

Rushing a return to work without the correct safeguards in place may place your business at risk to liability claims

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The UK Government has started to outline its phased approach to relaxing the current lockdown restrictions. Although pressure is steadily growing to allow economic and social activities to fully resume, both the Government and businesses now have a difficult line to tread in balancing economic survival against safety and wellbeing.

Throughout this whole period of uncertainty, employers have been required to react and make decisions quickly. Before returning to work, we would encourage businesses to take the time now to consider all options to create a safe working environment as this will be valuable in mitigating any difficulties and potential liability claims further down the line.

Managing and overcoming understandable employee and customer concerns as to potential COVID-19 exposure once they are back at work, commuting or visiting places of business, will be far more challenging. To build such confidence, measures may be required which exceed the minimum required by official guidance.

For some businesses, employees have been able to continue working from home.

For others, all or the majority of employees have been furloughed during this period, therefore a return to the workplace will impact some differently than others. It will be essential to have consideration for the health, safety and wellbeing of your employees when making plans for their return to work.

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.

COVID-19 clearly creates an immediate risk of infection to employees

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 they 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 therefrom.

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 of potential heads of past and future loss, in particular loss of earnings, care and domestic assistance.

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.

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 they are 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.

In this context, key considerations will also 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

Risk Assessments cannot just be a 'tick box' exercise as the health and legal implications of the Covid-19 virus are far too severe not to be taken seriously. Risk assessments must be reviewed as and when the factual situation, and government advice, changes in material aspects.

The Health and Safety Authority, the Health Services Executive (HSE) and the Department of Health and the Department of Business, Enterprise and Innovation have collaborated to produce the '[Covid-19 Secure Guidelines](#)'. The protocol should be used by all workplaces to adapt their workplace procedures and practices to comply fully with the Covid-19 related public health protection measures identified as necessary by the HSE. It should be noted that the Employment Rights Act provides protection to employees from being dismissed or treated to their detriment, if they raise health and safety concerns.

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" and the negligent act arose from the sphere of activities undertaken by that employee.

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



Your insurers will also want to know a business has done all it should, to mitigate their exposure and to not prejudice their ability to be defended. There are several factors to consider, including policy definitions and exclusions. Even the court of jurisdiction could influence whether Covid-19 liability claims will be covered.

It's no surprise that insurers have already begun adding Covid-19 exclusions to business insurance policies. Unfortunately, all policy wordings are different, which is why it's imperative you check your Employers', Public and Directors' & Officers' Liability policy wordings, particularly if you've recently renewed or undertaken mid-term adjustments to your policy cover.

In most circumstances, your liability insurance includes bodily injury including illness (including resultant death). 'Illness' is not normally defined, so could include legal liabilities incurred from COVID-19, in a situation where a business has breached their duty of care.

Directors and senior managers will be exposed to potential claims resulting from an alleged breach of directors' duties or in circumstances where a senior manager fails to protect employees from exposure, particularly in the event of corporate manslaughter. **If you do not already buy Directors' & Officers' Liability insurance, please speak with your Hamilton Leigh Client Service Executive for a quotation.**

Risk Assessments must be thorough and robust as they are likely to be tested as some returning employees may be concerned for their safety, reluctant to return, disgruntled and feel disengaged. Failure to carry out appropriate Risk Assessments in line with the '[Covid-19 Secure Guidelines](#)' could leave your business exposed to liability claims.

A business that is able to prove it has kept abreast of government advice and, more importantly, can prove it has interpreted and applied the general advice carefully, having regard to the particular characteristics of its business and workforce, should be well-placed to defend claims brought against it.

Hamilton Leigh is assisting clients in framing an appropriate return to work system from a liability insurance perspective and to understand the potential legal liabilities and how they might arise.

