

# SLAUGHTER AND MAY

## Slaughter and May Podcast

### COVID-19: Working from home

<b>Clare Fletcher</b>	Hello and welcome to the third in our series of Slaughter and May podcasts looking at key topics for employers in the context of the COVID-19 pandemic. My name is Clare Fletcher and I am a professional support lawyer in the Employment team.
<b>Lizzie Twigger</b>	And I am Lizzie Twigger, senior and in-house counsel here at Slaughter and May.
<b>Clare Fletcher</b>	<p>Today's podcast focuses on homeworking in the context of COVID-19. We will start with some scene setting before delving into the law and guidance. We will then look at some of the more difficult issues facing employers and give some practical take-aways.</p> <p>I should say this podcast is being recorded on the 17<sup>th</sup> July and reflects the law and guidance as it stands today.</p> <p>So to set the scene Lizzie can you take us through the developments in homeworking in the last few months?</p>
<b>Lizzie Twigger</b>	Yes, so the start of lockdown resulted in a huge increase in the number of employees working from home, other than critical or key industries if you could work from home you had to do so. As lockdown restrictions are eased the current indications are that just over half of employees see partial homeworking as a permanent arrangement, and the evidence is that even larger numbers want flexible working. Employers therefore need to make homeworking part of their new "normal". Clare sensible to take us through the legal position before we look at the guidance.
<b>Clare Fletcher</b>	Yes absolutely, so the law has been on something of a journey here. Initially the lockdown regulations prevented anyone leaving their home without reasonable excuse. One such excuse was attending work but only if it was not reasonably possible for that person to work from home. The messaging at this point was very much stay at home and what this really amounted to was a legal requirement to work from home if possible. Then on 11 <sup>th</sup> May there was a shift in messaging, a move away from the stay at home message and towards a return albeit gradual to the workplace and this was when the COVID-secure workplace guidance was published. However it wasn't until the end of May when the legal restrictions were eased.
<b>Lizzie Twigger</b>	So the lockdown regulations no longer mandate working from home. There was some talk in the early stages of lockdown about bringing in a legal right for people to work from home wasn't there?

<p><b>Clare Fletcher</b></p>	<p>Yes there was quite a lot of speculation about that some weeks ago but these weren't then taken forward. I think for the most part the messaging has now moved on, although I have seen the Health Secretary has started to make similar comments again this week so we might need to watch this space on that one. What we do have in law at the moment is a right to request flexible working which would include homeworking. We will be doing some a separate podcast on flexible working in a few weeks' time so do look out for that one. There are of course other legal rights and duties which may come into play, including the employer's duty to protect the health and safety of their employees and we discussed those in our first podcast so I won't revisit that here, other than to say that those duties very much include those who are working from home. So much for the legal background, Lizzie can you now outline for us where we are with the guidance on homeworking?</p>
<p><b>Lizzie Twigger</b></p>	<p>Yes the COVID-secure workplace guidance which was first published on 11<sup>th</sup> May remains unchanged in this respect, it still says that employers should take all reasonable steps to help people work from home and we will talk in a moment about what this actually requires employers to do. The guidance also states that people who can work from home should continue to do so and employers should decide in consultation with their workers whether it's viable for them to continue working from home, which begs the question we touched on it in our first podcast of where the homeworking line should be drawn. We are increasingly seeing the return, albeit a very cautious return of office workers viable isn't defined but to our mind it not only has to relate to the nature of the work, or whether there is the right equipment at home, it could also include where the employees own personal circumstances or surroundings mean that homeworking isn't viable. So for example children in the house or the impact on mental health of being isolated at home. This is reflected in the guidance which gives the example of workers in critical roles which might be performed remotely but who are unable to work remotely due to home circumstances or the unavailability of safe enabling equipment.</p>
<p><b>Clare Fletcher</b></p>	<p>That's right, we have today though seen a significant change in messaging just this lunchtime the Prime Minister announced that with effect from 1<sup>st</sup> August, employers will be given more discretion on how they ensure employees can work safely and the guidance will be amended so that the work from home if you can message is removed. The other important change announced today relates to public transport, and with effect from today the advice is that people can now use public transport, although they will still be encouraged to consider alternative means of transport where possible. So Lizzie what change of approach if any do you think this will require from employers?</p>
<p><b>Lizzie Twigger</b></p>	<p>My view is that this announcement will not require or even result in a significant change of approach to homeworking. I don't think we will suddenly see employers requiring their homeworking employees to return to the workplace, and we wouldn't advise this sort of mandatory approach. I suspect we will continue to see large numbers of employees working from home for many months to come, probably on a more partial basis than the last few months but</p>

