

## Return to work in Wales – your questions answered

Here we answer all the questions our viewers asked before and during our webinar on 23rd June.

**Q: If my business is based in Wales but my workforce delivers services both in Wales and across the border in England, which rules do I follow?**

A: Andrea Thomas:

That's a very good question – I am afraid the answer is not entirely clear. The guidance in Wales and England is entirely different and the guidance that applies in England says quite clearly that it does not apply in the other devolved nations.

Strictly speaking, when in Wales, you follow the Welsh guidance and when in England you follow the English guidance. I do appreciate that this is not particularly helpful to you as an employer, but I think that the pragmatic answer is that, as the guidance in Wales is generally more onerous than that in England, you are unlikely to go wrong if you follow the Welsh guidance.

In particular, the Welsh guidance imposes a statutory duty in respect of workplace distancing which will apply for as long as you are in Wales, although arguably that would cease to apply when you cross the border. It just illustrates that the two nations don't live in isolation and people cross the border all the time for various reasons including work, so is the differing guidance creates an obvious problem.

**Q: Can my employees insist that I give them face masks to wear in the office?**

A: Andrea Thomas

No, I don't think they can unless you are working in an industry where you wear face masks as part of your normal PPE. Therefore, purely as a way of dealing with Covid risk, I don't think that an employee can insist on this. It doesn't appear as a recommendation in the workplace guidance – but there has been a separate announcement from the Welsh Government addressed to everyone, not just employers, which says that there is some evidence that facemasks may help with transmission risk if you are not able to distance by 2m. However, the first step is to maintain 2m distancing if at all possible.

The guidance does recognise that there may be situations where that is not always possible, so in those circumstances, perhaps it is something you might want to consider, if only because it might make your employees feel more secure. However, I don't think it's something that could be insisted upon in an office environment where you should be maintaining workplace distancing if at all possible.

**Q: Where can I get risk assessment guidance for manufacturers from? (Is it part of the manufacturers' protocol?)**

A: Andrea Thomas

It is part of the manufacturing protocol and there is a section on the back which deals with that the assessment process. The protocol is part of the Welsh government suite of documentation for employers on Covid-19; if you go their website, there is a specific section on Covid-19 and then a subsection for employers - it is part of that subsection. However, if you want to contact me after the webinar, I am happy to send a link if that would help. Link: <https://gov.wales/return-work-protocol-covid-19-manufacturing>

**Q: As an employer, do I have to give my employees a work phone and a laptop?**

A: Bryn Thomas

No, you don't have to do that. It is about taking reasonable measures – you have to take a look at the nature of the work, the costs involved and how many employees you have.

The emphasis in Wales is working from home as far as possible, so you should do as much as you can to facilitate it. The rationale is that the best way to reduce transmission is to keep as many employees as you can away from the work environment.

If a business decision is made to not provide these items, resulting in staff being in work, reasonable measures should be taken to protect the 2m distancing requirement.

**Q: Who decides whether my risk assessment is good enough? If I have to create a bespoke one for my office, surely I'm the best judge of what is appropriate?**

A: Bryn Thomas

Yes, you are best placed to decide about the risk assessment. A bespoke one will look at the number of employees you have and the needs of the working environment you are dealing with. You just have to bear in mind that in the worst case scenario, there could be scrutiny by the HSE and if you have got incidents of Covid-19 which arise from the workplace environment, your risk assessment has to stand up to that scrutiny.

There are a lot of risk assessments online, but they are generic and off the shelf – I would move away from that as far as possible. Any conscientious employer will look at all the proper issues they have to consider and the factors involved. I agree that you are best placed to decide; if you have looked at all the issues, I am sure that your risk assessment will satisfy the regulatory bodies and any focus placed on your business by the HSE.

**Q: Directors Duties – what can I do if my fellow directors don't agree with my proposed measures for making our office safe?**

A: Chris Mayers

I don't know how many directors are involved or whether any other director has assigned to him/her the responsibility for health and safety, but clearly the best way forward is to try to reach a

consensus between the directors. If a director is concerned that they are being pushed down a road they are not happy with, they need to document that very clearly.

Certainly in my experience if a director or senior manager says that they are not happy about something and that they are putting their concerns and objections in writing, that quite often will grab people's attention and focus their minds, because there are very serious consequences for breaches of health and safety duties. So try to get consensus and if you can't, document it to safeguard your point of view as a director who is seemingly in the minority.

From a fiduciary/statutory duty perspective, directors cannot abdicate your obligations under health & safety law. Health & Safety obligations are non-delegable and directors are jointly and severally liable for any breach of health & safety law. A health & safety director would have a higher standard to meet than his or her fellow directors, but all directors must ensure legal compliance with health and safety law. You can't just rely on your nominated health & safety director doing their job properly.

If your fellow directors won't agree, despite you reinforcing your position and confirming in writing, you have four options.

- (1) Notify your fellow directors of your concerns in writing, try to agree a compromise you are comfortable with and proceed by consensus. If that means a breach of health & safety laws, you would still be liable for that breach, but you could use your contemporaneous notes in mitigation if a prosecution ensued to reduce any sentence or fine.
- (2) Notify your company chairman (if you have one) in writing of the steps you've taken to reach consensus and enable them to mediate between directors to resolve the conflict.
- (3) If those options won't work, or the issue is so significant in your mind you cannot compromise, you can go ahead and take the steps you believe must be taken and face the consequences (provided you do so in the best interests of the company, its employees and the environment). That might result in a disagreement with your fellow shareholders.
- (4) Alternatively, the very last resort is to resign from your position as a director and to notify your fellow directors in writing of your reasons for your resignation. That would again be useful in mitigation because it demonstrates you took all steps within your power and control to persuade your fellow directors to listen and they didn't, so, as a last resort, you had no option but to resign to minimise your ongoing personal liability.

**Q: If I need to make redundancies as the furlough scheme winds down, when do I need to start thinking about that?**

A: Andrea Thomas

As soon as possible. There will be many employers who genuinely don't know if they are going to have make redundancies if they have only just been allowed to re-open – shops or other retailers, for example, who really don't know, when they re-open, how badly affected their business is going to be. Other business, such as hotels, who will hopefully be allowed to re-open in the next three

weeks to some degree, will be highly unlikely to be able to get all parts of their business going again in the near future – conferencing or weddings, for instance.

If those people know that they will have to make redundancies, they should start planning for that as soon as possible. It is not pleasant but remember that, if you are going to make 20 or more people redundant within 90 days at the same site, then collective consultation obligations will be triggered. You are also going to have to notify the Secretary of State within the same time frame. If between 20 and 99 employees are affected, that will entail a period of at least 30 days, and for 100+ employees, that will be a 45-day period – those are the absolute minimum periods in each case, so you need to plan for that as soon as you know that redundancies are likely.

**Q: What are your thoughts on the current situation in the food packaging and processing industries?**

A: Bryn Thomas

The challenges thrown up by the environments of meat processing plants and abattoirs, are interesting. These outbreaks or clusters are not just a Welsh phenomenon – it is happening all over the world. We have two, one in Wrexham and one on Anglesey. There are also incidents at factories in the North of England.

These environments have quite distinct characteristics – they are dark, cold, with good aeration and have plenty of employees working on factory lines or conveyors. It is a difficult working environment in which to socially distance, together with the communication problems surrounding the use of face masks/PPE etc. There is a real focus on this at the moment and it is going to be important for the people running those businesses to focus on bespoke risk assessments and to put all reasonably practical mitigation measures in place.

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