

COVID-19: Safe working on construction sites

by Philip Barnes

Legislation

1. The impact of COVID 19 is changing daily and last week in England at least 1 Employers have a duty of care to protect the health, safety and welfare of their employees and other people who might be affected by their business (**Health and Safety at Work Act 1974 ("HSWA")**). Employers must do whatever is reasonably practicable to achieve this. This obligation applies to employees of contractors, sub-contractors and others who would normally be expected on a typical building site.
2. Employers have a common law duty to take reasonable care for the health and safety of their workforce. They are bound by the express and implied terms of contracts of employment and other contracts for the personal performance of work or services, including the implied duty of trust and confidence. They are under a duty under the Equality Act 2010 (EqA) not to discriminate against employees/ workers with protected characteristics and they have a duty under the EqA on employers to make reasonable adjustments for the disabled.
3. This is a public health emergency (and in Italy and Spain alone on 27 March 2020 a person is dying of Covid-19 every 48 seconds with over 1,790 dead in one day). The UK is said to be two weeks 'behind' Italy.
4. In these circumstances, what obligations does an employer have to its workers?
5. **HSWA** Section 2 and 3 state: -

2 General duties of employers to their employees.

(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

3 General duties of employers and self-employed to persons other than their employees.

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

6. Present specific legislation regarding safe working on building sites in particular is covered (amongst other legislation) by the **Construction (Design and Management) Regulations 2015 (SI 2015/51) ("CDM 2015")**.
7. In addition, and of possible use where a construction site is working in an unsafe way, the **Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013** may apply.

8. The present Covid-19 crisis does not alter the obligations and responsibilities imposed by legislation on employers and others regarding Safe Places of Work (of which there are many possible statutes and subordinate legislation). But World Health Organisation (WHO) guidance (27 February 2020, Version 1.4) must be read together with UK government guidance which follows it. The UK government and WHO have recommended a number of ways to prevent the spread of infections in the workplace.
9. The Government has recently released further guidance on safe working in the Covid-19 crisis ("**Site Operating Procedures – Protecting Your Workforce**") and this can be found at:- <https://builduk.org/wp-content/uploads/2020/03/Site-Operating-Procedures-23-March-2020.pdf>. (the "Guidance"). This document provides useful guidance against which "safe working" practices may now be measured, and importantly whether practices on building sites are "unsafe". The document clearly states: -

"These are exceptional circumstances and the industry must comply with the latest Government advice on Coronavirus at all times."

10. The "advice" from the Government is therefore mandatory, as it clearly states that the industry "**must**" comply at all times. Whether a contractor (at any level) might be entitled to additional time or money for complying with the Guidance is beyond the bounds of this note.
11. The document goes on to state: -

The health and safety requirements of any construction activity must also not be compromised at this time. If an activity cannot be undertaken safely due to a lack of suitably qualified personnel being available or social distancing being implemented, it should not take place. (emphasis added).

12. There is therefore no leeway regarding "social distancing". If an activity cannot be carried out safely due to social distancing then that activity should not take place.
13. 13 CDM 2015 Regulation 4 relates to client duties in relation to managing projects. It states: -

"Client duties in relation to managing projects

4. (1) A client must make suitable arrangements for managing a project, including the allocation of sufficient time and other resources.

(2) Arrangements are suitable if they ensure that—

(a) the construction work can be carried out, so far as is reasonably practicable, without risks to the health or safety of any person affected by the project; and "..."

14. Regulation 8 sets out general duties of various people including: -

"8(5) a person working on the project under the control of another must report to that person anything they are aware of in relation to the project which is likely to endanger their own health or safety or that of others."

15. By this Regulation, if you or any of your operatives see any activity which is regarded as likely to endanger their own health and safety, or the health and safety of others (including breaching the “two metre distance” safe working requirement of the Government), then they are obliged to report that to the controlling person (on a building site the Principal Contractor). Evidence by way of photographs will clearly assist (although you may need to check site regulations and your contract to ensure photographs are not banned). A file note made on the day the report is made may well assist in the future.
16. The Principal Contractor must comply with Regulations 12 - 14, and all contractors (which includes all levels of sub-contractor) must comply with Regulation 15.
17. Regulation 12 covers the construction phase plan and health and safety files.
18. Under Regulation 12 the Principal Designer for a project must keep their health and safety file up to date if the project progresses. The Principal Designer therefore has an obligation to update the health and safety file in the light of the latest information, including the Covid-19 outbreak.
19. If there is no “Principal Designer” or if the Principal Designer’s appointment has concluded (as may be the case with design in construction projects), then the draft health and safety file needs to be passed to the Principal Contractor who is obliged to keep it up to date.
20. Regulation 12(4) states: -

“Throughout the project the principal contractor must ensure that the construction phase plan is appropriately reviewed, updated and revised from time to time so that it continues to be sufficient to ensure that construction work is carried out, so far as is reasonably practicable, without risks to health and safety.

