

Getting your business back to work

This note is intended as an aide memoire to the discussion on 11 June 2020 regarding **Getting your business back to work**. It is provided to delegates not as formal legal advice but as an outline of Anderson Strathern's views on things which businesses should consider when planning to return and the options which may be available. The note considers Health & Safety and Employment Law aspects of returning to work. Precise considerations will vary from sector to sector and business to business.

We would be pleased to provide definitive legal advice on specific issues. Whatever you need, please contact Andrew at andrew.brown@andersonstrathern.co.uk or Jonathan at jonathan.guy@andersonstrathern.co.uk and we shall ensure that you receive prompt expert advice.

We also have further news and insights available on our Business Hub. To find out more about the help and insights offered by our Business Hub, please click the link in the email. By subscribing, you will ensure that you are invited to future events.

Please also pass this handout to anyone who you think might benefit.

Health & Safety issues

Introduction

We are all still adjusting to what is referred to as the “new normal” as result of the Coronavirus and what this means in relation to moving towards something that starts to resemble the “old normal” for employers, in terms of returning to work, raises a number of health and safety issues.

The lockdown phase has been some 8-10 weeks, and while it is hoped that a viable treatment or vaccine will remove this risk, the new normal phase could last for months, with some estimates suggesting a period of 18 months (before the coronavirus disappears, herd immunity is achieved or a successful vaccine is rolled out).

The Scottish / UK governments (<https://www.gov.scot/publications/coronavirus-covid-19-phase-1-returning-to-work/> / <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>) and HSE (<https://www.hse.gov.uk/coronavirus/working-safely/index.htm>) have published guidance in relation to what employers should do when planning to return to work. I start therefore with a somewhat obvious recommendation; that employers should carefully consult this guidance when formulating their plan for returning to work.

Principal health and safety duties

In order to provide the appropriate context to the more specific matters that are discussed below, it is important to briefly discuss the principal health and safety duties on employers, which are contained in the Health & Safety at Work Act 1974:

- S2 – *“(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.”*
- S3 – The same duty applies to people that may be affected by a business’s undertaking - for example, a customer that visits their local supermarket, or people to whom a business sub-lets a floor within their building.
- S7 – This duty applies to employees.
 - *“(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and*

- *(b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with."*

There are two important points to take away from the above legal duties.

The first is that the qualification "so far as is reasonably practicable", in sections 2 and 3, means that employers do not need to completely eliminate a risk; rather they must manage it appropriately. If it were otherwise, hardly anybody would be able to work.

The second point is that employees are under a duty to assist their employer to discharge their health and safety obligations.

Risk assessment

The key tool for managing risk in UK health and safety risk management regime is risk assessment, which is based upon the principle of reducing risks to "as low as reasonably practicable" (ALARP).

In summary, risk assessments for a re-opening of the workplace or a return to work must:

- meet the "suitable and sufficient" criteria in that they identify foreseeable hazards, evaluate risks and implement the risk control measures that reduce risks to the ALARP criteria by following best practice;
- be completed by competent persons (i.e. those with the skills, knowledge and experience to do so) but with input from others familiar with the working environment including employees and/or their representatives;
- communicate outcomes to employees and others in terms of residual risks and risk control measures to be adopted;
- and be reviewed where there is "significant change" in matters to which the risk assessment relates or where it is suspected the risk assessment is no longer valid.

Ten things to do now...

Against this background, I suggest that employers give consideration to the following 10 matters when deciding how best to manage the risk of their employees returning to work.

1. Inspect the premises

If the property has been left completely unattended, you may find unexpected pests, damage or breakages — all of which need to be addressed before employees begin to return.

Tests to run before the premises is reoccupied might include:

- checking the fire alarm systems, extinguishers and escape routes;
- inspecting lifts or pressure systems;
- making sure your water systems avoid legionella risks (see HSE reminder on water systems safety in lockdown);
- and ensuring any asbestos-containing materials have not deteriorated or been damaged.

2. Undertake the necessary risk assessments

These will help you identify the additional control measures and adjustments that will need to be implemented.

Style risk assessments can be found on the HSE's website and there are a number of online resources that also provide styles (<https://www.hse.gov.uk/risk/controlling-risks.htm>)

Some points to consider when undertaking the risk assessment in relation to returning to work in light of the Coronavirus include:

Risks

- the virus moves from person-to-person in droplets from the nose or mouth spread when a person with the virus coughs or exhales;

- the virus can survive for up to 72 hours out of the body on surfaces which people have coughed on etc.;
- and people can pick up the virus by breathing in the droplets or by touching contaminated surfaces and then touching their eyes or mouth.

