

# REINVENTING THE 9 TO 5: NO 'FREEDOM DAY' FOR EMPLOYERS

Part of the Horizon Scanning series



GOVERNANCE,  
SUSTAINABILITY  
& SOCIETY



NAVIGATING  
THE STORM

*England entered Step 4 of the Spring 2021 COVID Response roadmap on 19 July 2021. When the roadmap was originally set out back in February 2021, this 'Freedom Day' was billed as the point when all legal COVID-19 restrictions would be lifted, and businesses and individuals would largely be able to return to pre-COVID-19 arrangements.*

*However, the challenge is far from over for employers. While some legal restrictions have lifted, others remain. Although COVID-secure workplace guidance has been updated for Step 4, there has been a clear shift of responsibility from the government to employers and individuals to determine how to operate safely. The result is that it is unclear what is expected or required of employers now. With infection rates remaining high and announcements of new policies coming almost daily, employers may once again be reconsidering their working arrangements.*

**This briefing sets out five key challenges facing employers in the coming months, and some tips on how best to address them.**

## 1. Workplace safety

The [updated guidance on Working safely during COVID-19](#) was published on 14 July 2021. This gave little time for employers to react before Freedom Day, and unfortunately provided at least as many questions as answers.

The key changes under the updated guidance are:

- The instruction to “work from home if possible” has been removed, although the government “expects and recommends a gradual return to workplaces over the summer”.
- Social distancing no longer needs to be implemented in the workplace, and the previous content about staggering times for arrival/departure, one-way flow systems, floor signage and minimising indoor meetings has been deleted.
- There is greater emphasis on ensuring adequate ventilation of workspaces.
- The messaging on face coverings has shifted, from a previous expectation that they would not be relied on in the workplace (since social distancing and increased hygiene were deemed more effective), to suggesting that employers should consider encouraging their use, particularly in indoor areas and enclosed/crowded spaces.

Otherwise, much of the previous content of the guidance is retained, including sections on cleaning and hygiene, and on reducing worker contact (via the use of fixed teams, screens/barriers, reviewing layouts and limiting sharing or increasing cleaning of workstations).

Employers should remember that the guidance is just that; it does not supersede employers' legal responsibility to take all reasonably practicable steps to protect the health and safety of their staff. The guidance is deliberately high level, essentially providing a series of examples of what employers could do, rather than recommending what they should do.

### **Employers should therefore focus on their legal obligations to:**

- Carry out suitable and sufficient risk assessments: these should be updated in light of the revised guidance, and all other relevant circumstances (including rising infection rates etc). The guidance still expects that businesses with over 50 employees will publish their risk assessment results on their website.
- Consult with employees or their representatives about any new or revised measures to protect their health and safety at work, arising out of those risk assessments.
- Ensure that suitable personal protective equipment ("PPE") is provided to those who may be exposed to a risk to their health and safety while at work, except and insofar as the risk has been adequately controlled by other means. Given the new approach in the guidance encouraging the use of face masks, employers may wish to revise their position on the provision of PPE to their workforce, as part of their broader risk assessment.
- Maintain and clean the workplace to guard against the transmission of COVID-19.

## **2. 'Pingdemic' and managing employee absence**

During the second week of July 2021, there were more than 600,000 alerts issued on the NHS COVID app in England and Wales, asking people to self-isolate because they had come into contact with someone who had tested positive for COVID-19. This "pingdemic" has created significant staffing problems for some companies.

Many employees are aware that the stay-at-home alerts received via the NHS COVID app are in fact only advisory. The legal requirement to self-isolate is triggered by a notification received from NHS Test and Trace (by phone, text or email), as is the legal requirement on that individual to inform their employer. Employers are legally prohibited from knowingly allowing a worker self-isolating following a notification received from NHS Test and Trace to attend any place (except the place where they are required to self-isolate) for any purpose connected to the worker's employment.

Employers should nevertheless make it clear to employees what is expected of them when they receive a 'ping' on the NHS COVID app. On 20 July 2021, following an earlier message from a cabinet minister which suggested that employers and employees could make an "informed decision" on whether to observe quarantine in these circumstances, the government stepped in to contradict this approach. The government's stated position as at 28 July 2021 is that it is "crucial" to self-isolate when told to do so on the NHS COVID app - and businesses should support employees to do so. Employers may therefore decide to extend the requirement on workers to disclose any NHS Test and Trace notifications to NHS COVID app 'pings', and to stress that workers should self-isolate in both scenarios. Employers should also make contingency plans for the disruption this is likely to cause.

