

Coronavirus FAQs for UK employers: returning to a safe working environment

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Few would argue against it being easier to place an economy in lockdown during a pandemic than to enable it to emerge from lockdown safely. It is clear to most people that any changes will need to be gradual.

The UK Government's announcements on 10 May about the gradual easing of lockdown have been accompanied by sector [guidance](#) published on 11 May. Each set of guidance notes addresses a number of issues that employers will need to confront as they contemplate restoring their businesses to normal functioning.

In addition, on 12 May 2020 the UK Chancellor, Rishi Sunak, announced that the Coronavirus Job Retention Scheme (' CJRS') would be extended until 31 October 2020 – a clear recognition that normality in the workplace will not return overnight and businesses will continue to need support with their staffing costs for some time to come. The CJRS will remain in its current form until the end of July 2020 and is then likely to be moderated to introduce more flexibility for employers and employees. Sharing the furlough costs with employers and permitting part time work have both been mentioned, but the details are awaited. In the meantime, many of the questions raised by the CJRS remain relevant and you can read our answers [here](#).

In the meantime the return to work raises a new set of questions that you, as an employer, will need to consider as your business moves into the future. We have set out below answers to some of the key questions our clients are grappling with, which we hope will help you begin to tackle the complexities of emerging from lockdown.

Frequently asked questions

- What are the main employment risks that I face in returning my business to normal functioning?
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- What are the main health and safety concerns?
- What steps do I need to take to make the working environment safe?
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- I feel that by doing the right thing by my employees I am losing out to rivals who are cutting corners. How am I supposed to compete in those circumstances?

What are the main employment risks that I face in returning my business to normal functioning?

Businesses have many risks to evaluate in the current climate. Employment risks themselves fall into two broad overlapping categories: those affecting health and safety and those affecting employment rights. The risks arising from employment rights may not always seem to be the most immediate concern, particularly where the survival of the business might be in question. However there is clearly considerable scope in the current situation for claims and liabilities to arise if the wrong decisions are made.

You may also be depending on the goodwill of your staff to support you through what are likely to be difficult economic circumstances for some time to come. A recognition of relevant employment rights is also important in that context.

What employment rights could be breached if I make the wrong call about getting people back to the workplace?

As well as potential claims of negligence or breach of statutory duty (see below), you could face claims of constructive unfair dismissal if you try to force employees to work in unsafe environments.

You could also face discrimination claims – from lone parents (who are more likely to be female) not able to return immediately because they are looking after young children or from employees who statistically appear to be more vulnerable to the virus (men, BAME employees and those with underlying health conditions, many of which will amount to disabilities under the Equality Act).

More senior employees might claim that there have been breaches of their contracts that have the effect of negating their restrictive covenants.

Finally, employees who are penalised or dismissed for failing to co-operate with a requirement to return to the workplace could have claims of detriment or automatically unfair dismissal for reasons related to health and safety or whistleblowing depending on the specific circumstances.

What are the main health and safety concerns?

Employers have a common law duty of care to their staff and various duties under health and safety legislation. These can be summarised as a need to assess the risks arising at the workplace, to create a safe system of work and to make sure that safe system is implemented. None of this has been displaced by the pandemic itself or by the measures the Government has put in place to deal with it.

The duty of care and the duty to implement a safe system of work should be your starting point. This is largely implicit in the Government's new [guidance](#) and its requirement that employers undertake risk assessments that are specific to the Covid-19 pandemic. Employers with over 50 employees will be expected to publish their risk assessments.

What steps do I need to take to make the working environment safe?

The duty of care affects every aspect of the working relationship, particularly the working environment and the way in which people work together. Every work situation is unique and it is up to you, as an employer, to assess the specific risks in your own workplace, given, for example, the nature of the work to be done there and the degree to which staff need to work in close proximity to each other. In the current situation, in order for a safe system of work to be operating, a higher priority will need to be given to cleaning, handwashing, providing hand sanitisers, distancing and using common areas such as lifts and stairways hygienically.

The sector [guidance](#) gives more details about the measures that might be appropriate in different workplaces. The Health and Safety Executive (HSE) has also issued guidance, which can be [found here](#).

If you have adopted homeworking during the pandemic and are intending this to continue, you should be aware that you also need to satisfy yourself that your employees are adopting safe working practices at home. This will include the physical location and set up of the place where the employee works and employees' working patterns and working hours. Whilst it may not be practicable for you to actively monitor this, particularly during the pandemic itself, you must make sure that you issue guidelines to staff on working at home safely and assessing the safety of their own working environments.

