outset.

SEPT 21

# work place news by Chloe

## Government Autumn & Winter Covid Plan

**On 14 September the government posted an updated plan for managing covid throughout the upcoming autumn/winter seasons.**

In it, it reports that:

> "data continues to show that the link between cases, hospitalisations, and deaths has weakened significantly since the start of the pandemic. In England, the number of deaths and hospital admissions due to COVID-19 has remained relatively stable over the last month, and although hospital admissions and deaths sadly increased at the beginning of the summer, they have remained far below the levels in either of the previous waves".

### Plan A

The government's aim is to sustain the progress made and ensure the NHS doesn't suffer from the pressures it did in 2020. Plan A is made up of a combination of methods to achieve these aims which, for businesses, include:

- Providing regularly updated Working Safely guidance on how employer can reduce risk in the workplace – employers should consider this when carrying out risk assessments and putting in place safety measures
- Ensuring that businesses do not ask or allow employees to go to work in they are meant to be self-isolating

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## The editor's welcome

Where is this year going? As autumn creeps its way in I feel a bit cheated – we didn't even have summer!

It still feels a little like we're living in limbo – with things sort of returned to 'normal', but not quite. Many of us are still working from home, and as time flies by it seems that a hybrid way of working might be here to stay for a lot of us.

Whether you're back to the workplace, never left, staying remote – I hope you're finding ways to re-connect with colleagues and feeling a positive and renewed sense of energy. All well ahead of that time of year it's definitely too early to mention (despite what the supermarkets will have you believe).

I hope you enjoy our latest newsletter and, always, please follow us on LinkedIn for our latest updates and latest news.

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- Encouraging businesses to:
  - Ask employees to stay at home if they feel unwell
  - Ensure there is adequate fresh air – identify poorly ventilated areas by using a CO2 monitor and improve them
  - Provide hand sanitiser and clean heavy touch areas regularly
  - Display an NHS QR code poster for customers to check in
  - Consider using the NHS Covid pass

Employers will already be familiar with most, if not all, of these measures and should continue to monitor the latest Working Safely guidance to make sure you are taking the minimum recommended steps.

**Plan B**

This winter could potentially be a challenging one – the pandemic can change its course unexpectedly, and we could have an upsurge in the flu following a quiet year for it in 2020.

If the data shows the NHS could be overwhelmed, Plan B may be launched which involves considering the following measures:

1. Communicating the risk level has increased and encouraging more cautious behaviours
2. Introducing mandatory vaccine only covid status certification in certain settings (for example, in nightclubs)
3. Re-introducing mandatory face coverings in certain settings (e.g. on public transport)
4. Potentially asking people to work from home again, if they can

The last of the Plan B measures will clearly have the biggest impact on employers – particularly those who are working hard to re-introduce people back to the workplace. SAGE has advised that working from home is one of the most effective measures at reducing contacts – having a big impact on transmission and the fated R number.

Whilst we all want to be optimistic, and the government describes this measure as a last resort, employers should prepare for the worst, just in case.

# Calls for change

## Mandatory vaccines

Last month we reported on the open letter sent to the CQC, among others, claiming that the Regulations requiring care home workers to be vaccinated from 11 November 2021, is unlawful and unenforceable.

The mandatory vaccination requirement for care home workers is being challenged in judicial review proceedings launched on 9 September. They are brought on five grounds, that the Regulations are:

1. incompatible with laws prohibiting the enforcement of mandatory vaccines
2. interfere with the public's right to "bodily integrity" and are severe, unnecessary and disproportionate
3. will disproportionately impact women and those who identify as Black/Caribbean/Black British, contravening Human Rights
4. irrational and will lead to shortages in both frontline and non-frontline care workers

At the same time, the Department for Health and Social Care (DHSC) as published a consultation on making flu and covid jabs compulsory for workers in the wider health and social care sector. The consultation is open until 22 October 2021 – if you want to have a say, visit the online survey site.

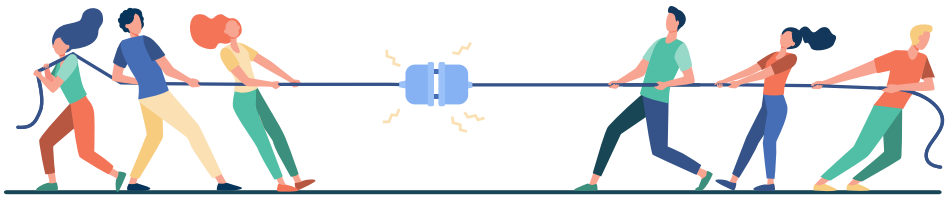
## Ethnicity pay gap reporting

The CIPD is calling for the government to require compulsory ethnicity pay gap reporting by large employers from April 2023. This follows a number of calls since the government consulted on the same in 2018.

