

Coronavirus guidance: UK health and safety and employer liability claims

March 2020

The current coronavirus pandemic (named 'COVID-19' by the World Health Organisation) has become an issue of unprecedented concern for employers and as it continues to evolve, the impact to businesses will be significant and employers will need to respond robustly to protect their employees and minimise their exposure to further commercial risks.

As such, we offer some guidance in relation to health and safety considerations and the defence of claims. We also highlight likely employers liability claims that may stem from the coronavirus and some specific industry issues in relation to the construction, food and retail sectors.

Health and safety

The consequences of a virus to which there is a lack of immunity are that:

- More humans are infected over a large geographical area than an ordinary flu
- It will spread rapidly and efficiently from person to person
- Cause clinical illness in a high proportion of those infected.

The Health & Safety Executive (HSE), which regulates workplaces has emphasised that the pandemic is primarily a public health matter with the government invoking emergency powers to impose specific legal requirements on employers.



Health and safety duties in the workplace

Section 2 of the Health and Safety at Work Act 1974 (HSWA) imposes a duty on every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees and others affected. The duty is not absolute - the requirement is to take measures which are reasonably practicable to reduce risk.

The law requires an employer to undertake a risk assessment to assess the risks created by the operation of its business. A risk assessment is a careful examination of what would cause harm to people allowing an employer to weigh up whether they have taken enough precautions or should do more to prevent harm.

In particular Regulation 3 of the Management of Health & Safety at Work Regulations 1999 (MHSWR) requires every employer to make a suitable and sufficient assessment of:

- a) The risks to the health and safety of his employees to which they are exposed whilst they are at work; and
- b) The risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking for the purposes of identifying the measures he needs to take to comply with his duties under the HSWA.

A similar duty is imposed on a self-employed person. Regulation 3(3) MHSWR requires assessments to be reviewed if there has been a significant change in the matters to which it relates and with an event as unusual and unpredictable as coronavirus there would be an ongoing legal duty on the employer to assess risk.

Regulation 6 MHSWR requires every employer to ensure their employees are provided with such health surveillance that is appropriate, having regard to the risks to their health and safety which are identified by the assessment. In the event of a pandemic outbreak this duty would necessitate, for example, the keeping of records of those employees who have contracted the virus, to monitor the time they have been away from work and any other particular features.

There is also general guidance from the HSE on what should be involved in a risk assessment.

This includes:

- Step 1 - Look for the hazards
- Step 2 - Decide who might be harmed and how
- Step 3 - Evaluate the risks and decide whether the existing precautions are adequate or whether more should be done
- Step 4 - Record your findings
- Step 5 - Review your assessment and revise it if necessary

Any employer with five or more employees is required to record the significant findings of an assessment. In the same way that the duty under Section 2 HSWA is not absolute, the duty in relation to risk assessment is to provide a suitable and sufficient and not necessarily a perfect risk assessment.

Whilst in the main it should be possible to produce a generic risk assessment, it will be necessary to develop specific plans for certain classes of employees and vulnerable employees. For example, a specific risk assessment may be required for employees with underlying health conditions for whom the consequences of contracting coronavirus may be more severe. Also, pregnant workers are particular categories of employee to be borne in mind in any temporary reorganisation of this sort and should not be substituted into inappropriate work.

Policy

It would be prudent to put in place a policy to help to protect staff in the event of an wider outbreak. The policy should include evidence of risk assessment to demonstrate the company's plans in the event of an outbreak and avoid suggestions an organisation has not done everything reasonably practicable.

As a pandemic has now been declared, it is also prudent to have a policy to monitor the numbers of staff affected by the pandemic on a day-to-day basis in order to identify the trigger levels for any new contingency plans.

