



COVID-19- related claims:

A practical guide for employers



The context



The COVID-19 pandemic has changed the way many of us do business. With more people working from home we have seen fewer workplace incidents such as onsite slips, trips and falls.

However, COVID-19 and the growth of hybrid working (a combination of working from home and the office) do present their own risks. We're seeing a change in the nature of claims, which is why we've put this guide together. It offers business owners practical guidance on how to mitigate potential claims as well as providing valuable insights from our legal partners, DAC Beachcroft.

Chris Hughes, Aviva Director of Commercial Claims



It can be difficult for businesses to appreciate the nature and extent of the duties they owe to employees in rapidly evolving and uncertain working environments. Employers can better understand the nature of novel risks by keeping up to date with advice on industry best practice, engaging with employees to listen to and address emerging concerns, monitoring and reviewing risk control actions that are adopted, and documenting steps taken. These are all responsible measures outlined in this guide, which will help to keep a workforce healthy by reducing both the risks of any claims being made and any enforcement action by the regulators.

Ruth Winterbottom, DAC Beachcroft Partner, Social Care



Employers' Liability overview

The responsibility of the employer

Employers are responsible for the health and safety of their employees while they're at work. If a current or former employee was injured or became ill at work, they may believe their employer is responsible and make a claim.

The rules around insurance

The Employers' Liability ([Compulsory Insurance](#)) Act 1969* requires that employers have at least a minimum level of insurance cover against any such claims. Employers' Liability insurance will enable employers to meet the cost of compensation for employees' injuries or illnesses whether they are caused on- or off-site.

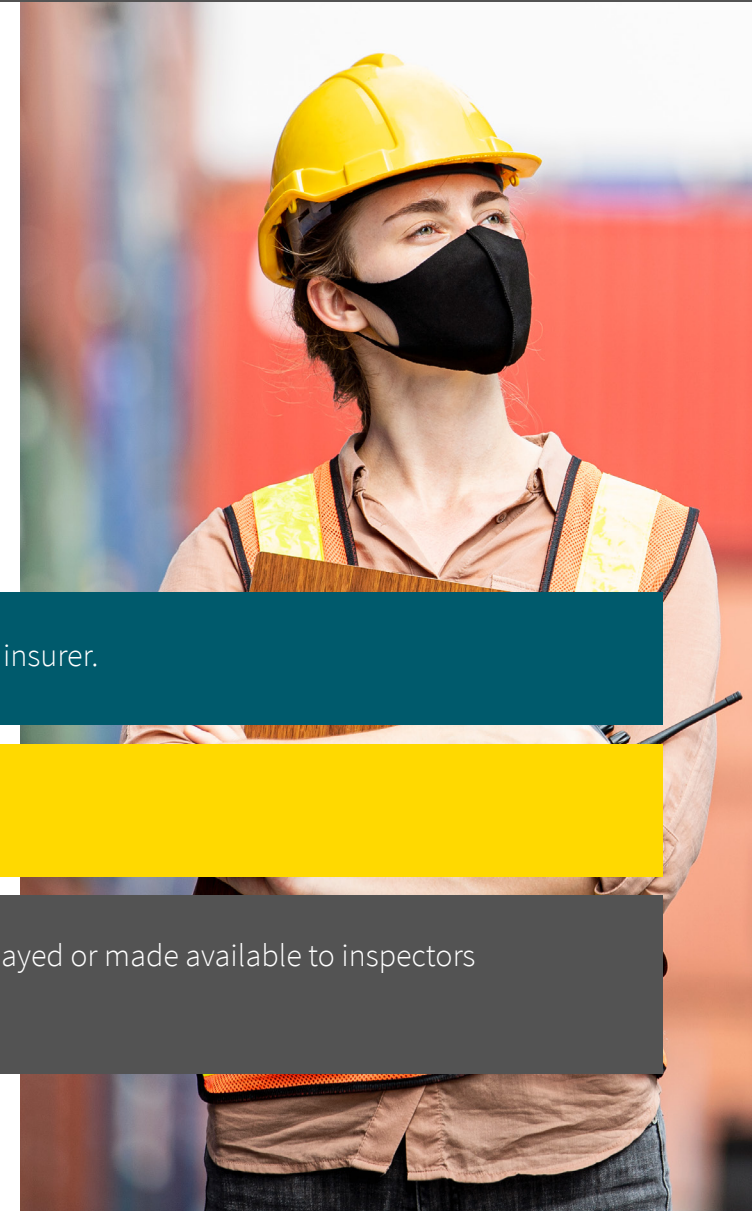
What it should look like: it must cover the business for at least £5 million and come from an authorised insurer.

