

GETTING BACK TO WORK: SAFELY, LEGALLY, PRODUCTIVELY

18 May 2020

Slowly, cautiously - and perhaps a little vaguely - the Prime Minister has told the country it can open for business. Footage the day following this announcement showed a rush-hour tube train packed with commuters. It seems we have started to get back to work. How then can businesses reopen?

Can employers tell their staff they have to return? What measures will employers have to take to continue to fight against COVID-19? Faced with difficult decisions, what happens if they get them wrong?

Watch our on-demand ThinkHouse webinar with Andrew Lichfield from our regulatory team and Jonathan Chamberlain from our employment team to help you make sense of some 50 pages of government guidance and various ministerial announcements, all overlaid onto existing legal frameworks.

Transcript

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David Lowe: Well welcome everybody to the Thinkhouse seminar on getting back to work safely, legally and productively. Thank you very much for joining us and joining us so promptly.

We all know of course, that back in March we had the mandatory lockdown introduced in the UK. Retail and public places were closed except for food and essential services. Schools have been closed and everybody has to stay at home unless it is essential to travel. And of course, some businesses have no choice but to close legally - many retailers had to close unless it was food and essential services, but of course other businesses closed or heavily reduced activities because they just were not able to operate with everyone at home.

So although factories, offices, warehouses, construction sites did not have to, at law, close, many have or heavily reduced their activities and of course we all know about the massive economic impact that that has had.

We all watched Boris Johnson, our prime minister, on Sunday night telling us about the government's plan to see if we can emerge from the lockdown and the message, at least in England, is move from 'stay at home' to 'stay alert'.

Now, we have had some minimal relaxation at least in May of some of the restrictions, so we can all now go fishing, play golf, play tennis, sunbathe as much as we want and even talk to one other person outside our household two metres away.

But more importantly for business was the message from government who said that if you cannot work at home, then you should go back to work, but subject to social distancing. And so for businesses we are all scrambling to understand just what does that mean. Does that mean that I have to reopen? How much money do I have to spend? What does social distancing at work mean?

And therefore, I have gathered here today two of my partners - Andrew Litchfield, who is a specialist in regulatory crime with a particular focus on health and safety and Jonathan Chamberlain, who is a partner in our employment team. Recognising that at the heart of this is a big health and safety issue about social distancing at work and employers' responsibility for health and safety, but of course this is all about the people and

employees.

What happens if they do not want to come back to work?

I am going to quiz Andrew first and then turn to Jonathan and then I will pick up your questions.

Those of you who are solicitors and barristers who are concerned about your continued practice development, we are an accredited training provider and that means that you will get the equivalent of points. It is important you keep your own training record but we do keep a record that you attended this webinar.

And finally, of course health and safety and the employment issues from that are not the only COVID-19 issues whether it is furloughing or force majeure clauses, on our website in our COVID-19 hub we have got a huge range of materials dealing with various issues.

Right, turning to Andrew. Andrew, is there any new law here?

Andrew Litchfield: Good afternoon everybody, hi. Well, as you mentioned in the beginning as you were speaking, we have a bit of new law. Health Protection Corona Virus Restrictions England Regulations - snappily titled - are the things that shut us down about six or seven weeks ago. But we do not have any specific new health and safety law.

So what we are doing is, we are falling back on, and relying on, the old existing health and safety law which has been around since the mid-1970s. Health and Safety Act 1974 and the regulations passed subsequently underneath that over-arching Act. And it will be, there is nothing new about it, it will be familiar to many people.

I am sensing perhaps that those organisations which are mainly office based are learning more about the Health and Safety at Work Act than they have perhaps had to know about before. So it is worth, I think, going through a little bit of law to understand how it works and why it is actually okay to rely back on it in the face of COVID-19.

The good news about health and safety law is that actually all you need to know fundamentally, is two sections of the Health and Safety at Work Act. Those two sections are as follows - and they are very similar, you really only need to know one and a half sections.

Section two is the section which sets up the duty that an employer owes to their employees and it says that it is the duty of every employer to ensure - just pause on the word ensure - so far as reasonably practicable, the health safety and welfare at work of

all his employees.

So that is the section two basic over-arching duty.

Section three - very similar. The duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that anyone who is affected by the undertaking is not exposed to a risk to their health and safety.

So two sections, one Act - if we get those right, if those two duties are discharged, all will be well.

Section two is the duty that an employer owes to their employees, and section three is the duty that they owe to anybody else who is affected by what they do.

So, just a few points to mention in relation to those two sections. I mentioned 'ensure'. Ensure is a very high burden. 'Make certain to happen' is what the dictionary says when I looked it up the other day, so you have to make certain that people are not exposed to risk. And risk has been held by the courts to mean that the possibility of danger. So it is pretty challenging stuff and this is not COVID-19 related, this applies to every risk that a business might come across. Ensure that people are not exposed to risks so far as reasonably possible.

