

Preparing for a **post-COVID-19** return to the workplace: what do UK employers need to think about from a **health and safety and HR perspective?**



Introduction

As the UK starts to move out of lockdown, employers are planning for their employees to return to the workplace. Employers will need to balance re-establishing and maintaining business and productivity with the need to comply with their legal obligations towards the workforce. The considerations are plentiful, but we have highlighted a number of key areas for employers to think about as they start to plan ahead, focussing particularly on human resources and health and safety, with a summary and checklist of key considerations on page 6.

On Sunday 10 May 2020, the UK government set out the next stages of its response to the COVID-19 pandemic, its 'roadmap' for starting to exit the lockdown arrangements, allowing businesses to resume and the economy to start its recovery. The plan is accompanied by guidance, including workplace-specific guidance providing the practical framework for businesses to continue or restart operations. More detail around phasing has been released since, and we can expect the periodic introduction of new or updated measures and guidance in the coming weeks and months.

Heavily conditional upon various public health milestones being in place, and with differences in Scotland, Wales and Northern Ireland where the issue is devolved, the road map will nevertheless be welcome news for many businesses, who will start to have an idea of when any semblance of the new normality may begin, and what is expected of them, allowing them to start to plan.

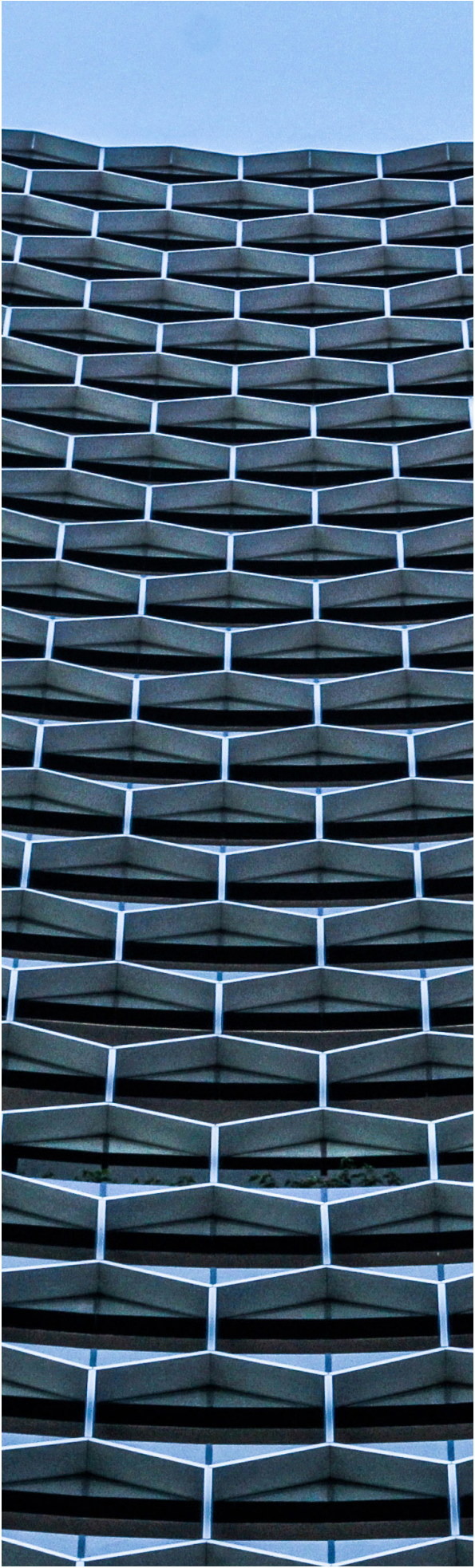
The roadmap (so far)

Step 1 (from 13 May 2020): Those who cannot work from home actively encouraged to go to work if their workplace is open.

Step 2 (from, at earliest,* 1 June 2020): Phased reopening of non-essential retail shops and nurseries and schools (for limited year groups), cultural and sporting events to take place behind closed doors, and reopening of local public transport in urban areas.

Step 3 (from, at earliest,* 4 July 2020): Phased reopening of public places, and businesses working in personal care, hospitality and leisure.

*Timing is subject to confirmation of specific phasing, particular conditions being met and businesses will be expected to comply with 'COVID-19 Secure' guidelines.



