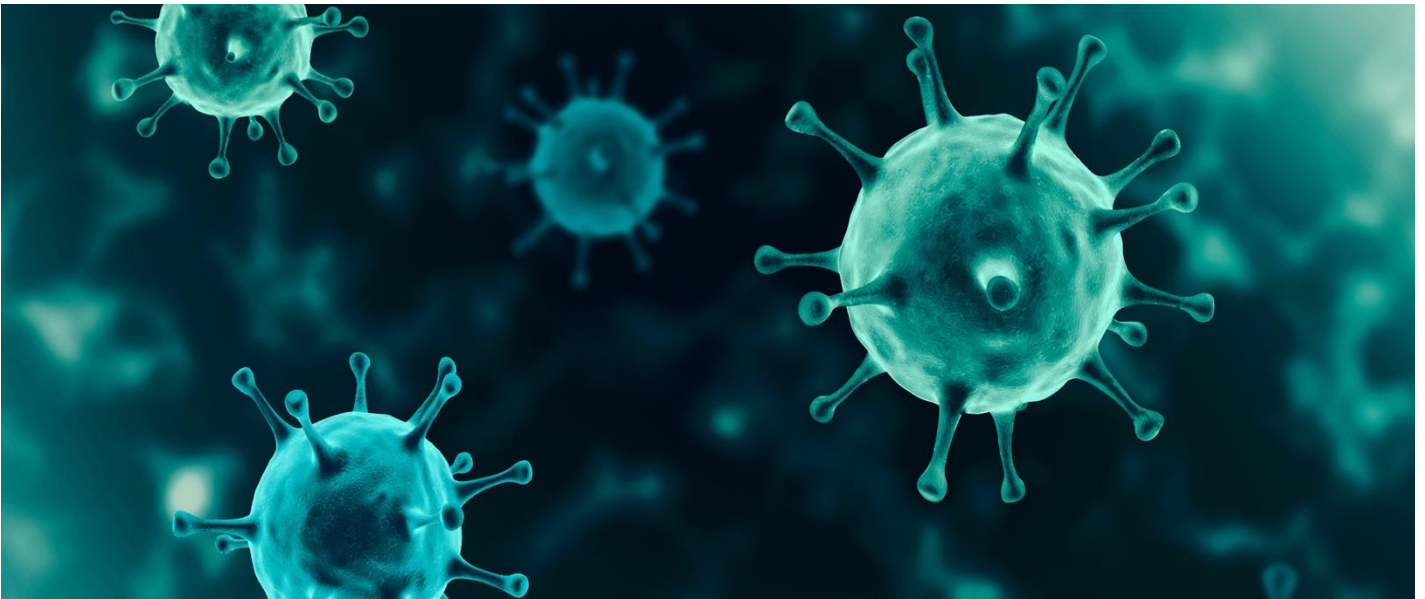


Workplace COVID-19 compensation claims: How employers can prepare



Key messages

Compensation claims by people who believe that they contracted COVID-19 in workplaces may become a significant issue in the future.

Employers who can show that they acted in accordance with the knowledge and standards of the day will have evidence to help them to defend any potential claim.

Commitment to compliance with authoritative guidance and providing evidence of the precautions taken will provide evidence that the appropriate standards were achieved.

Employers should review their records now to provide assurance that they have the evidence in place to assist in defending claims.

As businesses have struggled with the implications of COVID-19, there are some stark statistics¹:

- Over 3,500 workplace outbreaks of COVID-19 have been reported since July 2020²
- 100 COVID-19 outbreaks were reported in workplaces as recently as the second week of February 2021³
- Over 4,000,000 confirmed cases of COVID-19 in the UK⁴
- COVID-19 listed as a cause of death on over 135,000 death certificates in the UK⁵
- 7,961 deaths involving COVID-19 in the working age population in England and Wales⁶

It is perhaps debatable whether COVID-19 is an occupational disease; however, it is inarguably a workplace health and safety issue. Advice is provided by health and safety professionals and the Health and Safety Executive (HSE) and other authorities who enforce workplace health and safety law are inspecting COVID-19 precautions in the workplace. Where a worker has been diagnosed with COVID-19 and there is 'reasonable evidence'⁷ to suggest that it was caused by occupational exposure then employers are required to report the case.⁸

People who contract occupational diseases have a right to claim compensation from their employers if it can be shown that the disease was caused by work and the employer was negligent or in breach of statutory duty. Employers can also face claims from others to whom they owed a duty of care, such as customers or visitors to their premises.

