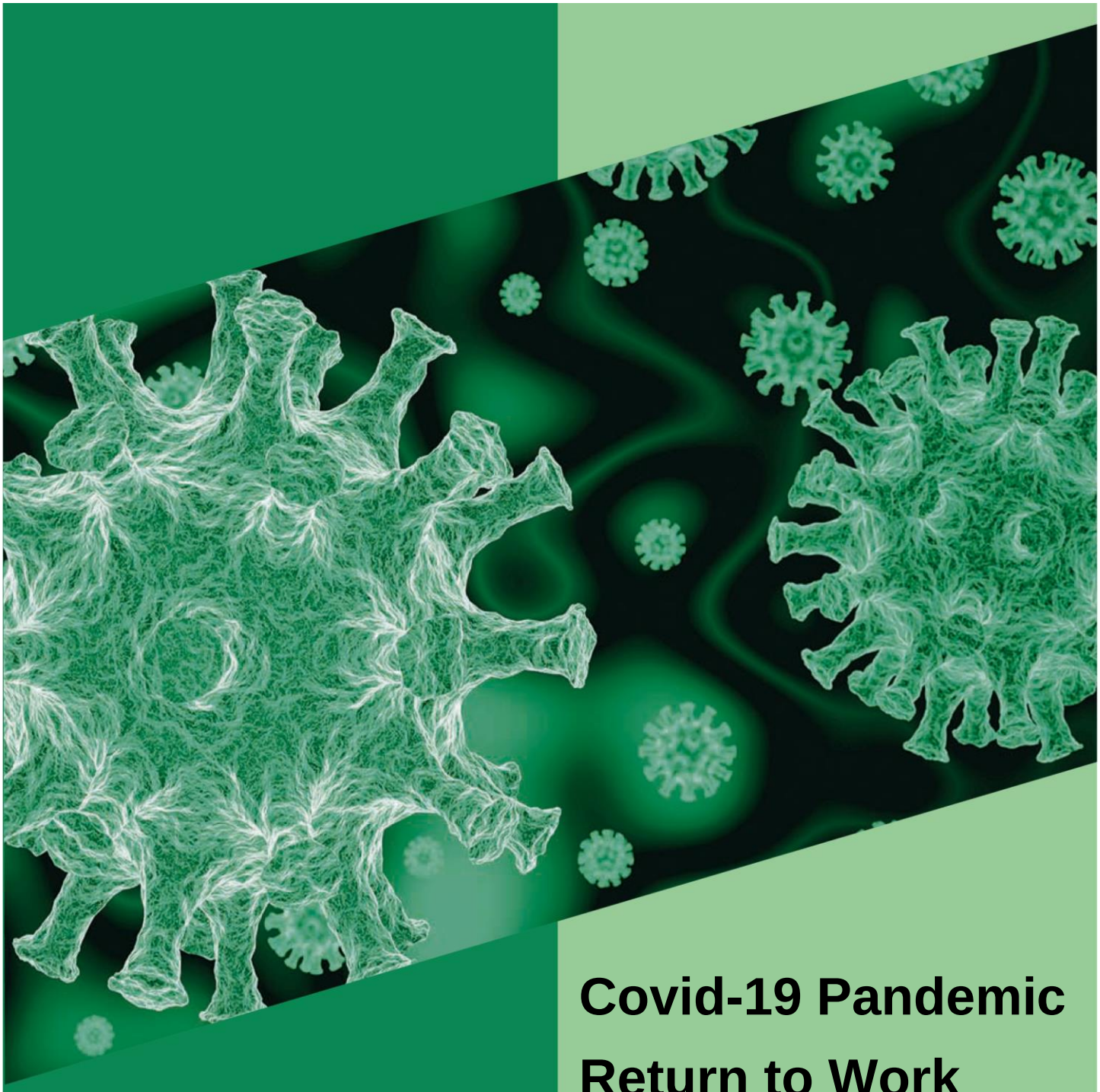

Covid-19 Pandemic

Return to Work Legal Advice for Branches

UNISON
the public service union

Return to Work – Guidance for Branches

Members will face different situations so it is not possible to provide a one-size-fits-all or conclusive legal guidance or advice. In each situation across the UK where issues around unsafe workplaces arise Branches and Regions should take steps to investigate the claims on the basis of this generic guidance, and then make a proper referral to Thompsons of all of the relevant information.

