

April Legislation 2020 Update Webinar Q&A

Simon Joyston-Bechal a Director at Turnstone Law



Q: With the current Furlough process being executed at many organisations currently, and many of the employees being furloughed are first aiders, is there any guidance been issued on increased first aider? Employee ratios etc. I have recommended we complete the first aid needs assessment again for all of our depots to assess whether the arrangements remain adequate. Would this be the recommended approach?

A: Yes, risk assessment is the answer to these difficult decisions. For first aid, also consider whether revised instructions or equipment are required to deal with COVID risks for a COVID and non-COVID related casualty. Don't forget to consider that the need for protection goes both ways - the first aider may have the virus!

Q: Should we continue with PSSR inspection and loler inspection? No one will be using the loler items as no one at work but the PSSR items are plant critical and still running?

A: Statutory inspections are required for plant that is still in use. If you can't get the inspection done on time despite having done everything reasonably practicable to do so, then risk assess and document your action plan to reduce risk to as low as reasonably practicable. Relevant aspects of the risk assessment would include: likelihood and severity of harm if the plant fails; number of people exposed to the risk; reliability and past maintenance record as an indication of whether any particular item of plant continues to be safe; and the social utility or necessity of continuing to operate the plant. The HSE do not appear to be prepared to allow a derogation from the statutory inspection regime but in the absence of a derogation it seems to me a robust risk assessment would be powerful in heading off a prosecution.

Q: Do we need to undertake self-undertaken risk assessments for staff working from home?

A: You need suitable and sufficient risk assessments for all staff, whether or not they work from home. In appropriate cases, such as office type home-working with display screen

equipment issues, then it is reasonable to guide staff through their own self-assessment, with a mechanism for support with queries and difficulties. Your guidance can include practical tips, such as using a biscuit tin as a laptop screen stand once they have an independent keyboard and mouse. Whilst at home, the "workstation" is something with which the employer should be concerned. This can technically include glare from a desk lamp and could arguably extend to include faulty wiring on a desk lamp (but I would argue against that). A trip hazard in the home staircase or a faulty home smoke alarm are generally going to be beyond the employer's responsibility in my view.

Q: At the current time, do those new to homeworking have to advise their home insurer of this (where they are being provided with equipment by an employer)?

A: The employer's compulsory insurance should cover all work activities, including those conducted at home. If an employee suffers a musculoskeletal injury as a result of working from home using their own equipment or the office's equipment, any successful compensation claim against the employer should therefore be insured. But it would be sensible for the employer to let the insurer know that working practices have changed once home working becomes prevalent. In contrast, the employee's own home insurance is unlikely to cover an injury in their own home that is work related.

Q: Our Union note they are enforcing the 2m exclusion/social distancing advice. For the work our staff do this is impractical. Are they being reasonable?

A: This question requires specific legal advice, but it is reasonable for a Trades Union to request that employers follow the Government's recommended social distancing measures in the workplace. In turn, the employer needs to risk assess and justify any derogation from those rules. That risk assessment should include a documented action plan to reduce risk to as low as reasonably practicable. It will depend upon all the circumstances as to whether the employer is justified in expecting workers then to continue working with proximity below 2 metres, including: whether an alternative can be found; the particular circumstances and vulnerabilities of the workers; the introduction of additional measures such as masks; and the social necessity of the employer's operations.

Q: In this emergency, though temporary lockdown should we be procuring all DSE equipment inc chairs for all staff working from home to be DSE compliant? We have 11,000 staff.

A: This needs to be risk assessed. It seems to me that most office type work for more than a brief temporary period should be done with a separate keyboard and mouse. For people who do not have an appropriate chair at home, this is the next priority. The chair ought to be adjustable but it need not be top of the range; and options include renting chairs or delivering existing chairs from the office. However, one contributor has kindly pointed out

that office furniture may not meet the higher standards of fire safety applicable to home furnishings.

Q: What is considered as Essential or emergency construction projects, and should other projects be carrying on, in this current climate, and if construction sites continue that are not deemed as essential/emergency construction projects, what if someone become ill and then dies from the Covid 19 virus, would clients, main contractors be liable under corporate manslaughter, please can someone advise?

