

# Returning to the office






## Key questions and answers for UK employers

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20 May 2021







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Issue	Recommendation
 <p>Can an employer force its employees to return to the office?</p>	<p>Despite the easing of the lockdown in the UK, the government guidance is to still work from home where possible. However, the potential further easing of restrictions on 21 June 2021 will mean that employers will have the option to consider whether it may be appropriate to ask their employees to come back to the office. Employers will need to act with caution and treat each employee on a case-by-case basis. Although the contract of employment will almost certainly require the employee to work at the company's offices, the impact of COVID-19 should not be disregarded. If an employee is reluctant to return to the office, they should be consulted first so that steps can be taken to allay their fears and other options can be explored. If an employee has a disability, there will be an additional requirement for the employer to consider the need for reasonable adjustments. Ultimately, if all options are explored, it may be possible (in some circumstances) for employers to require an employee to return to the office.</p>
 <p>What are the potential pitfalls with hybrid working and increased working from home arrangements?</p>	<p>Our recent survey has shown that 76% of employers will move towards a hybrid working arrangement after the further easing of lockdown restrictions (currently scheduled for 21 June 2021 under the UK Government's roadmap). Employers should be mindful that hybrid working arrangements could (in some circumstances) lead to a risk of indirect discrimination claims (race, age, gender etc.). Employers will need to carry out risk assessments to establish (i) the impact of hybrid working models and (ii) any particular groups of employees who are most at risk of being disadvantaged by a hybrid policy. For example, statistics show that people from ethnic minority communities are more likely than the wider population to live in rental accommodation. The same applies with younger employees. For some this means sharing small spaces without adequate home working set-ups. Employers will need to be aware that unless everyone has equal access to the same spaces, equipment and opportunities, a working from home arrangement could lead to less favourable treatment and indirect discrimination claims, placing a need on the employers to justify the business need of the arrangements. These possible pitfalls underline the importance of consulting with employees in order to identify concerns, and accepting that there is no one-size-fits-all.</p>
 <p>Will employers need to update their employment documentation and/or policies?</p>	<p>In our recent survey we have found that, where possible, most employers will opt for a blended working regime where they will allow an average of 2-3 days working remotely after the easing of the lockdown restrictions. Employers may consider tailoring standard employment contracts to cover some of the more practical considerations for homeworking arrangements, such as updating wording relating to: the normal place of work, hours of work, salary and benefits (i.e. making sure that homeworkers are not treated less favourably than office workers), expenses, confidentiality provisions, data protection and monitoring and trial period wording). However, employers should view contractual changes with caution; no one currently knows with certainty what the long term office labour market will look like and so employers should instead consider having a hybrid working policy that is subject to regular review rather than changing contracts at this stage. It is also advisable for employers to retain a residual contractual power to require someone to attend the office, even if that power is used sparingly and only after considering individual circumstances and the discrimination risk.</p>
 <p>Can an unvaccinated employee be prevented from attending the company's offices?</p>	<p>Such an approach would be inconsistent in June 2021 with a policy of encouraging people to return to the office for at least some of the time. This is because by 21 June 2021 there will still be a substantial percentage of the working population that will not have had the opportunity to be vaccinated. In addition, even if it is introduced at a later date, it creates legal risks for employers, in particular, the risk of discrimination claims based on disability, age or religious and philosophical belief. Accordingly, careful consideration will need to be given as to whether it is appropriate to stop those who have not been vaccinated from entering the workplace and employers should consider other alternatives. Employers should take appropriate measures with regards to vaccinations, such as allowing paid leave in order to have the vaccine. ACAS guidance advises that employers should support staff in getting the vaccine, but cannot force them to be vaccinated. The Equality and Human Rights Commission has said that a policy of compulsory vaccines is unlikely to be lawful.</p>
 <p>What are the alternatives for employers where employee vaccination cannot be achieved?</p>	<p>Employers have an implied duty to take reasonable care of the health and safety of their employees and to take reasonable steps to provide a safe workplace. Accordingly, establishing a COVID-secure workplace is vital for employers.</p>

