary action. It might also apply to an employee who is unable to work because they cannot, or refuse to, be vaccinated.

These rules will not apply if an employer has an express contractual right to send a worker home without pay.

It is unlikely that an employee who cannot work because they have not been vaccinated would be entitled to Statutory Sick Pay (SSP). This is because their inability to work would not arise from an illness.[47]

Unfair dismissal

Employees who have worked for their employer for two or more years are protected from unfair dismissal. A dismissal is unfair unless it was for a potentially fair reason and was reasonable in the circumstances.[48]

In cases where an employee refuses to obey an instruction, the reason for dismissal relied on will normally be "conduct". The key question will

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44 Lewis Silkin LLP, Vaccination for Covid-19 – can employers require their employees to be vaccinated?, 7 December 2020

45 Pinsent Mason LLP, Coronavirus: can UK employers require staff to be vaccinated?, 11 December 2020

46 *Northwest Anglia NHS Foundation Trust v Greg* [2019] EWCA Civ 387, para. 52

47 Section 151, *Social Security Contributions and Benefits Act 1992*

48 Section 98, *Employment Rights Act 1996*

be whether the employer's decision to dismiss fell within the "range of reasonable responses".[49] Whether an employer had a contractual right to give the instruction will be relevant but not always decisive.[50]

The employer's justification for its policy as well as the employee's reason for refusing to be vaccinated will be relevant factors. A tribunal will also consider an employee's right to private life as well as potential discriminatory treatment (below).

The Chartered Institute of Personnel and Development (CIPD) argue that the best course of action for employers will be to reassure staff:

> An employer can only attempt to defeat an unfair dismissal claim if it can show that the employee unreasonably refused to be vaccinated. Each case will be considered on its own facts, including consideration of other ways in which the employee could continue to work safely without vaccination. If an employee's vaccine refusal is related to a disability or a religious or philosophical belief the employee may have a direct or indirect discrimination claim as well as a constructive unfair dismissal, breach of trust and confidence and other claims.
>
> The best course of action is for employers to reassure rather than overtly persuade, leading by example and engaging with staff about safety, outlining the benefits of vaccination with the latest information, delivered in a culturally sensitive way.[51]

There are other potentially fair reasons for dismissal which could also be relied upon, including "some other substantial reason" (SOSR). This might be relied upon, for example, if an employee is required as part of their job to visit third parties and is unable to do so because they have mandatory vaccine policies and the employee has not been vaccinated. It might also be relied upon if an employer believes an unvaccinated employee attending the workplace poses a health and safety risk.

Discrimination

The *Equality Act 2010* prohibits discrimination in work. This includes during recruitment, in the terms and conditions an employer offers and in any disciplinary decisions. The Act prohibits discrimination on the basis of certain protected characteristics.

If an employer adopts a mandatory vaccination policy and subjects an employee to a detriment or dismissal for refusing to get vaccinated, this could lead to a claim of indirect discrimination.

Indirect discrimination occurs where an employer applies an apparently neutral provision, criterion or practice (PCP) which puts or would put people sharing the worker's protected characteristic at a disadvantage and puts or would put the worker at a disadvantage. It is not indirect discrimination if the employer can show that the PCP is a proportionate means of achieving a legitimate aim.[52]

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49 *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] EWCA Civ 903, para. 36

50 *Redbridge London Borough Council v Fishman* [1978] ICR 569

51 CIPD, Preparing for the COVID-19 vaccination: guide for employers, 15 Feb 2021

52 Section 19, *Equality Act 2010*; Equality and Human Rights Commission, Employment Statutory Code of Practice, 4 September 2015, Chapter 4

A mandatory vaccinations policy could impact workers with a number of different protected characteristics:

