

# COVID-19

## Liability Considerations

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## Background

**Throughout 2020 and into 2021, the Covid-19 pandemic has brought about rapid and radical changes in the way that people work. The UK government's current guidance is that people should only go to work if they cannot work from home.**

In addition, many businesses and venues have been or are still closed for a period or are working in a new environment affected by changes to ensure "social distancing". More people are working from home than ever before. Others simply do not have this option.

How does this new and rapidly changing situation impact on the duties on employers to ensure arrangements are made for employees to work safely?

Based on the early phases of looking at this pandemic, this article offers some thoughts on the legal issues that may arise around health and safety in the workplace in the context of Covid-19.

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## Employers' Duty of Care & Civil Liability

**Employers owe their employees a common law duty of care to provide a safe place and system of work, safe equipment and safe colleagues. They also have specific statutory duties under the 'six pack' of health and safety regulations implementing the EU health and safety regime in the UK.**

Central to this regulatory regime is the obligation on employers under Regulation 3 of the Management of Health and Safety at Work Regulations 1999 to carry out risk assessments and then minimise any risk identified using the principals in Schedule 1 of the Regulations.

Additionally, the Personal Protective Equipment at Work Regulations 1992 include a requirement that employers "shall" provide suitable PPE and must supervise employees to ensure that it is worn. Employers also have duties under the Control of Substances Hazardous to Health Regulations 2002 (COSHH) and as far back as 2003 the Advisory Committee on Dangerous Pathogens also published "Infection at work: Controlling the risks", which provided guidance for employers and the self-employed on identifying, assessing and controlling risks of infection in the workplace.

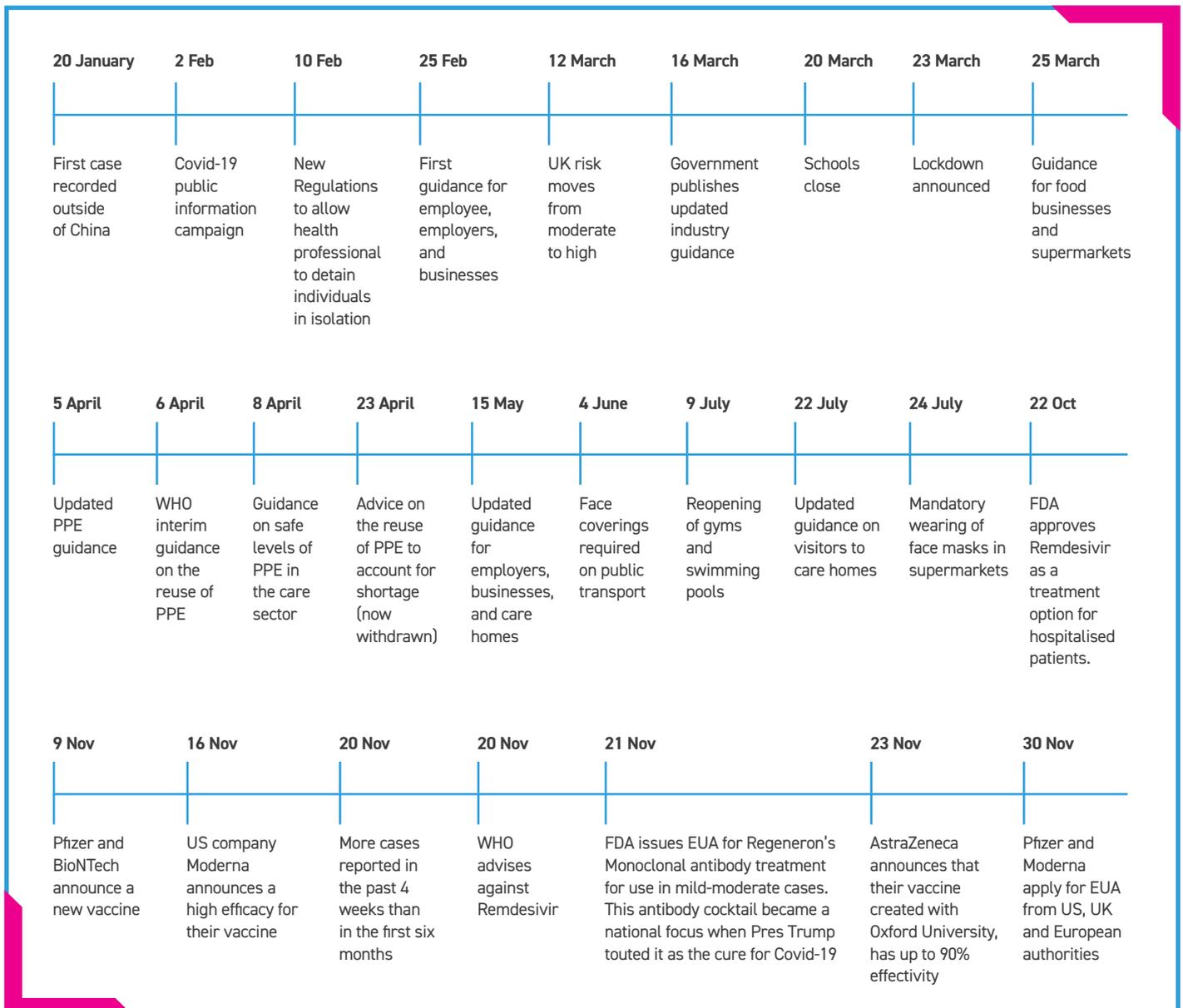
The word "shall" is included in many other Regulations and it creates a strict duty however following enactment of s.69 of the ERA 2013, employees can no longer plead a breach of health and safety regulations alone, and they must show the employer has been negligent. The Regulations and associated guidance remain relevant to identifying what is negligent. In addition, good practice can include reference to HSE Approved Codes of Practice (ACOPs), World Health Organisation guidance and government publications. If these are not followed an employer may well be negligent.

