

Frequently Asked Questions

Returning to the Workplace

Thursday 10th September 2020

1. It is clear that the return to the workplace is far more complex than the overnight switch that employers and employees were forced to perform in the spring.
2. Employers must keep themselves fully up to date with the current situation, including local outbreaks, which may result in different rules for certain cities.
3. Government guidance on working safely during the pandemic can be accessed here: <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19#social-distancing-in-the-workplace---principles>
4. Health and Safety Executive advice can be accessed here: <https://www.hse.gov.uk/coronavirus/index.htm>
5. All workplaces need to observe the Government's social distancing guidance, which seems likely to continue for the rest of 2020.
6. The Health and Safety Executive have the power to conduct spot checks on employers' working practices.
7. Employers have had discretion since 1 August to decide if staff in office-based businesses who can work from home should carry on doing so or whether they will return to the workplace.
8. The debate has tended to focus on office-based work but of course there are many jobs such as engineering, construction, hospitality and manufacturing that cannot be performed from home. So there are different dynamics where work cannot be performed at home.
9. We have all read many articles predicting that office based staff will not return to work in the same way they did before the pandemic and that substantial working from home is here to stay. But does everyone really

want to do that? I recently read an article called *“Bad backs and wobbly tables: why I hate working from home”*. By no means is everyone enthusiastic about a long-term and sustained working from home arrangement. Plenty of people do want to get back to work and there are good reasons for doing so.

10. Research by the Office for National Statistics this summer found that higher-paid and more senior employees were more likely to be able to work effectively from home, while younger people were least comfortable. It had been assumed that younger workers would cope well because they are more digitally savvy, but in fact older workers adjusted the easiest and best. The majority had a dedicated workspace at home, and did not share facilities with flatmates. Moreover, younger workers had often built strong social bonds with their colleagues, while older workers, often with families, were less dependent on this. So there is no “one size fits all” approach.
11. For junior and inexperienced members of staff, learning from the immersive experience of being alongside more senior employees is largely lost where substantial numbers of employees are working from home. So I think we need to bear in mind the needs and aspirations of trainees and apprentices, and the damaging effects on their development and careers through lack of contact with more experienced workers.
12. Another important factor is mental health. Through our work with our sister business, Sherrards Occupational Health, we are seeing an increasing number of individuals, particularly younger individuals, whose mental health has significantly deteriorated as a result of the lack of contact and interaction with peers. Work is good for you. Employees, perhaps many without realising it, are highly dependent on the social interaction aspects of work and it is clear that in many cases mental health has suffered as a result of the absence of that interaction.
13. In terms of performance of work, most employers and employees have coped well and whilst there have been disruptions, by and large businesses have functioned with a dispersed workforce. But certain aspects are less effective without direct interaction, an example being creative projects. Experience has shown that direct interaction between individuals is more productive than a Zoom meeting.
14. What about the situation where the employer has taken all reasonable steps to make the workplace as safe as possible but employees are still

reluctant to return? The first thing to say is that it is absolutely fine to encourage employees to return to work and is fine to make statements along the lines of you would prefer employees back in the workplace. Persuasion and seeking employee agreement is not legally problematic, and indeed is in compliance with recent Government guidance. I will come onto employees who continue to refuse later.

15. Communication is key and employees need to know that you have implemented the steps recommended by government guidance. One suggestion is that rather than having a “back to work policy” employers should develop a “Back to Better” strategy, as this sounds less commanding than “back to work”.
16. The “Back to Better” policy will set out hygiene and safety measures at the workplace. A suggestion is to create an online “re-induction” video so employees can digitally “walk” through the workplace and see how things have changed and the new safety protocols, including things like how to enter and leave the building.
17. Managers should conduct one to one return meetings with every employee, where a key focus is on health, safety and well-being and any specific concerns addressed.
18. The policy also needs to communicate that adherence to new Covid related workplace behaviours is mandatory for all employees.
19. The “Back to Better” policy will also set out the employer’s approach to working from home and flexible working generally. Remember that it is not a binary choice between working at home or working at the workplace, and more complex hybrid means of working are emerging. In the short term at least, some employers have put employees in bubbles with the intention that employees do not physically meet with anyone outside of that work bubble, with appropriate hygiene measures being taken at the workplace between each bubble’s attendance.
20. There have also been some imaginative arrangements for meeting places such as socially distanced meetings sat in employees’ gardens (feasible in the summer at least). There has been incredibly high demand for garden rooms and pods, indicating that employees with large enough gardens are creating hybrid workspaces; not at home in the fullest sense but not in the employer’s workspace either. With employees’ consent and subject always to appropriate hygiene, small meetings can take place in these work spaces.

21. I now turn to the legal position on flexible working. Contracts of employment specify that the employer's premises is the place of work, and employees wanting to continue to work from home are in effect making informal flexible working requests. Some employees, for example those with health problems who are shielding, and who fall into one of the Government's vulnerable categories, are more likely to have these requests granted. For healthy employees, who accept that the workplace has been made as safe as practical, but wish to continue to work from home for convenience reasons, employers may need to move the discussion to an instruction to return to the workplace. Employees could respond to this instruction by submitting a formal flexible working request, asking to work from home. How would this play out?
22. Employees' perceptions and the feasibility of working from home have substantially changed over the last several months, but the law hasn't. As before, employers can refuse to agree to flexible working on one of a number of business grounds. One of the potential grounds for refusing a flexible working request is the burden of additional costs. Another is detrimental effect on the ability to meet customer demand. But the point that many commentators are missing is that the bar is set low for employers. It is not necessary to demonstrate extremely high and onerous costs; it is not necessary to demonstrate that the ability to meet customer demand would be detrimentally affected in a major way. Any quantifiable additional cost or detrimental impact gets the employer home. So, contrary to the impression that has been given in the media, employers are in fact well-placed to turn down requests for flexible working and (subject to any new Government guidance or the Covid situation deteriorating) to secure a return to the workplace of the majority of their employees.
23. Employers can also use other non-statutory reasons for refusing a flexible working request, including points made above about the detrimental effect on the training of junior staff and the benefits to employees of social interaction. It is fine to use these additional grounds, but to be legally compliant the employer must ensure that at least one of the eight statutory grounds is used as well.
24. As previously, employers and employees can arrive at a compromise position when dealing with flexible working requests.