Absences may ease in the coming months, since from 16 August 2021, fully vaccinated people will be exempt from the close contact self-isolation requirements. There is also an exemption for critical workers which was introduced on 19 July 2021, whereby employers can apply to a government department setting out the designated critical workers. The government department will then decide if the exemption applies and notify employers what steps they and those critical workers must follow. It is then for employers to inform their critical workers that they can leave self-isolation to attend work, and ensure that they comply with all other requirements set by the government in these circumstances (which may include re-imposing social distancing and a requirement for face masks in the workplace).

Those who employ critical workers will need to adapt their processes in line with this new exemption (and keep them under review, since the scope of the exemption has already been extended twice since 19 July 2021). In addition, employers of non-critical workers may also want to consider as part of their risk assessments whether

they might need to impose any additional workplace requirements on anyone identified as a close contact but able to attend work post-16 August 2021 as a result of these exemptions.

As infection rates rise, employers are also likely to be dealing with more employees who are symptomatic or test positive for COVID-19. The updated Working Safely during COVID-19 guidance contains a new instruction to employers who become aware of a positive case in their workplace to immediately identify any close workplace contacts and ask them to self-isolate - and not to wait for NHS Test and Trace. The employer should also inform the local authority public health team. Employers should update their policies to ensure they can comply with these requirements.

Employers are also increasingly likely to encounter cases of long COVID amongst their employees, and must be prepared for the implications of this. See our [separate briefing on long COVID](#) for further details.

### 3. Testing and vaccinations - the NHS COVID pass

Since January 2021 employers have been encouraged to set up a workplace COVID-19 testing programme. The provision of free lateral flow tests to businesses registered for the COVID-19 workplace testing programme is however due to expire at the end of July 2021. Employers who wish to continue workplace testing beyond that date will need to procure tests privately, or alternatively ask their workers to access free NHS lateral flow tests at home or at a test site.

Testing forms a key part of COVID-19 status certification. An [NHS COVID Pass](#) can be obtained not just to show that a person is fully vaccinated, but also to provide evidence of a negative PCR or lateral flow test taken within the last 48 hours. Lateral flow tests taken at home will need to be reported into the [public reporting system](#) in order to be effective for these purposes.

Use of the NHS COVID Pass is currently voluntary in most scenarios (outside international travel). Businesses will need to decide whether its use is appropriate in an employment context. The updated Working Safely during COVID-19 guidance is completely silent on this. The broader government guidance on [using the NHS COVID Pass](#) encourages its use in facilities or events where people are likely to be in close proximity to a large number of people from other households for a sustained period of time. Business events of this nature are specifically mentioned. The guidance goes on to state that there are some settings where the NHS COVID Pass should not be used as a condition of entry, including essential services and essential retailers which have been able to stay open throughout the pandemic - and that businesses must still ensure they comply with their legal obligations and relevant guidance where the NHS COVID Pass is used.

Although the NHS COVID Pass also encompasses testing, there has been significant focus on the relevance of vaccination alone for certain activities, including a return to the workplace. The government has already announced that vaccination will be a requirement for all those working in care homes from November 2021 (unless a clinical exception to vaccination applies). In addition, full vaccination will be a condition of entry to nightclubs “and other venues where large crowds gather” from the end of September 2021.

More generally, the UK government has provided little steer to employers in deciding their approach to vaccination for their staff. The [COVID-19 vaccination: guide for employers](#) published by Public Health England on 12 July 2021 simply suggests that employers should encourage their employees to get vaccinated, and provides suggestions for sharing information with employees about vaccination. This is in contrast to the [separate COVID-19 vaccination guidance for employers produced by the Welsh government](#) (first published on 9 July 2021) which is more explicit, stating that the NHS COVID Pass should not be used for employment purposes such as job applications or assessing risk in the workplace, and that in most cases it would not be appropriate to treat non-vaccinated staff differently to vaccinated staff. This is in line with the position taken in some other European countries, including France and Italy, where employers are largely unable to collate or use data on vaccination status in an employment context.

The [ICO's guidance on vaccination and COVID status checks](#) makes it clear that employers cannot check or record employees' COVID-19 status on a 'just in case' basis, and must have a clear, necessary and transparent

reason for doing so (such as where employees work somewhere where they are more likely to encounter those infected with COVID-19, or could pose a risk to clinically vulnerable individuals).