In summary, a Claimant will need to prove negligence but can refer to various Regulations, guidance, and other documents to demonstrate it.

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## Covid-19 – What Happened and When?

The problem when looking at a claim for Covid-19 is that the Regulations, guidance, and other documents referred to above have constantly changed. The following is a very basic timeline of events in 2020.



The above dates refer to general advice and guidance, and key points in time. Each industry sector will have its own timeline and more specific direction, and this will need to be reviewed for each claim and its individual set of circumstances. In addition, each business will have been reviewing their own position and their own implementation will be site specific and depend on available space, numbers of employees, access to PPE etc.

The Health and Safety Executive (HSE) has published Covid-19 guidance, but as yet it is relatively limited and only covers certain discrete areas. The HSE also

has existing, detailed guidelines for employers in relation to an outbreak of pandemic flu (i.e., a new influenza virus), linked to the government's national framework for responding to an influenza pandemic. This is very relevant to Covid-19.

At some stage we may end up with litigation which defines what should have been done by employers and when, similar to dealing with the dates of knowledge for deafness and asbestos.

## Allegations

**We expect most claims to contain allegations familiar to Defendant insurers. With a Covid-19 twist these could include:**

- The availability or adequacy of a risk assessment showing inadequate precautions were taken
- Inadequate health surveillance, including identification of vulnerable individuals, regular testing and ensuring those at risk are isolated
- Not providing suitable PPE
- A failure to account for changing work patterns and workloads in the anticipation of reductions in available staff through sickness or self-isolation

In addition, we expect there will be some allegations quite specific to Covid-19.

Employers should allow for and enforce social distancing within the workplace, maintaining the 2m gap between colleagues and others. We anticipate that it will be argued that this did not occur and a site visit will need to address the premises layout and changes made to assess practicability and compliance. Photographs and video footage will be important.

In some cases, such as the care and education sectors it is very difficult (and at times impossible) to ensure social distancing occurs. Then the availability of PPE will be a key issue particularly where Covid-19 has been contracted during April and May 2020. Claimants will look to imply a strict liability for lack of availability. The timelines, supply and any delays in supply will need to be investigated in detail; where delays have occurred any risk assessment should identify priority staff.

There will also be arguments surrounding vicarious liability and the negligence of other employees. Claims may arise from those infected because of a decision of another unwell employee to continue to attend work and not self-isolate, contrary to government and employers' advice. Questions of the other employees' knowledge and access to their

medical and testing history will arise, and general disclosure of employees' attendance records may be requested, with this creating GDPR considerations.

Home workers are entitled to the same level of care as those on the employer's premises. The quick transition from office working to home working may well have resulted in the individual environments not being assessed to ensure the correct display equipment and seating was provided to avoid musculoskeletal disorders. Back injuries are notoriously hard to tie to a particular issue and allegations could be made that pre-existing problems have worsened. Some employees required to work from home may simply have not had enough space in their domestic life to do so.

Covid-19 can result in some employees having an increased workload. Others may be self-isolating or in the industry sector (care, education etc) which is under increased demand. Sensible planning, workforce review, work distribution and clear leadership will mitigate this risk; however, there is the potential for claims of stress related injury with potential breaches of the Working Time Directive.

Evidence that such planning has been undertaken, as part of the employer's ongoing risk assessment, will be important.