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 <p>What if an employee refuses to return to the office until they are vaccinated? Could there be other reasons?</p>	<p>There may be several reasons that employees give for not returning and not being vaccinated is just one of them. It could be that some employees are happy to be in the office but are concerned about public transport, or they are worried about their own health conditions or those of people close to them. Over the next couple of months, it is likely that public sympathy will lie with people being cautious or worried. Therefore, even after 21 June 2021, employers should be very hesitant about requiring an employee to return to the office when they are working productively at home and there is no real and important need to be in the office. However, public sympathy may change over time if risk continues to diminish.</p>
 <p>Can an employer discipline or dismiss an employee who refuses to be vaccinated?</p>	<p>Although ACAS guidance suggests that a refusal to be vaccinated could, in some situations, result in a disciplinary procedure, this would depend on whether vaccination was necessary for an employee to do their job – for example a care home worker. It is unlikely to be relevant to office workers.</p>
 <p>Can an employer enforce a COVID-19 testing regime?</p>	<p>Whilst testing does not carry a risk to an employee in the way in which a vaccine may, there are still difficulties for employers requiring testing. Workplace testing in itself is difficult to put in place. There has been a movement towards home testing, largely influenced by its introduction by schools when they re-opened. Employers should consider encouraging employees to undertake home testing and to avoid attending the office if they test positive. However, requiring employees to produce evidence of negative test results has data protection implications and is unlikely to be justified. The emphasis should be on implementing the social distancing and related measures of ensuring a COVID-secure workplace.</p>
 <p>Can an employer request vaccination or testing information from its employees?</p>	<p>In order to contain and control COVID-19 within the workplace, many employers will be keen to record who has and has not received the vaccination as well as records of any COVID-19 testing. From a GDPR perspective, this creates its own challenges as the mere fact that someone has or has not received a vaccine or any test results will constitute “special category data” concerning health. Employers will need to have a legitimate interest for processing vaccination or testing data. The Information Commissioner’s Office has said that employers should have a “clear and compelling” reason for processing vaccination status data and the same would apply to test data. This may be satisfied on the basis that employers are seeking to protect the wellbeing of their workforce and customers. However, employers would still have to show that the retention of such data was necessary as part of the steps it was taking in order to achieve this safe environment. In other words, why retain vaccine data if it is not essential to have had the vaccine in order to attend the office? As explained above, it is unlikely to be justified. In circumstances where it might be justified, employers would also need to ensure that the data was held securely and not held for any longer than is reasonably necessary. Employee Privacy Policies would need to be reviewed and updated accordingly.</p>
 <p>Will employers be able to remove COVID secure measures from 21 June 2021?</p>	<p>Currently, this seems unlikely. Although widespread vaccination and other measures of control may eventually reduce the measures required to make a workplace COVID-secure, it remains to be seen if and when the types of measures employers have introduced since the start of the pandemic can be reduced or removed altogether. Given recent comments from the government, the COVID-secure workplace is likely to remain in place for some time.</p>
 <p>What does the future look like?</p>	<p>Given the constantly changing landscape, employers have to continue to remain flexible. Government guidelines and legal requirements will continue to change. The danger caused by COVID-19 will also change (hopefully continuing to diminish). This will mean that the steps needed for a COVID-secure workplace will also change, along with people’s fears and the individual threat to them. A successful return to the office is likely to be gradual and at a slower rate for some individuals than others, with some employees being very keen to return full time as soon as possible but others being concerned for many months. Policies need to be adaptable to change. We expect to see a hybrid working environment operating from 21 June 2021 but with the ratio of working from home to working in the office changing as, over time, confidence in being in the office grows. We would not expect an equilibrium to be reached for many months. A return to the working patterns that existed pre-March 2020 is unlikely. Hybrid working is here to stay.</p>

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This document provides a general summary only and is not intended to be comprehensive nor to provide bespoke legal advice. Given the fast moving nature of the coronavirus outbreak and that fact that many countries are introducing new legislation and measures to address it, employers will need to adopt a dynamic approach. Specific legal advice should always be sought in relation to the particular facts of a given situation.