

Key COVID-19 legal developments in the health sector: Key Q&As relevant to the health workforce

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Update: We are acutely aware of the efforts that our clients in the healthcare sector (both NHS and independent) are making to deal with Covid-19 and the difficulties that they are facing. We have set up a free helpline for healthcare providers with COVID-19 related employment queries and this has now been extended to cover healthcare providers who are not clients of DAC Beachcroft. This service is designed to deal with queries that might take up to 30 minutes to deal with and is over and above the service which we provide our clients. The helpline is staffed by volunteers who are qualified employment lawyers with a switchboard that is in operation 24/7. The telephone number to access this service is 0800 048 5212. If you need support please do call and we will endeavour to resolve your query.

Can NHS bodies furlough employees?

While we understand that NHS bodies are unlikely to need to have surplus staff at this time, this question has arisen in the context of staff in support functions. The Coronavirus Job Retention Scheme (CJRS) guidance is regularly being updated but at the time of this update (27 April 2020) our view is that the CJRS was not designed for use by public bodies who receive public funding for staff costs. The policy behind the CJRS is that where an organisation receives public funding for staff costs, these costs should not be deferred to the CJRS which is an emergency fund. It is therefore unlikely to apply to NHS employers.

For staff who are experiencing a shortfall of work due to COVID-19, there are alternative options which are available to all employers including NHS employers. These include looking to agree voluntary reductions in hours/pay, agreeing short-time working or requiring staff to take annual leave. Any measures should be considered carefully, taking into account any relevant contractual obligations to employees, whether it may be necessary to consult (either individually or with staff side) and ensuring consistency of treatment between employees.

Can we engage clinicians from other employers/non-NHS bodies as volunteers and do we need to carry out pre-employment checks for them?

Yes. Clinicians can be engaged on a non-paid, truly voluntary basis. For NHS bodies whilst there is no obligation to carry out a right to work check where the arrangement is voluntary and the person is not required to attend at specific times, the COVID-19 modified NHS Employment Check standards outline the relevant temporary arrangements for other pre-employment requirements where employers are recruiting volunteers to support during the pandemic (this covers DBS checks, references and other checks). Accepting pre-employment checks from other organisations is at each NHS organisation's discretion. NHS bodies are advised to take a pragmatic, risk assessed approach to allow the process to progress quickly and with appropriate safeguards in place.

Can we require staff and household members to take the COVID-19 test/flu vaccinations?

NHS employees are likely to welcome being tested for COVID-19 test given the risks posed to their colleagues and patients if the virus is contracted. However the question of mandatory testing and vaccinations has been raised with us (the latter both in the context of a future COVID-19 vaccine and the usual seasonal flu vaccination).

Employers have a duty to take reasonable steps to protect the health and well-being of staff but the NHS also has duty to ensure it is able to treat the public and to protect the health and safety of patients. Given the vital role of the NHS in the pandemic and the importance of protecting against the serious threat of COVID-19, it is likely to be considered a reasonable management request to require an employee to take the COVID-19 test/vaccination in order to protect other employees and also patients. We consider these priorities permit mandatory testing/vaccinations where necessary and proportionate and is permitted by Data Protection and Human Right legislation. If it is practicable employers should outline details and grounds for testing and vaccination in an appropriate policy document so that staff are aware of how testing will be carried out and the reasons for this (if not apparent) and provide a mechanism for employees to raise any concerns relating to the mandatory arrangements.

If an employee refuses testing/vaccination then an employer should first seek to understand the reasons for that objection, whether these are reasonable and how these concerns can be addressed. If, despite this, the employee continues to object on an unreasonable basis, an employer should explain that refusal could amount to misconduct for failing to comply with a reasonable management request and there could be disciplinary consequences. Plainly an employer will wish to avoid

disciplinary action in these circumstances and so engaging with those who object may help to avoid this. Each employee should be treated fairly and consistently in the circumstances.

We believe that household members are also unlikely to object to testing/vaccinations. However, where there is a legitimate objection by a household member who cannot be persuaded to change their mind, it is unlikely that the employee could be held responsible for the objection. In such instance the NHS employer must consider the impact on their NHS employee and whether alternative duties or other steps could be considered in order to protect health and safety of NHS colleagues and patients.

What happens to an employee's annual leave if they are unable to take it as a result of COVID-19?

The Working Time (Coronavirus) (Amendment) Regulations 2020 came into force on 26 March 2020 and creates an exception to the rule on carrying over leave in the situation where it is not reasonably practicable for an employee to take leave due to the effects of COVID-19. In such situation an employee can carry over up to 4 weeks' paid holiday (plus 8 days given for bank holidays if relevant) into the next 2 leave years. This may apply to those self-isolating or too sick from COVID-19, or who have had to continue working in the fight against COVID-19 rather than take annual leave. We advise that it does not apply in the situation where holiday plans have been cancelled but the leave can still be taken. NHS employers should consider revising relevant policies in order to ensure a fair and flexible approach for employees' annual leave that balances carrying over annual leave in light of service need with the fact that annual leave is a basic requirement of a safe working environment and an essential component of the health and safety duty owed to staff.

