

**Relevant health and safety law
for workers during the
coronavirus crisis**

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By Lord John Hendy QC



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**A Briefing Note to Andy McDonald MP, Shadow Secretary of State
for Employment Rights and Protections,
on some of the relevant health and safety law for workers during
the coronavirus crisis
9th edn., 22 May 2020
By
Lord Henty QC**

The evidence is becoming overwhelming that many employers not involved in essential work have been insisting on staff coming in to work. This increases the risk of the spread of coronavirus whilst staff are travelling to and from work.

Once at work, many employers are not arranging work so as to preserve the necessary two-metre social distancing between workstations and for access routes, not providing screens where necessary, not providing adequate washing facilities not providing personal protective equipment such as masks, disposable aprons and gloves where these are required for protection.

The requirement to protect staff and others affected by them in the course of their work is not merely a matter of moral duty or good practice, it is a longstanding requirement of the law. It is remarkable that the government in eight guidance documents published on 11 May 2020 entitled [*Working Safely during COVID-19*](#) failed to mention the range of extant statutory duties which protect workers. Even more remarkably, the HSE published guidance entitled [*Working Safely during the coronavirus outbreak – a short guide*](#) on 14 May 2020, but this too fails to mention any of the legal duties, notwithstanding that breach of the duties in the regulations is a criminal offence – see below.

There is a great deal of relevant law so this note can only refer to some of the more obvious provisions. The common law also has a lot say on these subjects, placing an obligation on employers of workers to provide and maintain a safe place of work, a safe system of work, and safe and adequate equipment for the job. A failure to take reasonable steps to provide and maintain any of these can entitle the worker to sue for damages if injured or made ill by the failure.

So far as legislation is concerned, the most obvious statutory provisions are those of the Health and Safety at Work etc. Act 1974, and regulations made under it, and the Employment Rights Act 1996. Though the Coalition government removed the right to sue for injury caused by breach of the regulations, breach is nonetheless a criminal offence and managers may be criminally liable along with corporate employers (see ss.33, 36 and 37 HSWA, added to this edition of this Note). Unfortunately, the Health and Safety Executive and Local Authority Environmental Health Officers have been so

denuded of staff and resources by years of austerity that few prosecutions are ever brought.

There is also the problem that the Acts and Regulations cited below confine most of the relevant employer's duties to 'employees' thereby excluding the self-employed and 'limb(b) workers' from protection. This appears to be a breach of EU law since the Directives on which the UK Regulations are based extend protection to 'workers', a much broader concept. This point is the subject of a judicial review launched by the IWGB union on 22 May 2020.

Nonetheless, constituency MPs, union reps and, indeed, workers can draw the legal provisions below to the attention of law-breaking employers and raise the issue of potential criminal prosecution or a claim for damages in negligence. The Health and Safety Executive and the Local Authority should always be notified of breaches.

Given the current controversy about the lack of PPE for NHS workers and care workers it is worth highlighting that the duty to provide suitable PPE is a mandatory statutory duty.

[Guidance from the government](#) makes clear the need for health and care workers to have PPE, but lengthy though it is, it too fails to specify the statutory duties on employers in relation to the provision of PPE. It merely states:

Please note that this guidance is of a general nature and that an employer should consider the specific conditions of each individual place of work and comply with all applicable legislation, including the Health and Safety at Work etc. Act 1974.

The guidance downgrades the extent of PPE required in many health and care situations.

Ignorance of the law is, of course, not a defence. And the mandatory duties set out below cannot be evaded by a defence of indolence or ineptitude on the part of the employer or its managers in failing to order the PPE in time. Breach of the duty to provide PPE is a criminal offence on the part of the employer (s.33, HSWA, below) and if the breach is '*due to the act or default of some other person, that other person shall be guilty of the offence*' as well as the employer (s.36). Managers thus cannot shelter from personal criminal responsibility behind their corporate or Crown employers (s.37).

Nor does the government guidance point out the right of workers not to be penalised where, '*in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work*' (ss.44(1)(d), 100(1)(d) Employment Relations Act, below).

Relevant legislation includes the following (the most relevant I have italicised):

Health and Safety at Work etc Act 1974

Section 2.— General duties of employers to their employees.

(1) It shall be the *duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.*

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—

(a) *the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;*

(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) *the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;*

(d) so far as is reasonably practicable as regards *any place of work under the employer's control*, the maintenance of it in a condition that is *safe and without risks to health* and the provision and maintenance of *means of access to and egress from it that are safe and without such risks;*

(e) the provision and maintenance of a *working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.*

...