Hopefully this guidance will be of assistance to you representing members and point the way for further investigations of any concerns in order to get appropriate legal advice on individual circumstances where required.

This guidance is applicable to a variety of situations where members have concerns about their safety at work.

Health and Safety Advice

Common law duties

An employer is obliged to take all such steps as are reasonably practicable to ensure the safety of its employees. An objective test is used to measure whether or not an employer has breached the obligation; did the employer in question act as a reasonable employer would have done in the circumstances?

An inquiry into such a question will undoubtedly look at the risks to the employee in carrying out their duties, whether that employer made a proper assessment of those risks to health and safety and the steps taken to minimise those risks. If an employer does not know what the risks are (because it does not carry out a proper assessment) then it may be held liable in negligence for failing to inspect and/or make those premises safe.

Employees may bring personal injury claims where they can show that their injuries or loss was caused as a result of the employer's negligence. Where the risk is not obvious, an employee will only succeed if it can show that the state of knowledge in the relevant industry at the relevant time was such that the employer knew or ought to have known of that risk, and showing causation is far from straightforward in relation to a disease as widespread as COVID-19.

Health & Safety at Work Act 1974

This act imposes additional obligations on employers in respect of employees and other classes of person coming on to the employer's work site.

Management of Health and Safety at Work regulations 1999

This legislation sets out in more detail what steps employers need to take to assess and reduce workplace risks and as such protect their employees.

This legislation can give rise to criminal liability for employers failing to comply with duties that broadly replicate those at common law as set out above. Breaches of this legislation do not give rise to a civil action for compensation for injury to employees but can be used to inform the common law position and as such be part of the evidence of an employers negligence.

Section 44 and 100 of the Employment Rights Act 1996

This provision at section 44, provides protection for employees who suffer any detriment (short of dismissal) or dismissal by their employer on the ground that the employee did or failed to do certain specified acts. These acts include for present purposes, at section 44(1)(d), employees who need to leave workplaces or any dangerous part of the workplace in circumstances where the employee faces serious or imminent danger.

Employees who suffer detriment as a result of leaving a dangerous workplace can take employment tribunal claims for compensation arising from the detriment. Again an employment tribunal determining such a claim will need to investigate the nature of the danger, whether or not the risks to the employees were *serious or imminent*, whether there were any steps taken by the employer to eliminate or minimise those dangers, the reasonableness of the employees actions in leaving the place or work or refusal to carry out the employers instructions. This will be an objective analysis of all of the circumstances surrounding the departure from the worksite of refusal to carry out the employer's instructions. If an employer can show that an employee was negligent in leaving the workplace in the circumstances, the claim under section 44 will not succeed.

Section 100(1)(d) provides additional protection for employees who have been *dismissed* as a result of taking the same specifics acts, including leaving the workforce or refusing to carry out the employer's instructions in the face of serious or imminent danger.

Whistleblowing

Further still, section 47B of the Employment Rights Act protects workers from detriment or dismissal where they disclose information in the public interest and the employees reasonably believes health and safety is endangered. Such whistleblowing claims are difficult for employees to make out and there are a number procedural steps that need to be complied with before such a claim will be successful.

Collective action

The definition of trade dispute for the purposes of TULRCA 1992 includes "the physical conditions in which any workers are required to work." This definition will necessarily include matters of health and safety and situations where employees are being asked to place themselves in serious or imminent danger at work.

The stringent balloting and notice provisions will apply to industrial action taken in pursuit of disputes falling under this definition. UNISON's rules, procedures and guidance on bringing such industrial action will also apply and the Court's ability to scrutinise and prevent such industrial action is not diminished insofar as health and safety is concerned.

A question might arise on whether or not action taken by a group of workers in the face of serious or imminent danger amounted to strike action for the purposes of TULRCA. This may be a difficult question to resolve, particularly in health and safety cases, as there is no definition of "strike" in the act.