The scary part is that breaching those two sections is a criminal offence by the employer and sitting behind that, which I will not go into now, but sitting behind that are the possibility of offences by individuals as well under the Act.

A breach is a criminal offence. If you were to be convicted of that criminal offence, the employer would face an unlimited fine and that fine is uninsurable so it is coming straight off the bottom line.

And also, you cannot contract out of that duty, so you cannot enter into a contract with somebody else - a supplier, a facilities management company or anybody which passes that risk onto anybody else.

So those are the two sections of the two bits of legislation which are most frequently investigated and prosecuted by the Health and Safety Executive and local authorities, and they have already started to investigate and enforce those two sections in relation to COVID-19. So they are being applied to the COVID-19 risk that we have now got and you will have seen in the press, reports about extra funding going to the HSE and about people being encouraged to report anything that they are concerned about to the HSE and via the trade union or direct.

But I think it is worth noting that that duty - it is a reciprocal duty. So it applies to your employees wherever they are - whether they are in your offices or on your site, but also if they are visiting other people - you owe them that duty. But it also applies to the employers who are sending their people to you - so visitors into your premises, onto your sites are also owed that duty by their own employers. So it is a reciprocal duty and everybody effectively should be co-operating, co-ordinating with each other to make sure that it is possible for both sides or everybody affected to be discharging that duty.

So we do not have any new specific health and safety law, but what we do have is a new very challenging, very difficult risk affecting all of us, all the time - at work, at home, commuting but it definitely comes into the workplace and existing health and safety legislation is being used to make sure we manage it.

Given the nature of COVID-19, it is not possible to totally eliminate the risk of COVID-19 in a workplace and so, I suppose it all turns on, as much as reasonably practicable, so if you are an employer and you are wanting to reopen your workplace, what does that actually mean they need to do?

First I think is to check those regulations, the snappily titled regulations that I mentioned at the beginning, to make sure that you are legally allowed to reopen your workplace. So I have had some - interesting for lawyers anyway - debates recently about what a shop is, for example and what you can do in relation to open spaces, so check those regulations, check that what you are about to do, you are allowed to do in accordance with the regulations and any subsequent amendments to those regulations.

But assuming you are allowed to open, essentially what we have to do is to apply the old law to the new risk. And as with every other risk, what the law also requires you to do, is to do a risk assessment. If you have to ensure that people are not being exposed to risk, then you have got to work out what your risk is in the first place.

You need to do a comprehensive COVID-19 specific risk assessment and that needs to be site specific. It needs to be task specific and it needs to be individual specific and they can filter down to the point where actually what you are effectively doing is assessing whether any particular individual in any particular place can be effectively managed against the transmission risk of COVID-19 as a result of that risk assessment.

It is worth noting in passing - and this has also been the case - that it is a legal requirement to consult with your employees and with employer's representatives in the preparation of those risk assessments.

Those risk assessments will spew out control measures. Those are the practical things that you have to do in order to manage, eliminate, manage the risks which you have just identified in your risk assessment, and that is where the control measures need to be closely linked to, and made by reference to, the government guidelines to PAG guidelines and increasingly now, to industry standards and industry guidelines which are now starting to be produced in ever growing numbers.

All roads in health and safety lead to those few sections of the health and safety work act and then passing those two sections leads to risk assessment and risk assessment is the basis of everything that a business needs to do.

So three quick points to remember:

One, those risk assessments need to be kept under review. In the six or seven weeks we have been in this situation there has already been a huge change in what we understand about the risk, what we know about the risk, what the guidance is. So those assessments need to be kept under review.

Secondly, I think it is easy to put into place control measures which deal with the COVID-19 risk, I worry that sometimes in doing that, you might introduce risks which were previously well-managed. So taking steps to deal with COVID-19 might reintroduce other risks, which also now need to be managed. If you are changing your working practices to deal with COVID-19, you might also need to make sure you are not reintroducing other risks.

The obvious example of course, is working from home. We are all working from home. That deals with the COVID-19 risk or it substantially reduces the COVID-19 risk, but what it might do is introduce workstation risk, which we were more effectively able to manage if we were all in the office. So therefore you might need to take steps to review what you are doing in relation to workstation risks because everyone is now perched at home, maybe on the kitchen table.

And then finally, and this is a new requirement. It's guidance as opposed to a requirement but you may well have seen that you are required to share that risk assessment and publicise that risk assessment internally on the website, which I think mainly is about giving people confidence that the problem has been thought about and steps have been taken as a result.