A: In my view there is not a 'one size fits all' answer to this question, other than to risk assess in each individual case. To the Government's credit, they have not outlawed all construction as yet. There are cases at each end of the spectrum to demonstrate the need for a tailored risk assessment approach. There are many construction projects that can be arranged to achieve social distancing effectively, for example by rescheduling the required activities in time and across different parts of the site - even though this may create delays. There are other projects for which a practicable work-around cannot be found. These should perhaps only continue if there is an overriding social necessity to weigh into the balanced risk assessment. In theory, an employer could be prosecuted for coercing an employee or a contractor into an unsafe working practice regarding COVID. Corporate manslaughter seems unlikely but cannot be ruled out - for example if a director is aware or ought to be aware that a worker is in a particularly vulnerable group and pressurises that worker to work in a way that is likely to lead to COVID infection. For CDM projects, the Client, Principal Contractor and other contractors/parties are expected to coordinate their responses. It seems to me the Principal Contractor has the main duty to get the job done with all reasonably practicable distancing precautions whilst not pressurising the other parties into unsafe working practices.

Q: We have a conundrum regarding routine legionella temperature monitoring in residential care homes. Whilst we need to maintain our control measures, we are concerned about our technical staff introducing the virus into the care home. Could you offer any advice?

A: This conundrum calls for a careful and documented risk assessment and action plan, in which the competing risks are balanced against each other. It may benefit from more detailed and tailored legal advice.

Q: Any advice for the Waste Sector? We have crews out on the front line & social distancing is not possible in the cab of vehicle. There is also concern regarding the recycled waste coming back to the depot and potential exposure to staff.

A: After taking into account all reasonably practicable distancing measures, the risk assessment and action plan here can also weigh into the balance the social necessity of continuing waste sector work. The same would apply to emergency service personnel. But don't forget to consider whether any staff have particular vulnerability that should be accommodated.

Q: What are your thoughts regarding the use of remote temperature checks of employees returning to the office as restrictions are lifted or for essential workers in the current phase of the pandemic? Good idea? Any Legal downsides?

A: We need to examine these 'return to work' conditions in more detail over the coming weeks. Individual employers could develop their own requirements, preferably with medical advice. We do not know what approach the Government will take regarding antibody testing and passporting as a route back to work, but it is worth noting that employers can buy the antibody test kits in bulk already and may wish to use them as part of a return to work programme with medical support. If the Government does not take up its options to purchase these home testing antibody kits, it will be much easier for companies to source them. It seems the testing kits don't pick up everyone who has been exposed to the virus; but if the kit shows a positive result that someone has immunity, this is more reliable as an indicator that they can safely return to work. I am following this closely.

Q: If staff have been sent home on special paid leave and have an accident whilst doing DIY (for example) are there any HASAW ramifications for the employer?

A: No, this would not be a work activity.

Q: Can guidance be provided with regards to keeping facilities safe for when we return to work? All our workforce is working from home, and the offices are currently closed. In normal operations we would be undertaking safety inspections i.e. fire alarm, water tanks and etc. Is travel to offices to check that safety systems are still operational considered essential travel. I am more concerned about the risks of Legionella as water tanks are holding stagnant water due to non-use.

A: Please allow your workers to come to work to conduct necessary maintenance on your premises. The Government have caused tremendous confusion over 'essential work'. This does not mean that the only people who can travel to work are those whose job is essential for society. For anyone who can't work from home, if their work is essential to them (eg to earn a living) then their work is currently permitted as essential work (no matter how trivial it might be to society). In London, the Mayor has confused everyone by saying these people should not use public transport - but he is out of step with the Government on this. The Government have not as yet tried to stop workplaces from operating for people who can't work from home.

Q: The 2m social distance is guidance, our Board are stating as guidance they do not have to legally comply as it's not a legal requirement. Is this correct?

A: The company (and by extension the directors) have a duty to ensure H&S so far as is reasonably practicable and to conduct suitable and sufficient risk assessments. These duties are enforceable in criminal law. A suitable and sufficient risk assessment should take into account COVID and the Government's guidance on distancing but there may be cases when the 2m rule is not followed - so long as these have been adequately risk assessed.

Q: How do you control construction sites which are in central London and they don't have access to a vehicle, don't drive or no parking on site? Construction sites have not been ordered to close by the Government nor are Clients instructing sites to close. How could this be controlled?

A: Health and safety law does not generally apply to the commute to and from the usual workplace. However, in the present circumstances, it seems to me that a COVID risk assessment should take into account the commute to work. The answer as to whether you should permit the commute on London public transport will depend upon your risk assessment. You should take into account the London Mayor's desire to restrict the use of public transport to essential workers - but I am not aware that this is a binding legal prohibition and it certainly contradicts the Government's national approach.

Q: Public Health England advice is only to have the 2m rule where possible and that masks are ineffective, are you contradicting the official advice?

