

Refusing to return to work

Lockdown has been easing since 13 May 2020 with more businesses being allowed to re-open from 1 June and 4 July 2020. The brake pedal has been pressed for others - that were due to reopen from 1 August 2020. During this time business and individuals alike have been considering what a return to the new normal will and **should** look like.

Since 1 August 2020, following the government's 'The next chapter in our plan to rebuild: The UK Government's COVID-19 recovery strategy', employers that can open have more discretion on how employees can and will work safely.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901522/6.6783_CO_Our_Plan_to_Rebuild_LP_FINAL_170720_WEB.pdf

Working from home (if this has been or is possible) remains one way to do this. Many workplaces have reopened following COVID-19 Secure guidelines.

Since lockdown business has had a more diverse workforce than ever. Staff will fall into one or more of the categories below:

- working at the workplace
- working at home
- unwell
- shielding (clinically extremely vulnerable or clinically vulnerable)
- on full-time furlough
- on flexible furlough
- 'refusing' to work

Some will be or have been on reduced or altered hours and/or pay.

As the world starts to return, business requirements are vitally important. Business wants to spring back and start the recovery as quickly as possible. Some will voluntarily seize a perceived opportunity (with potential environmental, human, and financial benefits) and never return to the way of working they may have vehemently defended for years. Others may return to a more comfortable way of working - whether through necessity or preference.

Treat staff as individuals

Business requirements are, of course, important. As important is considering each employee's circumstances. No-one, during this pandemic, has been impacted in quite the same way.

Throughout the pandemic we have championed employers behaving both legally and morally, doing 'the right thing'. There are several factors to remember (beside the legal). For example:

- your staff are your most important asset
- a harmonious and happy workforce will be a key part of recovery
- employees who feel devalued will be difficult to manage and may well leave at the first opportunity
- recruitment is expensive

Refusing to return to work

Workplaces remaining open, starting to reopen, or reintroducing more staff have to decide if work can be done safely in the workplace and by who. If there is no work which can be done safely in the

workplace employees should not be asked to return and should continue to work from home where possible or, potentially, remain on furlough.

Employees who unreasonably refuse to the workplace to carry out work available could be subject to disciplinary action, not be paid and, ultimately, be dismissed. This is not a step to take lightly and there are several areas to be cautious about.

Childcare

You may think childcare is no longer issue as it is, after all, school holidays and we are being reassured schools will reopen on time. However, many holiday clubs are no open and other childcare arrangements disrupted. Workers are continuing to face the difficulty of children at home - whether they are working or not. Failing to take this into account if a worker refuses to return for this reason runs the risk of allegations of indirect (if not direct) discrimination on grounds of sex and possibly disability if there are concerns around ill-health.

Vulnerable

Clinically extremely vulnerable

Those who are extremely vulnerable were advised to shield until 31 July 2020 and, since 1 August 2020, can return to Covid-secure workplaces.

<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>

Clinically vulnerable

Clinically vulnerable, being those aged 70 and over, aged under 70 with a specified underlying health condition and pregnant women, can attend work but should be helped to work from home, either in their current role or in an alternative role and if this is not possible they should be offered the option of the safest available on-site roles, enabling them to maintain social distancing guidelines.

<https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing-after-4-july>

Living with vulnerable individuals

There is no requirement for individuals living with those who are shielding to, themselves, shield. They can, therefore, attend work.

This group of vulnerable individuals or individuals with a connection to vulnerable individuals are very likely to be concerned about returning to the workplace. Any individual concerned for their health might be a disabled person depending on the reason for their 'vulnerability'. The position is less straightforward where the concern relates to another. Legally, an individual is not protected against a failure to make reasonable adjustments, discrimination arising from disability or indirect discrimination because of the disability of another. However, they are protected against direct discrimination, harassment, and victimisation. The protected characteristics of age and pregnancy might also be relevant.