25. Public transport is of course outside the employer's direct control and potentially a difficult subject if the employee has concerns. Face coverings as we know are mandatory on public transport and the employer could suggest the wearing of gloves, which the employer could provide. Other practical measures can be taken to reduce reliance on public transport such as enhanced parking and providing bicycles using the cycle to work scheme. It is not quite as green a suggestion, but contracts of employment can be varied to provide employees with a car allowance which they can then use to purchase a small vehicle to use in place of public transport.
26. I now move on to review where the employer stands if employees cite health concerns, and because of this continue to refuse to return even though the employer has a well planned and executed return to work strategy. Are there legal risks if the employer moves from persuasion to instruction? This engages sections of the Employment Rights Act 1996 which deal with health and safety cases. Although it has been around for almost 25 years, this legislation has rarely been used and its authors had in mind physical workplace dangers rather than a pandemic.
27. Section 44 states that an employee has the right not to be subject to any detriment by any act by his employer which is carried out on the ground that the employee reasonably believed that he/she was in serious and imminent danger.
28. A step that an employer might take is to advise employees who refuse to return to work that pay will be stopped. The employee can argue that the absence of pay is a detriment, and that this detriment has arisen as a result of the employee reasonably believing that he/she was in serious and imminent danger. It's a fairly technical argument, but the employer can point to an analogous situation where the employee cannot get to work due to icy road conditions or a broken down car. In those circumstances the employer is not contractually obliged to pay the employee. If faced with a Section 44 claim arising out of the pandemic, the employer would argue that *any* employee in *any* circumstance who fails to turn up for work would not be paid. Therefore it was the absence from work rather than the assertion of a risk to health that brought about the non-payment of salary.
29. Can employers go a step further and dismiss employees who refuse to return to the workplace? Section 100 of the Employment Rights Act provides that it is automatically unfair to dismiss an employee if the

reason for the dismissal was that *“in circumstances of danger which the employee reasonably believed to be serious and imminent he/she refused to return to his place of work”*.

30. There is no qualifying period of employment for bringing a claim under Section 100, so this remedy is available to employees with under 2 years' service who are unable to bring a claim for “ordinary” unfair dismissal.
31. Breaking down Section 100, if the employer has complied with extensive hygiene measures as discussed, can the employee “reasonably believe” that there was a “serious and imminent” danger to health? It is a difficult one to call and, as above, the legislation was not written with a pandemic in mind. All circumstances will be taken into account including the measures the employer has taken, the age and gender and other vulnerability factors of the employee concerned, the number of cases in the region and all other aspects of the process of returning to work. Each case will require detailed individual consideration but it is certainly feasible that employers, as the pandemic eases, become increasingly likely to succeed in establishing a defence.
32. Alongside a claim under Section 100 that an employee may bring, the employer would also (for those employees with 2 years' service or more) have to defend a claim for “ordinary” unfair dismissal. In the midst of the pandemic it is important not to lose sight of the fact that the normal rules of employment law still apply and have not changed. A question that was asked by a delegate on the webinar was “How do we deal with an employee who has severe anxiety regarding the wearing of PPE where this is essential especially where this may be a long term or permanent requirement?” An employee who is not capable of performing a job role can be fairly dismissed using the capability ground. Simply put, if PPE is essential for a job and an employee cannot wear PPE then that person does not have the capability to perform the role. The employer, after following due procedure, can fairly dismiss on capability grounds.
33. A point to make here is that whilst no employer welcomes the prospect of litigation from employees, there is no legal quick fix for employees at present. The tribunal system ground to a halt during the pandemic and there is a huge backlog of cases, meaning that a case started now is likely to take in excess of a year to come to hearing, giving employers the opportunity to resolve matters.
34. We have been discussing employees who are reluctant to return to work, and the other side of the coin is the employee who returns to work but

refuses to follow the employer's guidance about hygiene, distancing etc. It is important to ensure all employees understand that disciplinary sanctions can and will be issued for breach of the rules and that, depending on the severity, it could be considered to be gross misconduct and result in the termination of employment without notice.

35. Turning now to quarantine and employees returning from holiday from one of the countries specified by the Government, there are no rules in terms of how those employees are managed or paid by their employers. The employer has a range of options including permitting the employee to work from home if feasible, or mandating that the employee must take paid holiday for that period. There is no entitlement to SSP or sick pay, but an employer could voluntarily pay this. Picking up on the point made above about the employer not being required to pay an employee who cannot attend work, this would also apply here. Given that the contractual position is that the employer does not have to pay at all, this opens up options such as half pay for the quarantine period.

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Note 1: The information given in this document is by nature generic and there are a great number of uncertainties and challenges in the current situation. Individual advice in each situation is required before action is taken and Sherrards accepts no liability for any action or inaction taken on the basis of this document only.

Note 2: The information given in this document is based on the legal position as at 10th September 2020. Further emergency employment legislation could change, possibly very significantly, the current legal position.

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