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Protection from covid-19 at work: health and safety law is fit for purpose

Shortcomings in protection from contracting covid at work arise from legislation being ignored, argue these authors

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The 2020 Coronavirus Act and ensuing secondary legislation, as well as official government coronavirus guidance, have provided some limited protection from covid-19 for workers such as by temporarily implementing work from home orders.[1] By contrast, the health of employees and others in workplaces remains potentially well protected by laws dating back at least as far as the 1974 Health and Safety etc at Work Act.[2-4] This mandates that employers have duties to ensure both the health of their employees and of others affected by the conduct of their undertakings, such as patients, students, and site visitors.

Regrettably, government departments, notably the Department of Health and Social Care and the Department for Education, fell short in emphasising the obligations of employers to protect their employees health during the covid-19 pandemic. The Omicron variant has increased transmissibility and likely partial vaccine resistance, and therefore especially warrants appropriate safeguards for employees, particularly front line healthcare and social care workers who will be extremely vulnerable to exposure in the impending outbreak.[5]

The most recent guidance on infection prevention and control (IPC), published by the UK Health Security Agency, goes further than earlier iterations in advising compliance with health and safety legislation in protecting healthcare workers.[6] However, it is still flawed, for instance, in recommending less respiratory protection for healthcare workers routinely exposed to patients infected with covid-19, which it considers both droplet transmissible and airborne, than for tuberculosis which it deems solely airborne.

The law imposes the duty on all employers to undertake a "suitable and sufficient risk assessment" proportionate to the risk arising from exposure at work and appropriate to the nature of the work, and this obligation overrides IPC guidance.[7 8] Evidence has grown overwhelmingly regarding the airborne viral exposure of healthcare workers and the corresponding effectiveness of appropriate respiratory protective equipment in controlling this risk.[9 10] This has been accompanied by an increasing number of NHS Trusts which have recognised this need as well as the practical feasibility of deploying respirators as respiratory protective equipment to protect healthcare workers in the routine care of patients with covid-19 or at significant risk of carrying it.[11] Thus the law courts would be justified in taking the view that these pacesetting NHS Trusts have satisfied the "reasonably practicable" legal test and would "ensure the health at work of all employees"[4 11] This would contrast with the weaker UKHSA guidance.[6] The Health and Safety Executive (HSE) has been relatively silent with regards to the protection of frontline healthcare workers from covid-19 and, without any evidence, had simply endorsed Public Health England's guidance as "effective control measures."[12] Therefore these pacesetting NHS Trusts, and not UKHSA nor HSE, have effectively been setting the legal standard for protection mandated by the paramount primary legislation.[4] Hence this protection (e.g. respiratory protective equipment such as FFP3 respirators to protect healthcare workers in the routine care of patients potentially with covid-19) would be what all NHS Trusts ought to provide, in order to comply with their legal obligations.

In addition to the legal obligations to assess and mitigate risks to all employees who are vulnerable to ill health by virtue of collective classes of exposure, the law imposes obligations to safeguard individuals. Thus, risk assessments should also address the protection of groups of individuals who are susceptible to a higher risk to health because of factors such as gender, age, comorbidity, and ethnicity.[13] The Equality Act imposes obligations on employers to take into account individual disabilities: for instance, a reasonable adjustment might entail a "clinically extremely vulnerable individual" continuing to work from home.[14] Such legal obligations antedate and will persist independently of any coronavirus regulations.[1]

Concerns about the application, and enforcement, of the law are as relevant now as at the start of the pandemic. In spite of the advantages afforded by vaccination, breakthrough significant infections have been recognised, and this risk is likely to worsen with new variants such as Omicron.[5 15 16] Many workers and employers, from healthcare to education, remain rightly concerned in spite of Government regulations and guidance. If coronavirus regulations do not explicitly mandate certain precautions, these measures (for example wearing masks in classrooms or catering establishments) can and must be enforced locally if they arise from an appropriate risk assessment conducted in consultation with employees as required by law.[17 18]

The Management of Health and Safety at Work Regulations impose a duty on employers to give comprehensible and relevant information to employees of risks to their health and safety identified

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by the risk assessment and preventive and protective measures.[3] In the case of public bodies, such as NHS hospitals and most schools, the public has a right to see such risk assessments by virtue of the Freedom of Information Act.[19]

Most of the serious shortcomings in protection of workers and others from contracting covid at work arise from the authorities and many employers ignoring legislation and precautionary principles as well as inadequate enforcement, rather than from the existing law being unfit for purpose.

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