

How to mitigate the risk of employment claims on return to work during Covid-19 – a table

Our table for employers sets out the practical steps to take in order to reduce the scope for claims from employees arising out of the return to work during the Covid-19 pandemic.

There has been a lot of discussion about possible claims that employees might make if they are unhappy about returning to work. These include claims arising from provisions in the Employment Rights Act 1996 (ERA) about serious and imminent danger in the workplace that have rarely been used before. Lawyers can debate endlessly whether such claims are likely to be successful, while no employer wants to be a test case.

Taking a more pragmatic approach, we've produced a table of the practical steps that employers can consider taking to mitigate the various legal risks arising from the return to work.

For a quick explainer of the claims referred to in this table, see the summary underneath. For more information see our FAQs on managing a safe return to work and our FAQs on staffing decisions when re-opening workplaces, or visit the Lewis Silkin Covid-19 hub.

Steps to take as an employer	How it mitigates employment law risk
Comply with the government's workplace safety guidance	This is the minimum that employers should do. Without this, there is a real risk of: negligence claims; employees refusing to work, taking other steps or even resigning under section 44 or 100 of the ERA (see quick explainer below); employees using it as a basis for blowing the whistle on health and safety risks; and claims of constructive unfair dismissal.
Assess risks in your own workplace(s) via your own individual risk assessment and set up control measures	Reduces scope for: negligence claims; employees refusing to work, taking other steps or resigning under section 44 or 100 of the ERA; employees seeking to blow the whistle on health and safety risks; and claims of constructive unfair dismissal.
Welcome employees raising health and safety issues Establish clear channels and processes for dealing with employee complaints about workplace safety (including complaints that other employees are not observing the rules)	Welcoming complaints reduces the risk of employees perceiving themselves to have suffered a detriment for raising them. It is also evidence that you have complied with your legal obligations to consult about health and safety measures you are proposing and implementing. If employees have confidence in the effectiveness of your processes, they are less likely to escalate the issue (internally or to a relevant regulator such as the Health and Safety Executive or local authority).
Explain how you are controlling risks Communicate the latest official guidance on risks	An employee's right to refuse to work or take other appropriate steps under section 44 of the ERA depends on the reasonableness of their own view about the danger, considering what they know and have been told. Case law on section 44 suggests that what employees understand to be the official advice is highly relevant.

Steps to take as an employer	How it mitigates employment law risk
<p>Train employees on health and safety duties, and how to protect themselves and others</p> <p>Be clear that employees should remove themselves from obvious danger (e.g. people not observing safe distancing)</p>	<p>Helps reduce risk of negligence claims over behaviour of colleagues.</p> <p>Helps employees avert danger without having to leave the workplace under section 44 of the ERA.</p>
<p>If an employee leaves the workplace early over legitimate safety concerns, maintain pay for that working day/shift – and ideally maintain pay until you are confident that the issues have been rectified</p>	<p>An employee whose pay is maintained has suffered no detriment for the purposes of a whistleblowing claim or claim under section 44 of the ERA.</p> <p>Ideally, maintain pay until you can be confident it is longer be reasonable for the employee to believe they face serious/imminent danger on return to work. This will minimise the risk of unlawful deductions from wages and constructive unfair dismissal claims.</p>
<p>Act quickly to rectify legitimate safety concerns raised through your reporting channels</p> <p>Inform employees</p>	<p>Any legitimate concerns need to be addressed to avoid negligence claims.</p> <p>Even if an employee is justified in leaving work over serious health and safety concerns, case law is clear that employees can only refuse to return to work for as long as the danger remains imminent/serious.</p> <p>Communicating how you have resolved legitimate concerns makes it less likely that employees can justify any continuing refusal to work.</p> <p>While your normal whistleblowing channels might not include giving feedback to whistleblowers, the current situation is different and employees should be kept informed</p>
<p>Suspend and discipline employees who break the rules (irrespective of their seniority)</p>	<p>Limits the employer's vicarious liability for the employee's actions.</p> <p>Removes imminence of any threat of danger to colleagues, meaning they cannot refuse to return to work because of what that employee was doing.</p>
<p>Train managers on dealing with whistleblower</p>	<p>Helps to ensure that all managers react appropriately to employees who raise concerns and understand why it is important to welcome people raising these issues. This will help avoid detrimental treatment of whistleblowers.</p>
<p>In dealing with any concerns about health and safety, consider each employee's circumstances individually</p>	<p>Whether it is reasonable for an employee to refuse to return to work or take other appropriate steps under section 44 of the ERA will be judged according to their own circumstances and beliefs. You can reduce exposure to claims in practice by taking a case-by-case approach.</p> <p>The extent of the duty of care in negligence also partly depends on the gravity of the consequences, e.g. the likely seriousness of Covid-19 for a clinically vulnerable person.</p>