Health and safety

Employers are under a duty to reduce workplace risk to the lowest level reasonably practicable by taking preventative measures to protect the health, safety and welfare of their workforce, as well as others visiting their premises, by providing a place of work and systems of work that are safe. Employers have a duty to consult on health and safety and the development and review of health and safety policies. A failure to adhere to health and safety regulations risks civil claims, as well as criminal sanctions.

Remote working: working from home remains the default position, and businesses should make every reasonable effort to enable this wherever possible. Employers should consider the health and safety implications of this ongoing arrangement, including workstation assessments, putting plans in place to ensure a check is being kept on mental and physical health and ensuring effective day-to-day management. This may have been overlooked at the height of the crisis, but should not be neglected longer term.

Social distancing: social distancing will be a feature of our new normal for some time. Employers should consider:

- How social distancing can be achieved in all relevant work areas of the business, including on arrival, on departure and while moving around and between sites.
- The changes that may be needed to work areas, welfare facilities, working arrangements or working hours and patterns to ensure safe social distancing both at work and on the commute.
- How social distancing will be achieved in communal work areas, in meeting spaces where external visitors may congregate, when undertaking work-related travel, when goods arrive or leave the workplace, on the occurrence of extraordinary events such as fire drills, or where first aid is required.
- What innovative steps they can make. Published guidance gives examples of potential steps which could be taken depending on the particular workplace context.

Mitigating social distancing concerns: safe social distancing may not always be possible, or extra precautions deemed appropriate. Employers should:

- Consider what personal protective equipment (PPE) (e.g., gloves and face coverings) is needed or what other steps could be taken to assist (e.g., physical barriers between workstations, limiting activity time, or using side-to-side or back-to-back (rather than face-to-face) working). Published guidance gives context-specific examples.
- Put plans in place to procure any required supplies (ensuring that any PPE, hand-sanitiser and so on is compliant with applicable product safety laws), to establish appropriate cleaning measures, and to obtain necessary consents for physical changes to the workplace.

Communal areas: social distancing requirements equally apply to entrances and exits, break rooms, canteens and similar settings, yet maintaining separation in communal areas can be particularly challenging. Employers should:

- Identify which areas the business controls and which are the responsibility of a third party. Where relevant, ensure early contact and communication with the relevant third party to coordinate or shape strategy to ensure these areas are safe.
- Consider how best to ensure scrupulous cleanliness, procuring sufficient supplies and services and setting clear expectations for employees to maintain their own good hygiene routines.

Health screening: employers may want to consider screening employees before allowing them to return to work as part of their health and safety measures, for example, temperature checks, COVID-19 tests or a self-declaration of health. Employers may also want to insist that employees download the new contact tracing app (once out of testing). In making decisions around screening, employers will need to consider:

- Their obligations under the data protection legislation, remembering that health data is sensitive personal data for this purpose. The Information Commissioner's Office has issued guidance to assist employers.
- How to manage employees who refuse to be tested or share health information (see 'managing COVID-19 concerns in the workplace').
- How to treat workers who 'fail' a test, and be mindful of the risks of false positives.
- Who carries out the procedures. Where testing or screening is done 'in-house' (rather than engaging a specialist contractor), additional health and safety considerations apply, including training for testers, safe handling and transportation of samples (which may be classed as 'dangerous goods'), and safe disposal of samples and testing equipment.

Risk assessments: overarching all of the issues identified above will be the need for thorough and rigorous risk assessments, including on employees' journeys to work as well as once in the workplace. Risk assessments should:

- Weigh up the official public health guidance, and the benefits and risks associated with certain steps being taken or not, to assess whether the activity can safely go ahead.
- Remember that specific duties exist towards pregnant women (who should be suspended, on full pay, if a safe place of work cannot be provided) and disabled workers, as well as having regard to those who are especially vulnerable to COVID-19.
- Be carried out in consultation with the workforce or trade unions to establish the measures to be put in place.
- Be published on the website where employers have over 50 employees, together with displaying a 'COVID-19 Secure' notice in the workplace to demonstrate compliance with the guidelines.

Employee responsibilities: it is recommended that employees are told of the COVID-19 protocols in place, but also reminded of their own responsibilities to take care of their health and wellbeing and to be aware of the impact of their actions or omissions on the safety and welfare of others. This can be by way of notices and signage around the workplace, although employers should also consider the extent to which employees will be required to individually acknowledge and agree to comply with government and public health guidance and internal policies relating to health and safety; whilst this will not fully absolve employers from liability, it places some burden and accountability on the individual.