	<p>certainly far more than pre-pandemic. I think we will just have to see what more is said in the coming days but I think for the moment our advice to employers is to be guided by your legal obligations to employees and not just the constantly evolving guidance, and of course the change to the work at home message is premised on the prevalence of the virus remaining around or below current levels, which it may well not, so that's another reason I think for there not be a change in approach.</p>
<b>Clare Fletcher</b>	<p>So we promised to come back to this issue of what an employer taking reasonable steps to enable homeworking actually means. How does this translate in practice? So I would suggest there are three key points here. First is that communication is key, at the risk of sounding something like a broken record because I have made this point in both previous podcasts, engaging with your employees on homeworking is vital and not just from a legal perspective. The COVID-secure workplace guidance sets a clear expectation that employers should be consulting their employees about homeworking, and that this will inform the decision about whether it is viable or not as Lizzie has mentioned. Secondly risk assessments need to include homeworking and there will be a different approach required here to risk assessments which take place in the workplace, in the current circumstances clearly most employers won't be able to physically attend employee's homes to inspect their workstation and the alternative which seems quite widely accepted is for employers to provide their employees with guidance so that the employees can self-certify their homeworking set-up, and the Health and Safety Executive has some quite useful check-lists on its website for that purpose.</p>
<b>Lizzie Twigger</b>	<p>But another point I'd add is that most in-work risk assessments to date only really consider physical health and not mental health. Employers will need to think about how they can assess a risk to mental health. We will touch on this a bit more later on at the end of this podcast.</p>
<b>Clare Fletcher</b>	<p>The third key point then is the provision of equipment so the COVID-secure workplace guidance states that supporting homeworking includes ensuring employees have the right equipment. For example remote access to work systems and employers will need to assess on an ongoing basis and with input from employees, what equipment they need to work effectively from home. Now there could be some issues with partial homeworking if this does indeed become the norm as we suspect it will, because this might require employers to purchase two sets of equipment one for home and one for the office and there is at least some good news for employers on the tax front here, because the Treasury has introduced a new temporary tax exemption just for the current tax year and that means there won't be any tax or national insurance liability where the employer reimburses the cost of home office equipment purchased by the employee and that is provided that two conditions are met. The first is that the equipment is obtained for the sole purpose of enabling the employee to work from home as a result of the COVID-19 outbreak, and that secondly there is no significant private use of the equipment, and HMRC will look for employers to have a clear policy</p>

