**COVID-19: Returning to work: Health & safety implications in England**

27 May 2020

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**Introduction**

On 11 May 2020, the UK Prime Minister announced a gradual, three-stage plan to begin easing England out of lockdown over the coming weeks and months.

In stage one, which began on 13 May, the Prime Minister is formally urging people who cannot work from home, such as those in manufacturing and construction, to return to work, provided it is safe to do so and their workplaces follow the new “Covid-19 secure” guidance on safe working. However, the Prime Minister also stressed that, if you can work from home, then you should continue to do so for the foreseeable future, wherever possible.

In this briefing, we look at the legal requirements in health & safety legislation to carry out a risk assessment and the new Covid-19 secure guidance, to help companies assess what this means for them as they map out a plan to return to work.

Covid-19 is shining a new light on the “S” in ESG (environmental, social and governance issues) and companies are only too aware that their actions, including how they treat their employees and their approach to safe working, are coming under increasing scrutiny from investors and others.

The pandemic is bringing to the fore just how important it is to have a robust system in place to assess risks in the workplace and put in place the necessary safety measures. We are not talking about risks in the abstract or about hypotheticals. Covid-19 has real, and sadly, sometimes devastating consequences, particularly for workers who are clinically vulnerable or clinically extremely vulnerable.

1. **Key takeaways and practical tips**

   **General**

   - If people **can** work from home, then they should continue to do so for the foreseeable future.

   - All workers who **cannot** work from home should return to work if their workplaces are open (i.e. once the risk assessment and cleaning has been completed). There are exclusions for clinically extremely vulnerable people.
> Carry out a Covid-19 risk assessment to assess the risks and put in place steps to manage the risks.

> Remember that different rules and guidance apply in Scotland, Northern Ireland and Wales – what is allowed in England may not be allowed across the border.

**Guidance**

> Follow the Covid-19 secure and social distancing guidance from the government and other regulators, including the HSE.

> Follow the five steps to Covid-19 secure working in the downloadable notice provided by the Government confirming that: (1) you have carried out a Covid-19 risk assessment and shared the results; (2) cleaning, handwashing and hygiene procedures are in place in line with guidance; (3) you have taken all reasonable steps to help people work from home; (4) you have taken all reasonable steps to maintain a 2m distance at work; and (5) where people cannot be 2m apart, you have done everything practical to manage the risk of transmission.

> Remember that the guidance is additional to your general health and safety legal obligations and should be treated as a baseline of what employers should do. It is more important to be safe than be the first to reopen.

> Check regularly for updates or changes to guidance – this is a moving feast.

**Getting started**

> Consider a phased return to work on a gradual or rotational basis. Also consider the challenges of childcare and travel arrangements. Pay particular attention to risks to those who are clinically vulnerable or clinically extremely vulnerable.

> Make sure you have done a proper risk assessment, consult on it, and publish the results on your website.

> Good, two-way consultation on an ongoing basis with your workers, unions and employee representative bodies will be key to delivery of safe ways of working.

**Transport**

> Workers should avoid using public transport where possible and walk, cycle or drive instead.

> They should follow the social distancing guidelines on public transport where possible and wear a face covering.

> Employers should flex working hours (to avoid peak commuting time) and provide extra space for cars and bikes if possible.

**PPE**

> The guidance suggests PPE will rarely be appropriate unless you were already using it irrespective of Covid-19.
> Face coverings that are not PPE may be used, particularly where 2m distancing cannot be achieved. But they should not be used as a primary risk management tool.

> Ultimately it is up to employers – in consultation with their workforce and based on the results of their risk assessment – to decide what PPE is most appropriate for their business/premises.

**Learnings**

> Everyone is having to feel their way as to what works and what doesn’t – be ready to adapt and change course if needed. And remember to keep your risk assessment under review.

> What works for others may not be right for your workforce. Follow the guidance but remember that this is not a straitjacket of what can/cannot be done. Look carefully at the results of the consultations with your workforce and your risk assessments.