- **Age:** Public Health England's vaccine priority groups are based, among other things, on age. The Government has confirmed that Phase 2 of the rollout will continue to be based on age. The COVID-19 roadmap said that everyone aged 18 and over should have been offered their first dose by 31 July 2021. This means that, for now, many younger workers are unable to be vaccinated.
- **Disability:** Some individuals may be unable to receive the vaccine because of an underlying health condition that constitutes a disability for the purposes of the *Equality Act 2010*. The Joint Committee on Vaccines and Immunisation's guidance says that the vaccine may not be suitable for immunosuppressed people.
- **Pregnancy:** Public Health England advises that those who are pregnant should not routinely have the vaccine.
- **Race:** Vaccine uptake has been lower in BAME communities. The Government's Scientific Advisory Group for Emergencies (SAGE) says potential reasons include barriers to access, perceptions of risk, lack of vaccine offers and higher levels of distrust.
- **Religion or belief:** People who hold certain religions or non-religious beliefs (e.g. veganism) might object to vaccines if they contain animal products. The NHS website says that the current approved COVID-19 vaccines do not contain any animal products. A person who objects to vaccines because they believe they are unsafe may try to argue that this is a protected philosophical belief under the *Equality Act 2010*. There are five tests that need to be satisfied for a belief to be protected (the Grainger criteria), including that the belief must be cogent and worthy of respect in a democratic society. Employment lawyers have suggested that it is unlikely that such beliefs would qualify for protection.[53]

As noted, it is not indirect discrimination if an employer can show that the PCP is a proportionate means of achieving a legitimate aim. The Equality and Human Rights Commission's Employment Statutory Code of Practice explains the meaning of proportionality:

> Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.[54]

A tribunal may consider whether there were alternatives to a mandatory vaccine policy, such as offering on-site lateral flow tests to those who cannot get vaccinated due to a protected characteristic.

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53 See Sungjin Park, Can refusing to be vaccinated be protected on religion or belief grounds under the Equality Act 2010?, Practical Law Employment and Discrimination Blog, 19 January 2021

54 EHRC, Employment Statutory Code of Practice, 4 September 2015, para. 4.31

Right to private life

Article 8 of the European Convention on Human Rights (ECHR) protects the right to private life. This covers the right to physical integrity and a protection against forced or compulsory medical treatment.[55] The European Court of Human Rights has held that compulsory vaccinations infringe on the right to physical integrity.[56] However, the right to private life is a 'qualified right', meaning an interference can be justified if it is a proportionate means of achieving a legitimate aim.

The ECHR is only directly enforceable against the state, meaning it can be used to challenge legislation or the acts of public authorities but not the acts of private employers. However, the *Human Rights Act 1998* requires courts to interpret legislation, so far as possible, in a way that is compatible with the ECHR. As such, when a tribunal is considering an unfair dismissal claim brought against a private employer, it will need to consider the employee's right to private life.

Recruitment policies

Employers could also seek to make job offers conditional on a person being vaccinated.

A candidate going through recruitment is not an employee, meaning they have few rights they can enforce against the prospective employer. However, the protections from discrimination in employment do apply to the recruitment process. The Employment Statutory Code of Practice explains:

> The inclusion of criteria that relate to health, physical fitness or disability, such as asking applicants to demonstrate a good sickness record, may amount to indirect discrimination against disabled people in particular, unless these criteria can be objectively justified by the requirements of the actual job in question.
>
> Person specifications that include requirements relating to health, fitness or other physical attributes may discriminate not only against some disabled applicants, but also against applicants with other protected characteristics – unless the requirements can be objectively justified.[57]

The potential indirect discrimination issues outlined above could apply in recruitment in a similar way to how they apply to existing employees.

2.7 Devolution

Health and safety law is a reserved matter for Scotland and Wales. While health and safety law, and employment law as a whole, is devolved in Northern Ireland, its health and safety law is substantively similar to health and safety law in Great Britain.

By contrast, as noted above, public health is devolved in Scotland, Wales and Northern Ireland. The devolved administrations have adopted public

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55 Council of Europe, Guide to Article 8 of the European Convention on Human Rights, 31 August 2020, paras. 108-111.