(6) It shall be the *duty of every employer to consult any such representatives* with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.

(7) In such cases as may be prescribed it shall be the duty of every employer, if requested to do so by the safety representatives mentioned in subsection (4) above, to establish, in accordance with regulations made by the Secretary of State, a safety committee having the function of keeping under review the

measures taken to ensure the health and safety at work of his employees and such other functions as may be prescribed.

Section 3.— General duties of employers and self-employed to persons other than their employees.

(1) It shall be the *duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.*

(2) It shall be the duty of every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety.

...

Section 4.— General duties of persons concerned with premises to persons other than their employees.

(1) This section has effect for imposing on persons *duties in relation to those who—*

(a) are not their employees; but

(b) use non-domestic premises made available to them as a place of work or as a place where they may use plant or substances provided for their use there,

and applies to premises so made available and other non-domestic premises used in connection with them.

(2) It shall be the duty of each person who has, to any extent, control of premises to which this section applies or of the means of access thereto or egress therefrom or of any plant or substance in such premises to *take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises, all means of access thereto or egress therefrom available for use by persons using the premises, and any plant or substance in the premises or, as the case may be, provided for use there, is or are safe and without risks to health.*

(3) Where a person has, by virtue of any contract or tenancy, an obligation of any extent in relation to—

(a) the maintenance or repair of any premises to which this section applies or any means of access thereto or egress therefrom; or

(b) the safety of or the absence of risks to health arising from plant or substances in any such premises;

that person shall be treated, for the purposes of subsection (2) above, as being a person who has control of the matters to which his obligation extends.

(4) Any reference in this section to a person having control of any premises or matter is a reference to a person having control of the premises or matter in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not).

Section 33 **Offences**

(1) It is an *offence for a person—*

(a) *to fail to discharge a duty to which he is subject by virtue of sections 2 to 7;*

...;

(c) *to contravene any health and safety regulations. . . or any requirement or prohibition imposed under any such regulations ...;*

...

Section 36 **Offences due to fault of other person.**

(1) *Where the commission by any person of an offence under any of the relevant statutory provisions is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this subsection whether or not proceedings are taken against the first-mentioned person.*

(2) *Where there would be or have been the commission of an offence under section 33 by the Crown but for the circumstance that that section does not bind the Crown, and that fact is due to the act or default of a person other than the Crown, that person shall be guilty of the offence which, but for that circumstance, the Crown would be committing or would have committed, and may be charged with and convicted of that offence accordingly.*

...

Section 37 **Offences by bodies corporate.**

(1) *Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*

(2) *Where the affairs of a body corporate are managed by its members, the preceding subsection shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.*

...

Section 40 **Onus of proving limits of what is practicable etc.**

In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something *so far as is practicable or so far as is reasonably practicable*, or to use the best practicable means to do something, *it shall be for the accused to prove* (as the case may be) *that it was not practicable or not reasonably practicable to do more than was in fact done* to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.

The Workplace (Health, Safety and Welfare) Regulations 1992

9.(1) *Every workplace and the furniture, furnishings and fittings therein shall be kept sufficiently clean.*

...

10.(1) *Every room where persons work shall have sufficient floor area, height and unoccupied space for purposes of health, safety and welfare.*

...

11.(1) *Every workstation shall be so arranged that it is suitable both for any person at work in the workplace who is likely to work at that workstation and for any work of the undertaking which is likely to be done there.*

...

17.(1) *Every workplace shall be organised in such a way that pedestrians ... can circulate in a safe manner.*

...

21.(1) *Suitable and sufficient washing facilities, including showers if required by the nature of the work or for health reasons, shall be provided at readily accessible places.*

(2) *Without prejudice to the generality of paragraph (1), washing facilities shall not be suitable unless—*

...

(c) *they include a supply of clean hot and cold, or warm, water (which shall be running water so far as is practicable);*

(d) *they include soap or other suitable means of cleaning;*

(e) *they include towels or other suitable means of drying;*

...

The Control of Substances Hazardous to Health Regulations 2002

In these regulations a “*substance hazardous to health*” means ‘a substance ... (c) which is a biological agent’ and includes one ‘(e) which,

not being a substance falling within sub-paragraphs (a) to (d), because of its chemical or toxicological properties and the way it is used or is present at the workplace creates a risk to health'. A "*biological agent*" means 'a micro-organism, cell culture, or human endoparasite, whether or not genetically modified, which may cause infection, allergy, toxicity or otherwise create a hazard to human health' and a "*micro-organism*" means 'a microbiological entity, cellular or non-cellular, which is capable of replication or of transferring genetic material'. Thus coronavirus appears to be a 'substance hazardous to health for the purposes of the regulations.

