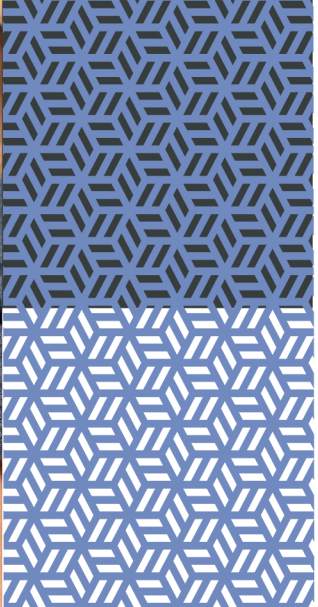
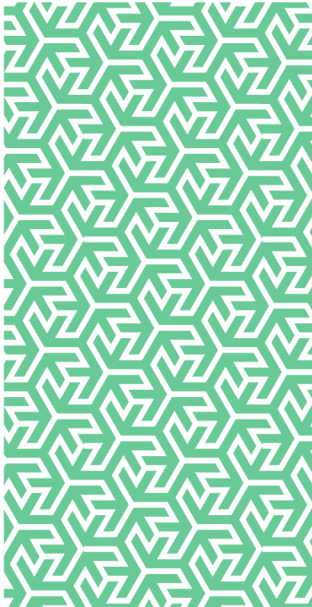


rmp

Risk control

COVID-19 – The Next Wave of Issues



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Introduction

As we emerge from lockdown; the return to the workplace is in our sights. As employers, this presents a wave of new challenges and issues to be worked through. A cautious approach to workplace return should be adopted - maintaining a stance of working from home where possible and re-entering the workplace on a gradual, stepped and managed programme.

There will be roles and individuals that would benefit being prioritised for a return. Those roles that would be performed more effectively from the workplace and those individuals who are struggling with a homeworking environment and are displaying a health and wellbeing need to be back in the workplace. Factors such as these should be considered as part of the organisations return planning process.

This briefing provides a high level overview of a number of the emerging issues as well as embedded links to more detailed supplementary information and advice provided by BLM Law.

Clinically Extremely Vulnerable Individuals

Within the workforce, there could be individuals classified as clinically extremely vulnerable who would like to return to the workplace. This can present leaders with a conflict where there is a desire to support the individual's needs and wants but there is concern for their welfare, compliance with Government shielding advice and the potential liability exposure for the organisation should the individual contract the virus as a result of their return. There is a sensitive balance to be struck between satisfying the mental health and wellbeing needs and protecting on a clinical need basis.

Priority vaccination for those clinically extremely vulnerable individuals will mean they are better protected and they may be able to finishing shielding and return to the workplace once they have received both doses of the vaccine. If mental health impacts are potentially an acute risk or a return is business critical, a detailed individual suitable and sufficient risk assessment should be undertaken which considers all influencing factors and is set with rigorous controls.

At the time of print, the Government advice was that clinically extremely vulnerable individuals are strongly advised to work from home because the risk of exposure to the virus may be higher. If they cannot work from home, then they should not attend work. Further guidance can be found on the Government website¹.

The Vaccination Programme

The national vaccination programme is now well underway, but in itself presents new risks and will undoubtedly impact on our workforce and the wider population. The vaccine is only one measure of protection and vigilance - social distancing, regular handwashing and other protective measures are still required to maximise its effectiveness.

Employers should encourage their workforce to be vaccinated and are supported in this stance through their imposed duties via the Health and Safety at Work Act 1974 which obliges them to take reasonable steps to reduce workplace risks. Employers should also recognise that whilst many will welcome the opportunity to be vaccinated; others may be more reluctant and in some cases may not be able to have the vaccine due to medical, religious or spiritual reasons.

The Government and the NHS take the lead role in addressing vaccine hesitancy but employers can contribute through proactive encouragement based on factual, informative messages and through early consideration of 'what if' scenarios in terms of how it may impact on service delivery and liability exposure.

The Chartered Institute of Personnel and Development (CIPD) has produced a Guide for Employers in Preparing for the Vaccination which provides practical solutions and advice on how to approach this next stage of lockdown exit².

Employers should map the implications of the vaccination programme for their workforce, visitors and those they may come into contact with as part of their activities. Consideration will need to be given to contractual terms, data protection implications and employee policies.

Further guidance on the subject the vaccination programme and the employers' key considerations by BLM can be accessed here: [BLM - News - Jobs for Jobs – COVID vaccines and EL/PL considerations \(blmlaw.com\)](#).

