

RETURNING TO WORK ONCE COVID 19 LOCKDOWN RELAXES – WHAT’S EXPECTED IN HEALTH AND SAFETY CRIMINAL LAW AND HOW CAN YOU AVOID PROSECUTION?

30 April 2020

Your organisation is looking ahead to stepwise resumption of operations once the Covid-19 lockdown starts to be eased. But what are your health and safety criminal law obligations for the return to work and what do you need to do to stay on the right side of the criminal law?

In my article published on 3 March 2020, I explained how to deal with difficult conundrums arising from Covid-19 in order to comply with H&S criminal law:

<https://nebula.wsimg.com/f4a1669ea15cc849081418946d152754?AccessKeyId=12CD98B2E32F20649B96&disposition=0&alloworigin=1>

Building on that, I have now been asked by many clients what they need to do to get their people back to work in compliance with the law. Your directors should be asking the same question, so these answers will help to structure your response.

What are your health and safety criminal law obligations?

1

As always, the starting point is to comply with the obligations in sections 2 and 3 of the **Health and Safety at Work Act 1974** – all reasonably practicable steps must be taken so as to ensure the health, safety and welfare of your workers and anyone else impacted by your operations. This includes keeping up to date with the work-related risks posed by Covid-19, as well as planning and implementing all reasonably practicable risk reduction measures.

More specifically, there is the requirement in Regulation 3 of the **Management of Health and Safety at Work Regulations 1999** to make “suitable and sufficient” risk assessments of the health and safety risks faced by your employees, as well as non-employees who are affected by your operations. Risk assessments must be in writing if you have 5 or more employees; and they must be reviewed or updated when the circumstances change. Circumstances and knowledge about Covid-19 risks are changing fast, so you need to keep abreast of the latest developments and act accordingly.

There are also the criminal law requirements under the **Personal Protective Equipment at Work Regulations 1992** to provide suitable PPE. The obligations include that PPE must be appropriate for the risks and conditions involved, capable of fitting correctly and must be assessed as suitable and effective, so far as is reasonably practicable, to prevent or adequately control the risk. Employees must be given adequate information, instruction and training regarding PPE, which must also be maintained, cleaned and replaced as appropriate. Last but by no means least, all reasonable steps must be taken to ensure that any PPE is properly used.

For Further information about Turnstone Law, please see www.turnstonelaw.com , email admin@turnstonelaw.com or call +44 (0) 20 3664 8226.

What do you have to do?

As part of planning a stepwise resumption of operations in the workplace, it will be necessary to follow the Government's rules and any revisions as the rules are relaxed, particularly in relation to specific sectors. To comply with H&S criminal law, it will also be necessary to revise, renew or create your relevant risk assessments dealing with Covid-19 to encompass returning to work. Your Covid-19 return to work plan(s) must identify the hazards and set out mitigation measures.

Are H&S criminal laws going to be enforced for Covid-19?

The HSE website says their regulatory approach will "take a flexible and proportionate account of the risks and challenges arising from the pandemic". This could include fee for intervention notices, improvement notices, prohibition notices and even criminal prosecution.

It may be tempting to assume that all employers have difficulties with their Covid-19 planning, separation/social distancing measures and provision of PPE, so the chances of facing criminal enforcement action are low. That could be a misplaced assumption because it downplays the very real fears and anxieties that many of your workers may be experiencing and the potential that they or their household members may die as a result of your acts or omissions. Also consider the likelihood that workers could report deficiencies to the HSE or local authority regulators if they are angry that resumption of operations has been accelerated without adequate mitigation and at the expense of safety.

For an insight into worker safety concerns, it is worth looking at the TUC's 27 April 2020 report on returning to work (<https://www.tuc.org.uk/research-analysis/reports/preparing-return-work-outside-home-trade-union-approach>) which includes the following call to arms:

"The HSE must act quickly to apply sanctions to employers that do not risk assess for Covid-19 or fail to provide safe working arrangements. Employers must be made aware of the consequences of refusing or failing in their health and safety responsibilities – including prosecution and the forced closure of businesses."

The risk of prosecution will grow, for example, if there is inadequate planning, if employees are pressured into returning to work, if social distancing is not arranged and enforced and if adequate PPE is not provided and replenished.

Can you be reassured that it will be hard to prove that infected workers contracted the virus in the workplace rather than elsewhere?

Don't forget that H&S criminal prosecution can be brought even if there is no actual injury – the offences mostly concern exposure to risk. That means it won't usually be a successful defence to argue that someone could have contracted the virus outside the workplace – what matters is whether you have failed to take reasonably practicable steps and thereby exposed people to the risk of contracting the virus.

What needs to be considered in your return to work risk assessment?

Details will depend on your organisation, sector, workforce and premises. Some of the issues that have arisen for my clients may be helpful to consider.

Appreciate worker anxiety about a safe return to work and make plans that accommodate your workforce demographics and individual vulnerabilities, including age, pregnancy, mental health and relevant illnesses. Keep up to date on potential evidence of BAME vulnerability and plan accordingly. You will likely need to gather a wide range of relevant information using a worker questionnaire, including attitudes to returning to work, individual commuting options and even whether your employee's household members have vulnerabilities or are shielding. Consider adjusting duties and prioritising successive waves of return to work to accommodate these individual variables.

Plans for social distancing should consider the workstation layout but also other parts of the workplace and the commute. For example, consider a policy of no more than 2 people at a time in the lift and appropriate restrictions and signage for distancing in the canteen, toilets, kitchens and copying rooms. Tape and plexiglass may play their part in your plans, as well as cleaning arrangements, changes to shift patterns and arrangements for shared vehicles and parking. Consider workplace ventilation and check your ventilation system isn't exacerbating risks.

Conclusion

It may be necessary to breach the 2 metre guideline on occasions; but if so consider other mitigation such as PPE and how to shorten the duration of such close proximity. Above all, risk assess any concerns, mitigate the hazards and document in writing the balancing arguments you have considered in order to demonstrate that you have done everything so far as reasonably practicable.

For difficult decisions, you may want advice from a specialist H&S lawyer; and it could be helpful to use legal privilege to protect some of the sensitive deliberative documentation from needing to be disclosed to the HSE, local authority and compensation claimants.

Dr Simon Joyston-Bechal
30 April 2020