Related items:

- [Coronavirus: employment and health & safety considerations](#)
- [Update - coronavirus: employment considerations](#)

Defence

The spread of COVID-19 has required employers, cognisant of their duty of care, to respond quickly to a rapidly changing risk environment. What might have been considered sufficient steps in the early days (provision of hand sanitisers; training in relation to virus transmission) moved rapidly, particularly once it was clear that containment had failed, to rigorous social distancing, the identification and isolation of vulnerable individuals and, more recently, to strictly enforced social isolation, a requirement to work at home if at all possible and the enforced closure of “non-essential” shops and public venues.

This has placed a considerable burden on employers attempting to balance the need to protect the health of employees (and those their employees come into contact with), with the need to ensure the business continues to function. It has also placed additional strain on employees, getting used to working differently, potentially taking on more work to cover for absent colleagues and, potentially, undertaking work they are less familiar with.

An employer which is able to prove it has kept abreast of government advice and, more importantly, can prove it has interpreted and applied that general advice carefully, having regard to the particular characteristics of its business and workforce, should be well-placed to defend claims brought against it. Furthermore, proving causation of infection is likely to be extremely difficult.

The duty

Employers have a legal duty to take reasonable care for the health and safety of their employees. If that duty is breached, they can be found liable to compensate employees for injury and losses which they prove were caused, or materially contributed to, by that failure.

It should also be recognised that employees are under a duty to take reasonable care for their own health and safety and that of those they work with, which includes following instructions given which are designed to protect them and others. The risk of infection and Government advice is widely understood. Wilful disregard for an employer’s instructions may provide a defence or, at least, the basis for a finding of contributory negligence.

Risk assessment

Employers have a duty to undertake a suitable and sufficient risk assessment to identify risks to the health and safety of their employees to which they are exposed whilst at work, and the risks to the health and safety of persons not in their employment arising out of, or in connection with, the conduct by them of their undertaking.

Key considerations will include:

- Adequate health surveillance, including identification of vulnerable individuals
- Provision of suitable PPE
- Assessment and management of workloads in the anticipation of reductions in available staff through sickness/self-isolation
- Health and safety of home workers
- Risks associated with individuals covering for missing colleagues.

A reasonable employer will, consistent with its duty to take reasonable care for the safety of its employees, ensure it closely monitors advice from the government, industry bodies and relevant experts, using such advice to inform the risk assessment and necessary steps to keep employees safe.

Causation

To establish liability, an employee must not only prove breach of duty, but also that the breach made a material contribution to the injury sustained. It is likely to be extremely difficult for an infected individual to prove that their condition was caused by a workplace breach, given the many other potential sources of infection, on the balance of probabilities.

Claims which relate to the impact of COVID-19 on staff numbers and the increased pressure on remaining workers do not face the same causational difficulty, however. This note considers various potential forms of claim, below.

Risk mitigation

When considering whether an employer has taken reasonable care for the safety of its employees, which steps are “reasonable” will be assessed, ultimately, against a range of factors, such as:

- The nature of the hazard
- The nature of the work activity
- The particular characteristics of the employees undertaking the work

- The cost and practicality of any given step
- What the employer knew, or ought to have known, about the risks associated with the work activity and the options available to mitigate that risk.

Furthermore, if faced with a developing situation, as we are in relation to the coronavirus, the reasonable employer will ensure that the initial risk assessment is reviewed as and when material changes occur, such as (and perhaps above all in the current crisis) when governmental advice alters.

Loss of workers

A reducing workforce will unquestionably place increased pressure on those remaining at work and to ensure they continue to comply with their duty of care, employers will need to ask themselves, and keep asking themselves:

- Are we able to deliver the same level of service, or do we need to cut back on what we do?
- Can those who remain undertake the duties we require of them safely, having regard to both their physical and mental well-being?
- What more do we need to do to support them and reduce the risk of injury?
- Can we do things differently, for example, is there an IT “solution” to ease the burden on those who remain?
- Do we need to accept that continuing to trade is impossible without putting our workforce at risk of injury?

