



TLD INSIGHTS

Return to Work : Your Questions Answered

TLD

Welcome back...

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As we step into Autumn, many of us are returning to the workplace, either part-time through a hybrid home-working model, or full-time. This isn't a straightforward process, with a myriad of practical, logistical implications to consider.

Back in July, our blog highlighted the essential elements of planning your return-to-work strategy from an HR and legal perspective. Our live Q&A session in August provided the opportunity to delve deeper into the very real concerns employers have around implementing new guidance and how to best address employee concerns.

We're delighted to share these with you in the first in a series of TLD Insights.

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Kate Palka
Client Legal Director
TLD



Health and Safety

Q: “What steps should we be taking now to manage the risks of Covid-19?”

A: Few restrictions remain in place but employers have a statutory duty to provide staff with a safe place to work and a general duty of care. There are up-to-date Covid-specific risk assessments available from the Health and Safety Executive and it is worth consulting these: <https://www.hse.gov.uk/coronavirus/working-safely/risk-assessment.htm>. Generally speaking, the guidance is still fairly cautious and focuses on preventing transmission, advocating a reduction of the number of people who come together at one time, the use of screens and barriers, ventilation and the promotion of good hygiene.

There is also sector-specific guidance from the government which provides relevant information affecting different industries: <https://www.gov.uk/guidance/working-safely-during-covid-19>. Although this is termed “guidance”, if an issue emerges and you haven’t followed this guidance, it is likely that you will not have adequately exercised your duty of care.

Q: “Do we need to do a risk assessment even if everyone is working from home?”

A: We have seen some reluctance from employers to provide specific guidance on home working but you are responsible for your employees’ health and safety during their working hours so should consider what risks they may encounter whilst working from home. What activity could cause transmission? How likely is it that they will be exposed to Covid-19? You should identify and assess the risks and consider what controls can

be put in place to minimise these through the completion of risk assessments. These should be shared with employees and if you have more than 50 staff, you should also be publishing the results online. This doesn’t need to have huge prominence on your website but it does need to be there. Consider also the equipment that your employees are using at home. Though it may be prohibitively expensive to provide office equipment for people working from home, and will probably be unwanted by many, you should consult with your staff to find out if anyone is using equipment that may cause pain or ultimately injury, and try to address these issues on an individual basis.

Q: “If an employee contracts Covid-19 at work, can we be held liable?”

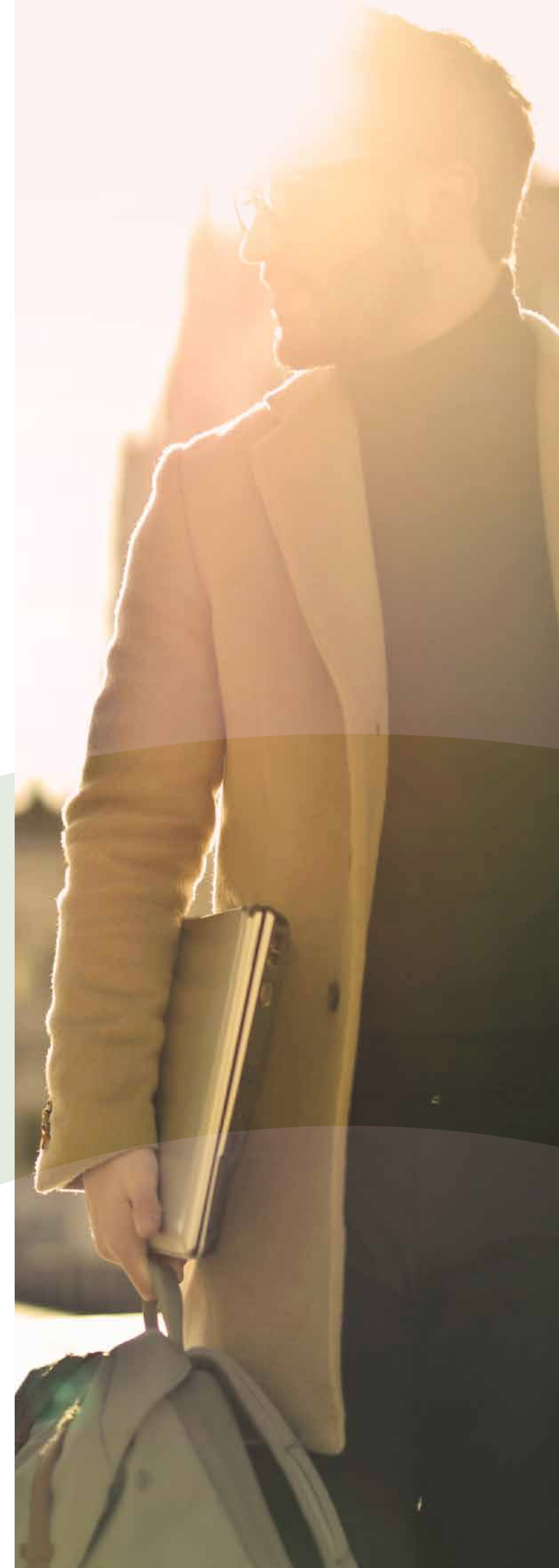
A: In theory, yes, and you should have Employers’ Liability Insurance of at least £5 million to protect you. However, it would be difficult for an employee to prove that they contracted Covid-19 at work. They would need to provide evidence that you, or one of your employees, acted negligently and also that this negligence caused or materially contributed to them contracting Covid-19. A realistic defence to a claim of negligence could be raised if you have put in place appropriate and well-communicated safety measures, followed the available guidance and paid particular attention to the vulnerable members of your workforce. It makes sense to take those steps anyway, bearing in mind your statutory duty to your employees: not only is this in the best interest of your staff, but it will also help demonstrate that you are taking that duty seriously.