A: My personal view is that UK advice on masks for COVID is conflicted by two factors: First, there is not an adequate supply to provide them to everyone. Second, it is easy to say they are not 100% effective. A more rigorous approach is to conduct a risk assessment. If masks are partially effective and they can be obtained, then they are a useful tool in managing risk.

Q: Should we consider the health & safety of our employees as well looking forward? A business that goes bust will not be able to take care of the health & safety of the employees. Losing a job does not contribute to the health, safety AND wellbeing of the employees and their family either. Where lies the balance?

A: The balance lies in the test of reasonably practicable. If a precautionary measure can't be done without threatening the future of the business, then that could be a valid factor in determining what is reasonably practicable. But only a factor and not a 'get out of jail' card.

Q: Do you foresee the possibility of an HSE HSWA prosecution of an organisation which fails to effectively implement social distancing / 2 metres when work is not suspended: a. Following a Covid-19 death arising from work? b. Following a workplace infection? c. When the circumstances of cross-infection are present?

A: H&S criminal law is flexible enough for a prosecution to succeed in the right cases. My view is that prosecution is relatively unlikely regarding COVID save for the most extreme cases, such as ignoring the vulnerable or coercing risky activity. But cases may look extreme with hindsight, so we all need to be careful.

Q: Our offices are closed. Would we be expected to re-open them just to have a LOLER inspection completed on a lift no one is currently using?

A: I would prefer to see maintenance activity, particularly statutory inspections, continue whilst the office is mostly closed. Otherwise you may struggle when activity returns or when someone, perhaps a lone security worker, decides to use the lift that hasn't been inspected. Your maintenance/facilities staff can't work from home so they are allowed to go to work and follow social distancing.

James Meredith a Legal Assistant at Russell-Cooke



Q: If there is shielding people in the household - should we stop employees from coming to work. Can we furlough them?

A: To save the lives of extremely vulnerable people who are shielding, contact between those who are extremely vulnerable and others should be kept to a minimum. This applies to those who reside in the same household as those who are shielding in the sense that they should reduce their contact with others. This would be best achieved by not attending work which could require interaction with lots of different people.

Employees who are unable to work because they are shielding in line with public health guidance (or need to stay home with someone who is shielding) can be furloughed. (<https://www.gov.uk/government/publications/guidance-on-shieldingand-protectingextremely-vulnerable-persons-from-covid-19/guidance-on-shieldingand-protectingextremely-vulnerable-persons-from-covid-19>). Other requirements within the guidance must be complied with including the three-week minimum furlough period, the requirement that the employee must have been on the PAYE scheme since 28 February 2020 or before that date, and, crucially, the worker must be consulted and must agree to be furloughed. Please see the guidance, accessible via the link above, for more details.

Q: Is Covid 19 RIDDOR reportable?

A: The HSE's guidance states that you must only make a report of COVID19 under RIDDOR in the following three circumstances:

1. An unintended incident at work has led to someone's possible or actual exposure to coronavirus. This must be reported as a dangerous occurrence. An example would be where a lab worker accidentally smashes a glass vial containing coronavirus, leading to people being exposed to the virus.
2. A worker has been diagnosed as having COVID 19 and there is reasonable evidence that it was caused by exposure at work. This must be reported as an exposure to a biological agent; as a case of disease. An example of a work-related exposure to coronavirus would be a health care professional who is diagnosed with COVID-19 after treating patients with COVID-19.
3. If someone dies as a result of a work-related exposure to coronavirus and this is confirmed as the likely cause of death by a registered medical practitioner, then you must report this as a death due to exposure to a biological agent using the 'case of disease' report form. You must report workplace fatalities to HSE by the quickest practicable means without delay and send a report of that fatality within 10 days of the incident.

Q: Why will the new Building Regulator not cover Wales? And when would Wales be added?

A: The Government will legislate for this in new primary legislation through the Building Safety Bill and further secondary legislation where necessary, but there is no clear answer as to why, at this moment in time, the new Building Safety Regulator will not cover Wales or when this may develop. Further information pertaining to the new regulator was published by the Ministry of Housing, Communities & Local Government on 1 April 2020 in their response to the 'Building a Safer Future' consultation which you can access via this link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_

data/file/877628/A_reformed_building_safety_regulatory_system_-_gvt_response_to_the_Building_a_Safer_Future_consultation.pdf

Q: Is it expected that the other countries in the UK will follow suit with increased standards in their own legislation?