Workforce planning and management

As employers navigate the technical guidance relevant to each type of workplace they operate, they will also need to be mindful of existing employment laws, while carefully managing employees, to maximise engagement and mitigate against disputes.

Equality in the workplace: in applying the government’s guidance and planning the future of the workplace, employers should be mindful of the particular needs of different groups. Employers should not discriminate, directly or indirectly, against anyone with a protected characteristic (e.g., age, sex or disability) and should ensure that any measures or policies put in place are not discriminatory. Employers have particular responsibilities towards new and expectant mothers and disabled people, and should also keep abreast of public health guidance on particular groups who are considered vulnerable to COVID-19.

Coordinating a return to the workplace: employers will need to carefully consider the phasing of any return to the workplace, deciding who should return and when. A one-size-fits-all approach is unlikely to be appropriate. It is recommended that thought processes are documented to demonstrate the rationale for any differences in strategy for particular groups to help mitigate against allegations of discrimination, and that employers consider where there is scope for flexibility and choice regarding working arrangements.

Managing employees on their return: it is inevitable that some employees will be more reluctant than others to return to the workplace, perhaps because of concerns once they get there or as a result of their commute, or due to ongoing childcare issues resulting from school and nursery closures. This should be anticipated and consideration given as to how concerns can be addressed:

- A clear, robust and well-communicated health and safety and ‘return to work’ plan will go some way to assisting anticipated general areas of concern.
- Employers are encouraged to work through issues with employees collaboratively and many concerns will need to be resolved on an individual basis after establishing the specific concerns. In doing so, employers should be flexible and remember their duty to not unlawfully discriminate and also to provide reasonable adjustments to disabled employees.
- Employers should also ensure that support is available for employees who have anxieties or concerns (whether they have returned to the workplace or remain working at home), and that employees know how this is accessed.

Managing COVID-19 concerns in the workplace: it is possible that some employees will refuse to return to the workplace due to concerns for their (or others’) health and safety, subsequently raise these concerns having returned, or otherwise fail to co-operate with the proposed steps being put in place, for example, in respect of health screening. Specific areas of concern should be discussed on a case-by-case basis to establish how employers can assist to enable the employee to co-operate. Normal employment principles apply for addressing grievances or tackling suspected misconduct, but employers should exercise some caution – depending on the nature of the issues raised, employees may be afforded protection under the whistleblowing legislation, which protects them from being dismissed or suffering a detriment in consequence of making a protected disclosure. Similarly, employees are specifically protected from dismissal or detriment where they take steps to protect themselves from a serious and imminent danger to their health and safety.

Absence issues: there are various circumstances where an employee may need to be absent from work despite the possibility of their return; for example, if they are unwell, or where public health guidance requires them to self-isolate or shield, to care for family members or other dependants who are unwell, or to look after children who are unable to attend school or nursery. Existing employment laws address time off for dependants, and emergency legislation introduced in response to the pandemic has relaxed eligibility for statutory sick pay, but employers should consider what, if any, flexibility and alternative or enhanced arrangements they will offer employees, being particularly mindful to prevent attendance at work where this poses a COVID-19-related health risk to others.

Annual leave: many employees are likely to have high levels of accrued but untaken annual leave as a result of the lockdown. Whilst emergency legislation was introduced to allow the carry over of four weeks of statutory leave for two years if it could not be taken due to the coronavirus, guidance suggests that employers should do everything reasonably practicable to ensure it can be taken in the current leave year, weighing up various factors in determining if this is possible; time off work will be important for employees’ wellbeing, albeit it needs to be balanced with business needs. Employers should consider the extent to which they require employees to take accrued leave by a certain time, or make use of the new carry-over rules and, if appropriate, communicate a policy on this.

Benefits and incentives: the government is keen to encourage employees to avoid public transport where possible. Consider what incentives or benefits may be available, such as cycle to work schemes, remembering that HMRC has declared COVID-19 a “life event” for the purposes of revisiting salary sacrifice arrangements.

