

Guidance: COVID-19 and employers' liability claims

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The current coronavirus pandemic (named 'COVID-19' by the World Health Organisation) is dominating global headlines and as it continues to evolve it gives rise to new areas of risk in the employers liability claims market.

As such, we offer some guidance about likely employers' liability claims that may stem from the coronavirus and highlight the key elements of such a claim, including employers duties, risk assessments and causation.

The duty

Employers have a legal duty to take reasonable care for the health and safety of their employees. If that duty is breached, they can be found liable to compensate employees for injury and losses which they prove were caused, or materially contributed to, by that failure.

Discharging the duty

Risk assessment

Employers have a duty to undertake a suitable and sufficient risk assessment to identify risks to the health and safety of their employees to which they are exposed whilst they are at work, and the risks to the health and safety of persons not in their employment arising out of, or in connection with, the conduct by them of their undertaking.



Kennedys' briefing note [Coronavirus - employment and health and safety considerations](#) provides further detail on the approach expected of employers in relation to their legal duties and provides practical advice how to comply with those duties.

In this context, key considerations will include:

- Adequate health surveillance, including identification of vulnerable individuals
- Provision of suitable PPE
- Assessment and management of workloads in the anticipation of reductions in available staff through sickness/self-isolation
- Health and safety of home workers
- Risks associated with individuals covering for missing colleagues.

Risk assessments must be reviewed as and when the factual situation, and government advice, changes in material aspects.

Government/expert advice

A reasonable employer will, consistent with its duty to take reasonable care for the safety of its employees, ensure it closely monitors advice from government, industry bodies and relevant experts, using such advice to inform the risk assessment and necessary steps to keep employees safe.

Causation

To establish liability, an employee must not only prove breach of duty, but also that the breach made a material contribution to the injury sustained. It is likely to be extremely difficult for an infected individual to prove that their condition was caused by a workplace breach, given the many other potential sources of infection, on the balance of probabilities.

Claims which relate to the impact of COVID-19 on staff numbers and the increased pressure on remaining workers don't face the same causational difficulty, however. This note considers various potential forms of claim, below.

Summary

An employer which is able to prove it has kept abreast of government advice and, more importantly, can prove it has interpreted and applied that general advice carefully, having regard to the particular characteristics of its business and

workforce, should be well-placed to defend claims brought against it. Furthermore, proving causation of infection is likely to be extremely difficult.

It should also be recognised that employees are under a duty to take reasonable care for their own health and safety and that of those they work with, which includes following instructions given which are designed to protect them and others. The risk of infection and government advice is widely understood. Wilful disregard for an employer's instructions may provide a defence or, at least, the basis for a finding of contributory negligence.

Potential claims

1. Infection

COVID-19 clearly creates an immediate risk of infection to employees.

Employers must ensure that they approach this risk as they would any other risk to the health and wellbeing of employees, taking sensible steps to discharge their duty of care and to document their assessment and adopted policies. Being able to demonstrate you considered the risks carefully and took sensible steps to mitigate those risks will be crucial evidence in defence of any subsequent claim. If someone becomes infected at work in the absence of evidence of such steps having been taken, the employer is vulnerable to being found in breach of duty and liable for losses arising.

Planning should start with the current government advice, having regard to the need to identify vulnerable individuals, ensure the infected feel able to report symptoms and self-isolate, the instigation of sensible home working policies where possible, introducing appropriate social distancing measures, ensuring that appropriate facilities are available to wash/disinfect hands and that suitably robust and regular cleaning of premises is undertaken.

Early identification of the infected, and those in close contact with them, is essential.

Damages would include awards for PSLA for the symptoms suffered, which could vary from the trivial to the fatal, plus compensation for a range of potential past and future loss, in particular loss of earnings, care and domestic assistance.

As stated above, proving causation is likely to be extremely difficult.

2. Overwork leading to psychological injury

COVID-19 may result in a significant proportion of the workforce being unable to fulfil its duties, with a consequential increase in the workload of those remaining in post.

Employers cannot ignore the potential impact this may have, in terms of increased stress and the possibility of psychological injury arising. Sensible planning, workforce review, work distribution and clear leadership will mitigate this risk.

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

3. Overwork/re-distributed work leading to physical injury

Similarly, a reduction in staff and re-allocation of work to others risks physical injury to those who may become overworked. Employees may be able to take more on, but this must be monitored carefully so as not to place their health at risk.

Care must also be taken in relation to individuals covering for others and potentially using equipment/machinery they are not trained to use or lack experience in operating. An injury sustained by an employee operating a machine they had not been trained to use for example, when covering for an absent colleague, would be difficult to defend.

4. Working from home (WFH) risks

Home workers are entitled to the same level of care as those on the employer's premises. Ensure home workers are properly equipped to fulfil the tasks expected of them, recognising the potential difficulties that will be faced by those who would not be WFH but for COVID-19.

The reasonable employer will consider issues such as:

- Workstation/risk of musculoskeletal disorder and appropriate advice and support in those circumstances
- Increased stress on employees attempting to WFH in sub-optimal circumstances
- Appropriate equipment required by those WFH.

5. Vicarious liability

Employers are vicariously liable for the negligence of their employees.

As is well-recognised, the courts will consider a range of factors when determining whether an individual is an employee for these purposes. Furthermore, the courts will impose vicarious liability where they conclude that the relationship between employer and worker is sufficiently "akin to employment" to make it right to do so, and the negligent act arose from the sphere of activities undertaken by that worker.

Against that background, it is possible to envisage claims arising from, for example:

- Those infected as a consequence of the decision of an infected employee to continue interacting with customers, contrary to government and employer advice to self-isolate in such circumstances
- Claims relating to negligent actions arising from employee fatigue
- Claims relating to employees negligently, and contrary to employer instruction, operating vehicles/equipment they are not training to operate due to colleague absence.

Further information

To find out more about our services and expertise, and key contacts, go to:

[kennedyslaw.com/coronavirus](https://www.kennedyslaw.com/coronavirus)

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