

# Working Safely in Wales during COVID-19: New Guidance and HSE Enforcement

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The guidance available to businesses in relation to safe working practices during the COVID-19 crisis is not only constantly evolving, but different in Wales to that issued by central UK Government and other devolved jurisdictions. We understand that this can be confusing and tiresome for employers and health and safety professionals, so in this article, we look specifically at the current guidance for Welsh businesses.

To tackle the spread of coronavirus, the Welsh Government introduced the Health Protection (Coronavirus Restrictions) (Wales) 2020 in March which imposed strict restrictions on gatherings, the movement of people and the operation of businesses, including closures, in Wales. A [framework](#) for easing lockdown, including reopening businesses and workplaces, was published on 15<sup>th</sup> May, and a traffic light system defines the stages for how restrictions in different areas of life in Wales may be gradually eased and lifted.

The Welsh Government assures the public that the health and wellbeing of everyone is of paramount importance, and that it is informed by guidance by the UK Government and relevant industry and trade bodies, and has engaged in consultation with various business and unions to ensure that its approach is proportionate and fair to businesses and workers.

New guidance was published on 29<sup>th</sup> May, titled '[Keep Wales Safe at Work](#)', to help Welsh businesses get back up and running whilst ensuring that they continue with a cautious approach and operate their workplaces as safely as possible. The Welsh Government states that it will be producing further guidance which is specific to key sectors to support a safe return to work. In the meantime, businesses should follow the new guidance by following two key instructions, Keep Safe and Keep Legal.

## Keep Safe

This is a focus on workforce health. If someone becomes unwell in the workplace or displays the symptoms of coronavirus (i.e. a new, continuous cough, high temperature, loss or a change in sense of smell or taste) they should be sent home and advised to follow the advice to stay at home. Those who follow advice to stay at home could be eligible for statutory sick pay from the first day of their absence from work. Employers should use their discretion concerning the need for medical evidence for certification for employees who are unwell. This will allow GPs to focus on their patients. If evidence is required by an employer, those with symptoms of coronavirus can get an isolation note by using the COVID-19 symptom checker on NHS 111 Wales.

The Welsh Government's [Test, Trace, Protect Strategy](#) is aimed at allowing us to live and work alongside the virus while research continues to find an effective treatment or vaccine.

## Keep Legal

The Health Protection (Coronavirus Restrictions) (Wales) Regulations are being continually reviewed, and there is a [full list](#) of businesses and premises that must currently remain closed in Wales. If a business is permitted to operate, it must do so safely in a way that complies with any restrictions imposed by the Regulations, in addition to other health and safety legal obligations imposed on employers. Workers are only allowed to return to the work place if it is not reasonably practicable for them to work from home.

Physical distancing of a two metre distance is a legal requirement under the Regulations and employers must take all reasonable measures to ensure that this distance is maintained between persons on their premises. [Guidance](#) has been produced to help both employers and employees understand what taking all reasonable measures means and what to do if it is not possible to maintain a distance of two metres in certain circumstances. A non-exhaustive list is provided of examples of reasonable measures which may be relevant:

- Reducing the number of people working on the premises at any one time - increasing the space between people by reducing the total number of people in attendance.
- Increasing space between staff - for example, on a production line leaving two metre gaps between people and indicating spacing with markings.
- Consider appropriate provision of rest space - is there a congregation of workers at a certain time? Could additional

- space be provided, or breaks staggered.
- Altering tasks undertaken - making adjustments to the way that work is done, to reduce contact.
- Stagger shifts to minimise people on site and to reduce congestion at the point of shift changes.
- Carrying a passenger in the back seat rather than the front seat of a vehicle would be a reasonable measure.

Employers have a legal duty to protect employees and others from risks to their health and safety and the starting point is to conduct a suitable risk assessment - a legal requirement under Regulation 3 of the Management of Health and Safety at Work Regulations 1999. The guidance recognises this by requiring employers to undertake a COVID-19 risk assessment. It is an important principle that employers undertake an assessment of what reasonable measures can be taken and to keep this under periodic review. However, it is unlikely that no reasonable measures could be adopted at all in these circumstances. Employers and staff will be best placed to know what can be done and the concept of “taking reasonable measures” means that there is some discretion in this respect. Where contact or closer working is required, it is important that other measures are considered, for example:

- minimising the level of interaction
- physical barriers
- improved hygiene and reminders about the importance of hygiene
- washing hands well for 20 seconds with soap after close contact
- ensuring those with symptoms are not present on the premises

The guidance emphasises the importance of consulting with employees, health and safety representatives and trade unions when assessing the risks and how they should be managed before re-commencing work.

Overall, the guidance encourages employers and employees to adhere to five key principles:

1. **Care:** Our health and wellbeing comes first
2. **Comply:** The laws which keep us safe must be obeyed;
3. **Involve:** We all share the responsibility for safe work;
4. **Adapt:** We will all need to change how we work; and
5. **Communicate:** We must all understand what to do.

## HSE Enforcement

It is essential that employers comply with the guidance that has been published to keep people safe. Where the enforcing authority, whether the HSE or local authority, identifies employers were not taking actions to comply with the relevant public health legislation and guidance to control public health risks, they will consider taking a range of actions to improve control of workplace risks.

Although the HSE has said that they will be taking a flexible and proportionate approach to the risks arising from the COVID-19 crisis, employers should be aware that in appropriate cases, the HSE can go beyond the issuing of enforcement notices and consider a prosecution. As part of the UK Government’s announcement in May with regard to enforcing workplace health and safety, an extra £14 million has been available to the HSE, equivalent to an increase of 10% of their budget, for extra call centre employees, inspectors and equipment if needed.

Given that the guidance specifically refers to the HSE as the enforcing authority for many workplace settings and directs those who are concerned about work place safety to make a report, we consider that many businesses, particularly those involved in high risk industries such as construction, will be exposed to investigations by the HSE on the back of concerns raised by employees, contractors and suppliers. The difficulties of establishing causation given the complexities of identifying the source of the transmission of the virus will not necessarily deter the HSE given that for a successful prosecution for breaches of the Health and Safety at Work Act they only need to prove that an employer has exposed employees and/or others to a material risk of harm.

As the whole of the UK faces months of change and challenge, the guidance from central and local governments will need to continue to evolve and all businesses will need to ensure they keep updated on changes to guidance to remain compliant and provide ongoing training and information to their employees.

*DAC Beachcroft’s National Regulatory team has set up a specialist team who can advise on health and safety queries relating to COVID-19. If you have any queries please telephone or e-mail one of the contacts below:*

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