Q: “Do we need to consult with our employees about our workplace safety plans?”

A: Any changes that you make that will affect the Health and Safety of your employees confers a legal obligation to consult with them. Government guidance is emphatic about this. This is less arduous than it may at first appear - an email setting out changes is usually sufficient - but it should be undertaken on an individual basis.

Q: “Do employees have the right to be notified if a colleague has been diagnosed with Covid-19, or is suspected to have it?”

A: No - your employees have no specific rights to be informed about their colleagues’ health. The information is under a special category of data that requires more protection than normal because it is sensitive, so it must not be revealed without consent. However, in order to ensure the Health and Safety of other employees, you can inform them that there has been a case without including any identifying references. Take the opportunity to remind your employees of your organisation’s Health and Safety measures and check that they are being followed, to ensure that the risk of transmission is reduced.



Current Challenges: Test and Trace, Vaccines, Boosters

Q: “Do you have to let an employee self-isolate?”

A: The situation has changed and now employees only have to self isolate if they have symptoms of Covid-19 or have tested positive, or they have not been fully vaccinated and live with someone who has symptoms or has tested positive or if they have been told to self-isolate by a test and trace service or the NHS Covid-19 app. If your employee tells you that they fall into any of these categories, you can require them to obtain an NHS Isolation Note from www.111.nhs.uk/isolation-note/. You can check that it is valid by using the checking service at www.111.nhs.uk/isolation-note/check.

Q: “Does using the app make it more likely that an employee can claim that they contracted Covid-19 at work?”

A: In short, no. The app doesn’t collect names or personal data. In the unlikely event that the NHS is asked to disclose this information, the app would not be able to prove that Covid-19 was contracted at work.

Q: “Can vaccines / boosters be made a requirement of returning to the office?”

A: No, although this hasn’t been properly tested yet, and is fairly complicated. As we repeatedly say, employers have a legal duty to ensure the Health and Safety of their workforce as far as reasonably possible and there may be certain settings where such a requirement is reasonable - for example, in health care or other high-risk areas. However, employers need to be very cautious about pursuing a policy of mandatory vaccination, for a few reasons.

There’s a likelihood that the policy would result in indirect discrimination, which could result in discrimination claims and/or employees resigning and claiming constructive dismissal if the employer took any kind of detrimental action because an employee refused to be vaccinated. You need to consider those who have a characteristic that’s protected under the Equality Act 2010, such as pregnant women and people with Long Covid-19. It is also possible that Long Covid-19 will be classed as a legal disability. Similarly, a philosophical belief that results in strong anti-vaccination feelings could potentially be protected (although the tribunals have not found this to date).

A policy of mandatory vaccination could also infringe employees’ right to privacy under Article 8 of the Human Rights Act 1998. Technically, an employer may be able to justify such a breach, but this is likely to be difficult where less personally invasive measures are available to employers to maintain the Health and Safety of their workforce, such as social distancing and the wearing of face coverings.

Employers should also consider the data protection implications of mandating vaccinations since holding data on whether an employee has had the vaccine is likely to be considered to be special category data (meaning that it needs more protection because it is sensitive). In order to lawfully process such data, there must be a lawful basis for the processing, and additional conditions and supporting documentation must be put in place, including conducting an impact assessment to identify and minimise any risks.





In terms of public officials (police/immigration officers/health care workers etc), the Public Health (Control of Disease) Act 1984 makes explicitly clear that the power in the Act for the Government to make further regulations does not include mandatory treatment or vaccination (section 45E). However, the Government has introduced new legislation requiring care home workers to be fully vaccinated and this amendment to the 1984 Act is being challenged. “Normal” employers are outside the scope of the 1984 Act obviously, and it is unlikely that the Government will be able to impose the right to enforce mandatory vaccinations, despite the hype.

