

## ***‘Not a quick return to “normality”’.***

In the new normal, businesses are having to change. Physical workplaces are having to change. And it's challenging, as the UK government Covid-19 recovery strategy, quoted here, recognises. How do you operate safely post-lockdown? What are the health and safety, employment and other legal implications? Markets are also changing - so how does your business fit into the economy now? Getting compliance right is critical, but it need only be the first step. Managing the transition to the new normal can go beyond this, potentially adding value, making your business better able to adapt for the future. This Briefing covers these two areas. It flags up, first, the changing compliance issues to be aware of, and then gives you the tools to work out where your business is positioned now.

## **Where to go for guidance**

Relevant guidance is to be found in a variety of places. Specific Covid-19 guidance, based on where your business is located in the UK, should be read alongside your other legal responsibilities to employees, customers and others.

Rules restricting people's movement and affecting public gatherings, and those dictating whether a business should be open or closed, are devolved. With restrictions being lifted at a different pace in each of the four nations, this is a fast moving area, and you should therefore check the rules specific to your location regularly. For England <https://bit.ly/380hB3t> Scotland <https://bit.ly/32bkrSa> Wales <https://bit.ly/3euLyuQ> and Northern Ireland, <https://bit.ly/3f6Fqcx>.

## **The Covid-19 secure workplace**

The concept of the Covid-19 secure workplace comes from UK government guidance <https://bit.ly/2YrEZUm>. This sets out five practical steps to working safely, applicable to every business sector. The goals are to:

- encourage working from home where possible, subject to evolving government policy

- carry out a Covid-19 risk assessment (see below)
- develop cleaning, handwashing and hygiene procedures
- maintain required social distancing where possible
- manage transmission risk where this is not possible: for example, staggering arrival and departure times, using fixed teams or partnering, installing physical screens and barriers. Attention to changing policy on the use of face coverings is also needed.

The UK government has published Working Safely guidance covering specific workplaces. Much of this concerns the safety of employees, but there is increasing guidance on customer-facing responsibilities. The devolved administrations also provide guidance on safe working during Covid-19. This may all be accessed here <https://bit.ly/2BBsvjS>. Note, however, that such government guidance does not supersede other legal obligations, such as those relating to health and safety, employment or equalities. As a business or employer, you have to continue to comply with existing obligations, including those to individuals with protected characteristics.

## **Health and Safety compliance**

Employer responsibilities to employees and others sit inside the health and safety law that already exists. This requires that employers ensure, so far as is reasonably practicable, the health, safety, and welfare at work of employees. There are also responsibilities towards others affected by the business, such as visitors or customers.

Health and safety law is the same throughout Great Britain: there is some variation in Northern Ireland. Public health, however, is devolved. Employers need an eye to all the guidance available, both the Working Safely guidance and relevant devolved public health guidance. This should all be put in the context of health and safety responsibilities generally. Note, too, self-employed workers who are not employers will, in some circumstances, have responsibilities under health and safety law <https://bit.ly/2VTLM7H>.

## Tip: taking steps towards compliance

*Although Working Safely is guidance, not law, the steps it outlines make a good benchmark for health and safety compliance wherever you are based.*

Assessment of risk is key to employer responsibilities and you will need to update your risk assessment, consulting with workers or unions, to manage the risk of Covid-19 in your business. The Health and Safety Executive has guidance on carrying out risk assessments generally <https://bit.ly/3es4BG5> and specific Covid-19 advice <https://bit.ly/37W9RPO>.

You will need to:

- carry out a risk assessment (in writing if there are five or more employees)
- set up safe systems of work, modelled on that risk assessment
- implement safe systems of work
- keep those systems under review.

The assessment must take account of various different segments of the workforce: those at higher risk of Covid-19 than others, such as the clinically vulnerable and clinically extremely vulnerable, for example. You will need to consider how you communicate what you are doing with your workforce. The Working Safely guidance, for example, anticipates your sharing the results of the risk assessment with workers, and publishing it on your website if you have more than 50 workers.

## More than a tick list

The health risks of Covid-19 make health and safety a particularly pressing priority. But getting a business back up and running means more than simply complying with relevant legislation. Recent research shows four in ten employees are worried about a safe return to work. Nearly two out of five employees working from home during lockdown have experienced stress, anxiety or mental health difficulties.