David: Okay, so you will check the law to make sure you can open. That you are not a retailer that is not restricted. You then read the government guidance which may be

specific to your type of workplace, maybe on things like PPE. You then do the risk assessments as you described - site specific, task specific, individual specific and then you also stop and think, have I changed the profile of any risks that I need to think about.

Andrew: Yes, and you do that in consultation with your people and then you publicise the output.

David: So, how detailed is this government guidance. Let us take offices. Is it the government specifically setting out how you are meant to ensure that people are more than two metres away from each other. Is it that specific?

Andrew: It is quite specific in that - and there are different sets of guidelines applying to different industries and different general circumstances. So it is more prescriptive than normal health and safety legislation would be. But it is principal based, it is still principal based and ultimately, in order for Gowling WLG to manage the risk that it might face when it opens its office again, for example. We have our own offices, we have our own working plans, we have our own people, we have our own lift system. We have our own entrance requirements. So we will follow the principals set out in the government guidelines but apply them in detail to the particular circumstances that we face as a business.

David: Ultimately, employers have to make a judgment and there is a risk they might get that judgment wrong, which they will only discover with hindsight.

Andrew: Yes. Hopefully if they consult and think carefully and look round corners in relation to the risk they face and they are well-informed about the nature of the risk and are well-informed about the control measures that would work, hopefully they will not get it wrong. If they keep it under review it will not be wrong for long, but definitely need to do those two things and once those working practices are in place, you do not really know how effective a working practice is going to be until you have tried it for a while, so you need to keep consulting with the employees and keep consulting with the people who are visiting you to see whether that is working and you need to stay in touch with what everybody else is doing in the industry and what the government guidance and the industry standard guidance is, in order to make sure you are as close to the edge of the curve as you can be.

David: Is it a good idea then to pilot arrangements just to try it out with just a small number of employees to see if it works?

Andrew: I think so, I think so yes. It is going to give you lots of information. It is going to

give you some data, it is going to give you some feedback from those employees as to what is working and what is not working, what is difficult to do and what is not difficult to do. I think it is a good toe in the water and while the government is keen to encourage everybody to go back to work, they followed up fairly quickly to say that they did not expect it to be a rush and I think that it will depend a little bit on the industry and a little bit on what you are doing, but I think a pilot scheme or opening one floor of an office or opening a department first might be a sensible way to go.

David: Employers looking at the guidance in certain types of workspaces might conclude that if I do all of this and comply with the letter of this guidance, I am not going to make any money. It is going to be unprofitable. My factory is only going to be able to operate at 20%. Is that relevant to the law in judging that employer's responsibilities?

Andrew: Health and safety law in an enforcement context would look at cutting corners to save money or increase profit as a serious aggravating feature. So, there would not be a lot of sympathy from the court to an employer who is overly motivated by money at the expense of exposing people to a poorly understood or badly understood risk that they may have face, having brought them back into the workplace. So that is a tough one and it may lead to hard decisions about whether it is worth it or not, but it also may lead to discussions and conversations about whether there is anything to do innovation, it might drive all sorts of changes which may make things better in the long-run.

David: It may mean some employers decide they cannot open yet because they cannot do so profitably and therefore they just carry on hibernating.

Andrew: I am afraid so. If it cannot be done safely then I think that enforcement action against somebody trying to do that, an investigation may well follow and it would be a dangerous thing to do, given the sanction and the publicity risk - the adverse publicity risk of an investigation.

David: So, an employer complies to all this, the workplace is open, unfortunately an employee still catches COVID-19 at work. Is the employer going to be liable for that?

Andrew: I think the key thing about that question is the way you asked it, because you said, 'if the employee catches COVID-19 at work' and the challenge that any claimant might have in relation to bringing a claim for that, would be to prove that they got it at work as opposed to anywhere else. This is a highly unusual risk in the sense that it is potentially everywhere. It is not just something that you face when you are at work. It is in the community. So proving that you got it at work is going to be challenging.

Having said that, and this says a great deal about the society that we live in. Somebody sent me some information earlier this week about the new registrations of companies and organisations such as Corona Virus Claims Limited so I think there are absolutely opportunities being seen, or potential opportunities being seen for claims to be brought along those lines.

There are certain settings where it will be, of course, easier to prove that it was at work or on the balance of probability, prove that it was at work and care homes is the obvious one. So there is a big causation issue, but I do not think that will necessarily stop people from giving it a go.

David: And will your employers liability insurance cover it?

Andrew: Yes - and public liability insurance too - if the claim is put on the basis that this was something which is as a result of a breach by the employer, breach of those duties, breach of the general duty in negligence, then yes that is something which you should definitely notify to your insurers and your insurers should indemnify you.

David: So far we have been talking about the workplace, but then of course the employee needs to get to the workplace and that might well mean public transport. We have all seen the pictures of the Victoria line earlier in this week when there was a disruption and people were having to be crammed into it. Is that anything to do with the employer? Does the employer have to consider that?

