

SLAUGHTER AND MAY

The Slaughter and May Podcast

Employee Testing

Clare Fletcher	<p>Hello and welcome to the second in our new 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'm a Professional Support Lawyer in the Employment Team here at Slaughter and May.</p>
Philippa O'Malley	<p>And I'm Philippa O'Malley, one of the Associates in the Employment Team.</p>
Clare Fletcher	<p>Today's podcast focuses on Employee Testing for Covid-19. We'll look at some of the different testing options available and what issues these create for employers. We will then conclude with some practical takeaways. I should say this Podcast is being recorded on the 8th July and reflects the law and guidance as it stands today.</p> <p>So the first question I'd like to put to you Philippa is how employers should be approaching the idea of employee testing as part of their Covid-19 secure strategy?</p>
Philippa O'Malley	<p>I think this needs to be a key part of the Covid-19 risk assessment for every business, if only because it's increasingly likely that employees will get tested for Covid-19 at some point. This will impact on their employment even if testing is not mandated by the employer. Of course, at the moment, NHS testing is only available to those who have symptoms of Covid-19 and those individuals can either request a home test kit or make an appointment to visit a regional test site.</p> <p>I think it would be certainly sensible for employers to share information about the NHS testing service with their employees, but where it gets trickier is where an employer wants to go further than that and the question then becomes whether the employers can require their employees to undergo testing.</p>
Clare Fletcher	<p>Yes and that was one of the first questions that came up when employers started to think about re-opening their workplaces after lockdown. I think real caution needs to be exercised here. We should bear in mind that the NHS testing programme is voluntary, and for an employer to introduce a compulsory testing programme against that backdrop risks looking heavy handed.</p> <p>Certainly true to say that employers have legal duties to take reasonable steps to safeguard employee health and safety, as we discussed in our previous podcast and employees also have their own duties to cooperate with their employer's health and safety measures, and to follow reasonable management instructions. So that means there may be some circumstances when a testing requirement could be justified, could perhaps include employees working in a close contact setting or with vulnerable people, or where it is difficult to maintain social distancing in the workplace, for example. On the other hand though, I think many employees may see</p>

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	<p>a testing requirement as an invasion of their privacy particularly where they don't have any symptoms, the testing process as I understand it, can be pretty uncomfortable, it involves a throat and nose swab so employers will need to think about, is there a less intrusive method for protecting employees than testing and frankly there's unlikely to be a more intrusive one.</p> <p>What we would suggest is that employers should be asking themselves, for example, whether testing could be confined to the highest risk roles, or whether there are any reasonable alternative measures, such as stricter social distancing or a greater use of PPE.</p>
<p>Philippa O'Malley</p>	<p>And just to pick up on the alternatives, we've seen quite a few examples of employers asking their employees for example, to complete a health questionnaire so they are effectively self-certifying their fitness to return to the workplace as an alternative to undergoing testing.</p> <p>Temperature testing was also an early favourite with many businesses, however we've seen that the ICO is not particularly keen on this approach, and its guidance states that employers need to give specific thought to the purpose and context of its use and be able to make the case for using it, and that can be difficult given the obvious limitations in temperature testing as a method of detecting Covid-19.</p>
<p>Clare Fletcher</p>	<p>Yes that's right, and in fact just last week the Medicines and Healthcare Products Regulatory Agency, the MRHA issued a warning to businesses that they shouldn't be relying on temperature testing products for detecting Covid-19. So I think we will start to see a move away from temperature testing in this context.</p> <p>In the end I think it will come down to what is a proportionate way to address the risk, which is why this is an important part of the risk assessment as you mentioned Philippa.</p>
<p>Philippa O'Malley</p>	<p>And just to add to that is what we've seen in practice is that staff engagement is really valuable in implementing Covid-19 strategies, whether testing or other types. Employee consultation on health safety measures is of course a legal requirement in any event.</p> <p>Interestingly the ICO acknowledges that if staff proactively ask the employer to undertake testing, this could be used to show that the employer's measures are proportionate for those employees. On the other hand if employees refuse to get tested the employer will need to have a strategy for dealing with this. For example, if the employee has symptoms of Covid-19 or has been identified as a close contact through test and trace, they should be self-isolating anyway and the employer would have good grounds to exclude the employee from the workplace. If the employee does not have any symptoms, there is of course still the risk that they have the virus but are asymptomatic. The employers approach would depend on the same analysis we've just done and whether this could be seen as a failure to follow the reasonable management instructions and/or a breach of the employees own health and safety obligations, as you highlighted Clare.</p>