2. **Health and safety: legal obligations**

Employers are under a duty to protect their employees, and others, from harm. They are therefore required to assess the risk of returning to work while the Covid-19 outbreak is ongoing and to put steps in place to manage that risk.

Organisations will want to follow the relevant guidance applicable to their sector and workplace issued by the Government and regulators such as the Health and Safety Executive HSE (see section 5, section 7 and section 9). Doing so is bound to be helpful to show you are complying with your regulatory duties.

However, the guidance does not supersede an employer’s existing legal obligations under health and safety legislation. The guidance is there to help employers assess and manage the new risks posed by Covid-19. In addition, the guidance is non-statutory so it is not legally binding and seeing as it is not as clear as one might have hoped for on a number of key issues such as personal protective equipment (PPE), travel and testing, it should be treated as a baseline. It does not prevent employers from going above and beyond it if they consider it necessary.

The key legislation is of course the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations 1999.

This requires organisations, when conducting their business, to:

> ensure, so far as reasonably practicable, the health, safety and welfare at work of its employees; and

> ensure, so far as is reasonably practicable, that other persons who may be affected are not exposed to risks to their health and safety.

If there is a risk to health and safety, the onus is on the organisation to reduce that risk to the lowest reasonably practicable level by taking preventative measures.
Breaches give rise to corporate, and in some circumstances personal, liability for managers, directors and officers.

3. What does a health and safety risk assessment involve?

Employers need to:

> assess health and safety risks to which their workers are exposed, and where they have clinically vulnerable workers who cannot work from home, the employer needs to consider their risk exposure in particular (clinically extremely vulnerable people should remain at home); and

> consult employees and/or union health and safety representatives (particularly on any changes proposed to be made to working practices).

Employers also have an obligation, so far as reasonably practicable, to keep employees informed about health and safety at work and to provide training, instruction and supervision.

A risk assessment should:

> identify the risks associated with each part of your business operations in the current environment and who could be affected;

> enable you to assess those risks; and

> develop reasonable precautions to ensure any remaining risks are low.

You should take into account who is clinically vulnerable or clinically extremely vulnerable.

Employers need to apply a risk management hierarchy by:

> removing the risk or hazard entirely;

> controlling it; or

> if neither is possible, protecting the workers from the risk or hazard (for example through screens, PPE etc).

If you employ five or more people, you must record your findings in writing, including:

> the hazards;

> who might be harmed and how; and

> what you are doing to control the risks.

You should share the results of your risk assessment with your workforce. If possible, you should also consider publishing the results on your website. The Government expects all employers with over 50 workers to do so.

See section 5, section 9 and section 11 for details of the new guidance on safe working issued by the Government and HSE, including a template and examples of risk assessments.
4. **When does a risk assessment need to be done? And how do you demonstrate you have followed the guidance?**

The risk assessment should be done before re-opening the business or premises, as should cleaning and development of improved cleaning procedures, etc.

The Government guidance (discussed below) provides for a notice to be displayed in the workplace to confirm that:

- you have carried out a risk assessment and shared the results;
- cleaning, handwashing and hygiene procedures are in place in line with guidance;
- you have taken all reasonable steps to help people work from home;
- you have taken all reasonable steps to maintain a two metres (2m) distance at work; and
- where people cannot be 2m apart, you have done everything practical to manage the risk of transmission.

Precise methods of controlling the risks associated with Covid-19 will depend on the nature of the operation and your ways of working and layout. Complex or high-risk operations will need to analyse processes particularly carefully and may want to obtain external technical and medical advice.

5. **Phased return to work and Covid-19 secure guidelines**

On 11 May 2020, the Prime Minister announced a gradual, phased plan to begin easing the country out of lockdown over the coming weeks and months.

Sectors of the economy that are allowed to be open may open – such as food production, construction, manufacturing, logistics, distribution and scientific research. As soon as practicable, from 13 May, those workplaces that are allowed to be open should be set up to meet the new Covid-19 secure guidelines.