Andrew: So strictly speaking, no. The legislation as I referred to, speaks about being at work and on your way to and from work you are not 'at work'. However, there are elements of this which are within the control of the employer and you may well have seen government guidelines around staggering arrivals to and from work, making more car parking available, for example, in case people choose to drive instead of take public transport. There is a great deal of encouragement about active commuting - so cycling and walking etc. and the employer can have some influence over all of those things.

Then the entry points in and out of the site or the office are something which they definitely can control and make sure that there is no build-up of people trying to do that all at the same time and there is some specific guidance that is general to the general public, rather than to employers, but you will have seen the government guidelines around safer travel and the sorts of things that you might be able to do to make driving or make sharing a car safer. But of course, it is the right thing to do, fundamentally. You want your employees to come to work, you want them to go home, you want them to be safe, you want them to be well. That is a commercially sensible decision, apart from being just the right thing to

do in any event, so I think I would encourage employers to include the commute as part of their risk assessment and see whether there is anything they can do to help ease that process and reassure people, make them confident, encourage them to be at work and be working.

David: Great. Thank you Andrew. I will just have a quick look at the Q&As to see whether I have got any - got lots of Q&As coming in here. Some of these will be for Jonathan. Let us have a look to see if there is any for you here.

Somebody has asked "is the liability attached to them coming to place of work with the risk of catching COVID-19 on public transport". I think what I heard you saying is, employers should be thoughtful about it, but ultimately is not liable for their journey to work.

Andrew: Yes, I think that is right and I think that just adds to the whole causation problem that there will be in relation any of these claims. How is the claimant going to prove on the balance of probability that the transmission took place at work as opposed to on a bus, or on public transport.

Jonathan Chamberlain: Can I just come in here David. To trail something I am going to be talking about in a moment. There are aspects of the commute and how an employee can or cannot commute safely to work which do matter in the employment context.

What I would hate for anybody to do now, is to leave the webinar thinking, great we do not have to worry about their commute. Because you might have to. And we will be coming onto that later, in a few minutes I think.

David: Yes, absolutely. We have had here a question about publishing HS risk assessments. I think the answer Andrew is, yes - the answer is internally it is.

Andrew: what the government have said in their guidance - and it is guidance - is that you should publish a risk assessment and they have said on the website, I think that my interpretation of that is it should be published internally and made available to the people who it affects in general terms.

There is another debate that could be had about whether there is any point in publishing a risk assessment. I think it is really all about reassurance and giving people confidence that the problem has been thought about. What you should really be publicising and banging on about, are the control measures that emerge from the risk assessment because those are the practical things which will stop the transmission of the disease.

So a risk assessment which sets out, as they often do, a calculation of the scale and size and likelihood of the risk is okay, but it is not much practical help to somebody who wants to know how to behave in the workplace and where they should go and where they should stand and what they should do. So I think publicise the - the guidance is to publicise risk assessments give people confidence that a detail and comprehensive thought process has been gone through and it will help the consultation process as well if people look at it, they may want to comment on it. But the real important thing is to keep people safe - the control measures that emerge from those risk assessments.

David: And finally, before I turn to Jonathan, I will come back to the rest of the Q&A at the end, somebody has asked about responsibilities when you are working at home. We have been mainly concentrating about the workplace, but obviously if people can work at home, they should be working at home. What is the employer's responsibilities in relation to that?

Andrew: Same as they ever were really. Same as they were pre-COVID-19. We are, all of us, working from home. We are owed the same duty, whether we are working from home or whether we are working from the office under the Section Two of the Health and Safety at Work Act. The employer has to ensure, as far as reasonably practicable, that we are not exposed to risk. A key risk, probably as working from home funnily enough, is probably not COVID-19 it is probably upper limb disorders and everybody sort of huddled over their laptops on the sofa and getting neck and back and arm complaints. But the employer has the same duty to make sure that those risks are properly managed and do that again via a risk assessment by gathering data about where people are working. Helping them with kit, helping them with information about taking breaks etc. So those risks absolutely still need to be managed in the same way they ever were.

David: So employers who do not already have a working at home risk assessment need to get on and do one? And if you have already got a working at home risk assessment, now is a very good time to review it, now that your entire workforce is at home, rather than a smaller handful of people?

Andrew: Absolutely and this may well be continuing for many people for a long time yet so if that risk assessment from working from home was based on maybe once or twice a week, well it is now coming under a lot more serious stress than it was before so it definitely needs a review and a refresh.