Steps to take as an employer	How it mitigates employment law risk
<p>Provide Personal Protective Equipment (PPE)/face coverings in all cases where advised by your risk assessment and (potentially) upon request in other cases</p>	<p>This will not be required/recommended in all cases (and you need to be careful about depleting supplies of medical-grade PPE). But it may increase the scope for employees to avert danger by taking steps other than leaving the workplace.</p>
<p>Do not compel anyone to return – volunteers only</p>	<p>This is the absolute safest option for staffing your workplace, although it will not be practical for many employers.</p> <p>This approach may help avoid claims under section 44(1)(d) of the ERA, because employees who have not been asked to return cannot be “refusing” to do so. It will also minimise the risk of constructive unfair dismissal claims.</p>
<p>Do not ask vulnerable employees to return – volunteers only</p>	<p>In practice, claims are most likely to come from this group. If you need to mandate that some employees come back, not calling on vulnerable people is a sensible way of reducing risk.</p> <p>Many vulnerable employees will be disabled so this may be a reasonable adjustment in any event.</p>
<p>Treat employees who live with vulnerable people as if they were vulnerable themselves and do not ask to return – volunteers only</p>	<p>Again, claims are likely in practice from this group, who will have very real concerns about welfare of family members.</p> <p>Treating the employee as if vulnerable themselves avoids complex arguments about associative discrimination rights and whether rights under section 44 of the ERA could extend to dangers faced by others at home to whom the employer owes no duty of care in addition to the employee themselves.</p>
<p>Do not ask public transport users to return – volunteers only</p> <p>Or consider not allowing public transport users to return at all</p>	<p>Avoids the risk of negligence or breach of trust and confidence claims from employees who have no option but to travel to work by crowded public transport. Avoids arguments over whether rights under section 44 of the ERA can extend to commuting dangers.</p> <p>Some employees may not want to work next to public transport users due to increased risk of infection, so not allowing them back reduces any risk of claims from concerned colleagues. This does, however, create a risk of other claims (e.g. breach of trust and confidence) from public transport users who may lose out if they remain at home on reduced pay or want to return to the workplace.</p>
<p>Adjust hours as necessary to allow public transport users to avoid peak times</p> <p>Support alternative methods of getting to work other than by public transport</p>	<p>Reduces the risk of section 44, negligence or breach of trust and confidence claims from employees who have no option but to travel to work by crowded public transport.</p>
<p>Consider disciplinary action for out-of-work irresponsible conduct (e.g. employees who flout government guidance)</p>	<p>This is a difficult area, but employers can discipline employees for conduct taking place outside of work that has an impact within the workplace. Doing so has potential to reduce risk of claims from colleagues who are unhappy about working alongside such employees.</p>
<p>Ask employees to use contact tracing apps when they are available</p> <p>Ask employees to obey instructions from contact tracers to self-isolate</p>	<p>While not risk-free in itself (because of data protection compliance issues), this reduces the practical risk of Covid-19 being brought into the workplace.</p>

A quick explainer of the key legal claims:

- Negligence claims. Employers can be liable for breach of their duty of care towards employees. The employer is also vicariously liable for the actions of its employees if these cause harm to others in the workplace – either physical harm by transmitting the virus or mental distress.
- Claims under sections 44 and 100 of the ERA. Employees have the right not to suffer a detriment or be dismissed (including constructive dismissal) for leaving work or refusing to return to work when they have a reasonable belief that they are in serious and imminent danger (section 44(1)(d) and 100(1)(d)). Employees have similar rights not to be subjected to a detriment or dismissed for taking appropriate steps to protect themselves or other persons from danger (section 44(1)(e) and 100(1)(e)).
- Whistleblowing claims. Employees have the right not to suffer a detriment or be dismissed (including constructive dismissal) for making protected disclosures which they reasonably believe to be in the public interest.
- Discrimination claims. Employees have the right not to be discriminated against on the basis of a protected characteristic, including (in some cases) a protected characteristic of somebody they associate with.

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