Group 3 biological agents are those which 'can cause severe human disease and may be a serious hazard to employees; it may spread to the community, but there is usually effective prophylaxis or treatment available' and *Group 4 biological agents* are those which cause 'severe human disease and is a serious hazard to employees; it is likely to spread to the community and there is usually no effective prophylaxis or treatment available'.

6.—(1) An employer shall not carry out work which is liable to expose any employees to any substance hazardous to health unless he has—
(a) made a suitable and sufficient *assessment of the risk* created by that work to the health of those employees and of the steps that need to be taken to meet the requirements of these Regulations;
and
(b) implemented the steps referred to in sub-paragraph (a).

7.—(1) Every employer shall ensure that the *exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.*

...

(3) Where it is not reasonably practicable to prevent exposure to a substance hazardous to health, the employer shall comply with his duty of control under paragraph (1) by applying *protection measures* appropriate to the activity and consistent with the risk assessment, including, in order of priority—
(a) the design and use of appropriate *work processes*, systems and engineering controls and the provision and use of suitable *work equipment* and materials;
(b) the control of exposure at source, including adequate *ventilation* systems and appropriate *organisational measures*;
and
(c) where adequate control of exposure cannot be achieved by other means, the provision of suitable *personal protective equipment* in addition to the measures required by sub-paragraphs (a) and (b).

- (4) The measures referred to in paragraph (3) shall include—
- (c) reducing, to the minimum required for the work concerned—
 - ...
 - (ii) the *level and duration of exposure*,...
 - (d) the control of the working environment, including appropriate *general ventilation*; and
 - (e) appropriate *hygiene measures including adequate washing facilities*.

(6) Without prejudice to the generality of paragraph (1), where it is not reasonably practicable to prevent exposure to a biological agent, the employer shall apply the following measures in addition to those required by paragraph (3)—

- ...
- (b) specifying appropriate *decontamination and disinfection* procedures;
- ...
- (f) where appropriate, making available *effective vaccines* for those employees who are not already immune to the biological agent to which they are exposed or are liable to be exposed;
- (g) *instituting hygiene measures* compatible with the aim of preventing or reducing the accidental transfer or release of a biological agent from the workplace, including—
 - (i) the provision of appropriate and adequate *washing and toilet facilities*, and
 - (ii) where appropriate, the *prohibition of eating, drinking, smoking and the application of cosmetics* in working areas where there is a risk of contamination by biological agents; and
- (h) where there are human patients ... which are, or are suspected of being, infected with a Group 3 or 4 biological agent, the employer shall select the most suitable control and containment measures from those listed in Part II of Schedule 3 with a view to controlling adequately the risk of infection.

...

(9) *Personal protective equipment* provided by an employer in accordance with this regulation shall be suitable for the purpose and shall—

- (a) comply with any provision in the Personal Protective Equipment Regulations 2002 which is applicable to that item of personal protective equipment; or
- (b) in the case of respiratory protective equipment, where no provision referred to in sub-paragraph (a) applies, be of a type approved or shall conform to a standard approved, in either case, by the Executive.

...

9.—(1) Every employer who provides any control measure to meet the requirements of regulation 7 shall ensure that, where relevant, it is maintained in an efficient state, in efficient working order, in good repair and in a clean condition.

...

(5) Every employer shall ensure that *personal protective equipment*, including protective clothing, is:

- (a) properly stored in a well-defined place;
- (b) checked at suitable intervals; and
- (c) when discovered to be defective, repaired or replaced before further use.

(6) *Personal protective equipment* which may be contaminated by a substance hazardous to health shall be removed on leaving the working area and kept apart from uncontaminated clothing and equipment.

(7) The employer shall ensure that the equipment referred to in paragraph (6) is subsequently decontaminated and cleaned or, if necessary, destroyed.

...

11.—(1) Where it is appropriate for the protection of the health of his employees who are, or are liable to be, exposed to a substance hazardous to health, the employer shall ensure that such employees are under suitable *health surveillance*.

(2) Health surveillance shall be treated as being appropriate where—

...

(b) the exposure of the employee to a substance hazardous to health is such that—

- (i) an identifiable disease or adverse health effect may be related to the exposure,
- (ii) there is a reasonable likelihood that the disease or effect may occur under the particular conditions of his work, and
- (iii) there are valid techniques for detecting indications of the disease or effect, and the technique of investigation is of low risk to the employee.

