

SLAUGHTER AND MAY

Slaughter and May Podcast

COVID-19: Employee health and safety

Clare Fletcher	Hello and welcome to the first in a new series of Slaughter and May Podcasts, looking at key topics for employees in the context of the COVID-19 pandemic. My name's Clare Fletcher, I'm a professional support lawyer in the Employment team here at Slaughter and May.
Padraig Cronin	And I'm Padraig Cronin one of the partners in the firm's Employment team.
Clare Fletcher	Today's podcast focuses on employee health and safety. We'll begin with a brief overview of the legal landscape, before looking at some of the COVID secure workplace guidance. We will then move on to look at some of the more difficult areas for employers to navigate in practice. I should say before we go any further that this podcast is being recorded on the 2 nd July and reflects the law and guidance as it stands today. Padraig, do you want to start by talking us through the legal landscape?
Padraig Cronin	Thanks Clare, yeah I think the first thing I would say is that fundamentally the law on employer's health and safety obligations hasn't changed as a result of the pandemic, although it is certainly true to say that the guidance which has been issued helps as a kind of baseline as to what employers should be doing in the context of the pandemic, in order to comply with those legal obligations. And so the legal starting point is that employers are under a duty to ensure so far as reasonably practicable, the health and safety of their employees while those employees are at work. Now of course that isn't a one size fits all test which is both good and bad I guess but, what steps are reasonable and therefore what steps need to be taken will depend on the circumstances. Things that would be relevant include the nature of the work environment, the likelihood of harm occurring, the gravity of the harm which may occur, and the cost and practicability of preventing harm always needs to be taken into account. And just to look a little closer at two of those things – on the gravity of the harm which may occur, it's important to recognise there that some employees are potentially at greater risk than others because of their own particular circumstances, so obviously people with underlying physical and mental health conditions would be relevant in this case, but also potentially BAME employees, given that there seems to be a disproportionate impact on BAME individuals due to COVID-19, and on the cost and practicability aspect of the reasonableness test, it is important to understand that you don't have to spend unlimited amounts of money to protect people from risk, it's about what is reasonable in the circumstances, but all that being said if the employer fails to comply with that reasonableness duty of care, then the employer can be liable in respect of physical or psychiatric injury that arises as a result which would include COVID-19 itself and foreseeable complications arising from it.

Clare Fletcher	And one point I would just add there Padraig is that there are also a number of relevant statutory health and safety laws, for example under the Health and Safety at Work Act, and also a whole plethora of regulations under that Act which implement a whole range of specific statutory duties on employers.
Padraig Cronin	Yes there are statutory obligations that require risk assessments to be carried out, that require PPE to be made available if that's necessary to control a risk that cannot be controlled in some other way, and also obligations to consult employees on health and safety risks and on proposed protective measures.
Clare Fletcher	And just on employee consultation, it's relevant I think to note that the employer can chose to either consult employees directly, which actually isn't often allowed in other employee consultation contexts, or alternatively to use elected health and safety reps, although where the employer recognises a trade union it would typically be those trade union reps that are used for this purpose. And one of the important differences between the common law and the statutory duties, is that statutory duties aren't directly enforceable by employees, they are enforced instead by the health and safety executive, and in some cases the local authority. A breach of any of the employers statutory obligations will constitute a criminal offence and that leaves it open to a range of sanctions, including prison sentences of up to two years for the directors and unlimited fines.
Padraig Cronin	And I think it's also just worth noting that employees have their own duties under the Health and Safety at Work Act to take reasonable care for the health and safety of themselves and of others at work, and to cooperate with their employers to ensure that all health and safety obligations are complied with, and a breach of these duties by an employee is also a criminal offence. So that employee duty I think can be useful for employers to remember and to flag to employees when dealing with employees who fail to comply with new COVID-19 secure workplace measures that have been put in place. So those I think are the key legal and statutory obligations – Clare will you talk us through the government guidelines briefly?
Clare Fletcher	Yeah sure so the guidance for making workplaces COVID-19 secure was first published on the 11 th May, it has been updated a few times since, and the guidance starts by setting out five key steps for working safely. The first is to carry out a COVID-19 risk assessment which of course as Padraig mentioned is also a legal requirement, and this needs to consider what adjustments might be needed to the usual methods of working to minimise risks to employees' health and as a matter of law, employers must consult employees about that COVID-19 risk assessment.
Padraig Cronin	I've seen the odd risk assessment on peoples' websites – is that because there's an obligation to do that or..?
Clare Fletcher	It's not actually a legal requirement, no, but as a matter of best practice the guidance says that employers with over 50 employees are expected to publish their risk assessments on their websites, and there was a survey done by the TUC

