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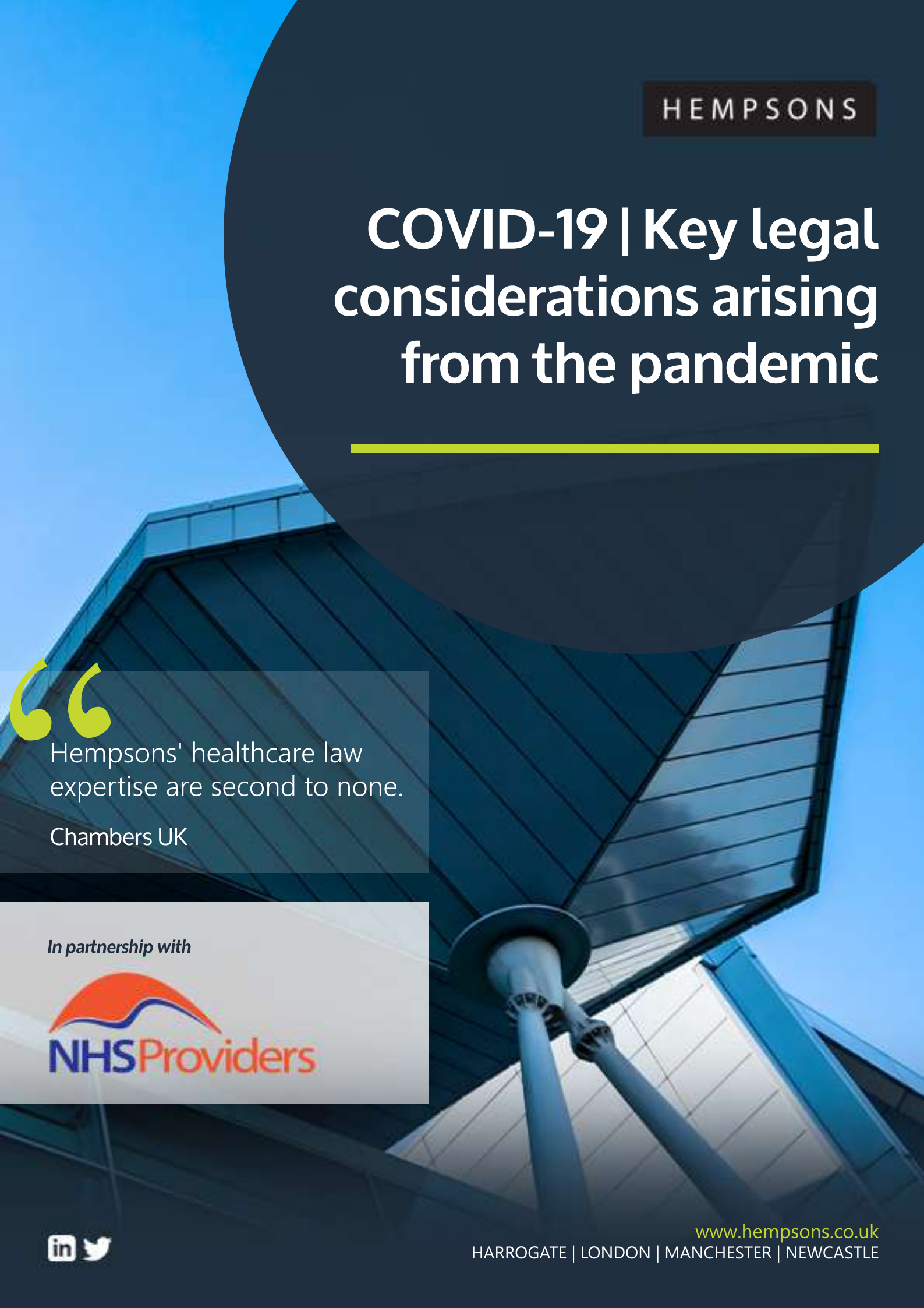
COVID-19 | Key legal considerations arising from the pandemic



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Introduction

The coronavirus pandemic has raised questions as to how NHS providers can meet their legal obligations to staff and patients, and how their boards and trust leaders seek sufficient assurance in respect of potential liabilities while working under immense pressure. This document (produced by Hempsons and NHS Providers) looks at the legal liabilities that are likely to arise due to the environment created by the pandemic and suggests ways in which trust boards could respond. The document is deliberately broad, covering a range of issues that have been raised with us as areas of concern since the beginning of the pandemic in the UK:

- Clinical negligence
- Employment and workforce
- Governance and board liability
- Health and safety

As the pandemic has progressed, new scientific evidence and advice has evolved and changed over time on issues ranging from the best treatments for patients to the best way to protect individuals from infection.