Businesses must therefore think very carefully about whether it is appropriate to use the NHS COVID Pass in an employment context. It is too early to say what market practice will develop in this area, but we do not currently anticipate that many employers will use this as part of their return to the workforce strategy. Employers would be well advised to seek legal advice on their own particular circumstances before adopting this approach.

## 4. Reluctant returners

Employees (and, since 31 May 2021, “workers”) have the right not to be subjected to any detriment or dismissal on a number of health and safety grounds. These include where an employee or worker leaves or refuses to return to their workplace, or takes appropriate steps to protect themselves or other persons, in circumstances of danger which they reasonably believe to be serious and imminent.

We now have a series of employment tribunal decisions on these protections, arising out of the first lockdown in spring 2020. These cases underline the importance of having COVID-19 workplace measures in place:

- In the first of these cases ([Rodgers v Leeds Laser Cutting Limited](#)), the tribunal dismissed a claim for automatically unfair dismissal from an employee who had refused to return to work in March 2020 due to concerns about his exposure to COVID-19 and the health of his two young children, one of whom had sickle cell anaemia. The tribunal found that the employee’s concerns about his safety and that of his family were general concerns about the virus circulating in society, and were not linked to his workplace conditions. There was evidence that the employer had put measures in place including implementing social distancing, handwashing and the provision of masks, which were consistent with government guidance at the time. On the other hand, there was no evidence that the employee had raised any specific concerns with the employer about these measures or the safety of the workplace. His claim therefore failed.
- In contrast, in [Gibson v Lothian Leisure](#) the tribunal upheld an automatically unfair dismissal claim from an employee who refused to return to his workplace in April 2020 due to concerns about the risk of catching COVID-19 and passing it to his clinically extremely vulnerable father, who he lived with. The employer did not provide any PPE for staff and, according to Mr Gibson, had no intention of adopting measures to create a COVID-secure working environment. When Mr Gibson raised his concerns he was told to ‘shut up and get on with it’, and was ultimately dismissed via text in May 2020. The tribunal was satisfied that there were circumstances of danger which were serious and imminent at the time Mr Gibson raised his concerns, and that Mr Gibson believed that his workplace was unsafe and posed a real danger to the health of his father. It concluded that Mr Gibson was dismissed because he took steps to protect his father, and his dismissal was therefore unlawful.

Circumstances have clearly changed since the first lockdown, when much less was known about COVID-19, there were no vaccines, and there were high numbers of hospitalisations and fatalities. Now, the vaccination programme has reduced (but not eliminated) the risk of people catching and transmitting the virus, and of becoming seriously ill or needing to be hospitalised if they do. This may make it more difficult for many workers to show that returning to work creates circumstances of danger which they reasonably believe to be serious and imminent, although those who are vulnerable may still have significant concerns.

Further, infection levels remain high, and much of the data around the effectiveness of the vaccines is not yet tested against new variants of COVID-19, including the now dominant Delta variant. It is not yet clear how long immunity lasts in vaccinated people, or if some of the more vulnerable groups will need booster jabs before the winter. It is therefore possible that some employees will not want to return to their workplace until infection rates are lower, and there is more clarity on these issues.

Complying with the updated Working safely during COVID-19 guidance will certainly help employers argue that there is no serious and imminent danger in returning to work. However, employers should be prepared to

discuss employees' individual concerns and accommodate any reasonable adjustments to working patterns to help alleviate those concerns.

Employers should also bear in mind that, notwithstanding the end of 'shielding' for the clinically extremely vulnerable, there is [new guidance](#) (published on 12 July 2021) which encourages employers to talk to any clinically extremely vulnerable workers returning to their workplace, so they can explain the measures being taken to ensure they are working safely. Finally, employers need to be alive to the risk of workplace tensions between those who believe that (for example) face coverings should be worn, and those who will now refuse to do so.

There is also a contractual angle to consider as part of the return to the workplace. Many employees will have been working under informal flexible working arrangements since March 2020. Few will have had changes made to their employment contracts, unless this was done as part of furlough arrangements. If changes have not been made, the contractual place of work will still be the office or other workplace which was prescribed pre-pandemic.