In summary, think very carefully about mandating this. Nobody wants to be the first business to be sued. There are far less contentious ways to make the workplace safe and you can still put in place non mandatory guidance encouraging employees to have the vaccine, providing scientifically-based information about it.

Q: “Can employees refuse to come to work if they are worried about working with an unvaccinated colleague?”

A: An employee has grounds to do this if they can show that there is a serious AND imminent danger of them being at risk. This would be difficult to argue if you’ve produced carefully considered risk assessments and taken appropriate measures. As an employer, you can feel secure about putting policies in place to require people to come back to work. But we would advise against adopting an overly hardline stance. People have gone through

a lot and it is likely to serve you better to be flexible and consider individual circumstances when required.

Q: “Can we make employees use personal protective equipment or face coverings at work?”

A: Excluding clinical situations, you shouldn’t be asking your employees to don extra PPE. The measures that you have adopted in the workplace should make this unnecessary. It is reasonable to ask people to wear face coverings in crowded areas or when travelling around the office and the requirement for this should be determined as part of your risk assessment when looking at the likelihood of transmission.



Workforce Issues

Q: “Can we introduce contractual changes to meet the Health and Safety challenges?”

A: You are justified in making necessary contractual changes because you have an express duty to keep your employees safe as far as is reasonably possible. These changes could include rotation of teams, cohorting, staggered working hours for people travelling on public transport and rotating working weeks. Make sure you consult with your employees about changes and be candid about why they are necessary.

Q: “Should any changes that are made to an employee’s terms and conditions be made on a permanent or temporary basis? And, if temporary, what is a reasonable timeframe?”

A: It is useful when answering this to make the distinction between ‘flexible working’ and other contractual changes to your employees’ terms of work. Flexible working is a legal construct that constitutes a permanent change to an employee’s terms and conditions. It can only be applied for once a year, is prescribed by law and is there are clear, but limited, statutory reasons that employers can cite to deny a request.

We advise considering changes on a temporary basis and being very clear that they will be implemented on a trial or short-term basis. As the situation is changing all the time, it would be unwise to make commitments that may be detrimental to the business in the near or long-term future.

With regard to timeframe, we would recommend six months as a reasonable length, and certainly nothing less than three.

There may be arguments for longer timeframes and, if this is something you’d prefer, we’d recommend consulting with your staff to get a feel for their opinions on the matter.

Q: “What steps can we take if work has dropped off?”

A: Before you go down the redundancy route, there are many options for short-term changes that may help you overcome this difficult period. Some of the options may be welcomed by your employees and give you an opportunity to operate differently in the future. These could include:

- Defer new starters
- Offer secondments
- Redeploy and re-train existing employees to manage resource without recruitment;
- Offer early retirement
- Employ casual, temporary or contract workers
- Offer sabbaticals
- Give unpaid leave to those who want it
- Ensure holiday is taken to prevent roll over or having to pay large amounts of untaken leave on termination
- Reduce the working week and/or consider short term working or lay off arrangements
- Put workers on furlough (though you will no longer get government grant for this, it is still a viable option to consider).
- Introduce salary sacrifice measures
- Reduce costly benefits and offer home working as a benefit instead
- Freeze pay
- Change pension benefits
- Stop bonuses
- Tighten up expenses policies





You may still have to reduce headcount and introduce layoffs and redundancies but consider these other measures first. Redundancies can be bad for staff morale and recruitment is expensive if business does pick up and you later need to increase your workforce.

Q: “What new policies do we need to consider?”

A: The pandemic has impacted lots of policies and necessitated the introduction of many others. You should be amending your existing Health and Safety policy and written Health and Safety procedures to include reference to Covid-19. We would also advise that you look at your policies on Discrimination and Inclusion, Whistleblowing, Misconduct, Testing and Health Screening and even your Holiday policy to prevent excessive rollover of unused days. Examine how you handle employee complaints in the light of the unprecedented upheaval and think about introducing forums to deal with issues on a regular basis.

In recognition of the enormous effect this has had on people’s mental health, we would also recommend introducing a Mental Health policy. The undeniable implication of poor mental health on productivity and its huge financial cost for businesses makes an investment in mental wellness, not only morally worthwhile but good economic sense as well. There is currently very little out there but TLD has created a Mental Health policy and risk assessment package so get in touch if you would like to know more.

Q: “What things do we need to consider for remote working?”

A: On top of the risk assessment and Health and Safety implications covered earlier, you ought to think about how you control productivity and monitor staff. Consider also other HR matters. How do you manage your staff or deal with potential morale issues? How do you avoid burnout? With remote workers being less visible, you may need to adopt more imaginative and formalised ways to check in with your staff and foster good team dynamics and communication. You will also need to think about practical and compliance matters like your employees’ home office equipment and IT provision, their connectivity and data security/ protection.

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