When it's needed: as soon as the business becomes an employer.**

If a business doesn't have it: a business could be fined £2,500 a day (£1,000 if the certificate is not displayed or made available to inspectors who require access to it).

*Contains public sector information licensed under the Open Government Licence v3.0.

**You may not need Employers' Liability insurance if you only employ a family member or someone who is based abroad.



The role of the insurer

What the insurer does

They must pay the full amount of any compensation agreed with the claimant or awarded to them by a court. They can't impose conditions which make the employer or the claimant pay part of it.

The most common claims are for...



Injury



Disease



Illness



Death

Action required

Given the emerging risks, it's vital that businesses reduce the potential for claims or ensure they can be disputed by their insurers. The following pages highlight some things to watch out for.



Emerging risks

Working from home

It was supposed to be temporary, then it became less temporary, now many businesses may continue to offer the option to their employees. In some cases there are clear benefits in terms of employee satisfaction and flexibility, however the responsibilities of employers don't change. They must still ensure the equipment used by their employees meets all relevant health and safety standards as set out by the Health and Safety Executive (HSE). Their staff should be provided with the right equipment and tools to work comfortably and safely at home.

Working from home considerations

- Do employees have the appropriate equipment?
- Have workstation assessments been carried out and appropriate action taken?
- Are employees encouraged to take regular mobility breaks?
- Are managers in regular communication with staff to minimise feelings of isolation?
- Are procedures in place for employees to report mental health issues and get support?

What to look out for: we expect to see an increase in liability claims for musculoskeletal disorders resulting from working from home if display screen equipment (DSE) guidance has not been adhered to.



Emerging risks

DAC Beachcroft view

The workplace is likely to have changed irrevocably following COVID-19. Employers encouraging employees to work in a more flexible and dynamic way will need to ensure they have fully considered the risks to employees of working from home, both in terms of physical and mental health. Employers will need to ensure that employees are provided with a suitable and sufficient safe workspace whether that be in an office or a spare bedroom. Provision should be made for appropriately adjusted aids and equipment such as a mouse, additional screens, separate peripherals and chairs, and clear guidance should be given regarding any musculoskeletal symptoms. Support, guidance and supervision of employees will also be required to ensure that they're not suffering from feelings of isolation or a lack of support which could lead to occupational stress. Clear expectations will need to be set about working hours to avoid fatigue and allegations of being overworked.



Emerging risks

Working from home: potential claim scenario

Scenario 1*

A finance company recruits a new graduate to work in their administration department. The employee shares a flat with three housemates, who each have their own bedroom and share the kitchen and living room.

Training for the new employee is carried out over video calls with additional reading material provided. However, they struggle to follow the training and spend additional time in the evening reading the material again to catch up – meaning that they are now worrying about their work, not sleeping properly, and spending 22 hours a day in their bedroom.

After six months, the employee raises the issue with their manager, but they take no action to assist them. After a further three months, the employee is signed off with work-related stress. Eventually, they resign and submit a work-related stress claim.



*This scenario is fictitious but based on the types of claims we anticipate may be made in relation to COVID-19.

Emerging risks

DAC Beachcroft view

Employers don't need to go looking for signs of occupational stress but once they are informed of an issue, steps should be taken. Here the employer may not be liable for the first six-month period if it can be shown they were not aware of any potential risk. Once made aware, steps should have been taken to provide support and guidance to the employee to mitigate the difficulties caused by their living conditions.