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	Nevertheless, the employer will need to tread carefully in deciding whether to go down a disciplinary route, for example, considering both the reputational aspects as well as the legal risks.
Clare Fletcher	Absolutely and there's just one other issue I wanted to raise briefly in relation to tax because I think this may have caused some confusion for employers in the past week or so. HMRC had issued some guidance which suggested that if an employer bought and provided Covid-19 tests for its employees in the workplace then these would be a taxable benefit in kind, and therefore create a tax liability for the employee, and that raised some obvious concern in sectors like healthcare and hospitality where employees are subject to regular and sometimes weekly testing and whether that could deter employees from getting tested. That HMRC guidance was deleted and in fact just today, HMRC have now confirmed that they will no longer be treating the provision of Covid-19 tests in the workplace as a benefit in kind.
Philippa O'Malley	But the fact that the guidance is changing so rapidly, as we saw with the Coronavirus job retention scheme highlights how important it is for employers to keep up to date with the latest position. I think one of the next issues is that we should touch on is what safeguards employers need to put in place in terms of handling test results.
Clare Fletcher	Yes there's an important data protection angle to Covid-19 testing and to the collection of employee health information generally. This will amount to processing of what's called special category data, and employers will have a legitimate interest basis for processing this data, where it is required to have the health, safety and welfare of workers. But the ICO has been very clear that when an employer intends to undertake Covid-19 testing or to process test results, it will need to conduct what's called a Data Protection Impact Assessment or a DPIA and the employer will then also need to make sure it has got all the right policy documents in place including updated or supplementary employee privacy notices, and really the key point is that employees need to know what personal data will be processed, what it will be used for, who it will be shared with and how long the employer will keep the data for. We would say it should also be a good idea to give employees a chance to discuss any concerns they have about the processing of their data.
Philippa O'Malley	So once again, the employers risk assessment and employee consultation are absolutely crucial.
Clare Fletcher	Yes I would certainly agree with that. So then once the employers have the test results, Philippa do you want to take use through what happens next?
Philippa O'Malley	Yes of course, so if the result is positive then under the current government guidance the employee will need to self-isolate and they should be told not to return to the workplace until they are safe to do so. If that's the case, employers will need to communicate with employees who are self-isolating and to make sure they are providing support where needed, particularly bearing in mind the impact this could have on employee's mental health for example.

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	<p>If those employees can work from home they should be instructed to do so, and the government guidance at the moment goes so far as to suggest that employers may need to find alternative work that can be done at home by that individual during the period they are self-isolating.</p>
Clare Fletcher	<p>I think one of the big concerns for both employers and employees in this scenario is how you would handle a situation where the employee needs to self-isolate but can't work from home.</p>
Philippa O'Malley	<p>Absolutely, that's definitely a risk area and the success of the test and trace service would depend on finding the right solution to that. What is clear as a starting point is that if the employee cannot work from home while they are self-isolating they will be entitled to Statutory Sick Pay or SSP, and employers should certainly bear in mind that workers will be less likely to follow the guidance to self-isolate if they have financial concerns, for example if the SSP is significantly lower than what they would usually be receiving, but also if they have job security concerns as a result of self-isolating.</p> <p>The Treasury has recently confirmed that it has no plans to fund the salaries of people who are self-isolating under the trace and test regime beyond SSP, so there is likely to be a real financial disincentive for employees, which begs the question can those who are self-isolating under the test and trace regime be furloughed instead? And there could clearly be a financial incentive both for employers and for employees if they are furloughed. It is worth noting that the HMRC guidance states that self-isolations should not be a consideration in deciding whether to furlough an employee but if for business reasons an employer wants to furlough an employee who is currently off sick or self-isolating, then in principle they can do so subject of course to the scheme rules.</p>
Clare Fletcher	<p>Yes, so I think the furlough decision is going to be very fact specific. There's a couple of other options that employers could consider, alongside furlough one of the things that the guidance suggests is that employees should be given the option of using paid holiday instead of sick pay if they prefer. Of course, another option open to employers would be to enhance SSP in some way, or perhaps to offer full sick pay during self-isolation. Of course that might not always be financially viable and employers when they are making that decision need to bear in mind that employees could be requested to self-isolate more than once, including because they are identified as a contact of an infected person or because they live with someone with Covid-19 symptoms.</p>
Philippa O'Malley	<p>So the self-isolation requirements certainly has the potential to be really quite disruptive for employers. Clare, do you think there is any way around that, for example, by employees taking a test or even an additional test to confirm they don't have the virus?</p>