Can we second/share staff from other NHS/non-NHS organisations to help fill short terms capacity issues caused by COVID-19?

Yes. It is important that agreements are in place with the employer of seconded staff to ensure that they continue to bear responsibility for the individual, and there is agreement on payment of salary and sick pay. These can be dealt with in a secondment agreement, or where the agreement is only between NHS bodies, or a more informal MOU (we have drafted and provided a Staff Collaboration MOU to the NHS for this purpose). However, some mandatory checks (based on the COVID-19 modified NHS Employment checks referred to above) are still in place. Where the employee is from another NHS body, you may be able to rely on recent checks carried out by that body, but taking a risk based approach. With non-NHS employers, thought may have to be given to whether seconded staff can be deployed in areas not requiring checks, or in training while appropriate checks are done.

Where you are sharing your staff, it is important to consider if your actions are reasonable and implemented reasonably. In the current circumstances, we do not envisage any problems generally in sharing staff with a neighbouring trust when an emergency arises, but requiring your staff to work well away from home for sustained periods may be more problematic.

What do we do if staff are reluctant to work for fear of contracting COVID-19 or because of lack of PPE?

While we understand the NHS is doing everything it can to increase supplies of PPE to staff, shortages of PPE have been widely reported. Our experience generally is that NHS employees will undertake their duties regardless of the personal risks they face, but this question has arisen in some cases.

The starting point should be to treat the employee with sympathy and seek to understand the reasons for the objections to working. Employers have a duty of care to take reasonable steps to protect the health and well-being of staff and to not victimise those who have raised genuine health and safety concerns.

If staff fall into one of the COVID-19 high risk categories, then it is unlikely to be lawful to instruct that employee to nevertheless come into work/continue working. Similarly, if an employee has a disability, then there is a duty to make reasonable adjustments. Consideration should be given to whether the employee can work from home or they can take leave (whether paid or unpaid). If they cannot, their issues of concern should be addressed where that is reasonably practicable - for example, is it possible to stagger start and end times to avoid peak travelling on public transport if that is the underlying concern?

Where staff do not fall into a high risk group (and in the case of disability, there is no reasonable adjustment that would permit working away from your premises), you should consider whether it is possible for staff to carry out their duties safely, or if there are any other reasonable steps that you could undertake to protect health and safety. With PPE equipment, this might be seeking to obtain more (if there is more to be had) or prioritising within the workforce to those who may be at most risk of exposure. In essence, have reasonable steps been undertaken to identify and address the health and safety concern? If there is a clear risk to staff and requiring them to undertake duties would cause personal harm, then it is unlikely this will be a reasonable or lawful step for an employer to take.

However, once you are satisfied that appropriate assessments and steps have been taken to protect health and safety, if there is still disagreement, we consider you can require an employee to undertake their duties. Any continued failure to not comply could then have disciplinary consequences. We stress however, such measures should be considered carefully and every employee should be considered within the context of their own circumstances.

Can we suspend the operation of non-essential policies such as grievances policies and disciplinary procedures?

An employer will have a contractual right to carry out its disciplinary procedures and an obligation to address employee grievances. If you do wish to suspend what may be regarded as “non-essential” policies to focus on service delivery, we suggest you try and agree this with employees first. It is likely they will understand the operational reasons for this and agree. If there is no agreement, in the current exceptional circumstances, we consider you are able to suspend such policies. It should be explained to staff this is being done on a temporary and exceptional basis. NHS employers may still wish to proceed with disciplinary issues/performance processes where they relate to any matter affecting patient safety.

Is there anything in the Coronavirus Act 2020 that will help me?

There are a number of measures that should help support NHS bodies:

- Regulators have been given emergency powers to register suitable people as regulated healthcare professionals. This will for example speed up recently retired doctors and nurses re-joining the workforce.
- Emergency Volunteer Leave allows workers who wish to take blocks of time off to volunteer to support the NHS (this is unpaid but a scheme to compensate such individuals for loss of earnings and travel and subsistence will be established).
- Suspension of pension scheme inhibitions on the return of retired workers. This includes suspending the current retire and return rules that only allow retired NHS Staff to work a maximum of 16 hours per week, and the rules on abatement and draw down of pensions.
- Provision for an indemnity scheme for clinical negligence liabilities arising from NHS activities carried out for the purposes of dealing with, or because of, COVID-19, where there is no existing indemnity arrangement in place to ensure those providing healthcare are legally protected.

Authors



Udara Ranasinghe

London - Walbrook
+44 (0)20 7894 6727
uranasinghe@dacbeachcroft.com



Guy Bredenkamp

Newcastle
+44 (0) 191 404 4076
gbredenkamp@dacbeachcroft.com