Increasing the amount of contact with the employee, discussing reasonable adjustments that can be made to their role or workload, and encouraging regular breaks are all steps the employer could take.

For a stress case to be successful, there needs to be evidence of an impending threat to health. Absence due to occupational stress causes significant disruption and employers need to be aware of the relatively simple steps they can take to avoid it.



Emerging risks

Back to the workplace

COVID-19-secure

Whether businesses have managed to stay open throughout the pandemic, or they're reopening over the coming weeks, it will be necessary to ensure they are operating in a COVID-19-secure manner and complying with government regulations. This may include providing washing stations, PPE and face masks, implementing social distancing rules and increasing ventilation.

For many industries, homeworking isn't an option so these businesses are expected to comply with the key HSE safety at work regulations to protect their workforce from risk. Namely:

Section 2 of the HSWA 1974

To ensure, so far as reasonably practicable, the health, safety and welfare of your employees whilst at work.*

Section 3 of the HSWA 1974

To conduct your organisation in such a way as to ensure, so far as reasonably practicable, that persons not in your employment, but affected by your undertaking, are not exposed to risks to their health and safety.*



Emerging risks

Back to the workplace

Vaccination, testing and the workplace

It's important that the return to work is dealt with fairly, with care being taken to avoid discrimination against people who are yet to have the vaccine and those who have chosen not to – it's a potential legal minefield. From a claims perspective, workplaces must remain COVID-19-secure, which means keeping the same control measures in place. In short, they must treat everyone as if they haven't had the vaccine.

Back to the workplace considerations

- Has the building water system been tested for legionella?
- Has the business fallen behind on statutory inspections or equipment testing?
- Have steps been taken to ensure the workplace is COVID-19-secure (see previous page)?

What to look out for: we expect to see an increase in liability claims by customers and staff who feel measures put in place were inadequate. It's especially difficult to guard against such claims given that there have been multiple changes to government advice since January 2020.



Emerging risks

Back to the workplace

DAC Beachcroft view

The vaccination of the workforce should not be relied on as a singular control measure in risk assessments, particularly where some of the workforce have not had the opportunity to be vaccinated or the vaccination of employees is not compulsory.

Employers should ensure that COVID-19-secure measures other than vaccination are in place to protect their workforces and should undertake individual risk assessments in relation to employees at greater risk from COVID-19. If employees are to return to the workplace employers may wish to use on-site lateral flow testing, self-testing by employees, testing through a third-party provider or community testing facilities. But all these should be used as a complement to COVID-19-secure measures rather than in place of them.

As is the case for vaccination, there is a risk of indirect discrimination if an employer seeks to compel employees to undergo testing. Claims may be presented by employees who have contracted COVID-19, where their employer has not implemented COVID-19-secure measures and enforced their use. Where employees are required to return to the workplace, either prior to their receiving the vaccination or prior to their colleagues receiving the vaccination, claims may be presented. In summary, vaccination should be one factor in a suite of COVID-19-secure measures (applied equally to all employees) taken to protect the workforce, rather than the only factor.



Emerging risks

Back to the workplace: potential claim scenario

Scenario 2*

A supermarket has put several COVID-19-secure measures in place, such as installing acrylic barriers at the checkouts, closing its café, providing staff with face masks, and putting hand sanitisation stations throughout the shop. In the first lockdown, the supermarket also enforced a strict limit on the number of customers allowed inside, but they have since lifted this rule. Regular announcements are made asking customers to maintain social distancing, but this isn't enforced.

While an employee is stocking shelves, customers regularly move within the two-metre social distancing guidelines to pick items from the shelves next to them. The employee asks for barriers to be put around the area they are working, or to stock the shelves at night when the store is closed, but the supermarket refuses both requests. Unfortunately, the employee tests positive for COVID-19. Their condition deteriorates and they are admitted to hospital with respiratory problems, resulting in six months off work. With the assistance of their trade union, they submit a claim against their employer for injury and loss of earnings.



