



THE NEW REALITY

Keith Morton QC of Temple Garden Chambers, looks at the legislation dutyholders must abide by in the shadow of COVID-19.

The key health and safety legislation in this country is of general application: all employers and the self-employed must ensure the health, safety and welfare of employees and non-employees affected by their undertaking, so far as is reasonably practicable. A failure to do so is a criminal offence punishable by imprisonment for individuals and very large fines for companies and organisations. Fines are now commonly over £1m for organisations with a turnover exceeding £50m a year.

The law treats safety as a relative concept. Safety is judged according to the general and industry specific knowledge and standards of the time, by reference to what might reasonably have been foreseen by a reasonable and prudent employer.

The duty to undertake risk assessments is the central building block for complying with that duty. A risk assessment is about identifying reasonably practicable measures to control the risks arising from work. Dutyholders are required to foresee how their undertaking might cause harm and to identify what measures are reasonably required to eliminate or reduce that risk. A risk assessment is not a piece of bureaucratic paperwork but rather a blue print for action.

The risk of harm, potentially very serious harm or death, from Covid-19 is a new and grave risk to which employees and non-employees may now be exposed. Every dutyholder is now on notice of this risk. Every dutyholder must immediately ensure that this risk has been assessed and reasonably practicable measures to reduce the risk to all those affected by its undertaking are implemented.

Knowledge of the risk and how to control it is evolving. The pressure on dutyholders to return to work will increase. Risk assessments must, therefore, be kept under review to reflect these new and changing circumstances.

Covid-19 is a notifiable disease. If anyone is diagnosed with or dies as a result of it and the likely exposure was work-related it must be reported under RIDDOR.

Dutyholders must make themselves familiar with the emergency legislation applicable to their work and their part of the UK, including the various Health Protection [Coronavirus, Restrictions] Regulations.

The Regulations permit travel for the purposes of work but only where it is not reasonably possible for a person to work from home. The risks arising from Covid-19 must be assessed: Is it reasonably possible for particular workers to work from home? If not, whether particular individuals should travel to work (do they have symptoms? Are they at risk?) What risks arise from travelling and what reasonably practicable measures will reduce that risk? What risks arise to workers at work and what reasonably practicable measures will reduce that risk?

Identifying reasonably practicable measures to reduce the risk of infection at work will of itself require consideration of other specific duties, such as the provision of personal protective equipment. It will also require consideration of guidance issued by government and the HSE (most obviously in respect of social distancing). Guidance is not of itself law, but if it is not followed dutyholders must be able to justify why not.

The duty to risk assess is not limited to the risks from Covid-19 itself. If it is reasonably possible for particular workers to work from home then the risks arising from the new home working arrangement must themselves be assessed. This will include identifying what work is to be done and how and implementing reasonably practical measures to reduce the risk of harm from, for example, working with display screen equipment, lone working, absence of supervision, stress and mental health.

Regulators are likely to look leniently on dutyholders who have been a little slow to adapt to the challenges of Covid-19 but the longer it goes on the more certain enforcement action will become.

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