COVID-19 is not a trivial disease in the working age population, it can be fatal and 'long COVID' is receiving increased attention - a group of 65 MPs and peers have written to the Prime Minister requesting that he recognise 'long COVID' as an occupational disease⁹.

It remains to be seen if workers who have suffered from COVID-19 will attempt to claim compensation from their employers through the civil courts. If they do there is a large potential for claims, some of which would be likely to be high in value. Consequently, it seems likely that COVID-19 compensation claims will become 'a thing' in future.

But what can employers do now to prepare?

Firstly, it is important to appreciate that claims can be defended. Pragma's experts have prepared evidence in thousands of cases of occupational disease and there is one common theme to our reports: employers are required to control occupational health risks in accordance with the 'knowledge and standards of the day'. Therein lies the key to employers defending claims: employers who can show that they have implemented risk control measures consistent with the 'knowledge and standards of the day' will be able to provide arguments in defence of any COVID-19 claims that do arise.

Implementation of risk control measures consistent with the 'knowledge and standards of the day' is likely to be consistent with compliance with health and safety law. Furthermore, employers who can demonstrate that they have implemented control measures can be reassured that it is less likely that COVID-19 was contracted in their workplace and will be able to argue that any particular case of COVID-19 was more likely to have been contracted elsewhere.

How can employers show that they complied with the knowledge and standards of the day?

Pragma's advice to employers regarding COVID-19 risk control is consistent with our advice in relation to any other occupational health and safety risk: Employers who comply with relevant authoritative guidance will not only minimise risks in their workplace but will also create the basis on which they can demonstrate that they acted in accordance with the available knowledge in relation to risk control and complied with the standards of the day.

The key for employers in defending Covid-19 claims will, therefore, be being able to evidence compliance with authoritative guidance.

The UK Government has published 14 guides¹⁰ on working safely during coronavirus covering different occupational situations:

- Close contact services
- Construction and other outdoor work
- Factories, plants and warehouses
- Heritage locations
- Hotels and other guest accommodation
- Labs and research facilities
- Offices and contact centres
- Other people's homes
- Performing arts
- Providers of grassroots sports and sports facilities
- Restaurants, pubs, bars and takeaway services
- Shops and branches
- Vehicles
- The visitor economy
- Schools

Further, separate guidance is available for schools, further education and childcare providers and also for receptions and celebrations.

The Government points out that their guidance is 'non-statutory' and does not supersede legal obligations in relation to health and safety. However, employers who explicitly commit to complying with the above guidance or other authoritative guidance¹¹ and who can provide evidence that they complied with the specific guidance are, in our experience, likely to have a strong defence that they complied with the requirements of health and safety law, which, in the context of COVID-19, are more general than the specific guidance.

Employers should consult and refer to the guidance most appropriate to their situation, but each of the Government's guides is based around five key steps involving risk assessment, hygiene control, work location, distancing and measures to manage transmission risk.

Evidence of commitment to managing COVID-19 risks can be made by completing the UK Government's 'Staying COVID-19 19 secure' notice¹²

Staying COVID-19 Secure in 2020

We confirm we have complied with the government's guidance on managing the risk of COVID-19

FIVE STEPS TO SAFER WORKING TOGETHER

- ✓ We have carried out a **COVID-19 risk assessment** and shared the results with the people who work here
- ✓ We have **cleaning, handwashing and hygiene procedures** in line with guidance
- ✓ We have taken all reasonable steps to help people work safely from a **COVID-19 Secure workplace** or work from home
- ✓ We have taken all reasonable steps to **maintain a 2m distance** in the workplace
- ✓ Where people cannot keep 2m apart we have ensured at least a 1m distance and taken all the mitigating actions possible to **manage transmission risk**

Signed on behalf of employer _____ Employer representative signature

Employer _____ Employer name Date _____

Who to contact: _____ Your Health and Safety Representative
(or the Health and Safety Executive at www.hse.gov.uk or 0300 003 1047)

UK Government 'Staying COVID-19 19 secure' notice

Employers' risk assessments will provide evidence that precautions were considered and implemented. Advice and template risk assessments are available from Pragma:

<https://pragmaandassociates.co.uk/news-and-resources/COVID-19-19-template-risk-assessments-for-employers>

It will be useful for employers to ensure that their risk assessments have clearly recorded the basis for their decisions about risk control, this is particularly the case as some of the terminology used in the Government guidance is different to that used elsewhere in health and safety practice. For example, the introduction to the guidance relevant to work at offices¹³ states:

“Work from home if possible. Office workers who can work effectively from home should do so”

At Section 2 of the same guidance, the advice is:

“Office workers should work from home if they can.”