56 *Solomakhin v Ukraine*, no. 24429/03, ECHR 2012

57 Equality and Human Rights Commission, Employment Statutory Code of Practice, 4 September 2015, paras. 16.17-16.18

health guidance which differs in places from the guidance in England. They also each have their own lockdown legislation. In some places the legislation is similar to the legislation in England, in other places it is different. For example, in Wales there is a legal obligation to self-isolate while in Scotland and Northern Ireland there is only guidance.

The Scottish, Welsh and Northern Ireland governments have each published their own set of guidance on working safely during COVID-19. Scotland and Wales have legislated to require businesses to take all reasonably steps to maintain 2m social distancing on their premises.[58]

Ultimately, employers must undertake their own risk assessments and take account of any relevant guidance. For employers in Scotland and Wales, the UK Government's working safely guidance may be relevant to the extent that it provides examples of the sorts of measures that can be taken to comply with health and safety legislation. Equally, employers will need to take account of devolved governments' laws and guidance as it will be based on their assessment of the public health situation in that part of the UK.

[58] Para. 3 of Schedule 1, *Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344)*; Regs. 21-24, *Health Protection (Coronavirus Restrictions) (No. 4) (Wales) Regulations 2020 (WSI 2020/1219)*

3. Refusing to attend work

3.1 Refusing to attend work for health and safety reasons

The number of people working from home has changed throughout the course of the COVID-19 pandemic. The Office of National Statistics' Opinions and Lifestyle Survey from 10 to 13 December shows that 37% of people worked from home because of COVID-19. This is up from 27% between 26 August and 30 August but still down from 44% between 17 and 27 April.

There are a number of reasons why a person may not wish to go to the workplace. In particular, those who are vulnerable to COVID-19, or who live with a vulnerable person, may fear for their health and safety.

Duty to obey lawful and reasonable instructions

It is an implied term in every employment contract that the employee will obey lawful and reasonable instructions given by their employer.

However, employees have certain protections when they refuse to attend the workplace because of a reasonable fear of serious and imminent danger (discussed below). Schona Jolly QC, a barrister at Cloisters chambers, has highlighted that there could be difficult situations where an employer's instruction to attend the workplace is lawful and reasonable but the employee may have grounds to refuse:

> So, in essence, we may find ourselves extraordinarily in the situation where the employer's instruction is likely to be reasonable, and the employee's refusal to attend the place of work fearing serious and imminent danger may also be reasonable. In employment law terms, that leaves both decent employers and fearful employees with difficult questions about what steps they take in such circumstances. If an impasse is reached, both sides need a solution.[59]

Employers may need to find solutions on an ad hoc basis, such as putting workers on furlough and claiming under the CJRS.

Protections from detriments and dismissal

Sections 44 and 100 of the *Employment Rights Act 1996* protect employees from detriments or dismissal if they leave or refuse to attend the workplace for health and safety reasons. Detriment usually includes loss of pay, although some employment lawyers disagree in this context.

The protections under sections 44 and 100 apply if:

- The employee left or refused to attend the workplace because they reasonably believed there was a serious and imminent danger that they could not reasonably avoid; or
- The employee took appropriate steps to protect themselves or others because they reasonably believed there was such danger.

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[59] Schona Jolly QC, COVID-19: Critical workers refusing work – What if everyone is being reasonable?, Cloisters, 26 March 2020

Who is protected?

The protections in section 44 and 100 apply to 'employees' as defined in the 1996 Act. This definition excludes 'limb (b)' workers, including many agency workers, zero-hours workers and gig economy workers.

