

Coronavirus (COVID-19)—HSE guidance, enforcement and social distancing at work

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Corporate Crime analysis: The Health and Safety Executive (HSE) has said it will look closely at concerns about social distancing and coronavirus (COVID-19) to secure compliance with the law, and has made clear that duty holders have a responsibility to protect workers and others against the risk of coronavirus infection in the workplace. In the third of his articles concerning coronavirus and the application of the Health and Safety At Work etc Act 1974 (HSWA 1974), Paul Rogers of Outer Temple Chambers considers what the HSE has said about enforcement, and what guidance there is to assist employers to make decisions about protective measures, and raises some questions about the difficulty of proving a material risk of transmission in relation to the so-called ‘two metre rule’.

HSE’s approach to enforcement during the coronavirus

The HSE has characterised its [approach to regulation](#) in this crisis as ‘supporting a safe return to work across Great Britain.’ It [says](#) it is ‘adjusting the focus of its activities, including visits to business premises and sites which will be conducted in line with social distancing regulations and guidelines.’ It goes on to remind duty holders that they ‘continue to have obligations to comply with [HSWA 1974](#) legislation and requirements to manage and control workplace risks, including protecting workers and others from the risk of coronavirus infection in the workplace’. It says its regulatory approach will ‘continue to take a flexible and proportionate account of the risks and challenges arising from the pandemic’.

Further the HSE goes on to say it will carry out work to check that appropriate measures are in place to protect workers from coronavirus and will resume targeted proactive inspection of high-risk industries. In relation to investigation it says it will continue this:

‘for work related deaths across all industry sectors, the most serious major injuries and dangerous occurrences and reported concerns, including those related to social distancing and coronavirus. In such cases we will continue to secure compliance with the law, and conduct our investigations using a mixture of technology, without compromising the collection of evidence and our ability to secure effective control of risk, and site visits.’

These recent remarks must be seen against the HSE Enforcement Policy Statement (EPS) released in October 2015 and which continues to apply to all its enforcement decision-making. The EPS declares all enforcement actions will be proportionate meaning that inspectors ‘should take particular account of how far duty holders have fallen short of what the law requires and the extent of the risks created’. Prosecution is, according to the EPS is ‘an essential part of enforcement, ensuring that where there has been a serious breach of the law, duty holders (including individuals) are held to account’. The HSE Enforcement Management model (EMM) also applies and assists inspectors to determine if action should be taken and what type of action.

From its public utterances since the coronavirus crisis hit, HSE appears to be trying to get across a message that it understands these are difficult times for duty holders, and that while they adapt it will adopt a ‘flexible and proportionate’ approach to enforcement. It has also emphasised that: ‘Advice on coronavirus will continue to be provided by our Concerns and Advice Team, and up to date guidance

and information will be available on our website.' HSE provides a contact number for 'help and advice on how to protect people from coronavirus in your workplace.' The number is 0300 790 6787 and lines are open Monday to Friday 8:30am to 8:00pm. There is also an online 'working safely' enquiry form for employers and others which has a series of drop down menus to describe who the enquirer is, what sectors they work in and what areas they need advice about eg social distancing, sanitisation, PPE, etc.

HSE has also published detailed advice directly related to coronavirus which includes the following topics:

- [Social Distancing, keeping businesses open and in-work activities during the coronavirus outbreak](#)
- [Working safely during the coronavirus outbreak—short guide](#)
- [Talking with your workers about working safely during the coronavirus outbreak](#)
- [Using PPE at work during the coronavirus outbreak](#)
- [Legionella risks during the coronavirus outbreak](#)
- [Hand sanitiser products and surface disinfectants during the coronavirus outbreak—use, manufacture and supply](#)
- [Carrying out thorough examination and testing of lifting and pressure equipment during the coronavirus outbreak](#)
- [Protect home workers](#)
- [First aid cover and qualifications during the coronavirus outbreak](#)
- [Arrangements for driver welfare and hours of work during the coronavirus outbreak](#)
- [Arrangements for regulating chemicals during the coronavirus outbreak](#)
- [Health and medical surveillance during the coronavirus outbreak](#)
- [Extension for diver's certificate of medical fitness during the coronavirus outbreak](#)