Personal Protective Equipment at Work Regulations 1992

Regulation 4 Provision of personal protective equipment

(1) [Subject to paragraph (1A),] *every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.*

...

(2) Every relevant self-employed person shall ensure that he is provided with suitable personal protective equipment where he may be exposed to a risk to his health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.

(3) Without prejudice to the generality of paragraphs (1) and (2), *personal protective equipment shall not be suitable unless—*

(a) *it is appropriate for the risk or risks involved, the conditions at the place where exposure to the risk may occur, and the period for which it is worn;*

(b) *it takes account of ergonomic requirements and the state of health of the person or persons who may wear it, and of the characteristics of the workstation of each such person;*

(c) *it is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed;*

(d) *so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk;*

(e) *it complies with any legal requirement which is applicable to that item of personal protective equipment.*

(4) Where it is necessary to ensure that personal protective equipment is hygienic and otherwise free of risk to health, every employer and every relevant self-employed person shall ensure that *personal protective equipment provided under this regulation is provided to a person for use only by him.*

...

The Management of Health and Safety at Work Regulations 1999

3.(1) *Every employer shall make a suitable and sufficient assessment of—*

(a) *the risks to the health and safety of his employees to which they are exposed whilst they are at work; and*

(b) *the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,*

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions...

...

(3) Any assessment such as is referred to in paragraph (1) ... shall be reviewed by the employer ... who made it if—

- (a) there is reason to suspect that it is no longer valid; or
- (b) there has been a significant change in the matters to which it relates;

and where as a result of any such review changes to an assessment are required, the employer or self-employed person concerned shall make them.

...

4. *Where an employer implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1 to these Regulations.*

5.(1) Every employer shall make and give effect to such arrangements as are appropriate, having regard to the nature of his activities and the size of his undertaking, for the *effective planning, organisation, control, monitoring and review of the preventive and protective measures.*

(2) Where the employer employs five or more employees, he shall record the arrangements referred to in paragraph (1).

6. *Every employer shall ensure that his employees are provided with such health surveillance as is appropriate* having regard to the risks to their health and safety which are identified by the assessment.

7.(1) *Every employer shall ... appoint one or more competent persons to assist him* in undertaking the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions...

SCHEDULE 1

GENERAL PRINCIPLES OF PREVENTION

[This Schedule specifies the general principles of prevention set out in Article 6(2) of Council Directive [89/391/EEC](#) for the purposes of regulation 4 above]

- (a) *avoiding risks;*
- (b) *evaluating the risks which cannot be avoided;*
- (c) *combating the risks at source;*
- (d) *adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;*
- (e) *adapting to technical progress;*
- (f) *replacing the dangerous by the non-dangerous or the less dangerous;*
- (g) *developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;*
- (h) *giving collective protective measures priority over individual protective measures; and*
- (i) *giving appropriate instructions to employees.*

RIDDOR - Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013

9. Where, in relation to a person at work, the [employer] receives a diagnosis of—

...

(b) *any disease attributed to an occupational exposure to a biological agent,*

the [employer] must follow the reporting procedure [set out in the regulations].

The definition of “*biological agent*” and ‘*Micro-organism*’ are above. It seems likely that that the virus COVID-19 is a micro-organism.

[There are other specific regulations too numerous to set out here that deal with specific kinds of workplace, such as the Construction (Design and Management) Regulations 2015. None detract from the standards of the above regulations.

Employment Rights Act 1996

Section 44 Health and safety cases

(1) *An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—*

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) a functions as such a representative or a member of such committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),

(c) being an employee at a place where—

- (i) there was no such representative or safety committee, or
 - (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
 - (d) *in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
 - (e) *in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*
- (2) For the purposes of subsection (1)(e) whether steps which employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.
- ...
- (4) . . . this section does not apply where the detriment in question amounts to dismissal (within the meaning of [Part X]).

[s.100 in Part X of the Employment Rights Act provides similar protections against dismissal for the above reasons which will be regarded as automatically unfair.]

Finally, workers are protected under the Employment Rights Act 1996 from being subjected to a detriment or dismissed for whistleblowing, that is for making a “*qualifying disclosure*” to certain persons or bodies, including to the worker’s employer or the Health and Safety Executive. S. s43B(1) Employment Rights act 1996 defines a ‘qualifying disclosure’. It means (so far as is relevant in this context):

any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a *criminal offence* has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any *legal obligation* to which he is subject,

...

(d)that the *health* or safety of any individual has been, is being or is likely to be *endangered*,

... or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be *deliberately concealed*.

JH

22 May 2020