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<p>Clare Fletcher</p>	<p>Well that's certainly a question we've seen Philippa but I don't think it seems to be that case at the moment. What Public Health England have said is that employers shouldn't be conducting additional employee tests as a way of avoiding the self-isolation requirement, and that's primarily because of the uncertain incubation period of the virus and the possibility of false negative testing. The message instead is to focus on making the workplace Covid secure so as to reduce or eliminate the chance of close contact in the workplace. And I think it's interesting to note there that when you look at the guidance of how someone will determine if there's been a close contact, the only workplace measure that would be taken into account is if the contact has taken place through a Perspex screen, other measures that employers might put in place, for example, the use of face coverings or PPE wouldn't be taken into account so I think that's why we're seeing Perspex popping up here, there and everywhere in the workplace.</p> <p>And on the subject of close contacts, Philippa do you want to take us through the current position on contact tracing?</p>
<p>Philippa O'Malley</p>	<p>Yes of course, so the NHS test and trace service works by getting in touch with anyone who has had a positive test result with the aim of being able to help them share information about any close recent contacts they have had. Close contact is defined as being within two meters of someone for more than 15 minutes or within one meter of someone for more than one minute and the period they are concerned with is the two days before symptoms emerge and 7 days after symptoms emerged, i.e. the period in which people are most infectious, the service then alerts those close contacts and notifies them that they need to self-isolate. However it's really important to stress that just as we saw for the testing limb of the service, the contact sharing limb is also voluntary which I think is also important for employers when considering what action they should take to ensure that their employees comply with the scheme.</p>
<p>Clare Fletcher</p>	<p>Yes, although I suppose I would add that complying with the scheme is likely to overlap with some of the compulsory health and safety duties we mentioned earlier for both employers and employees.</p> <p>So the NHS test and trace service is administered by the NHS team, that doesn't mean that there's no role for employers though does it?</p>
<p>Philippa O'Malley</p>	<p>No, far from it and I think we are already seeing employers build on the requirements of test and trace as part of their own employment arrangements. For example, workers have no strict obligation under the scheme to tell their employer that they've been advised to self-isolate. We've seen employers and we've certainly advised that employers consider making that notification as well as the self-isolation itself a requirement of their own health and safety policies.</p>

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<p>Clare Fletcher</p>	<p>Yes, I think what we are also seeing is there is certainly a role for employers to play in keeping track of Covid-19 cases in the workplace, and the ICO have confirmed that employers can keep lists of employees who have either had symptoms or have tested positive, provided that they ensure the use of that data is actually necessary and relevant and the data processing is secure. So in practice, for example, that would mean that when you are holding test results those should be dated to ensure that they are accurate as inevitably the results would change over time.</p>
<p>Philippa O'Malley</p>	<p>But Clare what about communicating those test results to other employees?</p>
<p>Clare Fletcher</p>	<p>Well I think there's a bit of a balancing act for employers here. So on the one hand, again the ICO is in its guidance states that employers can and should keep staff informed about cases of Covid-19 in the organisation, although it does then go on to say that employers probably don't need to name individuals and shouldn't provide more information than necessary. Identifying an infected worker to their colleagues could create the possibility of stigma or of recrimination. For example if the employee hasn't observed social distancing and so employers do need to approach that with caution. There is also of course the possibility that where an employee tests positive, they ask the employer not to share their health information with colleagues, and in that scenario I think, what we would say is, the employer should probably respect the employees wishes provided that they then make it clear to that employee, that they should submit the details of their close contacts to NHS test and trace and this service would then let any co-workers know if they had been in close contact and should self-isolate, without disclosing the identity of the person who tested positive.</p>
<p>Philippa O'Malley</p>	<p>Of course technology could make the employers job easier here by tracking more accurately who an infected person has been in contact with.</p>
<p>Clare Fletcher</p>	<p>Yes, absolutely and we've all seen the reports about the infamous NHS tracing app which its reportedly still being worked on, although the initial product has, of course, been scrapped. And at the moment it is not yet clear if and when this app will be made available. In the meantime we've seen a few companies, sort of, stepping into the breach and building their own surveillance tools to monitor the spread of Covid-19 in the workplace and we may just see more of that developing as time goes on.</p>
<p>Philippa O'Malley</p>	<p>Yes it will be really interesting to see the approach different companies take in that regard.</p> <p>Clare, I would like to just finish summing up a few of the key takeaways for employers. The first part as we've already said is key, consider making employee testing for Covid-19 part of your risk assessment and make sure that you consult with employees about that approach. Employers will also need to check they've also got appropriate policy documentation in place, and will need to think carefully about how they manage employees who are self-isolating noting that a 'one size fits all' approach may not be appropriate. Employers will also need to decide on an approach about sharing information about Covid-19 in the workplace, and whether any contact tracing in the workplace is feasible.</p>

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	<p>Finally, it would be crucial to keep the approach under review as the situation develops. We've already seen over the last few months how rapidly the guidance can change and that's likely to continue to be the case as lockdown eases and workplaces re-open.</p>
Clare	<p>Absolutely. Thanks Philippa.</p> <p>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 our first podcast on employee health and safety and all future episodes on our website. In the meantime, if you would like more information about anything that we have talked about today please do feel free to contact either Philippa or me or your usual Slaughter and May contact. Thank you and goodbye for now.</p>

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