David: Great. Thanks Andrew. So, Jonathan. Turning to you now. We talked about how to make the workplace safe and the employer's responsibilities but of course we need our

employees to turn up for it to be meaningful. The Prime Minister has obviously encouraged everybody to go back to work if they can, and if they cannot work from home to go to work, stay alert rather than stay at home. But do you have to go back to work?

Jonathan: Not necessarily. I feel a bit lawyerish giving that answer and I could almost hear a collective sigh from our 300 plus attendees. Indeed the first question that has been asked on the Q&A, is if we have made all the adjustments such as PPE, social distancing and there is no reason such as why an employee refuses to come to work, can we take the disciplinary action?

We will come onto explore that question and we will be getting to that - it is not simple though. And the reason it is not simple is that, as Andrew has noted in relation to health and safety, there is not any new employment law as such here. There is existing legislation which now has to apply to this, pick your cliché, unprecedented, unique, millennial set of circumstances.

It is not clear how a lot of the legislation - which was never designed for this - is actually going to apply or how it is going to apply. So eventually, if an employee refuses to come to work in circumstances where it is clear they should come to work, and the business needs them to come to work, then yes, disciplinary action or even dismissal may be an appropriate sanction. But there is so much to go through before we get to that point and what I am not going to be able to do, in this time, what no-one can do at all, is give clear direct answers that the blanket rules if you like, which will apply.

What about childcare? What about commuting? Are these reasonable excuses not to come to work? They may be, is the short answer and that is something that we need to explore.

David: So I think Jonathan you would say, as a starting point, as a good employer you need to start by trying to persuade people that they can come to work and address their concerns, before you start thinking about your big stick in your back pocket that you might need to deploy.

Jonathan: Yes. That is absolutely right. Let us talk about practicalities first rather than the law. What should an employer be doing in these circumstances?

Well, building on what Andrew has said - firstly an employer cannot require an employee to come back to a workplace that is not safe. It is as simple as that. A duty to ensure - the word that Andrew highlighted - a safe place of work means that if it is not safe, the employee does not have to attend and so that is the first thing that has to be done.

But then both as a matter of employee relations and as a matter of in practice employment law, what employers should be looking to do, is to get buy-in from the workforce, to get acceptance from the workforce that the workplace is safe. So publishing the risk assessments and the control measures as Andrew has already talked about, is part of that. But here is where employers need to use their imagination and accept that this is not going to be as simple as issuing instructions - you have to be back at work on this date and if you do not, you will face disciplinary sanction.

You may, at some point be issuing those instructions but not until quite a long way down the line. What you will need to be doing first, is telling employees what you have done, asking employees what they think you need to do. Andrew mentioned pilot groups - we know of one employer that has allowed colleagues to ask questions of the people who have been on the pilot. So we have seen, for example, construction companies have opened up one site and then people who have worked on that site have been able to share their experiences with colleagues as to what has worked and what has happened.

Retailers might choose to open one shop first. These communications and consultations have to be lead from the top. As Andrew mentioned, a lot of us work in offices and frankly there is not much consideration given to health and safety. We think if there is a trailing wire from a laptop that somebody has placed on a table, that you know 'ooh better not show the health and safety people that, hahaha'. You know, and that is how it is often approached.

Construction companies, manufacturing companies - do not find that in the least bit funny. Never have. Their safety efforts are lead from the boardroom and that is what everybody is going to have to be doing now and being seen to be taking this seriously so it is not just that employers are going to have to be saying, we have got to do this in the workplace to keep people safe. If people do not follow the instructions, they do not stand behind the lines that they are supposed to, they do not wear the PPE that they are supposed to. If somebody insists on going into the lift and there might only be one person in there. Then disciplinary action is going to be have to be taken against those people, regardless of their status in the company.

So those are the practical things, if you like. Now, why do I say that? What is the law underpinning that? Well, there is a whole host of law which might be applicable here. But the one which will not have had much attention up until now - particularly in the office workplace - is the sections in the Employment Rights Act which deal with detriment to dismissal of employees who raise concerns about an imminent and serious threat to their health and safety or those of another.

Such employees are protected against detriment. They are protected against dismissal and there is a bit of a - I am not sure if irony is the right word - this is legislation that was designed as a red button. This was something to be used in an emergency situation. That is what I meant at the beginning when I said the legislation was not really designed for circumstances like this.

But it is what we have, at the moment. And an employee who says, I cannot come back to this workplace because I do not believe it is safe for me, or because I am shielding someone who is vulnerable at home, I do not believe it is safe for them if I have to come into this workplace because I am at increased risk of catching COVID-19 and transmitting it to them. They are protected if they have a reasonable belief in the truth of what they say. And that is why it is really important that employers communicate to employees what they are doing and that they do everything that they need to do so that when this is assessed months down the line by an employment tribunal, that it can be clearly seen that that belief was not reasonable.

