

Responding to COVID 19 - what does your organisation need to do to stay on the right side of the criminal law?

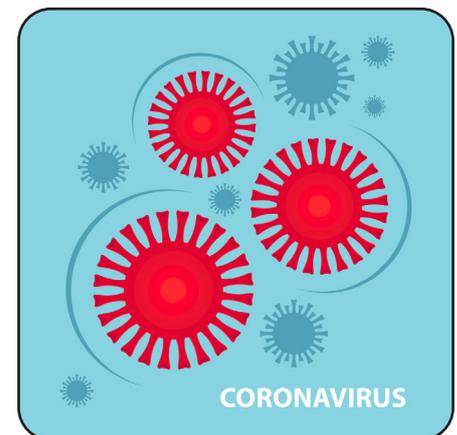
By: Dr Simon Joyston-Bechal, Turnstone Law, 3 March 2020

Your organisation is now making preparations for the coming COVID 19 pandemic and you are deluged with specific concerns, information and action plans that need to be developed. Amongst the many questions being asked by the Board, should be a cut through question: "what are our health and safety criminal law obligations in dealing with the Coronavirus, what do we have to do and how can we protect ourselves from blame if we get it wrong?"

Background

There are going to be difficult decisions to make about handling COVID 19. Some will be fairly generic to all organisations in your sector, but others will apply specifically to you, depending upon your workforce demographics, geography, working practices and even your organisation's social utility or necessity. For generic decisions, you can follow publicly available guidance.

However, you will most likely need to develop and personalise the plans for your organisation and your people. Who should be required to come in to work? What commuting is needed? What about travelling for the work itself, whether that is long distance or local? What about measures to take within the workplace? What if our workplace or operations involve people being gathered together in close proximity (e.g. retailing, transportation or events)? To make these decisions, it is essential to bear in mind the criminal law framework of health and safety obligations.



What are the health and safety criminal law obligations?

Don't lose track of the basic Health and Safety at Work Act 1974 duty to do everything that is "reasonably practicable" to safeguard your employees and those affected by your operations. Your senior executives should be aware that they face potential personal criminal liability if the organisation commits an offence due to their act or default; each senior executive has a duty to be as proactive on this as someone in their position ought reasonably to be.

There are also specific duties under the Management of Health and Safety at Work Regulations 1999 to conduct suitable and sufficient risk assessments covering risks to employees who are at work and also risks to non-employees arising from your operations; and to make and give effect to appropriate arrangements for planning, organisation, control, monitoring and review. These arrangements need to be recorded in writing for employers with five or more staff.

We can also expect there to be specific fresh health and safety related diktats promulgated by the Government as civil contingency emergency measures.

What do you have to do?

The principles of risk assessment should guide you through each difficult decision and remind you to evaluate and balance the risks against appropriate control measures. The mantra to guide you through difficult decisions should be "would it have been reasonably practicable to have done more"; if the answer is "yes", then you are potentially exposed to criminal prosecution.

Remember to personalise, so far as reasonably practicable, your procedures to your specific workers and those affected by your operations. Exposing a twenty year old employee to potential infection will not be the same risk as for someone whose age or underlying health condition makes them more vulnerable.

Follow all relevant guidance and risk assess carefully any derogations from it.

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How can you protect yourselves from blame if you get it wrong?

Some decisions will be very difficult over the coming weeks and months, with potential life and death consequences if you get them wrong. You will be balancing these also against the disruption to business and commercial consequences of taking an approach that is too cautious.

Bear in mind the general principle in health and safety law, that if you can't do an operation safely, you should not do it at all. However, as a pandemic develops, this general principle will be tested probably to destruction in many cases. If your business operations have wider health and safety critical implications, you may have to balance the safety of your staff against public safety (for example, if your operation is necessary for the supply of utilities, food, medicines, healthcare and communications). To take an extreme example, imagine a health and safety risk assessment before sending your workers in to Chernobyl to fight the fire?

What if you get it wrong and hindsight is used to accuse you or your organisation of exposing people to unnecessary risks? In these cases, it will be invaluable to be able to point to a written risk assessment or similar document, showing that you have grappled with the issues and sought to balance them, taking into account factors on both sides before reaching a difficult decision that you will keep under review. Quite rightly, it will be harder to blame you in criminal law if you have conducted a balancing exercise and sought to achieve what is reasonably practicable, even if hindsight suggests otherwise.

Specialist health and safety legal advice can help you through the exercise, with the added bonus that in appropriate cases your draft plans, risk assessments and documents can be protected from ever needing to be disclosed by invoking the principle of legal privilege.

Conclusion

The message is clear. Develop your plans, taking into account the demographics and vulnerabilities of your staff and those impacted by your operations. Monitor and review to take into account the changing nature of the contagion and your control measures. And I would recommend taking specialist health and safety legal advice to help you with the most difficult conundrums and documentation – hopefully to help you make the right decision but also to seek to protect you and your directors from blame if you get it wrong.

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