



Health and Safety and Claims Defensibility

COVID19 – Protecting your business

During this Covid19 pandemic employees’ health and well-being is paramount. Employers have both a statutory and common law duty of care for people’s health and safety at work and the risk of potential criminal and civil sanctions continue to exist.

Whilst government guidance is the starting point, businesses need to consider their own workforce, identify and review the risks they face and the activities they undertake. It needs to be ensured (and can evidenced) that a dynamic and ‘reasonably practicable’ approach is taken to reviewing current ways of working and implementing any new controls required in light of the current pandemic. This should incorporate (but not be restricted to) all government guidance.



The message is simple:

Act responsibly and ethically, not out of fear of prosecution or civil claims but out of an appropriate sense of accountability to staff and customer stakeholders. Stay current and do all that is reasonably practicable based on government advice and an ever changing situation and you are likely to stay on the right side of the law.

We would encourage clients of Lockton to contact your usual Account Handler or the Lockton Risk Management team and we will make every effort to support any specific queries you may have relating to your business at this difficult time.



If you require further information, please contact:

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For more information regarding Coronavirus visit:

www.lockton.com/coronavirus



LOCKTON®

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Some examples of what this means in practical terms are included in this document.

1. Perform a risk assessment of employees and others being placed at an increased risk of catching Covid-19 as a result of their activities and implement controls in line with government guidelines.
2. Risks associated with normal activities may be elevated due to a reduced number/absence of skilled employees and distraction. Particularly consider those hazards which have potential for fatal and major injuries to ensure an adequate level of control can still be applied.
3. In the event of an incident at work, emergency services response may be compromised potentially resulting in relatively minor injuries having more significant consequences. Managers and supervisors must be extra vigilant instead of being distracted by the current situation.
4. Statutory examinations and maintenance of critical plant may be compromised as a result of specialist engineers being unavailable. The Health and Safety Executive is not currently offering any derogation in relation to thorough examinations, although the situation remains under review. Be aware of any approaching or overdue requirements and mitigate where possible including:
 - a. Not using overdue equipment and using alternatives if available. Note that examinations of pressure systems may be postponed based on agreement from the inspection body (but not after the examination due date has passed).
 - b. Prioritising the engineering resources which are available to the most urgent equipment in terms of inspection/maintenance date, equipment criticality and consequence of failure (from a safety and business continuity perspective).
 - c. A more frequent internal inspection and maintenance regime may also help improve reliability of critical equipment (but does not replace the need for statutory examinations).
 - d. Operating equipment where the statutory examination date has passed would be in breach of legislation. If a business chooses to take this course of action advice should be sought from competent persons to identify any control measures which may reduce the likelihood or severity of equipment failure. For example, no longer using lifting equipment to lift people or measures to ensure that no one is in proximity.

HOME WORKING

At this time many employers will be forcibly testing their home working arrangements. Employers' legal duties to look after their staff extends to working at home. By carrying out a home worker's risk assessment (typically self-assessment), employers will be able to identify and then deal with, any health and safety risks that cannot be remedied by the individual themselves following guidance as far as is 'reasonably practicable'.

Health and Safety Executives have updated their guidance following the government announcement on Monday 16th March to state:

“There is no increased risk from DSE work for those working at home temporarily. So in that situation employers do not need to do home workstation assessments”.

There is no guidance as to what constitutes 'temporary' and full information can be found at:

<https://www.hse.gov.uk/toolbox/workers/home.htm>

Employees working from home should be instructed to notify their employer in the event of them suffering an accident whilst working at home which is related to their work activity (e.g. injury from defective company equipment). Similarly, they should also report pains and strains which they suspect to be work related (e.g. in their thumb or wrists).

SITE CLOSURE AND WORKFORCE RATIONALISATION

It is foreseeable that business forced to rationalise their workforce and potentially close operations and sites will see a potential (typical) upturn in claims. This will not necessarily relate to Coronavirus, but due to employees increased propensity to claim from past accidents and exposures as their loyalty and connection to the business is severed. It is important that the business appoints an executive team to manage such situations and avoid or mitigate liability issues which undermine its long-term viability.

CLAIMS HANDLING AND INVESTIGATION

An indirect impact of Covid-19 will be the ability of businesses and their insurers to investigate existing claims, particularly when claims inspectors are unable to attend sites. In those circumstances, clients and insurers should proactively seek extensions of time from Claimants' representatives in order to minimise the risk and costs of Pre-Action Disclosure applications.

SPECIAL GROUPS

The law does require some groups to have specific risk assessments: young persons and pregnant women are specifically safeguarded; whilst there is no specific protection for those with a disability, sensible risk management means that individual risk assessments should be carried out and controls agreed for those who have a selfdeclared/underlying health condition which could increase their risk profile in relation to Covid-19. Home working and isolation are likely to be recommended for such staff.

PROSECUTION PROSPECTS

In the context of potential organisational or individual prosecution for getting it wrong, in these unprecedented times enforcement action arising from such legislation in this context, is probably an unlikely outcome save perhaps for the most reckless of employers whose instruction to employees flies in the face of Government advice.

The HSE is involved in helping the government's response; individual COVID-19 cases are not RIDDOR reportable so would not fall for investigation and it would likely be challenging to prove definitively that an individual contracted the disease from exposure at work. The regulatory framework should perhaps be seen as an enabler to assisting duty holders with the tools to 'do the right thing' by those they affect rather than as a stick to ensure measures are taken. In many ways, the burden is on the business to behave ethically and appropriately. This is about looking after people, rather than avoiding censure.

EMPLOYERS' LIABILITY CLAIMS

Given the nature of Covid-19, and the proportion of the population expected to develop the condition over the next few months, any claim presented on the basis that the condition was contracted due to negligence of an employer would appear to be difficult to prove, particularly on causation, although it is not a given that claims of this nature will not arise in the future.