Control measures

- Managers should pass on and reinforce key Government public health messages to all staff, including:
 - cover the mouth and nose with a tissue or sleeve (not hands) when coughing or sneezing (Catch it — Bin it — Kill it);
 - put used tissues in the bin straight away;
 - wash hands regularly with soap and water for at least 20 seconds; use hand sanitiser gel if soap and water are not available;
 - avoid close contact with people who are unwell;
 - clean and disinfect frequently touched objects and surfaces;
 - do not touch face, eyes, nose or mouth if hands are not clean;
 - ensure that the organisation complies with its duty to provide a safe and healthy workplace/working conditions for staff who remain working in the workplace during the coronavirus pandemic;
 - circulate coronavirus policy and safety procedures to all staff and managers; these set out how staff should behave and the precautions they must adopt during the pandemic to keep them safe;
 - require staff to practice effective social distancing while in and around the workplace and when travelling to and from work by:
 - avoiding non-essential contact with others;
 - keeping a safe distance of at least 2 metres (about 3 to 4 steps) from others at all times;
 - and avoiding physical contact (e.g. hugs, handshakes, etc.)

- In all departments, fully implement the Scottish Government’s Guidance for the particular sector that it is involved and also have regard to Public Health England Guidance for Employers and Businesses on Coronavirus, including the following key safety precautions:
 - keep local/departmental risk assessments under review to ensure that a safe place of work is maintained;
 - make any adjustments to the workspace/rotas/work patterns/ procedures necessary to facilitate social distancing at work;
 - cancel face-to-face meetings and replace them with video conferencing/ phone conferencing, etc.;
 - follow Government health and travel advice;
 - increase environmental cleaning in the workplace; review and revise cleaning method statements and schedules and ensure cleaning staff have access to suitable detergents, disinfectants and PPE;
 - cancel non-essential training and all face-to-face training/recruitment practices;
 - carry out any essential training/ recruitment by using email/online learning wherever possible rather than bringing people together face to face;
 - display appropriate public health posters around the workplace, such as Cleaning and Disinfection Guidance
- The risk assessment should also address what should be done if a person that has been at your workplace has symptoms or tests positive for the virus.

It is important that these assessments are carried out in consultation with employees or trade unions and should be continually reviewed and adjusted.

3. Decide who will return

Will you stagger the return to work? The priority will be those employees who can’t do their job fully from home. Are there others who could continue working from home for the foreseeable future?

It is important that employers don’t forget to continue to support homeworkers. Where the home working is temporary however, the HSE is advising employers to provide workers with advice on completing their own basic assessment at home and has provided a checklist which may be helpful <https://www.hse.gov.uk/msd/dse/>.

Another important aspect is that you look to protect the mental health of your workers. The HSE's guidance document recommends *"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"*.

Another point to consider in relation to homeworking, is whether there are any implications in relation to insurance both from the employer and employee's perspective. For example, most home insurance policies have an exclusion for people that meet clients at their home. It is prudent for employers and employees to notify their insurers.

4. Redesign the workplace for social distancing

Review workplaces, procedures and work patterns. For example, you could consider the following.

- Can you adjust work patterns and arrival/departure times to reduce the number of employees in the premises at the same time?
- How can you reduce bottlenecks at access points and lifts?
- Do you need screens or barriers for employees?
- Would investing in equipment for card payments prevent contact through handing over cash?
- What actions should be taken to mitigate the risks of shared equipment or hot-desking?
- How will you maintain distancing and hygiene with regards to bathroom use?
- Can you improve ventilation?
- Could you implement one-way corridors?
- To what degree do employees need to change how they use break times, and access kitchens, canteens and refreshments on-site?
- What will the procedure be for visitors and contractors?
- Would signs or other visual aids assist in changing behaviour?
- How will the organisation evacuate for a fire or other emergency?

5. Establish your cleaning and hygiene needs

The risk assessment should show whether a deep clean is required before the premises reopen.

Until a vaccine is available, the organisation will need to maintain a high level of hygiene. Government guidance says employers should provide handwashing facilities or hand sanitisers at entry and exit points.

Identify your cleaning needs (e.g. more frequent cleaning, regular disinfecting of surfaces, handles, keyboards, bannisters, lift buttons, photocopiers, etc.) and confirm whether your existing cleaning contractor can fulfil them. Do you need to bring in additional help or order supplies?

6. Consider issues around work equipment

Plant and machinery will need to be inspected for deterioration, etc. If employees have taken IT equipment, office furniture or other assets home with them you will need a plan to get them back to the workplace, sanitised and checked for damage.

7. Amend your H&S and HR policies accordingly

Obviously there are lots of variables depending on the organisation, its size and activities. Issues to look at might include the following.