Workforce planning – headcount reduction and alternatives: the challenges created by COVID-19 mean that continued employment for all employees may not be feasible, or that changes or other steps (for example, variations to terms and conditions, pay freezes, unpaid leave or furlough) will need to be made to allow ongoing employment. The Coronavirus Job Retention Scheme (CJRS) has provided some comfort, and will remain in place until the end of October, with flexibility to allow a part-time return to work from August. However, employers should anticipate headcount and business needs and plan accordingly, remembering the collective consultation obligations if more than 20 dismissals are contemplated within a 90-day period, and that there is a need to follow a fair redundancy or change process.

Policies and procedures: employers should review their handbooks and consider the extent to which policies, particularly those on remote working, performance, discipline and grievances, leave, sickness and health and safety remain fit for purpose or need updating to address COVID-19-related issues. For example, more flexibility may be needed to ensure social distancing is maintained in in-person meetings, or reasonable arrangements are in place for remote hearings; and conduct policies should ensure that COVID-19-related misconduct is covered as an example of what may prompt disciplinary action (albeit noting the warnings above).

Key considerations

Task force

Get the right team in place to project plan the lockdown exit strategy, including individuals who can manage and coordinate strategies around health and safety, premises, facilities, human resources, communications, procurement and so on.

Timing

Plan ahead – many of the preparatory steps needed for the return to work will take time to work through, and a long lead-in time should be anticipated.

Third parties

Identify which third party relationships may impact on internal strategy (e.g., outsourced service providers, insurers, landlords, building managers, suppliers and regulators) and engage early on a coordinated response where interests overlap. Where appropriate, seek to renegotiate terms and obtain suitable consents.

Other third party relationships

Identify where outsourced provision of services or supplies may be of help (for example, professional services for medical assessments, risk assessments, or legal or financial advice, or suppliers of equipment to assist with providing a safe workplace), and start procuring such services and suppliers where applicable.

Knowledge

Assign responsibility for staying abreast of developments in the lockdown exit strategy and guidance. New information may come through quickly and could be piecemeal or change over time.

Communication

A clear, consistent and effective communications strategy will be key to managing employees' transition to the 'new normal', including sufficient notice of their return (or not) to the workplace. Employees should be clearly informed about what protocols have been put in place, including what is expected of them and any training which is needed. Managers will need to be adept at managing day-to-day communications with employees and should also be prepared to manage the business message across a potentially fragmented team during transition phases. Effective communication backing up clear strategy and policy on relevant issues will help to maximise engagement and goodwill, and mitigate against risks of employee grievance and management issues.

Contingency planning

Employers should have a plan in place for changes, for example, a retightening of lockdown arrangements, disrupted attendance because of health care or childcare difficulties, and significant changes in guidance on managing COVID-19-related risks in the workplace.

Checklist

- ☐ Risk assessment(s) carried out (in conjunction with employees and/or trade unions) on all aspects of working arrangements, and published on the website (if over 50 employees).
- ☐ Necessary permissions and consents obtained for any changes to premises.
- ☐ Insurance cover reviewed and deemed adequate.
- ☐ Workplace assessments for remote workers.
- ☐ Thorough cleaning of workplace before allowing access, and arrangements in place for frequent and extensive cleaning.
- ☐ Sufficient stock of required equipment and supplies.
- ☐ Workplace policies and procedures updated.
- ☐ Health and safety protocols effectively communicated to, and acknowledged and understood by, employees.
- ☐ Relevant notices and signage, including a 'COVID-19 Secure' poster, visibly displayed across the workplace.
- ☐ Employee support system in place and communicated to employees.
- ☐ Communications and engagement plan in place to monitor and address the impact of the steps being taken.
- ☐ Action plan in the event of a positive diagnosis in the workforce.

Guidance - useful links

Our Plan to Rebuild: The UK Government's COVID-19 recovery strategy

COVID-19 Secure Guidance – Working safely during coronavirus (guidance specific to different types of workplace)

Social distancing in the workplace (sector guidance)

Cleaning of non-healthcare settings

Holiday entitlement and pay during coronavirus

Health and Safety Executive

Workplace testing – guidance for employers (Information Commissioners Office)

How we can help

The analysis and opinion contained in the guidance is based on a review of the government guidance as at 18 May 2020 and does not constitute legal advice. The Reed Smith employment and health and safety teams are available to assist businesses to prepare for employees returning to the workplace by staying abreast of developments in the law and guidance, and providing strategic and day-to-day advice on handling the challenges arising from preparations for the return to the workplace. Specific advice can be obtained from the key contacts below.

Key contacts



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