## Furlough and short-time working

The TUC is calling on the government to extend the furlough scheme further and introduce a permanent short-time working scheme. It says this will help protect jobs and workers in economically challenging times. This comes in the wake of a poll showing that low-income worker rarely have the option to work from home and suffered with lower living standards during the pandemic compared to higher income workers.

The TUC is also calling for a ban on zero hours contract and an increase of the national minimum wage to £10.



# The legal right to disconnect

**In a recent study conducted by Autonomy, a future of work think-tank, working from home during COVID-19 has been linked to an epidemic of hidden overtime, having negative effects on workers' mental health and disproportionately affecting working women.**

As part of its paper, The Right to Disconnect, Autonomy is advocating amending the Employment Rights Act 1996 so that employers are prohibited from requiring employees to monitor or respond to work-related communications or to complete any work outside working hours. An employee facing a detriment for refusing to work outside their agreed working hours could bring a claim in the employment tribunal.

The paper suggests that businesses that can't comply with the new requirements would be granted an exemption – for example, those in the care sector.

In order to opt-out they would need to demonstrate a clear need to communicate with workers outside of contracted hours.

Ireland is considering the legislation that was enacted in France. The French set the example in 2017 when they required companies with over 50 employees to limit their staff's use of email during working hours.

Whether our government takes similar steps to amend legislation or not, addressing the issues highlighted by the Autonomy research will only benefit the workforce and in turn the employer.

Not least bearing in mind the risk of Plan B returning more people to working from home again (see this month's article on the government's autumn/winter covid plan).

Some steps employers can take to promote the well-being of those working from home include:

- Encouraging employees to take appropriate rest breaks including annual leave
- Not sending emails outside of working hours
- Including text in your emails making clear that, for example, you may be sending it out of hours as you work flexibly, but you don't expect a reply

### The flip side

Most of us have experienced the challenge of separating work from home life – whether during the pandemic or otherwise, and can see the benefits of the measures described above. But what about the issues these good intentions might cause?

Research conducted by the University of Sussex found that bans on out-of-hours emails may aid relaxation for some employees, but for those with high levels of anxiety and neuroticism, the "growing accumulation of emails" could actually increase stress levels.

The CIPD has spoken out in favour of clear guidance on remote working in order to ensure balance, rather than a blanket ban on out-of-hours emailing.

As with most things, a balanced approach usually works well. Employers would be well advised to consider a combination of measures to tackle the pressures that can be caused by out of hours working.

# Believe it or not?

With all the challenges faced by the economy, employers, individuals and families over the course of the pandemic we cautiously enter the autumn/winter season with one eye looking over our shoulder.

**But, believe it or not, there are lots of positives emerging in the world of work too:**

- A number of large high street businesses have announced they will **close all of their branches on both Christmas Day and Boxing Day** this year to give staff proper time off. This includes Sainsbury's, Marks & Spencer and Morrisons
- Prezzo has announced a **4% payrise for all 2,500 staff** and the day off on Boxing Day
- Other chains announcing **payrises for all staff** includes Itsu (11% to a minimum of £10.40ph), Costa (5%), £50 **punctuality bonus** for Amazon staff and a £1,000 **joining bonus** from Tesco
- There are plenty of jobs to be had with official figures showing the number of **vacancies hitting one million for the first time since records began**. The hospitality sector alone is advertising **over 100,000 vacant positions** and John Lewis has created 7,000 temporary Christmas jobs

## Thompson v Sancrown Ltd

# Refusal of flexible working request could cost you £100k… and don't annoy the judge by being poorly prepared

### The background

Following her return from maternity leave, Mrs Thompson asked to work 4 days a week instead of 5, and to leave at 5pm instead of 6pm on those days.

She provided suggestions as to how her work could be managed in her absence but her request was rejected. She raised a grievance which included matters dating back to prior to her maternity leave, which wasn't upheld.

There was a detailed series of events which culminated in her application and grievance being rejected and which contributed to Mrs Thompson resigning from her position as an estate agent.

She brought claims in the Employment Tribunal for constructive unfair dismissal and indirect sex discrimination, among other things.

### The decision

Out of the several claims she lodged, Mrs Thompson was successful with one: her indirect sex discrimination claim.

The Tribunal commented that it isn't as obvious nowadays that a requirement to work full time places more women with children at a substantial disadvantage.

However, Mrs Thompson produced evidence of a 2018 survey indicating it is (overwhelmingly) still the case that mothers are more likely to carry primary responsibility for childcare.