Related item: [Coronavirus: consequences for serious injury claims](#)

Potential claims

1. Infection

Employers must ensure that they approach this risk as they would any other risk to the health and wellbeing of employees, taking sensible steps to discharge their duty of care and to document their assessment and adopted policies. Being able to demonstrate you considered the risks carefully and took sensible steps to mitigate those risks will be crucial evidence in defence of any subsequent claim. If someone becomes infected at work in the absence of evidence of such steps having been taken, the employer is vulnerable to being found in breach of duty and liable for losses arising.

Planning should start with the current government advice, having regard to the need to identify vulnerable individuals, ensure the infected feel able to report symptoms and self-isolate, the instigation of sensible home working policies where possible, introducing appropriate social distancing measures, ensuring that appropriate facilities are available to wash/disinfect hands and that suitably robust and regular cleaning of premises is undertaken.

Early identification of the infected, and those in close contact with them, is essential.

Damages would include awards for pain suffering and loss of amenity for the symptoms suffered, which could vary from the trivial to the fatal, plus compensation for a range potential heads of past and future loss, in particular loss of earnings, care and domestic assistance.

As stated above, proving causation is likely to be extremely difficult.

2. Overwork leading to psychological injury

Employers cannot ignore the potential impact this may have, in terms of increased stress and the possibility of psychological injury arising. Sensible planning, workforce review, work distribution and clear leadership will mitigate this risk. Evidence that such planning has been undertaken, as part of the employer’s ongoing risk assessment, will be important.

The burden of proof on an employer in a stress claim has historically been very high, the employer needs to be on notice of foreseeable risk of harm to any individual employee due to stress. The warning signs of impending harm to health arising from stress must be plain enough for any reasonable employer to realise that they should do something about it. Even then the employer may only find themselves in breach of duty if they have failed to take reasonable steps to prevent that harm occurring. Monitoring workloads and capacity will be important to ensure that work is disseminated as evenly as possible to ensure that some individuals do not bear the lion’s share of work.

To reduce the risk, employees should be reminded of any Employee Assistance programs in place designed to help them, to ensure that positive staff contact continues, and where some staff may be finding times challenging, that solutions are explored with them to ease their pressures, whether it be to allow more flexible working or to delegate work among more staff if possible.

There is also the separate risk of harassment claims. The tone of any correspondence can be misinterpreted when there is no face-to-face contact, and it is therefore all the more important to ensure that any communications and instructions remain clear, positive and are not later construed in a way that may be retrospectively misinterpreted. Keeping positive is key.

3. Overwork/re-distributed work leading to physical injury

A reduction in staff and re-allocation of work to others risks physical injury to those who may become overworked. Whilst employees may be able to take more on, again this must be monitored carefully so as not to place their health at risk.

Care must also be taken in relation to individuals covering for others and potentially using equipment/machinery they are not trained to use or lack experience in operating. An injury sustained by an employee operating a machine they had not been trained to use for example, when covering for an absent colleague, would be difficult to defend.

An employer must ensure that employees are properly trained. In particular, employees required to use work equipment must be trained to do so safely. Many employers liability claims relate to the failure to properly train and many such claims are settled because the training given was inadequate or, often, inadequately documented.

When a workforce becomes stretched, there is a clear risk that individuals will begin to operate equipment they are unfamiliar with, are inadequately trained to operate, or under poor supervision.

Employers need to consider this hazard carefully when managing reducing human resources.

If it cannot be done safely, it should not be done.

All employers will want to encourage employees to go the extra mile at difficult times and “muck in” to keep the wheels turning. There is nothing wrong with that in itself, but it is critical that the health and safety of staff be continuously reviewed and decisions to redeploy staff be documented and justified.

So:

- Review your resources regularly
- Consider and document redeployment decisions
- Ensure employees are able to undertake the new or additional tasks safely

- Ensure those who require training before using unfamiliar equipment or undertaking unfamiliar tasks, are provided with that training (and document it!)
- Be prepared to recognise that, if it can't be done safely, it should not be done and consider other adjustments that may be required, up to and including ceasing to do that work.