	<p>a few weeks ago of a hundred companies and as at the 22nd June, about 45 of the those companies, so just under half, had made their full risk assessments public.</p> <p>The second point of the five step plan is to develop cleaning, handwashing and hygiene procedures, I think that's fairly self-explanatory and something that we are all becoming very familiar with. Thirdly, all reasonable steps should be taken by employers to help people work from home, and we will discuss a bit later what this means for employers when deciding when and how to bring employees back to the workplace, and the fourth and fifth steps of the plan can be taken together. They are effectively to maintain two metre social distancing wherever possible, but where people can't be two metres apart, the employer needs to manage the transmission risk.</p>
Padraig Cronin	And that's I guess where this new one metre plus rule comes into play and that's something we can take a look at a little later on as well.
Clare Fletcher	Yeah that's right. So then building on the five key steps, the government has also produced twelve specific workplace guides and these set out some practical considerations on how to work safely. However, each business will need to translate the principles of the guidance into the specific actions it needs to take for each of its different types of workplace. This is going to depend on the size of the business, type of business, how it is operated, managed and regulated for example, just as with the legal principles you outlined Padraig, one size does not fit all here as well. Which brings us on to consider how the law and the guidance interact. Padraig could you talk us through the status of the guidance.
Padraig Cronin	Yeah, Clare, I mean as you said the guidance that's been published in the UK, certainly in England, is less prescriptive and more flexible than you might see in some other jurisdictions and it expressly stated to be non-statutory, so it isn't law and therefore it doesn't supersede employers' legal obligations on health and safety, so that being said, there is a general principle that I think employers should follow the government guidance because if they do so, it helps to show that reasonable steps have in fact been taken and therefore that the duty of care has been discharged. To put it another way, I think that the guidance is broad, and because its principles based, it makes it more relevant for people to take legal advice on their own circumstances if they think they have particular circumstances which haven't been addressed or where they haven't really got a steer from the government.
Clare Fletcher	Yeah absolutely and I think that brings us on to look at some of the more difficult issues that can face employers in this context. I'll start with one that we've seen quite a few client queries on, and that is how long homeworking needs to continue, and when employers, particularly those who are office based, can bring people back to the workplace. The latest version of the guidance, as at the 24 th June, still clearly states that people who can work from home should continue to do so, and that employers should decide in consultation with their workers whether it's viable for them to continue working from home. So what that means is it's not enough to say that it's more convenient or more efficient for people to work in the office, the

	test is whether homeworking is viable. If employees can work from home they should continue to do so, and the employers should support them in doing so, at least for now.
Padraig Cronin	The next issue I think we wanted to address was the introduction of this one metre plus social distancing, and at least from my own perspective I think the messaging around this has been maybe just a little bit confused. There may be an impression there that the one metre plus has replaced two metres as a distance – a lot of the talk here is obviously focused on pubs which seems to be quite an important consideration in this context, but in any event the one metre plus rule hasn't I think replaced the two metre rule. The guidance, which again as Clare says is as at 24 th June, retains the two metres as the primary social distancing standard but it now allows distancing of one metre with risk mitigation, where two metre distancing isn't viable. So again it's a question of what is viable and not necessarily what's convenient. So I think what that means is if employers have been operating up to now with two metre social distancing, they really should continue to do so. The benefit if you like of the one metre plus risk mitigation measures approach is that it may allow activities to be carried on now which couldn't be carried on before the one metre plus rule was introduced, but it's not a replacement, it's an additional ability I guess.
Clare Fletcher	Yeah that's right Padraig, and just to pick up on the risk mitigations point with the new one metre plus, as far as the guidance is concerned that risk mitigation doesn't include PPE or face coverings. The guidance has always been quite clear that additional PPE beyond what employees normally wear isn't beneficial, that COVID -19 needs to be managed through social distancing and hygiene measures rather than using PPE, and the same goes for face coverings. Employers shouldn't be relying on those in their risk assessments.
Padraig Cronin	I think there has been quite a lot of controversy – uncertainly – in / out about face coverings?
Clare Fletcher	Absolutely – yes. My own view is that actually in some circumstances, what the guidance says actually conflicts with one of the employers statutory duties that we mentioned earlier, the one to provide PPE to an employee where there's a risk to their health and safety which hasn't been eliminated by other measures, and I think that's why we're seeing quite a lot of employers going above and beyond the requirements of the guidance in this respect. CBI did a survey last month which revealed that 79% of employers are reporting an increased use of PPE and to my mind, it's not just about what might be needed to comply with the employer's legal obligations, it's also about giving employees the confidence they need to feel safe about returning to the workplace.
Padraig Cronin	Yes and I think an area where a lot of people are focused on as you say right now is transport, and how employees should be getting back to work when they are getting back to work, and maybe just to start with the law on this. There's a large patch of grey I think on the question of whether an employer could face liability for requiring employees to travel to work if their method of transport exposed them to

