



Returning to work

19 May 2020

Workplaces will slowly start to reopen in line with the NI Executive's lockdown exit plan over the forthcoming weeks and months. However, it is unlikely that things can go back to 'normal' any time soon. The summary table and more detailed briefing note below provides guidance on how you can manage different groups of employees as you consider your return to work plan. It is worth highlighting at the outset that there is no one size fits all and each individual situation should be considered on its own facts. The position may also change as the Government continues to issue guidance on the Coronavirus Job Retention Scheme. Just yesterday the Department for the Economy in NI published guidance on making workplaces safer and a list of priority sectors during the current coronavirus crisis. A link to the guidance can be found [here](#).

1. Working from home

The starting point is to consider whether some or all of your employees can work from home. That is the NI Executive's preference, where possible. Step 5, the final step in the Executive's exit plan, states that *"Remote working still strongly encouraged and maintained where possible."* Therefore, now may be a good time to either introduce a remote working policy or update any such existing policy to ensure it is suitable in light of the current pandemic.

If homeworking is not an option, the next question to consider is whether you can set up a safe working environment within your workplace for certain groups of employees, if possible? The answer to this question is very fact specific as it very much depends on

the type of role undertaken by the employee as well as the employee's current status. The table below summarises the possible options to consider and a more detailed explanation is set out below.

2. Summary table

	Category of employee	Description	Options to consider
a.	Clinically extremely vulnerable (CEV)	<p>Employees with specific underlying health conditions.</p> <p>Extremely vulnerable to severe illness if contract COVID-19.</p> <p>Advised by the Government to shield at home.</p>	<ul style="list-style-type: none"> - Reasonable adjustments (if disabled) - Reallocate to another role working from home, where possible - Furlough - Company sick pay/SSP
b.	Clinically vulnerable, including pregnant employees and over 70s (CV)	<p>Underlying health conditions.</p> <p>Increased risk of COVID-19.</p> <p>Advised to 'stay at home' by the Government.</p>	<ul style="list-style-type: none"> - Reasonable adjustments (if disabled) - Reallocate to another role working from home, where possible - Offer the safest possible workstation on site where social distancing and other mitigating factors can be implemented - If the above are not possible, furlough or unpaid leave (if agreed and being mindful of the risk of any

			<p>potential discrimination on the grounds of sex and/or age)</p> <ul style="list-style-type: none"> - Special risk assessment for pregnant employees
c.	Living with a CEV or CV person	An employee lives with a CEV person shielding or a CV person and does not want to return to the workplace to protect that person.	<ul style="list-style-type: none"> - Furlough - Paid holiday - Unpaid leave
d.	Childcare responsibilities	An employee who cannot return to work because of childcare reasons as result of the schools/nurseries still being closed.	<ul style="list-style-type: none"> - Flexible working - Paid annual leave - Unpaid parental leave (up to 4 weeks per year for a maximum of 18 weeks and you could also agree to extend any period of unpaid leave) <p>((unpaid)Time off for dependants is typically to cover an emergency situation and unlikely to be appropriate for a longer term absence)</p>
e.	Showing symptoms of COVID-19 and/or tested positive for COVID-19	Unable to come to work because of COVID-19/cold-like symptoms and/or tested	<ul style="list-style-type: none"> - If sick, sickness absence on company sick pay (where applicable) and/or SSP

		positive for COVID-19	- Ensure self-isolation guidance is observed.
f.	Fearful / Anxious employees	Employees who do not want to return to work because they are fearful of catching COVID and/or are suffering from anxiety as a result.	<ul style="list-style-type: none"> - Paid sick leave/SSP if signed off sick with anxiety - Furlough - Unpaid leave

3. Detailed explanation

(a) Clinically Extremely Vulnerable employees

The list of clinically extremely vulnerable (**CEV**) employees was published by the Government with guidance stating that they should stay at home and shield. This includes people with severe respiratory conditions including all cystic fibrosis and severe asthma, for example. If an extremely vulnerable employee wishes to continue to shield at home either because of government guidance or because there is no vaccine for the virus, then it is likely that any requirement on them to return to work may lead to potential claims under the health and safety legislation highlighted in our briefing note of the 14 May and/or a potential disability discrimination claim. A requirement for employees to return to the workplace could place CEV employees who may be disabled at a substantial disadvantage as it would expose them to the potential risk of contracting the virus. Therefore, the duty to make reasonable adjustments may arise. Reasonable adjustments you could consider taking to avoid the disadvantage may include transferring them to another job which might be capable of being undertaken at home or simply allowing them to remain at home shielding whether that's on furlough or on Company Sick Pay / SSP. How long the period of shielding should continue for and what the employee should be paid will depend upon the length of time the individual is required to shield for and the circumstances of the employer.

(b) Clinically vulnerable Employees (including Pregnant or those aged 70 or over)

Clinically vulnerable (**CV**) employees are those who are listed as “vulnerable” in the Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020. This list includes those who are pregnant, over 70 or who have underlying health conditions such as diabetes, chronic heart or kidney disease, those with a weakened immune system as a result of chemotherapy in the past as well as those who are “*seriously overweight with a body mass index of 40 or above*”. Bar those who are pregnant or over 70, CV employees may be considered as disabled for the purposes of the Disability Discrimination Act 1995. CV employees have been advised by the Government to stay at home but as of 1 May 2020 they have not been advised to shield. Every individual case should be considered on its own facts. It should also be noted that pregnant employees require a special risk assessment and they also have a special statutory right to safe alternative work or suspension on full pay if the risks identified cannot be avoided. Those who are pregnant will also have maternity rights and the right not to be discriminated against on the basis of their pregnancy/maternity status.