The above guidance requires a judgement from employers as to whether workers can work ‘effectively’ from home. However, this judgement may be difficult as the guidance that people should work from home ‘if possible’ carries an implicit alternative interpretation that people should only work at an office if it is impossible to work at home. There is a difference between it being impossible to work at home and it being impossible to work from home ‘effectively’. It is not difficult to envisage parties in a claim taking opposing points of view on interpretation of guidance such as this.

Where phraseology is subject to interpretation, employers should record the basis of their decisions. For example, if workers have continued to work at a COVID-19 secure office, then it would be useful to record the justification for that course of action ie to record why the worker could not work from home effectively. Ultimately, the effect of the guidance, and compliance with the guidance, will be a matter for the Courts; however, in our experience, a decision recorded and justified now is likely to carry more weight than a decision justified later and after a claim has been made.

There were 53 updates to the Government’s guidance on working safely during coronavirus between 11 May 2020 and 19 February 2021¹⁴. In defending such COVID-19 compensation claims as they may face, employers will need to show that their risk assessments were regularly reviewed to ensure that these updates were acted upon. At the present time employers could usefully ensure that they retain all versions of their COVID-19 risk assessments and any associated evidence documenting why changes were made. This is likely to be easier now than when faced with a claim and, again, is likely to carry more weight if done now.

Employers who have experienced an outbreak of COVID-19 are clearly more likely to experience claims than employers who have not. Such employers will benefit particularly from reviewing their records now as the existence of an outbreak may suggest that exposure controls were ineffective. Control measures should be reviewed in the event of an outbreak and employers should document that review and their response. In the context of the knowledge and standards of the day, the ‘early outbreak management advice’ published by Public Health England¹⁵ may be of assistance. A proactive approach to documenting the precautions taken in relation to any individuals known have contracted COVID-19 would also assist.

In conclusion, compensation claims by people who believe that they contracted COVID-19 in workplaces may become a significant issue in the future. Employers who can show that they acted to control risks in accordance with the 'knowledge and standards of the day' will have evidence to support a defence of any claim that does arise. Commitment to compliance with authoritative guidance and providing evidence of the precautions taken will provide evidence that the appropriate standards were achieved.

Employers could usefully review their records now in order to provide assurance that they have evidence in place to assist in defending claims.

David Paveley would be pleased to provide further information and advice in relation to the action that you can take now to manage the risk of workplace COVID-19 compensation claims.

If you would like to speak to David you can call him on 01302 499050 or email him at davidpaveley@pragmaandassociates.co.uk



¹ As of 20 February 2021

² Based on media reports attributed to Public Health England <https://www.theguardian.com/world/2021/feb/14/hse-refuses-to-close-workplaces-that-are-putting-employees-at-risk>

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⁴ <https://coronavirus.data.gov.uk/details/deaths>

⁵ As at 25 February 2021: <https://coronavirus.data.gov.uk/details/deaths>

⁶ <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/causesofdeath/bulletins/coronaviruscovid19relateddeathsbyoccupationenglandandwales/deathsregisteredbetween9marchand28december2020>

⁷ <https://www.hse.gov.uk/coronavirus/riddor/riddor-reporting-further-guidance.htm#reasonable>

⁸ <https://www.hse.gov.uk/statistics/coronavirus/index.htm>

⁹ <https://www.bbc.co.uk/news/uk-england-oxfordshire-55668650>

¹⁰ <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>

¹¹ For example advice issued by the HSE: <https://www.hse.gov.uk/coronavirus/working-safely/>

¹² Downloadable at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951736/staying-COVID-19-19-secure-notice.pdf

¹³ <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/offices-and-contact-centres>

¹⁴ <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/updates>

¹⁵ <https://www.gov.uk/government/publications/reporting-outbreaks-of-coronavirus-covid-19/covid-19-early-outbreak-management>