On 13 November 2020, the High Court issued a judgment which held that by restricting the protection from health and safety detriments (section 44) to employees, the UK had failed to properly implement Article 8 of the EU Framework Directive, which covers 'workers'.[60]

On 1 March 2021, the Government laid the *Draft Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021* before Parliament. The Order will amend the 1996 Act to extend the protection from health and safety detriments to 'workers'. If approved, the Order will come into force on 31 May 2021. It will not apply to detriments suffered by a worker before that date or a series of detriments that ended before that date.

The protection from dismissal only applies to employees. Employees do not need to have worked for their employer for any specified period of time in order to be protected from health and safety dismissal.

Scope of the protection

The protections apply if an employee has a reasonable belief that there is a serious and imminent danger that they cannot reasonably avoid.

Gus Baker, a barrister at Outer Temple Chambers, has written a detailed paper on health and safety dismissals. There are a number of key points.

First, courts and tribunals have interpreted the term 'danger' broadly. It is clear that the danger can arise from another employee, which could be relevant if an employee believes that a colleague is symptomatic.[61]

Second, the key question is whether an employee's belief was reasonably. This will need to be assessed on a case-by-case basis. The fact that an employer disagrees with an employee's assessment does not matter.[62] Steps taken by an employer to ensure that the workplace is safe will be relevant but they will not necessarily be decisive. As noted above, even if an employer's instruction to attend work was reasonable, an employee may still be able to show that they had a reasonable belief that there was a serious and imminent danger. Ultimately, it is for the employee to prove, on the facts, that their belief was reasonable.[63]

Third, employees can take steps to protect 'others' from serious and imminent danger. This is not confined to other workers.[64] Stuart Brittenden, a barrister at Old Square Chambers, has suggested that this could extend to steps taken to protecting family members.[65]

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60 *R (Independent Workers Union of Great Britain) v Secretary of State for Work and Pensions* [2020] EWHC 3039 (QB) (Admin)
61 *Harvest Press Ltd v McCaffrey* [1999] IRLR 778
62 *Oudahar v Esporta Group Ltd* [2011] IRLR 730
63 *Akintola v Capita Symonds Ltd* [2010] EWCA Civ. 405
64 *Masiak v City Restaurants* [1999] IRLR 780
65 Stuart Brittenden, The Coronavirus: Rights to Leave the Workplace and Strikes, UK Labour Law Blog, 27 March 2020

Health and safety during the commute

The Department for Transport has published guidance on safe travelling which says workers should only use public transport if truly necessary.

It is unclear whether an employee's protection from detriment covers dangers arising from a commute or whether it is limited to dangers in the workplace. Lewis Silkin LLP, the law firm, highlight that the case law is not settled and that employers would be best advised to assess the circumstances of each employee individually and provide support for alternative means of travel if possible.[66]

Application to specific categories of workers

What constitutes a serious and imminent danger will differ from one employee to another. For example, employees who are clinically vulnerable or who have family who are clinically vulnerable may be in a different position from employees who are less at risk from COVID-19.

3.2 Discrimination law

As noted above, when undertaking risk assessments and implementing safe systems of work employers must take account of their obligations under equality legislation. On 2 June 2020, Public Health England published a report on the disparities of risk in the context of COVID-19, finding increased risk on the basis of age, ethnicity and existing health conditions, among other things.

The *Equality Act 2010* prohibits discrimination on the basis of a protected characteristic. If an employee is vulnerable to COVID-19 because of a protected characteristic, they may be able to bring a claim for discrimination if they suffer a detriment for refusing to go to work.[67]

The Equality and Human Rights Commission has published guidance for employers in the context of COVID-19. It gives an example of how blanket return to work policies might constitute indirect discrimination:

> Requiring all employees to continue to work in front line, key worker roles. This would have a greater impact on those who need to self-isolate or follow the social distancing guidance more strictly, such as disabled, older or pregnant employees. If you cannot objectively justify this approach, it is likely to be unlawful indirect discrimination against those employees.