	<p>about private use of home office equipment for these purposes which brings us on nicely to think about policies more broadly.</p>
<p><b>Lizzie Twigger</b></p>	<p>Because employers now need to be considering whether their policies are fit for purpose, significant number of employees working from home has really changed the landscape. It would sensible to look at policies across the board so this will include a number of formal policies such as those on computer use or email communications, use of personal devices for work purposes, rules about the use of home printers or personal email accounts, data privacy and monitoring will be key. Employers need to ensure that there is a clear communication with employees about the nature and scope of the monitoring and to be clear themselves as to what expectations are. An employee can only fairly be expected to abide by rules and policies that are brought to their attention and which are clearly explained.</p>
<p><b>Clare Fletcher</b></p>	<p>Absolutely. Just to pick up on the data monitoring what we are starting to see is some companies using some really quite invasive monitoring technologies that were primarily designed to prevent fraudulent activity, but using them instead to monitor the activities of their employees where they are working from home, and that is particularly for employers who aren't used to having employees working from home certainly not in the numbers and for the length of time that they currently are. That sort of approach raises some quite tricky legal issues so it's just really to flag a warning note here that employers should be getting legal advice if that is the approach that they are thinking of taking.</p>
<p><b>Lizzie Twigger</b></p>	<p>And we also need to have employers looking at their soft policies as well because I think there are going to be lots of guidelines that need to be considered and possibly refreshed. Safe destruction of documents for example, what do you do with confidential documents when you can't just throw them in the office shredder or know that the bin that you've thrown them in is going to be shredded in due course, so issues like that are going to be quite important I think. And problems will arise if policies such as sickness absence reporting are not fairly managed and consistently managed, they might not need to be amended but thought does need to be given as to how they are operated when you have a very different working pattern.</p> <p>Which I think brings us on to another soft area of potential problems and attendant legal risk, that of managing employees who are working from home. Certainly during the height of the pandemic, employers recognised that they needed to look at issues such as furloughed employees being subject to review and annual appraisal in the normal way, and many employers will have introduced systems for formal review and assessment and feedback with employees on furlough, and will have managed this variation quite well but probably with a sense that it was a temporary deviation from normal practice. If it continues in truth, especially where there are issues with performances it is likely to be harder to performance manage people remotely.</p>

<b>Clare Fletcher</b>	Absolutely and there may of course be some niggling historic issues there, and if so these really need to be addressed you can't really leave these things to fester. Particularly as remote working can actually make these things less easy to see, let alone to deal with.
<b>Lizzie Twigger</b>	Yeah and feedback is more difficult. You know the end of a zoom call is not the same as leaving a meeting room with a colleague or colleagues, where feedback can be subtle it can be you know unspoken I think you have a sense of whether something went well it is all in the moment. When you click off a zoom call you really are left a bit in the dark. You know sometimes you do find yourself thinking do I give them a call and say how do you think that went? Don't want to bother somebody. There is a lot of unspoken communication which being remote from colleagues means you lose, you lose that communication and interaction, and also, you know how do you manage feedback? What is the best means of managing feedback because emails can be horribly cold and abrupt, factual but abrupt?
<b>Clare Fletcher</b>	Absolutely, I think this is really going to feel like a new normal to bring that phrase in again for employees and for managers. Would you agree Lizzie this is really going to be about setting new expectations and people being more adaptable then they have in the past?
<b>Lizzie Twigger</b>	I do, yes, definitely so if necessary line managers need to schedule regular calls with team members or those for whom they have direct responsibility. If you don't see colleagues at work, you need to make the opportunity to catch up with them, and you need to be more adaptable about the expectations. It may be less about time at a desk, more about setting expectations for the delivery of a piece of work and timely feedback on that. In many ways it is all about the same sort of concerns as we had before, such as feeding back on performance promptly and not leaving it until a formal review a few months later, but I think it will become even more important to do it. And we shouldn't forget that for some categories of workers you know there may be other specific and particular issues, so it might be difficult for new employees to establish themselves in a workplace without contact with colleagues. Businesses need to be alert to these sorts of issues arising and that there might be more of an impact on newer workers the generations coming in may need more support to achieve or be able to demonstrate their capabilities.
<b>Clare Fletcher</b>	Which I think brings up another really important consideration with homeworking that of equality of treatment, as we said at the start I think it's unlikely that all of us who are currently working from home all the time will continue to do so but what we may see is that some groups of employees do so more than others.
<b>Lizzie Twigger</b>	Yes and the profile of those self-selecting homeworkers may show, for example that more women work from home which could in itself lead to issues of exclusion both real and imagined, which in itself is capable of creating allegations of discrimination. Employers need to be alert to the risk that there may be segregation of workers who does do a call together from one place from