The Prime Minister’s announcement was followed by publication of the following documents:

- **COVID-19 Recovery Plan.**
- **Staying alert and safe guidance** (revised guidance on social distancing).
- **Travel guidance.**
- **Workplace-specific guidelines**, covering eight different sectors and workplaces:
  - Construction and other outdoor work (for example, energy and utilities, waste management, railway services, street and highway services and farming).
  - Factories, plants and warehouses.
  - Offices and contact centres.
> Restaurants offering takeaway or delivery.
> Shops and branches.
> Labs and research facilities.
> Vehicles.
> Other people’s homes.


The Covid-19 Recovery Plan sets out a roadmap for lifting restrictions and opening more businesses and venues. This will be based on a three-phased approach:

> **Phase 1**: contain, delay, research and mitigate the effects of the virus.
> **Phase 2**: smarter controls.
> **Phase 3**: reliable treatments for the virus.

The Recovery Plan refers to the **five tests** first announced in April 2020, which determine whether restrictions may be eased:

> The Government must be confident that it is able to provide sufficient critical care and specialist treatment across the UK (“protecting the NHS’s ability to cope”).
> There must be a sustained and consistent fall in the daily Covid-19 death rates, so that the government is confident that the pandemic is past its peak.
> There must be reliable data from the Scientific Advisory Group for Emergencies (SAGE) that the rate of infection is decreasing to manageable levels across the board.
> The Government must be confident that operational challenges (such as the supply of PPE and testing capacity) are in hand, with supply able to meet future demand.
> The Government must be confident that any adjustments to the current measures will not risk a second peak that overwhelms the NHS.

The Prime Minister has stressed that the overall plan is dependent on successfully controlling the spread of the virus. If evidence shows sufficient progress is not being made in controlling the virus, then the lifting of restrictions may have to be delayed or the Government may have to re-impose some restrictions.

Underlying the Covid-19 secure guidelines are the Government’s **five steps to working safely**, namely:

> **Step 1**: Carry out a Covid-19 risk assessment in line with the relevant HSE guidance (see section 3 and section 4).
> **Step 2**: Develop cleaning, handwashing and hygiene procedures.
> **Step 3**: Help people to work from home.
Step 4: Maintain 2m social distancing, where possible.

Step 5: Where people cannot be 2m apart, manage transmission risk.

Each of the eight workplace-specific Covid-19 secure guidelines follows the same format and has compliance with Public Health England's (PHE) 2m social distancing guidelines as its central message. Employers “have a duty to reduce workplace risk to the lowest reasonably practicable level by taking preventative measures” and the guides set out how to achieve this. They require employers who have not already done so to carry out risk assessments and to share the results with their workforce (see sections 3, section 4 and section 7). When considering how to apply the guidance, employers are advised to take into account agency workers, contractors and others, as well as employees.

In practice, as many businesses operate more than one type of workplace, multiple guidance documents will need to be consulted by many employers. A downloadable notice is provided with each of the workplace-specific guidance documents, which employers should display in their workplaces to demonstrate compliance with the Government’s guidance.

The guidance also states that firms should consider any advice that has been produced specifically for that sector. For example, for construction, there is the Construction Leadership Council's code of practice, Site Operating Procedures (SOP) - Protecting Your Workforce, and the recently adopted Charter for safe working practice co-produced by the Government and the Home Building Federation.

Employers should also consult any specific guidance published by the Northern Ireland Executive, the Scottish Government and the Welsh Government, which must be considered alongside the Government's latest workplace guidance where applicable, as the devolved administrations are working to different timetables as regards re-opening.

Although the Government said it expects persons who cannot work from home to start returning to their English workplaces (if they are open) from 13 May 2020, its guidance requires both risk assessments and cleaning to be completed before reopening. Health and safety risk assessments and consultations take time. The focus is on ensuring a workplace is safe before encouraging employees to return to work.

