

# COVID-19 and employee rights: securing the right to safe working conditions



***Joe Atkinson** considers some of the legal questions surrounding employers who require their staff to go into work during the pandemic, a situation that disproportionately affects people in lower-paid jobs and those working in 'essential' sectors, including the NHS.*

The tendency for employers to misuse their power is a familiar problem for employment lawyers. But it is an important one, which is highlighted and exacerbated by the current crisis. Many employers are responding to COVID-19 by pursuing two strategies: first, keeping businesses open and running as far as possible; and second, cutting costs by any means available. Although these actions are not illegitimate in themselves, both come with heightened risks of employers misusing their power to shift the costs and burdens of the pandemic onto workers.

Employers understandably want to keep their business open and operating as close to normal as possible. Indeed, it is important for the country's economic prospects that they do so. Although some businesses are [required](#) to close, the government guidance states '[we are not asking any other businesses to close](#)'. Despite introducing a general lockdown, the relevant [Regulations](#) expressly permit people to leave their homes to work where it is not 'reasonably possible' to work at home, and the ban on gatherings of two or more people does not apply where these are 'essential for work purposes'. In addition, the Secretary of State for Health and Social Care has said that people who cannot work from home should continue going into work '[to keep the country running](#)'.

But what are the legal implications of employers requiring people to continue to come into work? The following analysis focusses on the legal position of individuals, rather than employers' statutory health and safety obligations (discussed [here](#) and [here](#)).

## Individual rights

A failure to turn up and perform one's job would normally, sickness and employer authorisation aside, amount to a breach of contract, and likely lead to disciplinary action or dismissal without notice. The current crisis alters this basic position in several ways.

First, employers who require employees to come into work may themselves be breaching the implied duty of trust and confidence owed to employees, or their duties of care in contract and tort. In either case, employees can resign and pursue a claim for constructive dismissal – either common law wrongful dismissal or statutory unfair dismissal. Yet this is unlikely to be an attractive option for most, not only because the English law of dismissal is not favourable to employees, but also because of the difficulty they will face in finding new work during the crisis. Alternately, if employees comply with the instruction to go into work and catch COVID-19 as a result, they can sue for the loss and injury caused by their employers' breach. But the stumbling block here will almost inevitably be establishing the necessary causative link between the employers' breach and the employee catching the virus.

Employees may have the right to resist employers' attempts to make them come into work without needing to quit. Under the Employment Rights Act 1996 (ERA), employees have a right not to be subject to detriments ([s.44\(1\)\(d\)](#)) or dismissals ([s.100\(1\)\(d\)](#)) for leaving or refusing to return to work where they 'reasonably believe' there is a 'serious and imminent' danger which they could not reasonably have been expected to avert.

Following this, if an employee reasonably believes that going into work puts them in serious and imminent danger due to COVID-19 (including on their commute) they can stay at home while continuing to be entitled to full pay. Detriments imposed by employers in response to this, including any disciplinary action or pay deductions, will be unlawful under [ERA s.44](#) (pay deductions will also be "[unauthorised deductions](#)"). Dismissals where the refusal is the reason, or principal reason, for the dismissal will be automatically unfair under [ERA s.100](#). Both these protections apply from day one of employment.

Individual employees clearly cannot reasonably be expected to avert the danger posed by COVID-19. The crucial questions are, therefore: does an employee believe that COVID-19 poses a serious and imminent danger to them, and is this a reasonable belief for them to hold? Although the answers will turn on the circumstances of each case, it is likely that in the current crisis many employees will reasonably hold such a belief, and so have the right to stay at home without detriment or dismissal.

It might be argued, as [some employers apparently believe](#), that the risks for most people are not serious, so it is not reasonable to believe the virus poses a serious and imminent danger. This seems untenable considering the facts, with [people of all age groups](#) having been hospitalised so far, and with the virus involving a non-negligible risk of death for those with certain health conditions. It is also difficult to see how, given the current pandemic, the virus does not constitute an 'imminent' danger. An Employment Tribunal might be convinced that in workplaces where protective equipment is provided and social distancing rules are strictly adhered to, the risk of infection is sufficiently reduced to bar a reasonable belief in imminent danger. But many employees are being required to work [in conditions](#) which [fall short of this](#).

Many employees who genuinely believe they are in danger if they go into work will therefore have the right to stay at home, free from reprisals by their employers. This is certainly likely to be the case for vulnerable groups of employees, or where the employer has not provided appropriate protective equipment or failed to introduce and enforce social distancing rules. This conclusion is also backed up by the introductory text of the recent Coronavirus Regulations, which describe the virus as a 'serious and imminent threat to public health' (although something can admittedly be a serious threat to public health without posing a serious threat to every individual employee).

## Conclusions

This article is not calling for employees to down tools and refuse to work during the crisis. Those people continuing to provide key services, or working in shops and supply chains, should be lauded for their important contributions. But the crisis should also not deprive them of their basic right to safe working conditions.

The above analysis applies equally to essential services. So, if paramedics or other NHS employees reasonably believe they are in serious and imminent danger, perhaps because [they lack adequate protective equipment](#), they have the right to refuse to attend work (although they may then face action from regulatory bodies such as the General Medical Council or Royal College of Nursing). Again, this is not a call for them to do so. It is no exaggeration to say that those working in the NHS during this crisis are genuine heroes; I am proud to have friends and family among them. But they should be provided with everything needed to safely perform these vital roles, not face a choice between public service and personal safety.

The importance of securing the right to safe working conditions highlights a significant failing of the protection provided by the ERA sections discussed. Namely, that it extends only to 'employees' rather than the [wider category of 'worker'](#), which encompasses all those contracted to perform work personally, including in the 'gig-economy'. The exclusion of this group of workers is unjustifiable given that the protections relate to the fundamental (human) right to safe working conditions.

Finally, there is another, more practical, limit to the protection provided by the ERA. The fact that employers' instructions to continue coming into work will be backed by the threat of dismissal (express or implicit) means that many employees will feel they have no choice but to obey, even if they reasonably believe this puts them in serious and imminent danger. They are unlikely to fancy their chances of finding alternate work during the crisis, and the prospect of a successful claim for unfair dismissal in future does not help with the immediate need to pay rent and bills. This weakness of individual legal rights in checking employer power during times of crisis highlights the need for cooperation between employers and employees to identify appropriate responses to COVID-19.

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## About the Author



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