*This scenario is fictitious but based on the types of claims we anticipate may be made in relation to COVID-19.

Emerging risks

DAC Beachcroft view

The retailer will need to show that it complied with all the relevant guidance issued at the material time. Enforcement of social distancing in public spaces will be a challenging and contentious area. However, the Court will consider whether the control measures were reasonable and whether it would have been practicable to include further measures.

In this case, is a physical barrier a practicable solution? Would it present a further hazard? Is restocking after hours a reasonable solution? Is it reasonable to allow essential items to be unavailable? The employer will need to show that it adopted a reasonable and proportionate approach to managing COVID-19 exposure risk.

Often, the reasons for something not being done will be as important as the reasons for positive action being taken. Recording the reasoning behind any key decisions, particularly those specifically requested by employees, is vital to claims defensibility.



Emerging risks

Claimant solicitor behaviour

As the revenue from PPI and whiplash claims is phased out, some claimant solicitors will be looking for new income streams. Liability claims related to the pandemic and working from home are likely to be options they explore, especially since COVID-19 claims, which are categorised by the Ministry of Justice (MOJ) as 'disease/environmental', will not be restricted to the fixed-fee structure.

How can businesses avoid being an easy target?

- Consider the specific risks within their business or sector.
- Put control measures in place and take care to enforce them.
- Assess the control measures regularly to establish that they're still appropriate and effective.

What to look out for: solicitors may pursue claims within specific industries they think are vulnerable.



Emerging risks

DAC Beachcroft view

The Industrial Injuries Advisory Council reported on March 2021* (based on figures to December 2020) that the most 'at risk' sectors for COVID-19 were social care, nursing, transport workers, food processing, retail and security. This was based on information gathered from Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) reports. It is likely that claims activity will be seen in these sectors in the first instance. However, it is possible that the data will change when new information from the UK's second wave becomes available.



*The Industrial Injuries Advisory Council (IIAC) Report, March 2021 on COVID-19 and occupation. Contains public sector information licensed under the Open Government Licence v3.0.

Emerging risks

Claimant solicitor behaviour: potential claim scenario

Scenario 3*

The solicitor representing the supermarket employee from scenario 2 is aligned with several trade unions. Since the start of the original lockdown in March 2020, one union has been regularly carrying out surveys of their members, asking them if they feel safe at their work and if their employers could do more to protect them. As part of the claim made by the supermarket employee, these surveys are reviewed. The union establishes that the supermarket does not restrict the number of customers allowed inside or enforce social distancing.

The solicitor contacts 214 supermarket employees who have contracted COVID-19, obtains witness statements and submits claims on behalf of each.



*This scenario is fictitious but based on the types of claims we anticipate may be made in relation to COVID-19.

Emerging risks

DAC Beachcroft view

Claims farming like this is becoming increasingly common and presents a significant risk. Each case must be dealt with on its own merits and carefully considered. Even the thinnest of claims can be time-consuming to investigate and respond to. At first glance the number of claims may seem problematic, but each claimant will need to show that they (a) were diagnosed with COVID-19, (b) caught COVID-19 while at work and (c) that the infection was due to a breach of duty on the part of the employer.

In many instances claimants will struggle to show that they caught COVID-19 at work. Relaxation of rules related to shopping generally coincided with the relaxation of the wider rules, meaning employees could well have been exposed outside of work. Even if the claimants can prove occupational exposure, the employer can still defend the claim by showing that it complied with all relevant guidance issued at the time.



Potential claim triggers

◀ 18 ▶

Certain COVID-19 'triggers' could suggest a formal Employers' Liability claim may be made in the future.