A homeworking arrangement necessitated by lockdown and other COVID-19 restrictions would not in most circumstances allow an employee to argue that their contractual place of work has altered. However, now that the government instruction to work from home has been lifted, if the employer does not either enforce the contractual terms by requiring employees to return to the office, or be clear that hybrid or transitional arrangements introduced will be kept under review and may change as the return to work phases evolve, it may become more arguable as time goes on that there is a custom and practice allowing employees to work from home. Employers should therefore ensure that discussions with employees about new working patterns, either on the basis of a return to 'business as usual' in the workplace, or some form of hybrid arrangement, are either agreed as formalised changes or are clearly subject to ongoing review.

## 5. Holidays and business travel

Many employees will be heading off on summer holidays in the coming weeks. The [list of red, amber and green countries](#) is constantly changing, and employees may find themselves needing to self-isolate unexpectedly on their return from holiday. Isolating in a managed quarantine hotel (on return from a red list country) is unlikely to be a suitable work environment for many employees, even if they can usually work remotely, necessitating a further period of absence from work.

From 19 July 2021, there is no longer any need to self-isolate on return from an amber list country (apart from France) if you are fully vaccinated. However, employees must still take a PCR test on or before day 2 after they arrive, which may require further absence from work.

Employers should remember that workers may have carried over more of their holiday entitlement from 2020 than would usually be permitted, under new rules which allowed workers to carry over some or all of their entitlement where it was "not reasonably practicable for a worker to take it as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society)". If workers have carried over holiday entitlement in this way, the [BEIS guidance](#) suggests that:

- workers should be allowed to take the holiday to which they are entitled in the new leave year before they take the 'carried over' holiday, since the carried over holiday entitlement lasts for longer (two years).
- Employers can only refuse to allow a worker to take carried over holiday on particular dates if they have a good reason. The guidance is silent about what would constitute a "good reason" for these purposes.

As international travel reopens, employers whose staff travel as part of their jobs will need to develop a policy to support this. The NHS COVID Pass is likely to be a key part of this, but it is already clear that some countries will require full vaccination, not simply proof of a recent negative test.

That said, employers with more than 50 employees that require staff to travel regularly across UK borders are under a separate '[employer duty](#)' to take reasonable steps to facilitate their employees to take COVID-19 tests. 'Reasonable steps' to facilitate the taking of tests may include:



- communicating testing requirements to the workforce when they are travelling for work;
- establishing workplace COVID-19 testing or providing employees with home testing; and/or
- supporting access and signposting employees to testing outside of the workplace.

There is also a [list of jobs that qualify for travel exemptions](#); this may avoid the need for quarantine when arriving from amber countries (which may otherwise be required if the employee is not fully vaccinated). This includes the ‘senior executives’ exemption’, allowing eligible senior executives to leave self-isolation if they are undertaking business activities which are likely to be of significant economic benefit to the UK. There are however some significant conditions on the exemption, which has already been revoked and reinstated once since it was introduced, so businesses will need to check carefully before relying on it.

## What comes next?

The Prime Minister had originally promised that ‘Freedom Day’ would be irreversible. However, at his press conference on the day itself, he admitted that this could no longer be guaranteed. The [COVID-19 Response: Summer 2021](#) confirms that:

- The Government may need to take measures to help manage the virus during periods of higher risk, such as winter, but will as far as possible prioritise strengthened guidance, and seek to avoid imposing restrictions that have significant economic, social and health costs.
- The Government will assess the country’s preparedness for autumn and winter, reviewing the remaining regulations in the early autumn to consider which requirements need to continue through the winter.
- The Government expects the Test, Trace and Isolate system will remain necessary through the autumn and winter.
- It is possible that the NHS COVID Pass could provide a means of keeping events going and businesses open, if the country is facing a difficult situation in autumn or winter. Any future implementation would involve consultation and appropriate parliamentary scrutiny.

The Working safely during COVID-19 guidance will also continue to be updated over time. We may also see the long-anticipated publication of the Employment Bill and the consultation on flexible working becoming the default option. There is therefore plenty for employers to keep under review.

The Coronavirus Job Retention Scheme (CJRS) is currently due to end on 30 September 2021, unless it gets a fifth extension beyond that date. Employers still relying on the CJRS could therefore find themselves facing a winter of discontent, if restrictions are indeed re-imposed.

For further details on the issues raised in this briefing, see our [Covid-19 People and Workforce](#) resources and our other content in this series on [Reinventing the 9-5](#), or speak to your usual Slaughter and May contact.

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### This briefing is part of the Slaughter and May Horizon Scanning series

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