4. Working from home (WFH) risks

Home workers are entitled to the same level of care as those on the employer's premises. Ensure home workers are properly equipped to fulfil the tasks expected of them, recognising the potential difficulties that will be faced by those who would not be WFH but for COVID-19.

Agile working has a number of potential pitfalls that need to be considered by employers. It remains primarily the employer's duty to risk assess the potential hazards. However, providing training to staff can empower employees to undertake their own desk assessments and identify their own risks within their surroundings. This solution puts the onus on the employee to alert their employer if they believe that further steps need to be taken to make their new workplace safer.

Employers need to ensure that staff working at new workstations have new desk assessments completed to ensure that staff are made aware of the importance of working at a proper workstation, to avoid long term physical injuries such as upper limb conditions and/or back complaints (e.g. being hunched over their computers for long periods of time).

The reasonable employer will consider albeit remotely issues such as:

- Workstation/risk of musculoskeletal disorder and appropriate advice and support in those circumstances
- Increased stress on employees attempting to WFH in sub-optimal circumstances
- Appropriate equipment required by those WFH
- Undertake new desk assessments
- Consider whether the work equipment used by staff is adequate and/or whether further PPE may be necessary.

5. Vicarious liability

Employers are vicariously liable for the negligence of their employees.

As is well-recognised, the courts will consider a range of factors when determining whether an individual is an employee for these purposes. Furthermore, the courts will impose vicarious liability where they conclude that the relationship between employer and worker is sufficiently “akin to employment” to make it right to do so, and the negligent act arose from the sphere of activities undertaken by that worker.

Against that background, it is possible to envisage claims arising from, for example:

- Those infected as a consequence of the decision of an infected employee to continue interacting with customers, contrary to government and employer advice to self-isolate in such circumstances
- Claims relating to negligent actions arising from employee fatigue
- Claims relating to employees negligently, and contrary to employer instruction, operating vehicles/equipment they are not training to operate due to colleague absence.

Related item: [Coronavirus and increased homeworking for office jobs: the risks](#)

Industries

We have listed below the sort of wider consideration that is needed from industry to industry.

Construction

There was and still remains some confusion about how the government’s advice applies to the construction sector. Following the Prime Minister’s ‘lockdown’ announcement, the UK’s Housing Minister said that if you are working on site you can continue to do so as long as Public Health England guidance on social distancing is followed.

To assist the construction sector to navigate these exceptional circumstances, the Construction Leadership Council published Site Operating Procedures to help sites to implement the government’s social distancing recommendations. As such, construction companies will need to conduct a documented and recorded risk assessment of each project on an individual basis to determine whether or not they can implement effective social distancing measures and remain open.

The need for compliance with safety regulation will continue as normal and businesses will need to look at how they can ensure as far as practicable the health, safety and wellbeing of their employees and others in this fast changing environment.

The Health and Safety (First Aid) Regulations 1981 require all construction sites to have a first aid box on site, and an appointed and trained person to take charge of first aid arrangements. This obligation continues notwithstanding these times of social distancing. Because of social distancing, companies may wish to contemplate the possibility that a first aider might refuse to provide first aid in the normal way because of the risk of contracting coronavirus. This could result in the injured person remaining unsupported. Equally, liability could attach if a first-aider was to contract COVID-19 whilst giving first aid.

We would expect that most first aiders in the current climate may consider that checking somebody’s airway, or the provision of mouth to mouth resuscitation, is too a high risk to take, and on that basis they may refuse to do it. The Resuscitation Council UK (RCUK) is in fact advising against mouth to mouth during the COVID-19 pandemic.