An employer should notify their insurer if:

- the Health and Safety Executive or an Environmental Health Officer are making enquiries into a work-related accident that could lead to a prosecution against them
- an employee has died and a Coroner's Inquest is being carried out to establish the cause of death
- their business gains media attention and the press make enquiries regarding media coverage
- they are aware that an employee who has already made a formal claim on another matter now has COVID-19
- they have had requests or enquiries in relation to COVID-19 safety in the workplace – whether from a trade union, employees, press or customers
- they have received a formal complaint in relation to COVID-19 from an employee or customer (for example, claiming that a staff member wasn't wearing a mask) specifying the time and date when this happened
- an employee is in hospital or has died as a result of COVID-19
- they have made employees redundant
- they have had any enquiries from claimant solicitors
- they have had a COVID-19 outbreak in their workforce
- staff have made complaints regarding COVID-19 safety at work
- they have been unable to provide suitable PPE for their staff
- an employee has mentioned they are suffering with long COVID-19
- a trade union has been involved.



Reporting regulations

The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR*) mean businesses must report serious workplace accidents, occupational diseases and specified dangerous occurrences. When it comes to COVID-19, it's especially tricky to decide what should (and shouldn't) be reported, since occupational exposure is hard to establish.

Some things to consider when deciding

- Have the employee's normal work activities or a specific incident increased their risk of exposure?
- Have they had direct contact with a known coronavirus hazard without control measures being in place?
- Has a medical practitioner highlighted the significance of work-related factors in contracting the virus?

What to look out for: RIDDOR reports can result in, among other things, fees, fines and prosecution, so it's important to take steps to minimise the risk that employees could be exposed.

Employers should notify their insurer under RIDDOR if:

- **an accident or incident at work has, or could have, led to the release or escape of COVID-19** – this must be reported as a dangerous occurrence*
- **an employee has been diagnosed with COVID-19, attributed to an occupational exposure** – this must be reported as a case of disease*
- **an employee dies as a result of occupational exposure to coronavirus** – this must be reported as a work-related death due to exposure to a biological agent*



Preventative measures

There are practical measures employers should take to manage any future claims effectively.



Document everything

Document PPE availability and any attempts to secure it. Keep a detailed record of all staff training and procedures and record all communications and decision-making rationales, including reference to the governmental guidance at the time.



Maintain records

Keep hold of names and contact details for all employees and agency staff, rotas, changes in care rendered necessary and external visitor logs.



Communicate and engage

A policy decision an employee helped to shape is one they're less likely to criticise, so involve and engage employees in these decisions where possible.



Review

Take the time to go back and review collated documents, such as risk assessments and care plans, and contextualise them to explain the decision making while it is still memorable.



Protecting our commercial clients

Working together to keep businesses safe

By working with brokers and insurers, businesses can operate safely and within the law. However, if our clients are claimed against, we can help control the costs and protect their business.

To do so, we need proof to support the decisions made. Regular documentation, thorough record-keeping and preservation of evidence is key to demonstrating that all guidance was followed correctly.

There can often be a lengthy period of time between an incident and a formal claim, which can make it difficult to remember exactly what happened.

If an incident occurs, it's vital we are notified as soon as possible. This early engagement is essential should a formal enquiry be launched because it allows witnesses to be interviewed while details are still fresh in their minds.



Thank you

For more information please speak to your insurance broker or your Aviva Claims contact.

For additional risk management advice and guidance visit www.aviva.co.uk/risksolutions/protecting-your-people/

This document contains general information and guidance only and may be superseded and/or subject to amendment without further notice. Aviva has no liability to any third parties arising out of this communication whatsoever and nor shall any third party rely on them. Other than liability which cannot be excluded by law, Aviva shall not be liable to any person for any indirect, special, consequential or other losses or damages of whatsoever kind arising out of access to, or use of, or reliance on anything contained in this communication. This document may not cover every risk, exposure or hazard that may arise and Aviva recommend that you obtain specific advice relevant to your circumstances.

Aviva Insurance Limited, Registered in Scotland Number 2116. Registered Office: Pitheavlis, Perth PH2 0NH.

Authorised by the Prudential Regulation Authority and regulated by the Financial Conduct Authority and the Prudential Regulation Authority.

BMGI59062021 11041-01. 06/2021.