	<p>the office and who dials in. There is a clear risk here you can well see that you might not bother to dial somebody in because you don't want to trouble them, but actually by not including them you leave them out of key decision making or key client calls. I think senior managers can help both by being aware and also by setting the example themselves by taking on some homeworking and not setting an example of always needing to be in the office to lead the way, and I think also that as much as many will want to work from home some will actually need to. And I think we will see a fear of missing out a sense of exclusion and possibly even the developing of in-teams if businesses aren't alert to this. Some of the issues we have seen around exclusion over the years, the all-male senior management team, the cricket team, the lunch crowd could emerge again but in different iterations, and employers I think need to be aware of the impact on those with particular vulnerabilities, those who are clinically vulnerable, extremely vulnerable individuals it is likely that employers will need to prioritise them for homeworking either in their current role or in an alternative role and those individuals may be classified as disabled under The Equality Act and therefore within the scope of the employer's duty to make reasonable adjustments. They might not want to work from home, they might need to work from home. Victims of domestic violence is another sad consideration there has been a real concern about this during lockdown and it has been the subject of what I think has been an impactful public awareness campaign with some very hard-hitting posters. On 10<sup>th</sup> June the Government launched a review into support for victims of domestic abuse in the workplace. Much of the existing guidance for employers focuses on measures to make victims feel safe in the physical workplace and do not address the issues which could arise during homeworking. The review closes mid-September and I think it will be very interesting to see what recommendations or changes in the law are made as a result, and employers will need to be looking out for those.</p>
<p><b>Clare Fletcher</b></p>	<p>Absolutely. Just to finish then on a topic that we have already mentioned a couple of times through this podcasts which is the impact of homeworking on mental health. There was a CBI survey recently which revealed that 35% of employees are now describing their mental health as poor or very poor and the issue is even starker for young people where 83% said that COVID-19 had made their mental health worse. The evidence suggests that while working from home may boast productivity initially, after a while it becomes much more costly in terms of loneliness, lack of creativity, lack of inspiration, the lines between home and work life become increasingly blurred, and this can all lead to more serious issues of anxiety and depression. So employees are increasingly looking to their employers for support and guidance, and there are a whole range of measures which employers can put in place to help. One of the main ones is employee assistance programmes and these can play a major part through things like counselling. Employers should really be speaking to their staff to understand the breadth and depth of needs because there will be a whole range of issues at play, whether that's bereavement related to COVID-19, financial worries, child care or dependence issues, other forms of anxiety you simply can't expect one size to fit all and now more than ever employers will</p>

	<p>really benefit from having a tailored mental health strategy and managers will need training and guidance to implement that.</p> <p>Finally make sure your staff know how to access mental health resources whether that's within the organisation or elsewhere. There are some really cost effective apps and technology available now which can be really valuable for people who are working from home.</p>
<p><b>Lizzie Twigger</b></p>	<p>So let's finish with a few key takeaways for employers: consult with employees without a doubt, risk assess and review your policies, think about the cultural impact on your workforce issues could develop into serious problems down the line and need to be addressed early. But I think that there's a final point, homeworking is undoubtedly part of the new "normal" but to throw in another mantra it can also be part of building back better. There is a real benefit to homeworking from a sustainability or ESG perspective and with the right approach I think there can be a win win for employers and employees we just need to take care.</p>
<p><b>Clare Fletcher</b></p>	<p>And it is good to end on a positive note there, thanks Lizzie. So that brings us to the end of today's podcast thank you all for listening. Do look out for further episodes in the series which we will be publishing in the coming weeks. You can find all the podcasts in this series on our website. In the meantime if you would like more information about anything we have discussed today please feel free to contact either Lizzie or me or your usual Slaughter and May contact.</p>