The Principal Contractor must “plan, manage and monitor the construction phase and co-ordinate matters relating to health and safety during the construction phase to ensure that, so far as is reasonable practicable, construction work is carried out without risk to health and safety” (Regulation 13(1)).

21. Regulation 14 of the CMD 2015 imposes specific separate duties on the Principal Contractor: -

Principal contractor’s duties to consult and engage with workers

14. *The principal contractor must—*
 - (a) *make and maintain arrangements which will enable the principal contractor and workers engaged in construction work to cooperate effectively in developing, promoting and checking the effectiveness of measures to ensure the health, safety and welfare of the workers;”*
 - (c) *ensure that those workers or their representatives can inspect and take copies of any information which the principal contractor has, or which these Regulations require to be provided to the principal contractor, which relate to the health, safety or welfare of workers at the site, except any information—*

(i) the disclosure of which would be against the interests of national security;

(ii) which the principal contractor could not disclose without contravening a prohibition imposed by or under an enactment;

(iii) relating specifically to an individual, unless that individual has consented to its being disclosed;

(iv) the disclosure of which would, for reasons other than its effect on health, safety or welfare at work, cause substantial injury to the principal contractor's undertaking or, where the information was supplied to the principal contractor by another person, to the undertaking of that other person;

(v) obtained by the principal contractor for the purpose of bringing, prosecuting or defending any legal proceedings.

22. Any request of the Principal Contractor to provide details of the provisions which it has in place for dealing with Covid-19 would not seem to fall within any of these exceptions and the Main Contractor should provide you the information if he is asked.
23. Accordingly, in the light of Regulation 14(c) Subcontractors and workers on a building site can ask to have copies of materials held by the principal contractor relating to health and safety for that site. The Contractor can refuse these requests if the requests relating to an individual, or it would cause substantial injury to the Principal Contractor or the documents being obtained for bringing prosecuting or defending legal proceedings.
24. Regulation 15 imposes on all contractors, at all levels of main and sub-contracting, a duty to ensure work is carried out "as far as reasonably practicable" without risks to health and safety:

"Duties of contractors

15 (2) A contractor must plan, manage and monitor construction work carried out either by the contractor or by workers under the contractor's control, to ensure that, so far as is reasonably practicable, it is carried out without risks to health and safety."

Brief Summary of Obligations of Various Parties

25. A **Client** must make arrangements that so far as is reasonably practicable, the construction project is able to be carried out without risks to the health or safety of any person affected by the project.
26. A Main **Contractor** (likely to be the "Principal Contractor" under CDM) must: -
1. ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees;
 2. ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety (this would include his sub-contractors);

3. review, update and revise from time to time the construction phase plan so that it ensures that construction work is carried out, so far as is reasonably practicable, without risks to health and safety;
 4. plan, manage and monitor the construction work to ensure that, so far as is reasonably practicable, it is carried out without risk to health and safety;
27. All levels of **Sub-Contractor** must: -
1. ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees;
 2. ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety (this would include his own sub-sub-contractors);
 3. plan, manage and monitor the construction work to ensure that, so far as is reasonably practicable, it is carried out without risks to health and safety.
28. Accordingly, you owe a legal obligation not only to your own employees but also to others to ensure that as far as practicable they are not placed at risk to their health or safety. That obligation must include complying with Government Guidance regarding Covid-19 and "social distancing".

Application to Particular Situations

29. There may be concern about the health and safety of site operatives and whether it is safe for them to work on certain building sites. Is it possible to refuse to work on certain building sites which may be regarded as an unsafe in the light of the advice regarding Covid-19 given by the Government?
30. For obvious reasons, there is no body of "case law" on this issue. What is and what is not "safe" in the context of the Government advice will be dependent on individual facts in each case. Simply because providing a "safe working environment" would be inconvenient, or more costly, or delay work on a project is most unlikely to pass any objective test of "not reasonably practicable".
31. The new, and stringent, test of whether the activity can be undertaken safely with social distancing being implemented must also be passed before work can be carried out. The Guidance is clear. If the work cannot safely be done within these guidelines, then the work should not take place.
32. This may require a highly detailed analysis of how work might take place. Not only must all the other listed criteria regarding PPE/ handwashing/ toilet/ welfare/ canteen etc facilities be met in the light of the Guidance, but the question of how a particular worker can access and exit each of his particular work locations safely and work, while all the time maintaining "social distance", must be addressed.
33. All levels of contractor (and sub-contractors) need to do this to ensure that they are complying with legislation. If there are differences in view about whether something can be done safely within the guidelines or not, then details need to be kept, and evidence held for future justification, if ever needed. Although, as stated, there is no definitive view from the Courts at present, it seems extremely unlikely that any Court would conclude that a sub-contractor had been unreasonable, and in breach of contract, if he was able to justify his decision not to attend site until such time as a main contractor could comply with the requirements to provide a safe working environment.