- What working hours, shift patterns, and locations need to change?
- How will you reintegrate furloughed employees?
- Will work processes change, e.g. should all meetings be video calls?
- What training is needed to adjust to the new procedures?
- What symptoms will you require employees to report? What will your procedures be if there is a suspected case of coronavirus?
- How will you manage high-risk employees i.e. those with certain health conditions?
- Will you require work-related travel? How will this be managed?
- What will the procedure be if a nervous employee refuses to return to work when the Government allows it?
- Does your supply chain or procurement process need support or adjustments?

8. Devise a communications strategy

It is worth involving staff and unions in the planning process and you should keep communications channels open with staff, unions, customers, suppliers and other stakeholders. Once you have a plan, it needs to be communicated carefully to all employees on the understanding that it will likely need to be adjusted as you go.

Aim to give employees reasonable notice of a return to the workplace so that they can arrange childcare, investigate commuting options, etc. Your employees must be confident that you are not putting them at risk by asking them to return to work, so let them know the measures you are taking to keep them safe.

9. Set up a COVID-19 secure team.

This team should be responsible for monitoring how well the new workplace is functioning and should include the current members of staff responsible for occupational health, workplace health and safety as well as staff representatives and trade unions. This team should be able to inform risk control measures and act as a conduit for staff concerns to be fed into management decision-making processes

10. PPE – face masks

At present, the UK, Scottish Government and HSE's position is that they do not recommend the use of face masks at work, other than in healthcare and clinical settings. This is on the basis that, "*There is very little evidence of widespread benefit from the use of face masks outside of the clinical or care settings*". Therefore, while there is guidance and rules in relation to the use of masks on public transport and in shops, they are not yet recommended for employees in most settings.

This is, however, only guidance and does not override the duties imposed on employers under legislation. It is possible for this advice to be shown to be incorrect and for an employee to sue their employer for a failure to provide face masks. It is therefore necessary to briefly consider an employer's duties in relation to providing PPE.

PPE, such as face masks, is generally regarded in legislation as the least effective control measure and the last choice in the hierarchy of measures that should be implemented by an employer to prevent their employees from being injured. Importantly, however, once PPE is deemed necessary, the employer is under a duty to ensure that it is used. Further, its use should be supported by the suitable and sufficient risk assessment.

The position with regards to face masks is a dynamic one and it is imperative that employers assign somebody to keep abreast of any developments. In terms of the guidance and literature available at present, it is acceptable for an employer in a non-clinical setting to conclude - as part of a suitable and sufficient risk assessment – that they do not need to provide face masks to their employees.

The dynamic nature of the position in relation to this is, however, demonstrated by the World Health Organisation (WHO) updating its advice on 5 June in relation to the use of face masks, whereby it does now recommend that they are worn in certain non-clinical settings. That said, the WHO still recommends that a risk based approach be applied to determine whether they are needed, which is consistent with the UK and Scottish Government's positions in relation to their use in non-clinical settings.

Employment Law - contracts and redundancies

Having conducted a risk assessment, you may very well come to a conclusion that you cannot accommodate all employees back on-site. Or that you cannot have them on-site at the same time. In addition, the reduced revenue may make a return for all staff to pre lockdown hours unaffordable.

Equally, many staff may not want to return or feel able to return.

From 1 August, the furlough scheme will begin to cost employers money – the sums are not insignificant and increase on 1 September and 1 October before the furlough scheme ends on 31 October.

For all of those reasons, employers need to plan now for the return of their workforce. In that regard, three broad themes are emerging for clients:

1. What do we do if staff can't or won't return to work?
2. What do we do if staff won't agree to a change in their working hours?
3. What do we do if we are simply unable to have everyone back by the end of October?

There are ways in which any of the three problems above can be addressed. Employers are not necessarily hamstrung by agreements that they reached before the pandemic.

1. What do we do if staff can't or won't return to work?

Key to addressing this issue will be identifying whether you are dealing with a “can't” or a “won't”. People might not return for various reasons:

1. Because they have childcare obligations and their normal childcare arrangements are no longer available.
2. Because they have their own health concerns e.g. they are recommended to shield.
3. Because they are required to support vulnerable relatives.
4. Because they prefer being on furlough leave.

By engaging with the employees you will be able to assess the different risks you face and options you have as an employer. Options might include:

- Keeping some employees on the furlough scheme. There are provisions making it clear that it is available for employees who have childcare obligations.

- Putting employees on part time furlough from 1 July. By finding out when exactly they are required to look after children or other dependents, you can assess the options in terms of either reduced hours or changes in shift times.
- Obtaining occupational health advice. Employers can engage directly with staff and ascertain what adjustments might be reasonable. But, from time to time, it is worthwhile obtaining expert Occupational Health advice. Reasonable adjustments can include:
 - Changed hours.
 - Home working.
 - Changes in role or duties.

