



Leaving lockdown: Considerations for employers

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Part 3: Navigating the return to the workplace

As we continue to follow the government's '[roadmap](#)' out of lockdown, increasing numbers of employers are considering the return to the workplace. In Part 3 of our "Leaving lockdown" series we look at key issues for employers navigating the return.

What is the current guidance?

The UK government guidance provides that office workers should continue to work from home if they can. This guidance will remain in place until at least 21 June 2021, however this is just guidance; it is no longer a legal requirement to work from home if reasonably possible. The government has also published [14 sector specific guides](#) on [working safely during the coronavirus](#), which employers are advised to read.

What do employers need to consider when re-opening their workplaces?

Employers should:

- Carry out adequate risk assessments and implement measures to minimise those risks. This is a crucial step for employers in discharging their statutory duties to provide a safe place of work. (For more detailed information on how to carry out a risk assessment, please see [guidance produced by the Health and Safety Executive](#));
- Consult with employees (and trade unions where appropriate) on plans to return to the workplace;
- Determine whether any roles or individuals should be priorities for return to the workplace;
- Identify any employees that should continue to work from home in the short term because they are vulnerable, have ongoing health conditions, or caring responsibilities;
- Calculate safe occupancy levels to maintain social distancing and consider rotas and staggered hours;
- Plan carefully their communications with employees about the return to work including

clarity and reassurance to employees on the 'Covid-19 Secure' measures they have introduced; and

- Review and refresh workplace policies such as whistleblowing, grievance, health and safety policies.

What about employees who refuse to return to the workplace?

Should employees refuse to return to the workplace, employers need to consider the employee's specific reason(s) as well as the employee's personal circumstances. If an employee is vulnerable or has a disability, employers must take extra care when managing their return to the office – consider whether they could return in a later phase or what reasonable adjustments should be made.

Employees have a statutory right not to be subjected to a detriment or to be dismissed for refusing to come to work when they have a reasonable belief that they are in "serious or imminent danger". (Note that the protection against detriment has been extended to "workers" from 31 May 2021). Given that the threat posed by the COVID-19 pandemic has previously been described by the UK Government as "serious and imminent" it is likely that some employees refusing to return to work will try to rely on this legal protection. Such claimants will need to demonstrate that they have a **reasonable belief** that there is a "serious and imminent danger", which may be tricky if the employers comprehensively follow Covid-19 secure guidance and measures (such as those set out in this article).

The Employment Tribunal recently handed down its judgment in one of the first of such Covid-19 related claims. In **Rodgers v Leeds Cutting**

Limited, Mr Rodgers who had vulnerable children told his boss in March 2020 that he would stay away from the workplace “until lockdown eased”, wanting to protect his children from the virus. A month later Mr Rodgers was dismissed. He claimed he had been automatically unfairly dismissed for exercising his right to leave the workplace and refusing to return due to his belief that there was serious and imminent danger.

The Tribunal dismissed his claim finding that he had not raised concerns with his manager about such danger and that he accepted that he could easily practice social distancing and frequent handwashing in the workplace. The Tribunal did not accept that there was a serious and imminent workplace danger of contracting Covid-19 where the employer has taken safety precautions. To have upheld Mr Rodgers’ claim would risk allowing any employee to refuse to work in any circumstances, simply by virtue of the pandemic. This case is a stark reminder to employers of taking adequate measures to make workplaces Covid-19 secure.

How can employers mitigate the risks of “serious and imminent danger” claims?

To mitigate the risks of such claims and to comply with their health and safety obligations, employers should take steps to ensure the workplace is 'Covid-19 secure' in line with current government guidance.

Employers should carry out regular risk assessments and keep an accurate paper trail of the decisions made regarding employee safety, in case of future claims. If an employee states they are refusing to return to work because they believe they are in serious and imminent danger, then employers should seek further information from the employee about their concerns, investigate such concerns and provide a reasoned response adequately addressing the issues. Ultimately, if an employee is dismissed as a result of raising health and safety concerns the dismissal will be automatically unfair (there is no two years’ service requirement to bring such a claim).

How should employers deal with health & safety concerns that are raised?

If an employee claims that an employer is not complying with its health and safety obligations, this type of allegation would be a protected disclosure under whistleblowing legislation and could be dealt with under an employer’s existing whistleblowing procedure. Any policy should be

comprehensive and include the following (as a minimum):

- A definition of whistleblowing
- The process to raise a concern
- The investigation procedure
- Dealing with the outcome of an investigation
- Disclosure to external bodies
- Protection and support for whistleblowers

Employers are advised to review their existing whistleblowing policy to check that it is up to date and robust. In addition, we would advise reviewing health and safety policies to ensure they are fit for Covid-19 purposes.

If you have any queries on the topics included in this alert please contact Paul Reeves, Leanne Raven or your usual Stephenson Harwood contact.

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