The guidance is reasonably practical, if pretty general. However, there are two big areas of weakness – transport to and from work and PPE (see section 8 and section 10).

6. What about the sectors and businesses that are not yet allowed to re-open?

For the time being, certain businesses and venues are required to stay closed to the public, including:

- restaurants and cafes (other than for takeaway);
- pubs, cinemas, theatres and nightclubs;
- clothing and electronics stores;
> hotels, hostels, bed and breakfasts, campsites, caravan parks and boarding houses for commercial/leisure use (excluding use by those who live in them permanently, those who are unable to return home and critical workers where they need to stay for work); and

> indoor and outdoor leisure facilities (such as gyms).

Food retailers and food markets, hardware stores, garden centres and certain other retailers can remain open. Other businesses can remain open and their employees can travel to work if they cannot work from home. The Government has also allowed outdoor sports facilities (such as tennis courts and golf courses) to reopen provided social distancing rules are followed.

The Government has set up a number of ministerial-led taskforces to plan how certain closed sectors will be able to reopen safely, including pubs and restaurants, non-essential retail, recreation and leisure (including tourism, culture and sport), and international aviation. The taskforces will engage with key stakeholders, including industry and trade unions.

On 25 May, the Prime Minister announced that outdoor markets and car showrooms will be able to reopen from 1 June, as soon as they are able to meet the Covid-19 secure guidelines and that all other non-essential retail (including shops selling clothes, shoes, toys, furniture, books, and electronics, plus tailors, auction houses, photography studios, and indoor markets) will be expected to be able to reopen from 15 June if the Government’s five tests are met and they follow the Covid-19 secure guidelines.

7. HSE guidance on consulting your workers

The HSE has published Talking with your workers about preventing coronavirus.

This guide explains how you can talk to your workers about preventing Covid-19 in your workplace and gives practical guidance on reducing the risks from coronavirus (for example, by putting in place social distancing measures, staggering shifts and providing additional handwashing facilities).

The guide emphasises that consultation with workers is a two-way process, allowing workers to raise concerns and influence decisions on managing health and safety. In a small business, employers might choose to consult workers directly. Larger businesses may consult through a health and safety representative, chosen by their workers or selected by a trade union. The employer cannot decide who the representative will be.

Employers should hold conversations before returning to work so that plans can be developed and put in place before going back. They should then have further discussions soon after return to make sure the actions are working and are being followed.

Employers may also decide to repeat the discussions if something changes, for example if:

> new guidelines are published;

> lockdown restrictions change;
plans you put in place do not work as expected (for example, if social distancing is not working);
work or tasks change; or
someone in the workplace is diagnosed with Covid-19.

Engagement with workers, unions and employee representative bodies is key to putting in place a “Covid-19 secure” return to work plan that complies with the legal requirements and also encourages worker confidence. In times like these, trust is of the utmost importance.

This is going to be a somewhat messy process and good, two-way communication is one of the best ways to manage this as best you can.

Whilst the full risk assessment does not need to be a public document, you do need to consult on your approach. You need to be aware that, like the Government and HSE guidance, the risk assessment is likely to be a living document. As you become aware of new facts, examples of best practice or new guidance, you will need to adjust your approach, communicate it and update your risk assessment. This is a moving feast, so you should have regular, frequent reviews and you should document these, and any adjustments made.

For further HSE guidance on consulting your workforce (not specific to Covid-19), see HSE: Consulting and involving your workers.

8. Travel guidance
The Government’s Coronavirus (COVID-19): safer travel guidance for passengers provides guidance for walking, cycling, using private vehicles (for example, cars and vans) and travelling by taxis and public transport (for example trains, buses, coaches and ferries).

The guidance says you should avoid using public transport where possible and should instead walk, cycle or drive. If you do travel, it urges you to think carefully about the times, routes and ways you travel.

Everyone is urged to consider all other forms of transport before using public transport. If you can, travel at off-peak times and your employer may agree alternative or flexible working hours to support this. It is suggested that employers should consider staggering working hours and expanding bicycle storage, car parking and changing facilities.