The broad principle that people must attend work in order to be paid has not been changed by coronavirus. While there might be sick pay rights and there are always obligations to be reasonable, an employer is not obliged to employ individuals indefinitely if they are unwilling or unable to work (even if that unwillingness or inability is for legitimate and understandable reasons). Depending upon what the employee's reasons are and providing the employer has complied with its obligations, dismissals on the grounds of "capability" or "misconduct" might be justified.

2. What do we do if staff won't agree to a change in their working hours?

Often contracts agreed before the pandemic will guarantee people:

- A fixed minimum number of hours.
- Specific times and/or days when work will be conducted.
- Premiums for working overtime or certain shifts.

As a result of a downturn in business and/or because of social distancing requirements, those obligations might not be affordable or practical. In that event, the obligations can be changed. Precisely how that change should be implemented will depend upon the number of employees and upon whether there are trade unions involved.

The first step is to try to obtain the employee's agreement – through the trade union if necessary. This may involve a degree of negotiation and employers have obligations to consider flexible working and there remain risks under the Equality Act 2010 if an employer is too inflexible. However, there are times when employers can justify their decisions to require employees to work at particular times. Agreement should also be sought for any changes in pay – whether it is to implement changes in shift premiums or a reduction in basic pay.

In the event that agreement cannot be obtained, employers can consider whether it is necessary to dismiss employees. While this is a harsh result for the employee, if it is being done in order to safeguard the business and all alternatives have been considered, it may be the fair outcome. However, employees are entitled to receive their full contractual or statutory notice. Whether a redundancy payment is due will depend upon the particular circumstances.

If the employer dismisses the employee, it is more likely to be able to demonstrate that the dismissal is fair if it gives the employee a final opportunity to accept the revised terms. Many employees who have refused prior to that stage, will be willing to accept the revised terms when there is no doubt that unemployment is the alternative outcome.

3. What do we do if we are simply unable to have everyone back by the end of October?

Many employers delayed making redundancies initially. However, it is becoming much more common in businesses of all sizes. Whether and when to implement redundancies is not an easy decision, but there are steps that must be followed and clear risks and costs involved in unnecessarily rushing the process. Some broad principles to be mindful of:

- Employers must show that they have consulted with employees before finally deciding which employees should be selected for redundancy. Depending upon the number of employees affected, this may also involve consultation with trade unions and/or may require employers to conduct an election process for employee representatives to be appointed.
- Employers must select people fairly. This may require them to use certain selection criteria and score employees against each criterion.
- Employers must have taken reasonable steps to consider alternatives to redundancy. The main alternatives to redundancy routinely considered include:
 - Pay cuts and reduced hours – as discussed above.
 - Redeployment into alternative roles. But there is no obligation to create a vacancy.

Employers who know that they will not recover quickly enough and who choose to start the process now, will position themselves well to defend any potential claims in due course. They will also be able to save money by, for example:

- Serving the employee with notice but requiring them to “work” their notice on furlough leave, thereby allowing the employer to recoup some of the cost from the UK Government. (In some situations it might be necessary to pay the notice period at 100% of normal pay.)

- Requiring the employee to take annual leave during the furlough leave period. This avoids a payment in lieu of accrued annual leave when employment ends. It means that some of the annual leave payment is recoverable from the UK Government.

In some situations employers may wish to remove risks by agreeing formal settlement agreements or “COT3” agreements through ACAS.

How can we help?

At Anderson Strathern our teams help employers (and employees) in all industries including hospitality and tourism, manufacturing, construction, office work, the education sector and the public sector. Clients range from small businesses with one or two employees to multinational companies with thousands of employees to Government departments and agencies. We are a full service law firm and so can provide a “one stop shop” service or provide specific support on particular issues. In recent weeks we have been assisting employers in many different ways and would be pleased to assist you, including:

- Considering draft risk assessments and offering our advice.
- Providing specific guidance on particular health & safety issues affecting your business – including matters such as PPE.
- Considering any contractual issues that face you as a business, including contracts that you have with your suppliers or customers to identify what rights, obligations and options you have.
- Considering what your current employment contracts already allow you to do as an employer and what steps might be necessary to change the agreement you have with your employees.
- Advising on redundancy processes, including selection methods.
- Advising on the furlough scheme, including how best to tackle some of its unknowns.
- Drafting correspondence with employees and/or trade unions.
- Providing “on the ground” HR support through Louise Cullen <https://andersonstrathern.co.uk/our-people/louise-cullen> and our HR Plus service, including attending redundancy meetings.
- Providing access to your employees to mindfulness training, led by Louise Cullen, to support your employees’ wellbeing.

We provide solutions based advice, focusing on resolving the situation for you rather than just telling you what the law says.

Please get in touch with Andrew or Jonathan if you would like to discuss how we might be able to help you further:

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