Aside from its own publications, HSE refers to the Public Health England (PHE) Guidance and other government guidance including, in particular the specific work settings [guidance](#) which has generic practical advice entitled five steps to working safely, and also covers the following sectors:

- construction and other outdoor work
- factories, plants and warehouses
- labs and research facilities
- offices and contact centres
- other people's homes
- restaurants offering takeaway or delivery
- shops and branches
- vehicles

One of the key themes to come from all of this [guidance](#) is that employers should take 'every possible step to facilitate their employees working from home'. Where this is not possible then rigorous social distancing will need to be employed, and there is extensive reference to this throughout the work settings guidance and in the HSE publication '[Talking with your workers about working safely during the coronavirus outbreak](#)'.

How will decisions be made about enforcement?

The [EPS](#) declares 'enforcement action should be proportionate to the health and safety risks and to the seriousness of any breach of law.' It says, the purpose of enforcement is to 'prevent harm by requiring duty holders to manage and control risks effectively.' Repeated reference is made in the EPS to a proportionate approach. In relation to coronavirus the word 'proportionate' also appears with the addition of the word 'flexible'. It is not clear what, if anything, this adds. The [declaration on proportionality](#) in the EPS reads:

'5.1 We adopt a proportionate approach to enforcing the law across different industries and sectors, recognising the importance of supporting businesses to grow and comply.

5.2 In our dealings with duty holders, we will ensure that our enforcement action is proportionate to the health and safety risks and the seriousness of any breach of the law. This includes any actual or potential harm arising from any breach, and the economic impact of the action taken.'

This will include account being taken of 'how far duty holders have fallen short of what the law requires and the extent of the risks created'.

Some duties are absolute, and others require action as far as is reasonably practicable. In relation to what is reasonably practicable the [EPS](#) notes:

'5.6 Deciding what is reasonably practicable to control risk involves the exercise of judgment. Our inspectors, when considering the adequacy of the protective measures taken, will balance the degree of risk against the money, time or trouble to avert that risk. Unless it can be shown that there is a gross disproportion between these factors and that the risk is insignificant in relation to the cost, duty holders must take measures and incur costs to reduce the risk and comply with the law.' Risk is defined broadly to include 'a source of possible harm, the likelihood of that harm occurring, and the severity of its outcome.'

At the heart of the HSE's [EMM](#), which guides the process for inspectors to determine the level if any of enforcement action, is the concept of 'gap analysis'. It is used to determine what action is necessary to ensure compliance with the law and also to determine whether prosecution should be considered. The difference between where the duty holder is in relation to the health and safety risks posed by the various activities (actual risk), and the benchmark risk (ie the level of risk accepted by the law or guidance) is the risk gap. This risk gap will inform the enforcement expectation.

The first step in determining the risk gap is to assess the level of actual risk arising from the duty holder's activities. Inspectors will base their judgement on information about hazards and control measures informed by their training, experience, guidance and other relevant sources of information. But how is the benchmark risk in the context of coronavirus to be determined where considerable uncertainties exist inter alia about: how it is transmitted, for how long it remains viable on surfaces, the extent to which it can be transmitted by touch, how far social distancing should be and the general efficacy of control measures to reduce the risk.

These uncertainties will impact on the determination of the risk of transmission of the disease and what effective control measures are.

Social-distancing—some issues about proof

Let us take as an example of a control measure social distancing in an office-based scenario. If an employer was not maintaining social distancing of two metres (but could have done so reasonably practicably), but was maintaining one metre or one and a half metre, what would the position be in terms of potential breach of [HSWA 1974? Section 2\(1\)](#) of HSWA 1974 requires every employer to ensure the health safety and welfare of its employees at work as far as is reasonably practicable. The government [guidance](#) on working safely in offices makes clear that the objective is to 'maintain 2m social distancing wherever possible'.