¹ <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19>

² [Preparing for the COVID-19 vaccination: guide for employers | Guides | CIPD](#)

Data

As part of their approach to vaccination; organisations may want to consider whether it is appropriate or morally justified to ask employees if they have received the vaccine. The majority of organisations will adopt a non-mandatory position in line with the Government, but recent press reports show that others have taken a different stance. Pimlico Plumbers has controversially introduced a 'No Jab, No Job' policy, pertaining to amending employment contracts and introducing mandatory vaccinations across the company³. Whilst some may question whether this is the right approach it nevertheless raises questions around the data management requirements.

Information pertaining to whether an employee has received the COVID-19 vaccination will constitute health-related sensitive personal data. Any data collected will have to be done so in accordance with GDPR and the Data Protection Act 2018. Processing of this category of data is complex and employers should carefully weigh the risks pertaining to such a request carefully.

If vaccination data is collected, the organisation should ensure a suitable policy document and data risk assessment is in place which ensures compliance with all key data protection principles. It may also be prudent to review employee privacy policies and contracts of employment as part of the process.

Further guidance on the subject of data management considerations by BLM can be accessed here: https://bestofboth.blmlaw.com/insights/news/workplace-covid-testing-data-protection-risk-reward/?utm_source=RMP&utm_medium=Article&utm_campaign=covid%20and%20data%20protection

Employment Law

This new wave of COVID exit issues places employers in a tough position. On one hand there is an obligation to protect the health, safety and welfare of their employees and those they come into contact with in the course of undertaking their duties and activities; but legally forcing employee vaccination would be classed as assault and battery⁴.

A mandatory vaccination policy carries risks for the employer which should be fully considered.

There could be discrimination claims from individuals who are not hired for vacant roles because they have not been inoculated or from existing staff who could bring claims of unfair or constructive dismissal if changes to their contract are made which they refuse to agree on and are dismissed or resign as a consequence.

Vaccination in the UK is voluntary but it could be argued that, if business critical for some roles, that there is a strong rationale behind mandating the vaccine for key workers in social and health care settings due to the increased risk of exposure as they could be placing those most vulnerable in our society at risk.

'Reasonable management request' is a phrase we are likely to hear more of in the coming months. It may be that organisations are able to put forward a persuasive argument to compel their employees to receive the vaccine without the need for firmer measures. A risk assessment, taking into consideration exposure risk based on the work activities, need for in person contact, health vulnerabilities and other related factors will support the organisation shape its vaccination policy and procedures and demonstrate a considered and measured approach has been taken.

Any such policy should set out the organisations position on requesting employee declarations and/or evidence of vaccination and their approach to requests for testing.

Further guidance on the subject of lateral flow testing and the legal implication of this produced by BLM can be accessed here: https://bestofboth.blmlaw.com/insights/news/lateral-testing-and-the-workplace-where-do-you-stand/?utm_source=RMP&utm_medium=Article&utm_campaign=employment%20lateral%20flow

In relation to the COVID-19 pandemic, the Health and Safety Executive (HSE) stated that "Despite the demanding circumstances, compliance with occupational health and safety legal requirements remains with duty holders and HSE will continue its regulatory oversight of how duty holders are meeting their responsibilities⁵." Whilst the HSE has adopted a flexible and proportionate approach to the risks and challenges presented by the virus, the onus has remained with clients as employers to have full awareness and appreciation of their health and safety obligations and manage exposures to their organisations and workforce accordingly.

³ Pimlico Plumbers boss prepared to defend 'no jab no job' policy in future court battle (msn.com)

⁴ BLM - News - Jabs for Jobs – COVID vaccines and EL/PL considerations (blmlaw.com)

⁵ HSE Regulating occupational health and safety during the coronavirus (COVID-19) outbreak - Epica Health, Safety & Wellbeing

Guidance for employers is readily available on the Health and Safety Executive website covering risk assessment, social distancing, cleaning, hygiene, handwashing, ventilation and air conditioning, communication with the workforce, working from home and vulnerable workers⁶.

The Government has issued clear guidance on how to ensure a COVID secure workplace⁷ which includes checklists and advice on personal protective equipment, hygiene facilities, reduced occupation and social distancing guidelines.

Failure of organisations to adhere to this guidance could bring about employers liability claims on the grounds that the measures implemented were inadequate or not fit for purpose. Organisations will be judged on their reasonableness of measures in the circumstances and based on the guidance issued at the time.

Where many employees will have been working from home over the last 12 months, we could see a rise in emerging musculoskeletal and display screen related injury claims where the home office environment may have been unsuitable for a prolonged period of homeworking.

Workplace stress and psychiatric injury claims are also likely to emerge. Not only from affected front-line workers, but those who have struggled with the change in work environment and possible increased pressure and expectation to deliver. Employers should revisit their communication plan and ensure there are plans in place for effectively managing what will be a testing transition for many back to the workplace after a prolonged period of alternative working style.