Do I have to worry about my employees' health?

In short, yes. A pandemic is a health emergency and employees' health concerns, which are always a challenge for employers, are, for the moment, more important than ever.

Two groups of people in the population have been identified as needing to shield themselves from infection because they are particularly vulnerable:

- Clinically extremely vulnerable people have been strongly advised not to work outside the home. Guidance on who is in this group can be [found here](#).
- Clinically vulnerable people include those aged 70 or over and those with some underlying health conditions. These people have been asked to take extra care in observing social distancing and should be helped to work from home, either in their current role or in an alternative role. If they cannot work from home, they should be offered the option of the safest available on-site roles, enabling them to stay 2 metres away from others. If they have to spend time within 2 metres of others, you should carefully assess whether this involves an acceptable level of risk – in some cases there may be no safe option and other options such as furlough may have to be considered instead. Members of this group are listed in the 'clinically vulnerable' section [here](#).

However, this is not an exhaustive list of employees who might need employers to take particular measures to protect them. It seems clear that some sections of the population are statistically more at risk than others (men, BAME communities and older employees) and indirect discrimination claims could follow against employers who do not factor these issues into their approach.

Ensuring that your employees have a clear and confidential channel for raising health concerns will be key to making decisions that minimise risk. You should also bear in mind that information about employees' health remains special category data for data protection purposes, and that nothing in the current situation has changed that. There must be a valid reason for seeking and processing employee health data and rigorous safeguards in place to protect its confidentiality.

Do I have to worry about the health of my employees' family members?

The pandemic has caused the concerns of work life and family life to converge in a particular way. Employers are relatively used to dealing with the health concerns of their own employees. Now they are also being affected by the health concerns of the people their employees live with, even if those people are currently well. Employees who live with family members in either of the vulnerable groups described above, particularly those who are extremely vulnerable, may be concerned about the risks of returning to the workplace and may refuse. If they are furloughed, they may ask to remain furloughed.

Communication will be extremely important in managing these situations. You should be slow to make assumptions without finding out from the staff member concerned what their specific situation is and what they are asking for. If the employee's role is one that really cannot be performed from home, you should try to establish a dialogue about what arrangements could be put in place to bring the risk to a manageable level for both sides. Inevitably there will be some employees whose concerns do not seem genuine. Even so, you will need to exercise your judgement so as to get the balance right between issuing reasonable management instructions and acting in a way that breaches the terms of the employment contract.

You should also be as cautious about processing information about the health of your employees' family members as you are about information concerning your employees' own health. Any health information about individuals will constitute special category data for data protection purposes and should be treated as highly confidential.

What are the mechanics of ending furlough and bringing people back to work?

The starting point is the furlough agreement that you entered into with the employee. The agreement might contain a clause setting out how the arrangement will be brought to an end. If not, you should send a written notice to the employee, giving reasonable notice of the date on which they will need to return to work and confirming any changes that will take place on their return.

Some challenging issues may arise if you are reopening your business gradually. Employers will need to act with care when deciding who should return to work in the first wave. These decisions are likely to be complicated by employees' personal circumstances (see below).

If staff have been on reduced pay during furlough and will be increasing their pay on returning to work, or if by returning to work staff will be able to earn bonuses or commission, there may be perceptions of unfairness, or even, in some situations, the danger of discrimination claims if you do not give some thought to the process. You must also take care not to put pressure on staff to return when they may be breaching legal requirements by doing so (see above).

One way of dealing with perceptions of unfairness or favouritism might be to rotate staff on and off furlough in blocks of at least three weeks while the business builds back up to pre-pandemic levels.

You might also want to factor the position on annual leave into your planning. To the extent that staff have not taken annual leave during furlough, the rules on carrying it over have been significantly relaxed and employees may carry over up to four weeks' unused leave for up to two years. You may want to plan for this, to avoid the accumulation of unmanageable backlogs.

What about parents whose children have not yet returned to school?

Employers are also affected by the fact that children in the UK are not currently attending school, meaning that many employees are trying to juggle work with caring for and educating school age children. Until schools are fully reopened, employees' ability to attend their workplaces and, in some cases, to work effectively from home, will be very much affected by this fact.

Many employers will already have had to come to terms with some of the implications of this state of affairs and will realise that asking an employee whose young children cannot currently attend school, to return to work, is impractical and will continue to be so until schools are fully reopened, most likely in a few months' time. In the meantime, furlough is an option for employees who cannot effectively work from home due to childcare responsibilities.