A: Scotland has its own legislation in place (Part 3 of the Fire (Scotland) Act 2005), whilst Northern Ireland is covered in Part 3 of The Fire and Rescue Services (Northern Ireland) Order 2006 and The Fire Safety Regulations (Northern Ireland) 2010. Only time will tell whether further developments will follow in Scottish and Northern Irish law.

Q: Does the new fire safety bill have any implications for commercial properties?

A: Not at this moment in time. The Fire Safety Bill 2020 applies only to multi-occupied residential buildings. However, Clause 2(1) of the Bill permits the Ministry of Housing, Communities and Local Government to make future amendments to the Fire Safety Order, by regulations, to change or clarify the types of premises falling within its scope and also allow for amendments consequential to those changes or clarifications to be made. This allows, for example, other types of premises to later be brought into the scope of the Fire Safety Order relatively quickly.

Q: Hotel main staff being accommodated in sister hotel in order to prevent travelling on tube. Has employer got a duty to clean and maintain the rooms staff are staying in? Hygiene issues COVID?

A: The World Health Organization published interim guidance for management in the accommodation sector on 31 March 2020. It advised that a plan of action should be established, tailored to the situation and implemented in accordance with the recommendations of local and national public health authorities with the aim to prevent cases, effectively manage cases, and mitigate impact among clients and staff, including cleaning and disinfection of rooms. Therefore, instead of advising that there should be a relaxation of cleaning measures, the guidance in fact encourages a more stringent approach to hygiene for guests and staff staying in hotel rooms. Importantly, however, an affected guest or member of staff staying in one of the rooms should be isolated on a temporary basis until the local health authorities intervene and provided the room is not shared with other guests. It states that no visitors should be permitted to enter the room occupied by the affected person. Please access the following link for more details:

<https://apps.who.int/iris/bitstream/handle/10665/331638/WHO-2019-nCoV-Hotels2020.1eng.pdf>

Q: Please clarify how the Fire Safety Bill 2020 applies where there is mixed occupancy; ie: residential and commercial?

A: See Clause 1(b). The Fire Safety Bill 2020 applies to all buildings containing two or more sets of domestic premises. The Regulatory Reform (Fire Safety) Order 2005 will apply to the external walls of this building and anything attached to it, including cladding, balconies, windows, insulation and fixings, as well as the common parts and the doors between the domestic premises and the common parts within this building.

Q: Does multi-occupied include rented houses where each room is rented to a different person i.e. student lets?

A: Normally yes. Consider sections 254 and 258 of the Housing Act 2004.

Q: Sounds like a lot of the supporting legislation for the new fire safety legislation has not yet been published?

A: Yes, that is correct, and pressure has been placed on the Government to act rather than simply deliberate on future developments. Once it is enacted, the Fire Safety Bill 2020 will act as a framework for further legislation designed to implement all of the recommendations of the Dame Judith Hackitt Review and the Grenfell Tower Inquiry Phase One Report.

Q: Is it likely that the new fire safety bill will be extended to non-domestic premises?

A: It may not extend in its current format. It could potentially be amended or added to in respect of commercial buildings. There is certainly scope for the Bill to extend wider, capturing other types of buildings, and it is likely to impact on fire safety in commercial buildings through future legislation.

Q: The information provided on the new Fire Safety Bill seems to be specific to only High-Rise Residential buildings. How, if at all, does the Bill impact upon 'normal' industry type buildings?

A: The Fire Safety Bill 2020 applies to all multi-occupied residential buildings of all heights, not solely high-rise residential buildings. It does not currently apply to commercial buildings with no residential units; however, I expect this to change with the implementation of further secondary legislation in the near future.

Q: Is there regional – IE Scotland, Ireland and Wales legislation being put in place?

A: The provisions in the Fire Safety Bill 2020 relate to matters within the legislative competence of the Welsh Parliament. The Welsh Minister has confirmed that she will put the matter before the Welsh Parliament for a legislative consent motion in relation to these provisions. The provisions in the Bill 2020 will apply to Wales once it is enacted.

Q: Does the Fire Safety Bill in its current form allow for its measures to be extended beyond the residential sector to incorporate commercial buildings too?

A: Yes. Clause 2(1) of the Bill permits future amendments to the Fire Safety Order, by regulations, to change or clarify the types of premises falling within its scope and also allow for amendments consequential to those changes or clarifications to be made.

Q: What date is the Fire Safety Bill due to become law? Is it 1/10/20

A: I think it would be unwise to make an assumption at this stage, especially considering the COVID-19 pandemic and its wider impact on law-making.