Our concern is that there will be occasions where a breach of duty can be demonstrated or that there will be a significant litigation in defending a claim.



## Causation

**Subject to a few exceptions, having established a breach of duty the Claimant must also show, on the balance of probabilities, that the breach resulted in the alleged injury. In short, the Claimant will need to show he or she contracted Covid-19 at work due to his employer's negligence.**

As an initial starting point, the Claimant should provide a record of a positive test and then clear symptoms. The test should be dated giving a window (of perhaps six weeks) during which Covid-19 was contracted.

It has long been legally accepted that most diseases are contracted as a natural consequence of life – for example the common cold. We may pick them up from a work colleague or another social interaction. They are spread through the population irrespective of work, and they do not care about their hosts' employment or other life factors. This is different from a disease or illness which may be contracted in specific circumstances and which can then be work related – for example asthma, which can be linked to the inhalation of isocyanides whilst paint spraying.

We suspect that Covid-19 will fall into the former category. It will be seen by the Courts as a disease affecting the whole country so creating an assumption of exposure within a workplace would be against public policy. It would place impossible expectations on too many employers who cannot control spread.

The same might well be the case with any breach of duty by an employer which they cannot realistically avoid. An early indication of this approach can be seen in the recent libel case of Scarsdale Grange LLP v NSMY Ltd & JPI Media [2020] EWHC 1988 (QB). The Claimant operated a nursing home, and an article said they had knowingly put its residents and employees at increased risk of death or illness by unreasonably withholding testing and personal protective equipment (PPE) from its staff thus allowing Covid-19 to spread due to unhygienic environment. In a preliminary ruling the Court held that allegations

relating to lack of testing and PPE could not be defamatory as they affected the nation as a whole and did not convey any fault on the Claimant. However, the allegation of an unhygienic environment could be, as it was specific to that particular care home. It was clear that the Court accepted that the unavailability of PPE and testing during the initial weeks were not specific to a particular business.

Reference can also be made to MRSA and its contraction in hospitals. The Courts have not assumed an automatic link between MRSA being present in a hospital and those contracting it – the Claimant still needs to link catching it to a specific act of negligence. We expect this approach is also likely to apply worldwide. For example, in the US, Germany, and other countries with Workers Compensation Schemes, Covid-19 is not listed as a work-related condition for which compensation can be sought.

One of the exceptions to a plaintiff's need to satisfy the balance of probabilities test is for the exposure to asbestos. In *Fairchild v Glenhaven Funeral Services Ltd* [2002] the test for causation asked not that the claimant should establish where the offending asbestos was inhaled, but instead whether an employer had materially increased the risk of harm to them. We doubt this principle will apply to Covid-19. The *Fairchild* exception applies as exposure to asbestos was very rare outside of a workplace, the employer's ability to control exposure in the workplace was clear, and there was a defined and narrow set of Claimants who had contracted medically recognised diseases; there was no risk of the litigation floodgates opening.

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## Claims Investigation

**It is clear that Covid-19 will give rise to a wide variety of issues. We expect initial claims will contain general allegations but as time moves on, more sophisticated allegations will be made with specific reference to dates, the availability of PPE and levels of supervision.**

The ideal claim for no win no fee lawyers will be a positive case, in a busy environment, where other positive cases have been identified together with a plaintiff who will state they have little other social interaction. For example, an outbreak in a factory during a period of lockdown.

The key will be to investigate promptly and capture the insured's systems, processes, and documentation at the relevant time. A site visit will be essential to ensure conditions are properly recorded and nothing is missed – particularly looking at old risk assessments or guidance which has been superseded and speaking to staff to recall a snapshot moment

of a complex and long series of events. The need for prompt investigations applies not just to claims relating to the initial outbreak but also regarding future spikes where a particular site, say a food factory or construction site, may see a rise in cases prompting quick action. We might later need to establish what and how this was decided and discuss this and their understanding of the guidance with the site staff.

With public and product liability claims, while the duties may appear less strict, there is the potential for a wide variety of liabilities including access to premises, adequate cleaning and enforcing the use of PPE. As premises must record visitors' details to allow for track and trace, people contracting Covid-19 may be able to identify where the virus came from. There remains the potential for defective PPE, medical or other care, or other services to have been in breach of guidance resulting a contractual liability.

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## What's Ahead?

**As the pandemic continues, Covid-19 related claims will increase. There will be difficulties in proving a breach of duty, and causation will also be a key factor.**

Moreover, if there is a public appetite to pursue such claims and whether there is also judicial appetite to allow them in the context of a fast-moving global pandemic remains to be seen. Until we have some clarity, insurers must treat them seriously and investigate accordingly.

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