The term 'employee' has a broad meaning under the 2010 Act and includes those who are 'limb (b)' workers.[68]

Barristers at Cloisters chambers have highlighted the specific protections that are available for disabled employees. This includes the protection from discrimination arising from a disability (e.g. discrimination because they are shielding) and the duty to make reasonable adjustments.[69]

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66 Shalina Crossly and Lucy Lewis, Does an employer's duty of care extend to commuting to work?, Lewis Silkin LLP, 21 May 2020 (accessed 4 August 2020)
67 Section 39, *Equality Act 2010*
68 Section 83, *Equality Act 2010*
69 Cloisters – Employment, Ninth edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 9 October 2020, Qs. 2.14 and 2.15

3.3 Employees with caring responsibilities

A particular area of concern has been employees who are unable to go to work because they have caring responsibilities.

School closures and caring for children

From 4 January 2021 primary schools, secondary schools and colleges in England moved to remote learning. This meant many parents had increased childcare responsibilities. While schools re-opened for all pupils on 8 March 2021, parents may still need time off to care for a child who is required to self-isolate either because they tested positive or someone in their school bubble tested positive.

An overview of school re-openings can be found in the Library Briefing, Coronavirus and schools: FAQs (CBP-8915).

Employees do not have a general statutory right to refuse to attend work because they have childcare responsibilities. Employees do have a right to a reasonable amount of time off for dependants and a right to four weeks of parental leave per child but both of these are unpaid.

Parents who need to time off to care for a child could be furloughed under the Coronavirus Job Retention Scheme (CJRS) if they are eligible. HMRC guidance on eligibility for the CJRS specifically says that people with caring responsibilities can be furloughed. However, this is at the discretion of their employer.

Following the announcement of school closures, the TUC called on employers to furlough parents who are unable to undertake work due to childcare responsibilities. The Shadow Chancellor called on the Government to promote the fact that parents can be furloughed and to adjust the rules of the scheme so that employees of bodies that receive public funding can be furloughed. HMRC guidance currently says bodies that receive public funding should not normally use the CJRS.[70]

If parents are not furloughed, it would be open to them to request to take paid annual leave. Workers have a statutory right to 5.6 weeks of paid annual leave. However, employers can refuse such requests by giving sufficient notice.

Acas guidance on COVID-19 and caring responsibility says employers should consider options that can provide support to parents.

Employers will also need to take note of the fact that caring responsibilities disproportionately fall on women and ensure that their policies are not indirectly discriminating against female employees.[71]

Caring for people who are vulnerable to COVID-19

A person may have concerns about going to work because they care for a person who is vulnerable to COVID-19.

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70 See FAQs: Coronavirus Job Retention Scheme, Commons Library Briefing Paper CBP-8880, 17 December 2020, Q5

71 Rachel Crasnow QC, COVID-19: Pay for working parents forced to look after their children, Cloisters, 27 March 2020

As noted above, the protection from health and safety detriments does cover employees who take steps to protect 'others' from serious and imminent danger. Barristers at Cloisters chambers have suggested that this might provide protection to a person who refuses to go to work because they live with a vulnerable or extremely vulnerable person.[72]

However, in this context it should be noted that the Government's guidance on shielding says that those who live with an extremely vulnerable person can continue to go to work if they are unable to work from home. The Government has produced guidance on how to safely care for a friend or family member who is vulnerable to COVID-19.

Ultimately these issues will turn on the facts of an individual case.

[72] Cloisters – Employment, Ninth edition released of Cloisters Toolkit: Returning to work in the time of Coronavirus, Cloisters, 9 October 2020, Q. 2.26

4. Whistleblowing

In light of the COVID-19 pandemic, a number of workers have raised concerns about their workplace. For example, on 6 May 2020 the Guardian reported that 170 care workers had called a whistleblowing hotline to raise concerns about health and safety issues.[73]

Protected disclosures

The law on whistleblowing is found in the *Employment Rights Act 1996*. Under the 1996 Act, workers who make "protected disclosures" are protected from suffering any detriment or being dismissed.[74] This is also supplemented by the right to freedom of expression.[75]

The rules on protected disclosures apply to both employees and 'limb (b)' workers, including agency and zero-hours workers. However, with some exception for the NHS, it does not cover to job applicants.