	<p>risks to their health and safety. We will take a look just in a little later on about some workplace protections for employers who have concerns about workplace risks, but suffice to say for now the cases don't clearly exclude the possibility that travel to work is also covered there. So it is possible that travel to work is something which could give rise to a liability for an employer. In any event employees who do have to travel in order to get to work are now advised to consider changing those travel habits, so thinking about cycling, walking or driving if they would otherwise have taken public transport, and in any event trying to avoid rush hour. The bottom line I think really is that public transport should be considered as a last resort because it really represents a different order of infection risk to all other types of transport which is why, I guess, the government are advising against all but essential public transport travel and mandating the use of face coverings for all but a very limited sub-set of people travelling on public transport.</p>
Clare Fletcher	<p>Yeah exactly. And transport is of course just one of a number of difficulties which may be facing employees on a return to the workplace and that's the next issue I would like to have a look at now. How should employers deal with those who are reluctant to return? And there are a number of options available. I think the first one needs to be, can the employee work from home, either in their usual job or in an alternative role? If not, is there a way to make their work in the office safer, particularly in light of the workplace guidance we have just looked at? If that fails, could they be furloughed or take paid holiday or some other form of unpaid leave, and only having addressed all of those issues should employers think about disciplinary action but we would say very much as a last resort.</p>
Padraig Cronin	<p>Yes because there can be real risks from employers if they jump to disciplinary action too quickly, not just reputationally but financially as well.</p>
Clare Fletcher	<p>Yeah absolutely. I think it's important for employers to be aware that there are legal protections for employees who act on health and safety concerns, and what this means is that if the employer doesn't take adequate measures to protect its employees, and there are therefore circumstances of danger which (this is using the statutory language) 'the employee reasonably believes to be serious and imminent', then employees basically have the right to walk out of the workplace, or refuse to return, or take any other appropriate action to protect not only their own health, but also potentially other peoples' health; and if having done that, the employer takes any action which may amount to detrimental treatment including dismissing that employee, the employer may face a claim, for which compensation is uncapped. So I think the key point here is for employers to make sure that any objections or concerns raised by employees are carefully managed to avoid triggering these detriment or dismissal protections.</p>
Padraig Cronin	<p>And one of the questions that comes up in this context at the moment is if an employer has an employee who refuses to attend work because they have concerns about their safety or their health arising out of COVID-19 risk, does the employer still have to pay that employee?</p>

Clare Fletcher	<p>Yeah I think that's a really important question because on the one hand you can see that if somebody isn't working then perhaps they shouldn't be entitled to be paid, but the law isn't entirely clear on this. I think the safest assumption is that this could give rise to a claim for detrimental treatment and that the employer might be better off thinking about some of the other options I just outlined, so potentially offering other work that could be done from home or a temporary suspension on full pay, although admittedly that's unlikely to be sustainable for large numbers of employees or for a long period of time. I think what we're seeing is that the more that employers engage with employees, understand their concerns and try to address them, hopefully the rarer these scenarios will be. I think we'll finish with one final question which I know we've both been asked Padraig, and that's whether employers should be asking their employees to sign waivers when they return to the workplace and I think we have a clear view on that Padraig.</p>
Padraig Cronin	<p>Yes in fact I had a client ask me this question on about the 17th or 18th March which was very, very early in the pandemic and I think before the sort of, the actual lockdown had been introduced. I mean it's been there from the beginning, but I think the issue is that the employers' duty to protect its employees' health and safety, you can't be contacted out of, can't be delegated and therefore employees can't validly sign away their rights. So any employee waiver of this kind would be unenforceable, it would not, as people say, be worth the paper it's written on, and in any event, the TUC and individual unions are alive to this question around waivers and are advising employees not to sign. The one thing we do see I think which is not quite the same thing is that employers could ask their employees to sign an acknowledgement that they understand the measures the employer has put in place to make the workplace COVID-19 secure, that the employers understand their own obligations in the context of those protected measures, and that they'll abide by them, and I would say that that is a sensible, practical thing to do partly from an information and real world perspective - I'm not sure it has a huge legal effect but it's a sensible process step I think.</p>
Clare Fletcher	<p>OK that brings us to the end of today's podcast. Thank you all for listening. Do look out for further episodes in this series which we'll be publishing in the coming weeks. In the meantime, if you would like to talk about any of the issues raised in this podcast in more detail, please do feel free to contact either Padraig or me or your usual Slaughter and May contact. Thank you and goodbye for now.</p>