At all points in your journey, it is important that you follow social distancing guidelines and keep a short distance from others where possible. Public Health England recommends keeping a 2m distance from other people, where possible. Where this is not possible, you should keep the time you spend near others as short as possible and avoid physical contact.

The guidance recommends that, if you need to use public transport, you should wear a face covering if you can. However, wearing a face covering is optional and so is not required by law. According to the guidance, the evidence suggests that wearing a face covering does not protect you, but it may protect others if you are infected but have not yet developed symptoms. This is most relevant for short periods indoors in crowded areas, such as
public transport and shops. A face covering is not the same as the surgical masks or respirators used by NHS staff. The guidance stresses that supplies of PPE, including face masks, must continue to be reserved for those who need them to protect against risks in their workplace, such as health and care workers, and those in industrial settings like those exposed to dust hazards.

This is going to be a big practical issue for employers, regardless of which sector they operate in. It has only been a few days since the Prime Minister announced the gradual easing of the lockdown and already we are seeing overcrowded trains and buses, making it difficult (if not impossible) for travellers to maintain social distancing and giving trade unions a serious source for concern.

Although employers are unlikely to incur regulatory risk under the health and safety legislation in relation to how people get to and from work (not least because it would be very difficult to establish causation), the civil position may be more complicated if you actively encourage people to use public transport in circumstances where the risks of transmission are clear (for example, for vulnerable people).

9. HSE guidance on working safely
The HSE has published Working safely during the coronavirus outbreak - a short guide, which provides advice on who should go to work, protecting people who are at higher risk, getting into and leaving work, work areas, common areas, good hygiene and PPE.

In particular, on who should go to work, the guide says employers should think about:

> where and how your work is carried out, and consider if there are jobs and tasks that can be changed to reduce risk;

> identifying everyone in your business who can work from home - if they can, they should;

> providing equipment needed for employees to work safely and effectively at home (for example laptops, mobile phones and video conferencing equipment);

> keeping in regular contact with people working from home, making sure you discuss their wellbeing and helping them to feel they are still part of the workforce;

> where it is not possible to work from home, the guidance on social distancing and hygiene should be followed; and

> the minimum number of people needed to carry out work tasks safely.

On protecting people who are at higher risk, the guide says employers should think about:

> planning for clinically extremely vulnerable (shielding) workers who must not work outside the home;
planning for people working at home who have someone shielding in their household;
>
helping workers at increased risk to work from home, either in their current role or an alternative role;
>
where people at increased risk cannot work from home, offering them the safest available roles; and
>
planning for people who need to self-isolate.

On **getting into and leaving work**, the guide says employers should think about:

>
identifying where people can travel alone in their own transport (or walk, or cycle if it is safe to do so) when getting to and from work to maintain social distancing;
>
staggering arrival and departure times so people can keep to the 2m social distancing rules by not using entry/exit points at the same time; and
>
providing handwashing facilities (running water, soap and paper towels) at entry/exit points. People should be able to wash their hands when they get to work and leave. If this is not possible, provide hand sanitiser.

On **work area**, the guide says employers should think about how you can organise your work area so that you can keep people 2m apart, where possible:

>
physically arrange work areas to keep people 2m apart;
>
mark areas using floor paint or tape to help people keep a 2m distance;
>
provide signage to remind people to keep a 2m distance; and
>
avoid people working face-to-face (for example, working side-by-side).

Where you **cannot** keep a 2m physical distance, you should think about:

>
assigning one person per work area;
>
reducing the number of people in the work area;
>
assigning and keeping people to shift teams (that is, people on the same shift working in the same teams) to limit social interaction;
>
keeping the number of people working less than 2m apart to a minimum; and
>
using screens to create a physical barrier between people.

10. **What does the guidance say about the use of PPE?**

The [HSE short guide to working safely](https://www.hse.gov.uk/coronavirus) says employers should continue to provide the PPE that you normally use to protect yourself or workers (for example, from exposure to wood dust, flour, welding fumes and silica dust).