Creating trust and communicating with employees will be critical. The best way to instil confidence in your management is to show you are serious about staff welfare. This

can be done not just by taking the steps necessary to create a safe place of work, but by involving staff in that process. This is the more important since employees worried that a working environment is unsafe are encouraged to report it to the Health and Safety Executive on a dedicated Covid-19 enquiry line.

## Other points to consider

**Data protection issues:** some businesses will be considering the idea of workplace health checks, such as temperature readings, to test staff for Covid-19. It is important to note the data protection implications here. Personal data relating to health is 'special category data' and has higher compliance requirements. Businesses required to take customer details for government contact tracing measures, such as pubs, hotels and hairdressers, will also need to be mindful of data protection issues.

**Home working issues:** where employees work from home, you may also want to review data security, for example around the use of video conferencing. The Information Commissioner's Office has useful guidance on all these areas: <https://bit.ly/317pm6d>.

## Employer options: employee rights

Where a business is allowed to open, it may still be the case that some categories of workers cannot be required to attend. The timeline for options for those shielding, and special protection for new and expectant mothers under health and safety law, for example, need careful consideration. Businesses entering the new normal may need to strike a judicious balance between employer options and employee rights generally. Many employers are unsure of the position where staff are reluctant to return to the workplace, and there is a potential imbalance here. Employers can make a 'reasonable request' for someone to attend work, and whilst an employee should comply, this is a complex area, made more difficult by the current pandemic. Where someone refuses to attend the workplace because they have a 'reasonable belief' that a danger exists which is 'serious and imminent' to themselves and others, they may be able to claim certain protections under employment rights legislation. Negotiation with your workforce to find satisfactory outcomes for all parties is

likely to be the most sensible path forward in this new and uncertain era.

You could, for example, continue to use furlough for workers worried about returning to the workplace, so long as they are eligible under the Job Retention Scheme (JRS) rules. This could be used to cover the period until the end of October, when the scheme expires. You could also require employees to take some of their statutory holiday entitlement now, and use this as part of a phased return to work strategy. This involves giving notice, usually at least double the length of the holiday period involved. As travel restrictions lift, too many employees taking holiday at once could leave you short staffed. Staggering holiday may help here. Note though, that rules on carrying forward annual leave have changed, and there are additional factors to bear in mind, for example if staff are furloughed.

You may need to review staffing levels, with a view to changing working hours or other arrangements, either permanently or temporarily. But with any adaptations, great care will be needed to comply with relevant employment law. Any selection procedure, including decisions on who to furlough and who to bring back to the workplace, must be handled sensitively to avoid discrimination. Until schools are fully open, for example, decisions regarding workers with caring responsibilities (frequently women) should take account of the potential for sex discrimination. Finally, as JRS ends, some businesses may decide they have no choice but to make permanent changes to the number of staff needed: we are happy to discuss the issues involved if you are considering redundancy procedures. In all, this is a specialist area. Advice tailored to your circumstances is highly recommended.

## Your business now

Taking stock now gives the potential to wrest the positives from the current market. And given the prevailing economic uncertainty, and challenges like Brexit around the corner, looking at ways to future-proof your business makes a lot of sense. The questions to address are these: where is your business

heading, and what has Covid-19 told you about your operations?

This checklist is a starting point to help you plan and respond to whatever the coming months may bring:

- has core business changed?
- have you focused on one product or service more than another, or made a sideways step into new markets?
- has the customer base changed?
- has your delivery model changed? Are you selling online, for example, where you used to sell face to face?
- are you confident that you can rely on your traditional suppliers, or would it be prudent to look at new ways to provide for business needs?

If the business has changed over the last few months, consider how likely those trends are to continue and whether you can turn this to advantage. If your business can operate successfully with employees working from home, longer term use of remote working may be beneficial. A successful shift to home working could mean the chance to capitalise on lower property costs. And remote working could bring the opportunity to tap into a much wider and more diverse talent pool than before.

## Your next step

Moving your business successfully into the post Covid-19 world means analysing all that the last months have taught you. In this Briefing, we have painted the big picture, but the detail will be specific to your business. We should be delighted to help you review core strengths and weaknesses, as well as any potential threats and opportunities on the horizon. Please don't hesitate to contact us.

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Aug 2020