Given this and their general experience, The Tribunal accepted that despite the shift towards equality society is making, it's still women who are more likely to carry primary childcare responsibility.

It was only left to examine the employer's justification for refusing Mrs Thompson's request, and the Tribunal found that the employer failed to show its refusal was proportionate to the real need of the business to maintain successful relations with customers.

The Tribunal largely accepted that the employer's aims were legitimate, but they had failed to properly consider the suggestions Mrs Thompson made about how these could be managed. Ultimately the Tribunal considered the reasons just not good enough to justify placing Mrs Thompson at a disadvantage by refusing her request.

### The award

The remedy judgment has recently been published and Mrs Thompson was awarded over £180,000. Yes, she was a high earner, but this included £13,500 injury to feelings and 20 months compensation for loss of earnings. This took into account the effect of the pandemic on the housing market which made it difficult for Mrs Thompson to secure another role.

### Comment

Although this was a first instance decision, so isn't binding on other Tribunals, it provides a helpful reminder of the risks involved when dealing with flexible working requests. With many employers looking to return people to their workplace, inevitably there will be a spike in flexible working applications.

It's important to remember that although it's fairly easy for an employer to turn down a request for one of the 8 reasons set out in the statutory flexible working regime – the greater risk will be around indirect discrimination.

Employers will need to be able to fully justify any reasons for refusal, and these must be compelling enough to outweigh the disadvantage caused to the individual making the request.

### One last thing

As an aside – at the start of the written reasons the Judge complains bitterly about the poor state of the bundles of evidence. The paper and electronic copies didn't match, the electronic copy didn't have page numbers or bookmarks and wasn't machine readable – it took up a lot of the Tribunal's time and they weren't happy about it.

The Judge pointed out that the Respondent's representative are "frequent flyers" in the Tribunal and should have known better.

This demonstrates the importance of getting Tribunal process right – it is time consuming, but it's worth it. The last thing you want is to start any tribunal hearing having already irritated the judge deciding the case…

*A guide to...*

# Right to work checks

We've published a few articles about right to work checks but especially in this post Brexit era it remains a hot topic and, understandably, source of confusion for many.

We've put together a high-level guide to hopefully steer you through – especially when it comes to checks for EU nationals:

1. The starting point for every right to work check is to ask if the employee can provide a share code. If they can provide a share code, you should use the employer 'view and check' service: https://www.gov.uk/view-right-to-work

   The 'view and check' result is all you need to keep on file – you don't need to copy the passport or obtain anything else UNLESS it's someone who has an application in progress (usually EU Settlement Scheme) in which case you must also keep a copy of the employee's Certificate of Application on file.

2. If the employee can't provide a share code, the employer should follow the steps set out in the latest Home Office right to work checklist and obtain a suitable document from list A or B. Note that a follow up check will need to be diarised if the individual can't produce a document from List A.

3. If the employee can't provide a share code AND doesn't have one of the documents from the checklist (perhaps because they have an application in progress) you will need to use the online Employer Checking Service (not to be confused with the 'view and check' service mentioned in 1 above).

   You need the individual's permission to use the service and a few personal details. If the person is allowed to work it will return a Positive Verification Notice that is usually valid for 6 months.

### Important Notes:

**a.** Individuals can usually continue to work if they are/have been on one valid visa, it is reaching expiry, and they have applied to extend it (or switch to a different visa permission/indefinite leave etc) PROVIDED they submit their new application before the existing permission expires. It doesn't matter if it then expires whilst they're still waiting for a decision, the important thing is they get the application in before it does. However, you still need to conduct a check in line with the above, and always take advice if you're unsure.

**b.** EU nationals can apply to the settlement scheme late – employers can't assume that because an individual hasn't applied, they are illegal workers and can't be hired/must be dismissed – that isn't usually the case. The employee will need to provide the employer with their Certificate of Application and the employer should follow step 1 above, or 3 if there is no share code. The employer needs to keep the result from the online check AND a copy of the Certificate of Application.

**c.** Employers should not insist that their existing EU national employees provide evidence of settled status. Provided they supplied a valid EU passport when they joined (prior to 1 July 2021) that is valid proof of their right to work for the entire duration of their employment, regardless of the fact the rules subsequently have changed. Employers can ask, but insisting on it could, depending on the circumstances, lead to discrimination claims.

## New guidance

Here are links to new guidance issued in September that are relevant for employers:

NEW **Acas guidance helping employers and employees understand the vaccination rules**

NEW **DHSC letter on how to self-certify medical exemption** - this letter explains how, temporarily, those working, volunteering and visiting care homes can certify that they have a medical reason for not being vaccinated.