Further information on Wellbeing at Work can be accessed here: [Sponsor segment – wellbeing at work | ALARM \(alarmrisk.com\)](#).

The Indirect Consequence of COVID-19

As we emerge from the depths of lockdown to resume our 'pre pandemic' lives, there will be many indirect consequences that will impact society. The recovery of the economy will undoubtedly have a negative impact on the environment. The pandemic gave our planet time to rejuvenate - we have seen cleaner beaches, improved air quality and less congestion on our roads whilst the world effectively 'stood still'. Will all of this good work be undone in a matter of months?

For many regions crime fell, our communities connected, cycling and other forms of exercising such as walking rose dramatically and we all had a renewed sense of appreciation and gratefulness for what we had. Many positive impacts will be here to stay, but there are others we should have on our radar in readiness for the exit from lockdown.

Insurance and Claims Management

As we prepare this paper it is interesting to take a snap shot of where we are in terms of claim numbers and potential costs. At this stage we all recognise the claims data is very raw and is likely to change substantially over the coming months and years. Below we share the data.

We have received claims in the expected areas of risk namely:

- Care Homes
- Police Sector
- Education

The common theme being, these are all areas where employees come into contact with other employees and members of the public.

The fundamentals of the claims discussions have centred on:

- Duty of Care
- Causation
- Proof
- Nature of Injury – short and long term recovery.

So far a very robust and firm stance has been taken with claimants.

⁶ [Making your workplace COVID-secure during the coronavirus pandemic \(hse.gov.uk\)](#)

⁷ [Working safely during coronavirus \(COVID-19\) - Guidance - GOV.UK \(www.gov.uk\)](#)

In terms of number and possible cost of claims; as at the end of February 2021 we had reported to us circa 93 incidents of which around 50% were actual claims. As you can see from the graph employers liability claims led the way.



By way of cost, the initial reserves are circa £1.5m but this is very much an early estimate and nothing too much can be read into the figures at this stage of genuine concern is the possibility of 'long COVID' claims and their potential cost where the claimants face life changing medical conditions, which by definition could prove to be very expensive.



Risk Management

Organisations should ensure they have a robust risk management plan in place to address the risks arising from the COVID-19 pandemic. This should include policies, procedures and processes for maintaining a COVID secure work environment, COVID secure risk assessment and programme of education for employees on working in these different times.

Employers should ensure any decisions taken are communicated effectively to the workforce and any other relevant stakeholders. The checklist below highlights a selection of risk management considerations.

Checklist

- Employers should keep up to date with Government Guidelines and regularly review and refresh their COVID secure workplace procedures are adequate.
- Set and implement a stepped return to the workplace plan.
- Consider the implications of receiving requests from clinically extremely vulnerable employees wishing to return to the workplace and develop an appropriate risk assessment.
- Positively encourage vaccine take-up across the workforce.
- Map the implications arising from the vaccination programme – the impact on the organisation and individuals and steps to be taken to address these.
- Consider if a vaccination policy is required and what this should include.

If employee vaccination data is to be captured, ensure this is done so in line with GDPR and the Data Protection Regulations.

Summary

Fluid and reactive pandemic planning is not easy. Organisations need to be able to respond to changing rules and operating parameters as Government messaging evolves and the need to have an effective internal communication strategy with employees has never been more important.

New COVID-19 related issues will continue to emerge; this is far from over and is new ground for all of us to navigate our way through. The learning we build through our experience of living and working through a global pandemic for the last 12 months, will prove invaluable in strengthening our contingency and recovery plans in preparation for other future interruptive events.

References

- 1 <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19>
- 2 [Preparing for the COVID-19 vaccination: guide for employers | Guides | CIPD](#)
- 3 [Pimlico Plumbers boss prepared to defend 'no jab no job' policy in future court battle \(msn.com\)](#)
- 4 [BLM - News - Jobs for Jobs – COVID vaccines and EL/PL considerations \(blmlaw.com\)](#)
- 5 [HSE Regulating occupational health and safety during the coronavirus \(COVID-19\) outbreak - Epica Health, Safety & Wellbeing](#)
- 6 [Making your workplace COVID-secure during the coronavirus pandemic \(hse.gov.uk\)](#)
- 7 [Working safely during coronavirus \(COVID-19\) - Guidance - GOV.UK \(www.gov.uk\)](#)

Further information

For access to further RMP Resources you may find helpful in reducing your organisation's cost of risk, please access the RMP Resources or RMP Articles pages on our website. To join the debate follow us on our LinkedIn page.

Get in touch

For more information, please contact your broker, RMP risk control consultant or account director.

contact@rmpartners.co.uk



Risk Management Partners

The Walbrook Building
25 Walbrook
London EC4N 8AW

020 7204 1800
rmpartners.co.uk

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