General concerns about health and safety

Employees raising concerns about health and safety concerns may be protected against dismissal and detriment regardless of their length of service. This will be the case if an individual:

- raises concerns with their employer about circumstances they reasonably believe are harmful or potentially harmful to health and safety, and they are dismissed on that basis.

- believes that they are in serious and imminent danger and they leave, propose to leave, or refuse to return.

They may also have 'whistleblown' and be protected against dismissal and detriment.

Employers must also bear in mind that they have a duty to:

- to take reasonable care of the health and safety of their employees
- to provide a suitable working environment
- of trust and confidence

A breach these duties could lead to the employee raising a grievance and/or resigning and claiming constructive unfair dismissal.

Individuals from BAME minorities and men may have greater concerns than others due to statistics evidencing they are at greater risk. In these circumstances, individual risk assessments (which are recommended anyway) should be carried out.

Due to the potential correlation between why staff may refuse to return to work and protected characteristics (for example age, sex and/or disability) of themselves or others employers need to be cautious about their responses when an employee is reluctant or refuses to return to work. A wrong step risks breach of the Equality Act 2010. As highlighted above, there are also other potential claims including for automatic unfair dismissal or constructive unfair dismissal. Some claims attract unlimited compensation.

Whether such claims could or would be successful, to a large extent, is academic; the time, money and workforce disruption involved in managing the situation, which is likely to include a grievance, may be deterrent enough.

Managing the process

For all these reasons, employers must be as flexible as possible.

Continue to consider alternatives to working in the workplace. For example:

- homeworking
- redeployment to allow for working from home
- furlough leave (if available)
- allowing unpaid (or paid) time off to deal with emergencies involving dependants
- unpaid parental leave
- compassionate leave
- career breaks
- holiday

Failing that, think about:

- reduced hours
- adjusted hours

which allows individuals to work around, for example, childcare commitments.

As part of the return to work process employers should:

- share risk assessments with their workforce
- discuss planned adjustments to the workplace generally
- communicate updates on guidance and approach regularly

- document everything
- talk as early as possible about returning to the workplace and take time to understand the circumstances.
- consult with staff and any trade union representatives, employee representatives and/or health and safety representatives and staff who might be concerned about degrees of risk for themselves or others.
- consider adjustments:
 - be flexible on return to work dates, hours, and times of work
 - travel plans and facilitate cycling or parking
 - new and expectant mothers
 - religious commitments
 - additional protections
- discussing any phased return of the workforce, with some staff returning before others
- minimise contact and organise attendance at work in groups
- talk to employees anxious about safety and returning to work and to try to resolve concerns together. Concerns can be:
 - fear of catching COVID-19 themselves
 - that they are vulnerable or living with someone who is vulnerable and therefore shielding
 - that they are caring for children
- be aware of perceptions of fairness and unfairness within the workforce and the potential for ill-feeling to develop

This information is up to date as of **4 August 2020**. Guidance is updated regularly so make sure you are fully up to date by checking the most up to date government information.

We can help support you

The Birkett Long Employment and BLHR team would be delighted to hear from you if we can help support a return to work or if you have any other queries at all. We can provide support to business and individuals on a fixed fee basis.

We also have available packages to support you through individual and collective redundancy processes. Get in touch today with any member of the team on 01206 217300. We would be delighted to hear from you.

Giving you extra

The Birkett Long Employment and BLHR team hold monthly HR Forums which are a great opportunity for you to keep up to date with recent developments in HR & employment law. You can discuss any HR issues you are facing with other HR professionals and managers in business. Our experts are on hand to provide advice. Our next HR Forums may be hosted online.

Alongside this we post monthly online newsletters keeping you up to date with recent developments in HR & employment law. To receive these, please email sarah.humphries@birkettlong.co.uk.

You can find the dates of our HR Forums at:

https://www.birkettlong.co.uk/site/about/birkett_long_events/

To book and find out more please email sarah.humphries@birkettlong.co.uk

Birkett Long host a Wednesday Webinar every other week, these cover multiple topics. You can find out our Autumn schedule here - https://www.birkettlong.co.uk/site/about/birkett_long_events/

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