Now, we are dealing here with lots of unknowns, lots of uncertainties. What is a tribunal going to think in a month's time? If it is difficult for us as employers, imagine how it is going to be for the employee. They want to know, do I have to go back? That is the question that you see being asked in employee's forums that people are asking the trade unions, incidentally by the way, trade union membership is going up massively. When Boris Johnson announced that schools were to re-open, the recruitment pages of teachers' unions websites crashed because they could not cope with the demand.

People are really worried and frightened and they are going to be asking these sorts of questions and employers have to be ready to answer them.

So that is just one aspect of the law that needs to be considered and there are others.

Employees have always had the right - well, for several years - to take time off in an emergency. An emergency does not mean something completely unexpected because clearly COVID-19 is not unexpected anymore. It does not mean that if your childcare has to have only fallen through five minutes ago. The law - the case law takes into account, will take into account, that in current circumstances it is really hard for people to find replacement childcare in these circumstances.

They are entitled to reasonable time off. Albeit it does not have to be paid. Similarly, people are entitled to dependant's leave if they give 21 days' notice of it, which they might be able to do if they are given sufficient notice of coming back to work. There is also of course, the disability discrimination provisions which might apply to somebody who is

particularly vulnerable and they do not want to come back to work.

It might apply in respect of somebody for whom they are caring - via the concept of associative discrimination. There is that whole legal minefield which I have just laid out and that is why I said, right at the beginning, that although ultimately you may be able to say to employee: we need you back, there is no reason why you cannot come back, if you do not come back we are going to go through a disciplinary process, that process may result in sanction against you including ultimately dismissal - but we are long way down the line. And that is even before we have got to consider whether the dismissal in those circumstances would be within the reasonable range of responses for an employer. And here is where employers need to get creative with things like the furlough scheme, because there will be some employees who can come back and some who cannot for the reasons that we have talked about or will find it particularly difficult.

Well you might think of instead of firing those employees of keeping them on furlough. And only bringing them back later as you ramp up. And that is perfectly permissible. We have seen some employers saying things like, well I cannot make an exception for you because that would not be fair on everybody else. That is not right. Employers need to consider individual circumstances. They need to drill down to that level of detail.

David: Okay, so let us imagine we have somebody who has no children, is in their thirties, has no dependants, has none of the extras. Is just a really simple employee. Employers, we have heard from Andrew, need to make the workplace safe and obviously there is some debate about that. Takes all the steps to make it safe, has pilots, engages with the workforce to say this is what we have done, what do you think and that person goes, 'nah, I would rather stay at home thanks'.

What I think you are saying is, frustrating as that might be, in reality as an employer you are going to have to engage with that person because to get to the position of ultimately dismissing them is a long and torturous journey, so do not think you can just instantly sack them. I think that is what you are saying?

Jonathan: That is absolutely right, yes. So to take the example of the employee that you have just given. Well, they are refusing to come back okay. Assuming that they have got some sort of reason, then one of the questions if they have got two years service if they are protected against unfair dismissal but a tribunal will be asking is, well did you have to dismiss that employee? Or could you, for example, have brought in a delay period until they were able to come back?

Now, where this is going to get tight, you can see for example, there will be small

operations where a particular employee can make all the difference and where somebody who can come back and knows the ropes who does not have to be trained, who can get the operations going is the person that needs to come back and if they - again if we have jumped through all the hoops that you set out at the beginning of the question - then it may be appropriate to move towards disciplinary proceedings for that employee relatively early. If only so that they understand the seriousness of the situation. But there would have been a lot of communication before that actually happened.

David: Okay. So, we talked about the commute to work and Jonathan you quite rightly flagged up health and safety and employment responsibilities are going to be slightly different. I know that our own teams - for the people in our teams - that is the key anxiety for many of them is travelling on public transport to get to work.

So if I am somebody who can only get to work on public transport, I do not have my own car and it is too far to walk or cycle, how does it work for them?

Jonathan: Thank you for picking that thank you for reminding me to pick that up. Yes, the protections I was talking about earlier Sections 44 and 100 of the Employment Rights Act to give them their full title, may well extend to the commute, such that if an employee has a reasonable belief that all the circumstances, including the commute constitute an immediate danger to their health and safety or that of another, then they may well be protected.

Now the law on that is not clear. Many areas of that bit of legislation that is not clear. What is serious and imminent danger, for example. I have covered about the danger at work, but an employer would be most unwise not to take into account potential dangers on the commute before requiring an employee to come back to work.

David: Okay. So that is going to be quite tough is not it. Because your employees will probably get to work in lots of different ways will they not. Some will cycle, some will walk, some will drive a car. Some do not need to come to work so they will just be working at home and then you have this small number of employees who might travel on public transport, some the train, some the bus, some the tube. All with different risk profiles. It is really difficult then, is it not for the employer?