There are two broad requirements that a disclosure must satisfy in order for it to be protected.[76]

First, it must be a 'qualifying disclosure'. This means that the worker must have a reasonable belief that the disclosure shows one of the things listed in the legislation, such as the breach of a legal obligation. The worker must also believe that disclosure is in the public interest.

Second, if a disclosure is a 'qualifying disclosure' it must be made to one of the groups of people listed in the legislation.

Qualifying disclosures

A disclosure can be a 'qualifying disclosure' if it tends to show, among other things, a breach of a legal obligation or that an individual's health and safety is being endangered.

Schona Jolly QC and Dee Masters, barristers at Cloisters chambers, highlight that the test is whether a worker had a reasonable belief that the disclosure showed that one of these things was happening:

> Importantly, it is not necessary for a whistleblower to show that a legal obligation has been breached; they must only show that they reasonably believed this to be the case. This is important because ordinary people at the front-line will not necessarily know, and should not be expected to know, the intricacies of complex health and safety law and other legal obligations.[77]

The term 'public interest' is interpreted broadly and the test can be satisfied even if the disclosure is partially motivated by self-interest.[78]

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73 "170 care workers call UK whistleblower helpline during COVID-19 crisis" *Guardian* [online], 6 May 2020

74 Sections 47B and 103A, *Employment Rights Act 1996*

75 See George Letsas and Virginia Mantouvalou, Is Gagging NHS Workers Lawful? Coronavirus and Freedom of Speech, UK Labour Law Blog, 14 April 2020

76 Part 4A, *Employment Rights Act 1996*

77 Schona Jolly QC and Dee Masters, How effective is whistleblowing protection for workers at the centre of the COVID-19 pandemic?, UK Labour Law Blog, 4 May 2020

78 *Chesterton Global Limited (t/a Chestertons) v Nurmohamed (Public Concern at Work intervening)* [2017] EWCA Civ. 979

Method of disclosure

If a disclosure is a qualifying disclosure, it must be disclosed in a certain way in order to be protected.

The legislation lists a number of different groups of people to whom workers can make disclosures. This includes their employer, a legal adviser and a prescribed person. A full list of prescribed persons can be found on the GOV.UK website. In the context of health and safety prescribed persons include the HSE, local authorities and MPs.

The HSE has an online portal though which workers can make protected disclosures, including disclosures related to COVID-19.

There are only certain circumstances in which a worker can make a disclosure to a person that is not specifically listed in the legislation, such as a journalist. This includes where they believe they will suffer a detriment if they make the disclosure to their employer or where there is no prescribed person and they believe that evidence would be destroyed if they made the disclosure to their employer.[79]

In addition, there are a number of onerous tests that must be satisfied:

- The worker must believe that the information disclosed is substantially true;
- The worker does not make the disclosure for personal gain; and
- It was reasonable in the circumstances for the worker to make the disclosure.

Protect, the whistleblowing organisation, has issued specific guidance on making Covid-related disclosures on social media, noting that the rules are "stringent" and "not straight forward".

The Employment Lawyers Association's COVID-19 Working Party has said that the law on protected disclosures is "broadly sufficient" but that the Government should take steps to increase awareness among workers and to provide clear paths for raising concerns about health and safety.[80]

Further information on protected disclosures can be found in Section 29 of the Library Briefing, Key Employment Rights (CBP-7245).

79 Section 43G and 43H, *Employment Rights Act 1996*

80 ELA COVID-19 Working Party, Issues in respect of which guidance is required to assist employers and employees/workers coming out of lockdown, relating to health and safety concerns and data privacy, ELA, 1 May 2020

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