The [Government’s workplace-specific Covid-19 secure guidelines](https://www.gov.uk/government/publications/covid-19-workplace-guidance) say the following on the use of PPE:
Where you are already using PPE in your work activity to protect against non-Covid-19 risks, you should continue to do so.

When managing the risk of Covid-19, additional PPE beyond what you usually wear is not beneficial. This is because Covid-19 is a different type of risk to the risks you normally face in a workplace and needs to be managed through social distancing, hygiene and fixed teams or partnering, not through the use of PPE.

The exception is a clinical setting like a hospital or a small handful of other roles for which Public Health England advises use of PPE (for example, first responders and immigration enforcement officers).

Workplaces should not encourage the precautionary use of extra PPE to protect against Covid-19 outside clinical settings or when responding to a suspected or confirmed case of Covid-19.

Unless you are in a situation where the risk of Covid-19 transmission is very high, your risk assessment should reflect the fact that the role of PPE in providing additional protection is extremely limited.

However, if your risk assessment shows that PPE is required, then you must provide this PPE free of charge to workers who need it and any PPE provided must fit properly.

The Government’s advice on the use of face coverings (as opposed to surgical masks or respirators used by health and care workers) is very similar to that set out in the new travel guidance (see section 8).

According to the Government’s Covid-19 secure guidelines, there are some circumstances when wearing a face covering may be marginally beneficial as a precautionary measure. Although it may not protect you, it may protect others if you are infected but have not developed symptoms. The guidance stresses that face coverings are not a replacement for the other ways of managing risk, including minimising time spent in contact, using fixed teams and partnering for close-up work, and increasing hand and surface washing. According to the Government, these other measures remain the best ways of managing risk in the workplace and so the Government would not expect to see employers relying on face coverings as risk management for the purpose of their health and safety assessments. However, the guidance goes on to say that employers should support their workers in using face coverings safely if they choose to wear one.

In practice, companies are likely to provide some PPE or cloth face coverings for their workforce and for anyone who cannot maintain 2m distancing. This may be part of a series of measures to reduce the risk. This obviously could pose sourcing challenges and if clinical PPE were to be used it might possibly attract criticism for diverting essential PPE from the healthcare sector and other frontline workers.

### 11. HSE toolkit, risk assessment template and examples of risk assessments

The HSE has published a toolkit to assist employers in managing and assessing risks at work arising from COVID-19.
The toolkit includes:

> A risk assessment template for use by any employer.

> Examples of risk assessments for certain types of businesses, including office-based businesses, food preparation and service businesses, factory maintenance work and warehouses.

The toolkit links to a health and safety toolbox, which provides detailed guidance on controlling the risks of a wide range of specific hazards, as well as providing a link to HSE resources designed around larger and higher-risk businesses and organisations.

For further HSE Covid-19 guidance, see:

> Coronavirus (COVID-19): latest information and advice.

> RIDDOR reporting of COVID-19.

**Conclusion**

It is going to be critical for employers to review guidance and announcements from the Government and regulators in real time and think about how that impacts their organisation and their people.

Employers have a lot to digest, including the workplace-specific Covid-19-secure guidelines and travel guidance. The difference in approach by the devolved administrations in Scotland, Wales and Northern Ireland does not help as many businesses span several borders. And the ongoing debate about when schools will reopen also adds to the already considerable uncertainty, as availability of childcare is a key consideration for a workforce preparing to return to work.

The Government has stressed that employees should not be forced into an unsafe environment. And, in our view, a mutual relationship of trust and confidence between an employer and employees will be critical for employers navigating a way through this uniquely complicated landscape.

Employers should also remember that what might work for others may not be right for their workforce. And although there will be many learnings that employers can gain from other businesses, an employer must think about what is right for them and their people. As John Lewis’s Group Operations Director put it: “If it has taught us anything, is that we simply cannot get everything right, and embrace the fact that there is uncertainty.”