What about employees who say that they simply do not feel safe returning to work at present?

An employee who says this may have a range of reasons for doing so. Communication will again be key and you should try to find out the reasons for the employee's concerns. These could range from previously undisclosed health conditions or family circumstances to straightforward anxiety about contracting the virus, either in the workplace itself or on the journey to and from work. Employees will differ in their response to the crisis and some may have mental health conditions that make them more vulnerable to anxiety.

You should inform yourself and try to discuss a solution, as far as possible reassuring the employee that measures have been taken that will minimise risk at work. You should be slow to take disciplinary action in these circumstances, although there will be cases in which that is warranted.

The HSE have also issued guidance on the need to talk to your employees regarding safety issues, which you can find [here](#).

Do I need to concern myself with how employees get to and from work?

The short answer is yes. Although there are no decided cases that establish that employers are liable if the journey an employee has to make to work entails risk, it is certainly possible to envisage an employer being held responsible if an employee is compelled to attend work and can only travel there by means of transport that is potentially a risk to health.

Whilst it would probably be difficult for an employee to prove that they had acquired Covid-19 as a result of having to travel on public transport, there are also some practical issues, including the reduced levels of public transport available, at least in the short term and employees' perception of the risks of using public transport to travel (see previous question). Both issues will require communication and a sensible approach. Staggering start times has already been suggested as a sensible measure to reduce crowding on public transport and you may need to be flexible about working hours.

If employees are afraid of travelling on public transport, you should explore the reason. There could be a clear health related concern on the part of the employee or a member of their household, in which case you could face a variety of claims for failing to take a reasonable approach. Some employees may simply be experiencing high levels of anxiety about the current situation without there being any specific health concern. A problem solving rather than intolerant approach is likely to be more productive, at least initially.

Can't I simply insist on employees returning to work if that is what the Government has said it expects?

Employers will not be able to take a blanket approach. The Government has said that employees in sectors that are open (and not still mandatorily closed) and who cannot work from home, should return to work where possible. But before they do so employers are expected to carry out risk assessments and put safety measures in place in accordance with sector guidance.

However employees may have difficulty returning to work for a host of different reasons: as explored in more detail above, they may have health issues and be shielding, or live with someone who does; they may have school age children whose schools are still closed; they may have concerns about using public transport or not be able to access it easily because of reduced timetables. They may simply be very anxious about the situation and fearful of putting themselves at risk. If you simply point to Government announcements or even Government guidance, without considering the facts of your own employees' situations, you are putting your business at risk of a range of employment claims.

If I follow the Government guidance surely I am covered?

Government guidance is simply guidance. As noted above, it does not change the law. It can be helpful to have followed Government guidance in order to demonstrate that you have acted reasonably, but it will not necessarily be enough in every case. It should be looked at as the starting point, but will not remove your responsibility to evaluate risk in your own workplace and in respect of your own employees.

Isn't all this really the concern of my employer's liability insurer?

Employer's liability insurance provides cover for certain kinds of employer liability such as breach of the duty of care or breach of statutory duty. It will not provide cover for other types of employment claim, including breach of contract, constructive dismissal or discrimination. Insurance policies may also contain terms requiring employers to meet certain standards in order for cover to be preserved. You should check the terms of your current policies to make sure that you are not doing anything that might undermine the availability of cover.

If the HSE undertakes spot checks it can issue notices to compel improvements to be made, and in serious cases could prosecute. Any fine will need to be paid by you and will not be covered by any insurance policy.

I feel that by doing the right thing by my employees I am losing out to rivals who are cutting corners. How am I supposed to compete in those circumstances?

There is no doubt that some employers have sought to steal a march on their rivals by ignoring Government guidance, good practice or even legal requirements. This creates a genuine dilemma for employers who are trying to act responsibly and many will feel that the issue of creating the right balance between the health of their employees and their livelihoods is playing out in individual businesses as well as in the country as a whole. Again, good communication and employee relations may help to achieve a solution that enables as much of the business as possible to continue in operation whilst protecting staff health and safety.

If there are genuine concerns about how rivals are conducting their businesses, you can inform the HSE or the Local Authority Environmental Health Officers. However, remember, they are there to address genuine problems and not to deal with commercial rivalry.

If you need further explanation or help with any of the above questions, please speak to a member of [our employment team](#). For more information on furloughs, see our [FAQs article](#).

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