If it can be said that the action was a concerted stoppage of work done with a view to improving conditions or to vent a grievance, then this action might well be considered strike action (with all of the sanctions available to employers to stop it). If on the other hand it was considered to be action founded on a genuinely held view by a number of staff that they would be placing themselves or fellow workers in serious or imminent danger be staying at work or continuing to work, then it might well not be considered strike action. Much will depend on the tribunal on the day, the reason for the strike action and the precise details of the steps taken by both the employer and trade union in respect of the particular case. Regions and Branches should be cautious that members are not advised to take such unauthorised industrial action, as UNISON would face heavy financial penalties in court, including the costs of defending legal proceedings.

Government guidance on COVID return to work

The first point to make about this guidance issued on 6 May is that it is advisory and not mandatory in nature. It does not require employers to take certain steps to avoid the transmission of COVID 19 at its workplace nor does it provide for sanctions for employers who do not comply with the terms of the guidance. In short it does not create any additional legal duties apart from the ones set out above in relation to workplace safety. However, the existence of the guidance and the recommendations made in it will be of assistance to any employees wishing to make any of the claims against employers under any of the various heads set out above. The present pandemic certainly creates additional risks for workers and employers are bound under their existing duties to assess those new risks in respect of their workforce and take all necessary and reasonable steps to eliminate and or minimise those extraordinary risks for its workers.

Apart from the obvious course of action in separating sick employees or those displaying symptoms of COVID 19, a primary recommendation in the guidance is for employers to **"*Carry out a COVID-19 risk assessment*"**

Before restarting work, the UK Government is advising employers to ensure the safety of the workplace by:

- *carrying out a risk assessment in line with the HSE guidance or specific guidance (see Schools' guidance)*
- *consulting with your workers or trade unions*
- *sharing the results of the risk assessment with your workforce and on your website*

This is a powerful statement and one which reinforces the general legal position in the common law and under health and safety regulation.

In relation to Personal Protective Equipment (PPE), the guidance does not go so far as to recommend the use of extra PPE in response to COVID 19. In fact, it says the opposite. It recommends that measures to be adopted include "*working from home and staying 2m away from each other in the workplace if at all possible. When managing the risk of COVID-19,*

additional PPE beyond what you usually wear is not beneficial. This is because COVID-19 is a different type of risk to the risks you normally face in a workplace, and needs to be managed through social distancing, hygiene and fixed teams or partnering, not through the use of PPE."

Employers who fail to carry out the additional duties that have been outlined in the guidance and/or who fail to protect their employees in accordance with the appropriate health and safety legislation run the risk of facing the types of claims identified above, particularly in relation to common law duties in negligence (based on an objective assessment of the known risks or those that employer could reasonably be expected to know).

Refuse and Cleaning workers

In relation to refuse and cleaning workers, the government has not provided separate, detailed additional guidance including advice on how to maintain a healthy work environment. It has provided general advice for the transport industry which is in part applicable to refuse drivers but other than the advice for employers to maintain the 2 metre distance between worker, where possible, there is no definitive statement on how employers should provide a safe working environment specifically for refuse workers.

In relation to circumstances where employers are continuing to insist on three refuse collectors occupying the cab of truck during rounds, this would not appear to go against the guidance. There is no general recommendation to ensure the 2 metre distance is maintained in the vehicle whilst it is on its rounds. The general guidance provides "Where it's not possible for people to be 2m apart, you should do everything practical to manage the transmission risk by:

- considering whether an activity needs to continue for the business to operate
- keeping the activity time involved as short as possible
- using screens or barriers to separate people from each other
- using back-to-back or side-to-side working whenever possible
- staggering arrival and departure times
- reducing the number of people each person has contact with by using 'fixed teams or partnering'"

Advice

Branches and Region should take steps to investigate any of their members' claims on the basis of this generic guidance and then make a proper referral to Thompsons of all of the relevant information. Thompsons should be provided with all the necessary details for such advice to be given.

In response to this pandemic UNISON has streamlined access to legal advice where appropriate https://www.unison.org.uk/news/article/2020/05/new-ways-members-get-legal-help/