

EMPLOYMENT LAW UPDATE - SEPTEMBER 2021

RETURN TO WORK ISSUES - OFFICES

Despite the Government recommending a gradual return to offices and ending the legal obligation to work from home, office attendance remains low with some staff reluctant to return. Government guidance states that it is for companies to decide how to implement a return to work provided their workplace is covid secure and they comply with legal obligations if staff are required to self-isolate. This update covers the key issues.



Can employers require their employees to return to the office?

In theory, yes. Employers have the right to require their employees to attend for work in the office. In practice, although the requirement to 'work from home if you can' no longer applies, employers have a legal obligation to provide a safe working environment. This now includes preventing risk of infection and spreading the virus following government guidance which includes consultation with staff.

Consequently, most companies seem to be adopting a gradual return with a hybrid approach of home and office working.

What steps do employers have to take to ensure a safe working environment?

The government has updated its detailed guidance on return to work focusing on eight different sectors, including offices (see below).

Before staff return to work, companies should carry out a covid risk assessment and should consult with staff or unions. Everyone must understand what is required of them and be able to put forward suggestions. Companies with 50+ staff should publish their risk assessment on their websites.

In earlier guidance, the main requirement to prevent the spread of covid was to maintain two metre distances. Although social distancing should still be taken into account, the focus in the current guidance is on adequate ventilation. Companies should ensure there is a supply of fresh air to indoor spaces where there are people present. This can either be natural ventilation through opening windows, doors and vents or mechanical ventilation using fans and ducts or a combination of both.

It is still recommended for barriers to be put up in shared spaces and individuals should face away from each other when seated. Cleaning should be reinforced, particularly door handles, computer screens, work surfaces and other high contact objects. If staff are hot-desking, desks and other equipment should be cleaned between each user. There should be hand sanitisers at entry and exit points. Face masks are not generally required for offices although some staff may prefer to wear them.

Employers should also take into account any reasonable adjustments required for disabled, vulnerable or pregnant staff which can include working from home.

Details are set out in the attached guidance:

<https://www.gov.uk/guidance/working-safely-during-covid-19/offices-factories-and-labs>



What if employees attend with Covid 19 symptoms?

Staff members or customers should self-isolate if they have Covid 19 symptoms e.g. a high temperature, a continuous cough or a loss or change to their sense of smell or taste. Staff must also self-isolate if they have tested positive for Covid 19 or live in a household with someone who has symptoms unless they are exempt from self-isolation or have been told to self-isolate by the NHS Test and Trace app.

Following pressure from businesses in response to the 'pingdemic', the regulations changed on 16 August so that the requirement to self-isolate by the NHS app no longer applies to those who are fully vaccinated or are under 18 although they are expected to get tested.

It is a criminal offence to require a person to attend work if they are legally required to self-isolate.

Potential claims against employers

Serious breaches of health and safety caused by an unsafe working environment can lead to criminal prosecution.

Employers owe a duty of care to their employees and could potentially be liable if there is an outbreak of COVID in the workplace.

If any employee is dismissed for raising (genuine) health and safety concerns, then this dismissal would be automatically unfair. It is also unlawful for the employee to suffer any detriment for raising health and safety concerns.

Are employees entitled to full pay if they contract COVID or are required to self-isolate after having returned to work?

Employees should be instructed to work from home in these circumstances. If they are unable to work, then they would be entitled to be paid Statutory Sick Pay if there is no contractual sick pay. Employers with less than 250 employees are entitled to be reimbursed by the government for 2 weeks' SSP (£96.35 per week). Alternatively, depending on circumstances it may be possible to put the employee on furlough leave although this will end on 30 September.

Can employers insist that staff are fully vaccinated before returning to the office?

Vaccines are not compulsory in the UK except for workers in registered care homes. This will take effect in November 2021 to allow for a 16 week take up period and may be extended to the Health and Social Care Sector. There is therefore no legal basis for having a 'no jab/no job' policy outside these sectors although the government is asking employers to encourage take up of the vaccine.

Some high profile UK companies have indicated that they may introduce compulsory vaccination as a condition for working in the office following similar action in the USA. Such a policy would be difficult to defend, if challenged due to the various legal implications.

Given that the vaccine is not mandatory apart from care homes, it would be difficult to justify such a policy on health and safety grounds. Government guidance on returning to work does not recommend that all staff are fully vaccinated but provides details of steps employers must take to make the workplace Covid secure.

There are Data Protection requirements in obtaining vaccine information from staff as the employer would be processing 'sensitive personal data'. The ICO¹ has issued specific guidance for employers emphasising that the use of such data must be 'fair, relevant and necessary' for a specific purpose. A 'just in case' basis is unlikely to be justified. Fines for breach of data protection are high.

The EHRC² believes such a policy would be unlawful on human rights privacy grounds. Any dismissal is likely to result in Tribunal claims for unfair dismissal (minimum 2 years' service required) and discrimination on various grounds.



Do employees have the right to work from home or is this something that may happen in the future?

All employees who have been employed for at least six months have the right to request flexible working including working from home under the flexible working regulations. There are certain procedural requirements which must be followed but ultimately, it is up to the employer to decide, provided one of the specified grounds for refusal apply, if rejected.

The government has indicated that it may give employees the right to work from home but, at present, the law has not changed.

¹ Information Commissioner's Office

² Equality and Human Rights Commission

Can employers reduce pay if employees insist on working from home?

From press reports, the Civil Service has indicated it may remove London Weighting element of salaries if employees insist on working from home. The London Weighting is intended to cover higher costs of working in London including travel which would be saved if employees work from home. Given that it is a separate part of the salary, employers may be justified in removing it in these circumstances.

In other jobs, working from home full time and reducing wages would be a variation of contract which requires consent or termination of an existing contract and an offer of a new contract on reduced terms. If not accepted, this could result in Tribunal claims.

Comment

Most companies seem to be adopting a hybrid approach having staff work 2 or 3 days per week in the office and the rest from home (without any compulsory vaccination policy). This may increase over time. Whilst the Government message may change, the health and safety considerations and employment issues remain the same.

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Disclaimer – This update is intended to provide readers with information on recent legal developments. It should not be construed as legal advice or guidance on a particular matter.

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