Jonathan: It is really difficult. And it is particularly difficult for city centre employers where public transport is often the only viable means to get in.

People are not going to be able to cycle 20 miles to work. And even if they could, even if they could do 10 miles to work, then are they going to have the facilities to be able to park

the bike, shower, change etc. etc. Even supposing they are physically capable of doing the cycle ride in the first place. So this is a particular issue for inner city employers.

I think we are going to have a lot of imaginative solutions around staggered commutes and some commentators have said, well employers cannot stagger commutes because they open when they open. Well they may have to open at different times. And if that goes to profitability then there are the issues which Andrew has already identified in relation to enforcement action. It may not be possible for employers to open in the way that they did before until the disease is more under control, until it becomes clearer that public transport is safe or alternative arrangements have been made.

David: Turn to the other elephant in the room for most people is around childcare. Nurseries are closed, schools are closed at least until June. If you have got young children you cannot abandon them at home. How are employees unable to come to work for that, how does that play out?

Jonathan: I am glad you have particularly asked that question because it gives me the opportunity to correct a slip of the tongue I made earlier when I referred to dependently rather than parental leave.

Now, let us just break this down as to what it actually means if an employee says, I cannot come back to work because I cannot get the childcare.

Now, the first question the employer needs to ask is, well do I need you back to work now or can I wait until you get the childcare? If the answer is, I can wait until you get the childcare then the starting point would be, probably wait until you get the childcare. Have the conversation with the employee. We have one situation where a client is thinking of re-opening and a lot of employees are saying I cannot come back because of childcare and there are childcare needs and childcare needs.

There are childcare needs because I need somebody to look after my children because otherwise they will starve and set fire to the house and childcare needs because my partner is studying for a degree and prefers quiet in the house during the day.

So, drilldown into the request is the first point.

The second thing to say is well, if you really do need this person back - and you press the button - they may have the Section 44 argument: I think there is an imminent danger to the health of somebody I am looking after and I need childcare to release me from those duties for example.

They could say, I would like some parental leave please. Some unpaid leave so that I can look after my children. They could say, my childcare has fallen through and this is emergency leave and I need a reasonable period of that. And they are protected against dismissal and detriment for making those requests. You may not, as an employer be able to grant all the leave they request but you have to look at this on a case by case basis.

Looking at this pragmatically, in the situation that we are in now and this is why I am trying to stick away from giving absolute rules. As an employer, will you really be in the situation where one employee who says I cannot come back for childcare reasons means that either your operation cannot go ahead or there will be serious employee relations consequences as a result?

And in some circumstances, there will be. If you run retail operations and you have only got two or three staff per shop which is quite common - or full-time staff equivalents per shop - so the presence or absence of one person at a time makes a big difference in the rota, then you can see that that would be an issue. But for other employers, it may not be. It can be something that they can work around with the furlough scheme, keeping people on furlough until arrangements can change and that scheme we know - we do not know how - but we know is going to taper out over time towards the end of the summer.

David: What are the practical steps then an employer should be taking to try to mitigate all of these risks Jonathan?

Jonathan: Communicate, listen, communicate. What Andrew said. Talk to the workforce, to individual employees, listen to their concerns, try to work with them. Lead from the front. Lead from the top. Those were the Do's. The do nots would be - do not make rigid rules for yourself, try not to do things on principle.

Be pragmatic and work with each individual case.

Now, I know that is not going to sit easy because people want clarity, people want to know where they stand. Individuals often say that - I will be okay so long as I know where I stand. They do not often mean it as much as they think they do. So I would be wary of looking to that as an objective. Do not make simplistic rules that are going to give yourself problems later on.

David: Thank you very much Jonathan. So now looking at some of the questions coming through. There are more questions here than we are going to be able answer in the next ten minutes, but we will endeavour to offline answer those ones we do not get to today.

One of the questions Jonathan is about how some countries are introducing flexible

working as a right at law. Do you think that might come down the tracks now that we have got used to potentially working much more flexibly?

Jonathan: I do not see any sign of that yet. I think the existing rules around the right to request flexible working may be paraded a lot more often. And I suspect - and this is certainly what is being discussed in HR circles as well as legal circles at the moment, is that the result of this pandemic - perhaps a positive result of this pandemic - may well be that employers are a lot more amenable to flexible working requests.

Many organisations said, we cannot have everyone working from home and have discovered they can have everyone working from home. I do not see any change in the law, I do see changes in working practices. I think that is very likely.

David: Somebody has asked about journeys to work. If somebody chooses to cycle to work because obviously that is safer, that is recommended by the government but it is going to be an hour's cycle ride in and an hour cycle ride home, can they insist on a shorter working week to absorb that commute time?