Translating this into a measure to protect against transmission of the virus it could be said that a failure to institute reasonably practicable and possible measures to ensure a two-metre distance was a failure to protect the health and welfare of the employer's employees. But is it a failure? This will depend on the materiality of the risk of transmission of the virus at below two metres. Arguably, on this the evidence is not so clear, and nor is government advice.

PHE's (endorsed by Scotland, Northern Ireland and Wales) most recent iteration of its [guidance](#) on infection prevention and control is contradictory in its assessment of the evidence of the area of infection risk from respiratory (droplet) transmission that surrounds an infected person (leaving aside aerosols generated during certain medical procedures). It states:

'The maximum distance for cross contamination from droplets has not been definitely determined, although a distance of approximately **two metres (six feet)** around the infected individual has frequently been reported in the medical literature as the area of risk.'

Under the section headed 'Reducing the risk of transmission of coronavirus in the hospital setting' it states:

'The maximum distance for cross contamination from droplets has not been definitely determined, although a distance of approximately **one metre (three feet)** around the infected individual has been frequently reported in the medical literature as the area of risk. However, a precautionary

approach is recommended and **two metres (approximately six feet) has been defined as the area of risk**. Thus distancing of two metres should be facilitated wherever this is possible.'

It seems clear that the first reference has not been updated from an earlier version, and while there is no definitive determination of the area of risk, the agreed medical literature upon which evidence of risk would normally be based supports a reduction in infective area from two metres to one metre. The World Health Organisation (WHO) [guidance](#) for the public on social distance is to maintain at least one metre distance between each other. Does this mean that the preponderance of medical evidence and opinion (as evidenced by the WHO and government acknowledgment of the medical literature) is that the area of risk is one metre? Does this mean that by staying at least one metre away the risk of transmission is objectively controlled to an acceptable level? Certainly all those countries following WHO advice would advocate that it is, otherwise they would be subjecting their populations to an unacceptable level of harm. Could it be said that there is insufficient evidence to show that any risk of transmission over one metre is material or, put another way, is more than merely hypothetical?

To determine the actual risk, as identified in the [EMM](#), the first question is what is the likelihood of exposure to the virus? In other words what is the potential for harm. This must be informed by an assessment of how the virus is transmitted. At under one metre from an infected person it appears that there is agreement at an international level, backed up by the available medical literature that there is a material risk of exposure to the virus via transmission of droplets. Arguably, the same cannot be said of between one metre and under two metres. The only statements supporting a two-metre distance comes from the precautionary declaration that due to uncertainty, and despite evidence to the contrary, PHE declares the risk area is two metres.

Could an inspector reasonably form the view that the benchmark is represented by two meters when, there is an absence of evidence to support droplet transmission over one metre and positive evidence from the medical literature that one metre is the infective area. Two metres is, arguably, simply a precaution, with no evidence to prove there is a material as opposed to hypothetical risk of transmission over one metre and under two metres. According to media reports, Professor Robert Dingwall a member of New and Emerging Respiratory Threats Advisory Group is quoted as having referred to the rule as based on 'very fragile' evidence. Put another way if the risk of droplet transmission was controlled to one metre, could it be said that any material risk remained given WHO guidance and absent a legal requirement to maintain two metres distance?

The issue of risk was considered in *Balfour Beatty Infrastructure Services Ltd and another v Health and Safety Executive* [\[2014\] EWCA Crim 2684](#), [\[2015\] All ER \(D\) 45 \(Jan\)](#). The Court of Appeal held that: 'risk must be a real or material risk; put otherwise, it must not be trivial, fanciful or hypothetical'.

Caution is a laudable aim in the control of an unknown, but the mantra of the two-metre 'rule' means the potential for enforcement action against those that do not obey it is real—especially given its' prominence in the return to work sector guidance. Even if this does not give rise to prosecution in the first instance it may result in a prohibition or improvement notice which could have significant financial implications for businesses struggling to comply.

Given the comments of the HSE CEO, Sarah Albon, at the Downing street Press Conference on 4 May 2020 about enforcement notices, and the [HSE's general statement](#) about use of enforcement notices, it may be that employers will appeal enforcement notices issued in relation to social distancing where controls are in place to one metre distance but not two.

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