There are additional risks associated with somebody deciding to give other forms of first aid and catching the virus themselves. NHS tests have shown, for example, that cardiac massage creates infectious aerosols that the first aider would be at risk of inhaling. The RCUK guidelines on basic resuscitation suggest that there should be no CPR without full Personal Protective Equipment (PPE), so no cardiac massage without full protection which means full face-fit mask (FFP3), gowns, gloves and eye protection. PPE may therefore be the key.

In general terms, construction companies should proceed on a risk based approach and, if the risk of limited first aid exists, control measures should be put in place. For example, businesses should, amongst other things, give consideration to:

- Providing NHS style PPE (full face-fitted masks, eye protection, and medical gloves) to first aiders on site.
- Reducing the volume and type of work being conducted during this time (perhaps low risk operations only will continue).
- Checking that first aiders are comfortable to continue to act as first aiders in the current climate.
- Making sure first aid equipment such as defibrillators etc. are available on site.

Those and other measures may reduce the risk rating to an acceptable level on some projects and allow work to continue (perhaps at reduced volume). However, there may well be some projects where the risk of a first aider refusing to assist is too great, and a decision may need to be taken to suspend those projects accordingly.

Related items:

- [COVID-19 - if sites close, what next?](#)
- [COVID-19: UK construction - will now be the time for collaboration?](#)

Fast food

The food and leisure industry has been hit hard by the effects of the current lock down not least due to the need to stop social gatherings and the inability to ensure a two metre distance, which has ultimately lead to the closure of cafes/bars, restaurants and other food outlets. For those outlets which have been able to remain open for takeaway and delivery services only, a keen eye must be kept on food handling standards and a heightened need for high hygiene standards due to the clear risk of transmission. Establishments will need to revisit their methods of working to avoid contamination, revisit risk assessments and use of PPE to ensure they can safely deliver this service .

For client facing staff, staff will need to have clear and specific training on adhering to the two metre rule and general proximity to the public, and thought must be given as to whether excessive exposure to the risk of infection is a factor for their employees. Shorter rotas, putting in place appropriate handwashing facilities and vehicle cleanliness are all factors to consider.

Businesses operating in the food industry not only need to protect their staff but must also be mindful of the long term reputational damage that any poor standards will bring.

Related item: [COVID-19 - impact on businesses in the UK](#)

Retail

We have all seen in the news some of the social distancing measures that have been put in place by supermarkets. For those retail outlets that sell essential goods and food, the traffic management of people both staff and the public is crucial.

A few of the basic considerations:

- Mapping/segregation of queues
- Controlling the number of people entering the premises
- Limiting the number of staff on the shop floor/at checkouts
- Implementing a vigorous cleaning regime
- Risks associated with the handling of money
- Encouraging contactless payments
- Marshalling of shoppers when suppliers are low and customer tempers rise.

Related items:

- [The social aspect of business: how businesses can adapt and flourish in the face of adversity](#)
- [Businesses feeling the relief from business rates freeze](#)
- [The UK Coronavirus Business Interruption Loan Scheme - assistance for SMEs](#)

Further information

To find out more about our services and expertise, and key contacts, go to:
[kennedyslaw.com/coronavirus](https://www.kennedyslaw.com/coronavirus)

Key contacts



Danny McShee
Partner, London
t +44 20 7667 9206
e danny.mcshee@kennedyslaw.com



Joy Middleton
Partner, Chelmsford
t +44 1245 299 835
e joy.middleton@kennedyslaw.com



Greg Woods
Partner, Sheffield
t +44 114 253 2078
e greg.woods@kennedyslaw.com



David Bywater
Senior Associate, Chelmsford
t +44 1245 299 774
e david.bywater@kennedyslaw.com



Clare Johnston
Corporate Affairs Advisor, London
t +44 20 7667 9893
e clare.johnston@kennedyslaw.com

The information contained in this publication is for general information purposes only and does not claim to provide a definitive statement of the law. It is not intended to constitute legal or other professional advice, and does not establish a solicitor-client relationship. It should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. Kennedys does not accept responsibility for any errors, omissions or misleading statements within this publication.