You could consider allowing Clinically Vulnerable Employees to return to the workplace if you can ensure social distancing. If it is not possible to offer a safe workplace role, then you may consider furloughing them or agreeing a period of paid holiday or unpaid leave.

(c) Employees living with CEV or CV people

You may have an employee who is fit and able to return to the workplace but he /she is living with someone who is a CEV person shielding or a CV person and he/she wishes to protect that person. If that’s the case, these particular employees are not required to stay at home themselves. Therefore, if you can offer them a safe workplace, in which it is possible to implement social distancing etc., then they may return to the workplace. If not or the individual still does not feel comfortable returning to the workplace, then you may consider furlough, paid annual leave or look to agree a period of unpaid leave.

(d) Employees with childcare responsibilities

Until schools and nurseries re-open, you may have employees who say they cannot return to the workplace as they need to continue to look after their children. These employees may be furloughed or you could ask them to consider taking paid annual leave or unpaid parental leave. Unpaid time off for dependents' leave may not be appropriate as such leave is intended for a more immediate emergency situation to arrange alternative childcare in unexpected circumstances. You may also consider other options such as flexible working or reduced hours. However, employers should ensure that unconscious bias doesn't creep in and be mindful of the potential risk of indirect sex discrimination when discussing issues relating to childcare with employees.

(e) Employees with COVID-19 symptoms/tested positive

You should consider sending home any employee who displays COVID-19 symptoms in the workplace and in accordance with Government guidance the individual should self-isolate. In such circumstances, the employee may be paid company sick pay and/or SSP, if appropriate. Each case and what the employee is entitled to be paid will very much depend on the facts of each situation. If an employee tests positive to COVID-19, he/she should remain at home and on company sick pay/SSP and self-isolate in accordance with Government guidance. You have a duty of care to your other employees to ensure they have a safe working environment and therefore action should be taken to remove the affected individual from the workplace. Consideration should also be given to other measures, such as a deep clean of the workplace and an appropriate communication to employees to reassure them of the measures you have taken, bearing in mind your obligations of confidentiality to the absent employee.

(f) Fearful/anxious employees

As discussed in our last briefing note, if any employee is genuinely fearful of returning to work because they have a reasonable belief in a serious and imminent danger related to COVID-19, then you should discuss with the individual the reasons for their fears and the options available to them. You should ensure they are not subject to a detriment or unfairly dismissed as a result of raising their concerns. You may consider furloughing such employees, paid annual leave or agreeing a period of unpaid leave. If the employee is unwell and unable to work as a result of his/her anxiety, then the employee may receive company sick pay/SSP.

4. Practical suggestions

It will be vitally important for employers to develop a strategy or plan for safely returning employees to the workplace, where necessary. Employers have legal obligations to ensure the health and safety of its employees. They will also have to comply with any continuing guidance issued by the Government (if applicable) and/or the NI Executive. We have listed below a number of factors to consider when preparing your return to work strategy:-

- Undertake a risk assessment in relation to what risks are posed by your workplace and wider business operations and share the results of the risk assessment with your workforce. The Government guidance also recommends publishing the results of your risk assessment on your organisation's website (where you have more than 50 employees)
- Convene regular and meaningful engagement with trade unions and health and safety committees (where they exist) about the COVID-19 emergency and the steps you are taking to mitigate the risks within the workplace
- Regular cleaning and weekly or monthly 'deep cleans'
- Provide hand sanitisers, antibacterial wipes and hand-washing facilities
- Display posters / signs to remind employees to wash their hands
- Apply the 2 metre social distancing requirement, where possible, with markings on the floor
- Use screens, where appropriate
- Issue Personal Protective Equipment (PPE), if necessary/appropriate
- Adopt a single entry and alternative exit points to ensure a one way flow of people throughout your office/site
- Limit the number of employees in confined spaces such as storerooms, kitchens, toilets etc.
- Adjust working hours and pay
- Stagger start and finish times
- Divide employees into groups and rotate attendance on site
- Review and, where necessary or helpful, amend HR policies, particularly in relation to absence management, sick pay and holiday entitlement

- Monitor employees' health (as far as necessary / appropriate) and absence
- Train managers and employees on the new safety measures you have introduced before they return to the workplace, where possible, through the use of online training or virtual 'Zoom'/Teams' meetings
- Ensuring compliance with Government (where applicable) and NI Executive guidance

Clear communication with employees (and trade unions where applicable) will be key to providing a smooth and safe return to the workplace. Furloughed employees may have been out of the business for 3 months or more by the time they return. So it will be vitally important that they understand and feel reassured by the measures you have taken to mitigate the risks of contracting the virus within the workplace. Refresher training may also be needed as employees build back up their confidence and adjust to life back in the workplace. Inevitably there may be difficult conversations to be had but ensuring there is an open line of communication with employees will assist with good employee relations.

This article does not constitute legal advice and specific advice should be sought in respect of particular cases.