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Industry Insights

Implications for insurers in the COVID-19 ‘New’ Working Environment

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As we have seen the workplace transform in accordance with the COVID-19 pandemic, employers and insurers are now paying attention to the scope for potential claims that may arise out of the ‘new’ working environment which is currently evolving.

As hybrid working models are being implemented, implications for employers and employees – and their insurers - are beginning to surface.

To mitigate the possible claims that may arise, employers must understand how to strike a sustainable balance between the benefits and drawbacks of office and homeworking for employees, as well as ensuring optimal operating work models can be maintained.

Potential COVID-19 related Employment Practices Liability (EPL) claims and issues arising as a result of ‘new’ working environments

Returning to the office

Employees may be reluctant to return to the workplace for a variety of reasons. For some employees, their reluctance and anxiety around returning to the office may relate to Covid risks. Employers should take particular care in relation to workers who are clinically extremely vulnerable, taking into account the duty to make reasonable adjustments. Alternatively, employees may be reluctant to return to the workplace as homeworking suits their lifestyle or works better with their childcare commitments.

Employers should be mindful of employee engagement and wellbeing when implementing a return to the workplace, and should seek to tread

a fine line between meeting the needs of the business and ensuring employees remain engaged and feel supported.

While employers may have the right to require employees return to the workplace, they should consider this in light of the employee's individual circumstances. If employers act unreasonably in requiring employees to return to the workplace, there may be a risk of discrimination claims (on the grounds of sex, disability etc) or of constructive dismissal claims.

Vaccinations

The UK government has made vaccination compulsory for workers in English care homes. From 1 April 2022, this will also include frontline health and social care workers. This is enshrined in legislation so that employers in these sectors can rely on a legislative basis for dismissing employees who refuse to have the vaccine. However, in all other sectors, the government currently only advises encouraging employees to take up the vaccine and notes that vaccinations are not suitable for everyone.

There are a number of legal risks for employers that implement a mandatory vaccination policy, which could result in claims being brought, and EPL cases ensuing. The type of claim which could arise from unvaccinated employees if dismissed could include unfair dismissal, if they have at least two years’ service, and discrimination.

Unfair Dismissal

For a dismissal to be lawful, it needs to be for one of five "fair" reasons, such as capability, conduct or 'some other substantial reason'.

Capability dismissals involving an individual's health are normally due to a physical or mental condition that prevents them from being able to work. As for conduct, if an employee fails to follow their employer’s reasonable instructions, this could be treated as misconduct and therefore fair grounds for dismissal. However, unless the nature of the employee’s work is such that they are in frequent close contact with vulnerable individuals, a tribunal is very unlikely to consider that a requirement to be vaccinated is 'reasonable'.

The 'some other substantial reason' ground for a fair dismissal also requires a 'reasonableness' test which, for the same reasons, is unlikely to be met.

Discrimination

If the reason employees are not vaccinated is due to religious or philosophical belief or an underlying medical condition, and the employer does not make exception for their medical reasons or beliefs, and disciplines or dismisses them (or reduces their hours) because they are not vaccinated, this could lead to discrimination claims from employees with protected characteristics.

How employers can prepare for the new hybrid working world

It is important that employers take active steps to mitigate the risk of potential EPL claims that may be pursued in light of the ‘new’ working environment, such as returning to the office and vaccinations.

Employers should be mindful to approach the new hybrid working

model in a careful and consistent way, and involve employees in the decision-making process to ensure their interests are protected.

Now read the insurance return to work viewpoint here

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