Jonathan: [laughs] Can they insist? Ultimately, no. Ultimately an employee is unlikely to be in a position where they can make a categorical demand like that.

Can they insist that an employer listens to that request and discusses it seriously with them, which may uncover that - for example, I need to cycle into work because I cannot take the risk on public transport. I can see that you have done everything you can in the workplace for me, and so I feel safe when I am here, but I am not safe on the tube and actually because of how far away I live, then if I am going to cycle in - if I am going to get home before midnight every night or whenever, I need a shorter working week - that may well be something that you put in place for that employee for a time. Try it as a pilot scheme. See if it works. Try it for the length of the epidemic. If you are a big employer and you can absorb that cost.

If you are a small employer and you cannot, you are in a much stronger position to say, no. What you cannot do - and must not do, is sack somebody for asking.

David: Andrew, there are lots of questions coming in here about risk assessments. The first thing - is it a legal obligation to carry out a consultation with your employees about your risk assessment?

Andrew: Yes.

David: Okay. And does that even apply to a small business?

Andrew: Oh. Good question. There are some of the more onerous requirements for example, recording it in writing, which do not apply if you employ less than five employees. So it depends a little bit, but you have to be right down at that kind of scale before you get let-off some of those requirements.

David: So the micro-business scale rather than as merely small.

Andrew: Yes

David: On posting the assessments, I think there are a lot of questions. I think people may have misheard. You do not have to post it on your external website?

Andrew: Well, the government guidance says you are encouraged to put it on your website.

Now, I suspect that nobody has really thought about the difference between an internal website and an external website. And it is guidance as opposed to a statutory requirement in any event. So I have interpreted that - and this is personal view - but I think that means internal website.

I think it means making it available to the people who are going to be interested in what it says and you can do that by doing that internally. So, that is a personal view, that is personal interpretation, but I think it is on your internal website. But we have only had that since probably earlier this week and watch this space as to exactly what the government intended but, the purpose of it is to make sure that it is done surely - to keep people on, it is to make sure that it is properly done and thought through and can therefore have questions asked about it and possibly challenged if people think it is not good enough.

The only people it is truly relevant to are the people who are affected by its outcomes. So I would say internal.

David: Yes, so do a risk assessment, do all the consultation, publish it internally, publish it on your intranet, hang back do not stick it on your external website unless you have got a real appetite to until you see what the emerging practice and interpretation is, is what I am hearing.

Andrew: I think so. Yes. I think so. And if a regulator comes and asks for it, then you will have to provide it to them, so it will be available. I do not think there is any secret to it, I just think it is an internally based process and internally based document for the moment and as we have discussed, that is the point of it.

David: Some people have asked about who you consult with. If you have not got trade

union reps or a formal employee reps, what do you do?

Andrew: I was having a conversation with a client about this actually just before we came on the call. Often there may well be a health and safety committee. Something that can be put on the agenda of the health and safety committee. Just simply having a pilot scheme, running it, seeing what people think, talking to people about that. That is a consultation. Anything is better than nothing. Reviewing and amending it and keeping it real is important as well.

There is no 'one size fits all' method that you have to consult. And I think probably you have to demonstrate that what you have done is a genuine attempt to seek the views of the people who are in the best position to tell you what is safe or what is not safe are the people who are on the ground doing the job.

It makes sense anyway to consult with them because they are in the best position to tell you what is hazardous and what is not. So, it goes to making a decent risk assessment in the first place. But I do not think there is any 'one size fits all' and I think it is important that something is better than nothing and the more you can do, the better.

David: Right. Andrew, Jonathan just ask you for some closing remarks? Andrew, starting with you.

Andrew: What I said at the beginning really, no new law but we have a big new risk. Unprecedented. Never had to deal with anything like this before but we do have a long-established set of principles and methodologies from general health and safety risk management. Those principles and methodologies, if they are properly applied to this risk will generate means of being able to operate safely, and it is a question of applying those methodologies to the new risk, keeping them under review, keeping them evolving and then hopefully we can - it will not ever be the same - but we can do business sooner than perhaps we feared.

David: Jonathan?

Jonathan: Win employee's hearts and minds. Win their trust and with that you will avoid even having to delve into the complexity of the legal issues.

If that is not working and you need to think in coercive terms, make sure that you drilldown into each employee's situation, do not work on the basis of blanket rules that you apply across the organisation. That is going to lead you into trouble.

David: Right. Well, Andrew and Jonathan thank you both, this is brand new and fast

developing so thank you very much for sharing your time today.

By all means contact any of the three speakers today including myself if you have any questions that occur to you afterwards and also on our COVID-19 hub on our website you will find a huge range of materials and there will be materials being developed to talk about the issues we talked about today as it becomes clearer.

So thank you very much for attending.

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