Clearly it is important that we learn from experience and amend clinical practice in line with the latest medical advice. However, with regard to potential liabilities, it also means that what was reasonable and proper under one set of circumstances may be seen differently with the benefit of hindsight. This means that placing events in the context of the knowledge, advice and guidance available at the time is important.

One of the key messages from this guidance is to record context fully and contemporaneously and where this has not been done, to correct any omitted information as early as possible, noting that this is the case.

While the pandemic prompted us to produce this guidance, we believe it will continue to be useful over the medium term. Clearly the guidance is generic and does not remove the need for trusts to seek specific legal advice in respect of individual cases when necessary. We hope you find it helpful.

Contents

Clinical negligence considerations

What should trusts be doing to mitigate claims?

Coronavirus will leave its legacy over every aspect of the NHS, from patients and staff to supply chains.

The standard of care in clinical negligence claims is not one of strict liability, but one of reasonableness. In clinical negligence claims, the reasonableness of any decision needs to be evidenced.

Ideally, we would have clear updates of national and local guidance where necessary – claims often fall back on what the guidance was at the relevant time.

Where updating guidance is unavailable or unrealistic, the reasons for diverging from pre-coronavirus guidance must be made clear in the medical records, including evidence of a discussion with the patient and/or family members explaining the current limitations.

Where an emergency overburdens available resources, the courts would be expected to make an allowance. But where there are current, future or potential restrictions on services trusts need to be able to evidence that they were anticipated, and appropriate arrangements were made.

Healthcare staff need to be supported to ensure there remains clear contemporaneous documentation in patient records.

Where prioritisation decisions are being taken, documentation should include evidence of why the decision is required, and evidence preserved such as discussions with the patient and family members (where appropriate), MDTs notes and (if available) Clinical Ethics Committee meetings minutes.

Witness statements are often vital to advising trusts in clinical negligence claims and yet the future identification of staff employed on a temporary basis may prove difficult especially where notes are handwritten – consideration should be given to providing identification stamps and/or ensuring signatures are in fact capitalised names.

Staff should be supported to provide contemporaneous written statements where an unexpected incident has occurred, regardless of whether an internal review has commenced. Again, this seems particularly important when care is fast-paced, and the workforce has temporarily expanded and diversified.

Where staff are working in different environments, such as taking clinics by telephone, extra care needs to be given to ensuring material risks (a subjective-patient standard) of proposed treatment are discussed and there is clear evidence of the provider's reasonable belief that the patient understood the information. The clinic letters sent to patients and their GPs should include any leaflets and diagrams that would have been provided in a face-to-face discussion, and provide contact details and an invitation to allow further discussion.

The Duty of Candour – is it still in place?

The statutory and regulatory Duty of Candour has not been impacted or altered by recent events.

Trusts will be aware that 'notifiable safety incidents' includes unintended or unexpected incidents that could result in, or appear to have resulted in, moderate harm.

Moderate harm includes harm that requires a moderate increase in treatment, such as a prolonged episode of care or the cancelling of treatment.

Coronavirus and the push back on NHS services will have resulted in unintended harm which engages the statutory Duty of Candour.

What Clinical Negligence Indemnity Schemes are Available from NHS Resolution?

NHS Resolution has three clinical negligence schemes that

are available to staff providing NHS services:

- **The Clinical Negligence Scheme for Trusts (CNST)** – which will apply to all staff working in NHS trusts carrying out NHS work (or independent sector providers carrying out NHS work who have joined the scheme).
- **The Clinical Negligence Scheme for GPs (CNSGP)** – which will apply to GPs and others working in NHS general practice.
- **The Clinical Negligence Scheme for Coronavirus (CNSC)** – for all staff providing NHS services directly related to, or as a consequence of, coronavirus to sustain the delivery of NHS services where there is no existing indemnity arrangement in place.

What about maternity services?

Claims arising from maternity services represent 10% of the volume but 50% of the money paid out annually by NHS Resolution.

Coronavirus and the pressures placed on the health service should not allow the focus on maternity safety to be undermined.

While the majority of reporting requirements for the Maternity Incentive Scheme are paused until 1 October 2020. However, trusts have been asked to continue to apply the principles of the 10 safety actions and keep a close eye on updates from the NHS Resolution Maternity Incentive Scheme team.

While it is no longer necessary to report Early Notification cases to NHS Resolution (until March 2021) but trusts must report cases to HSIB.

Trusts must still report perinatal deaths to MBRRACE-UK. Deaths where there is a positive test for coronavirus in the mother and/or baby are a priority.

Conclusion

Successfully defending a clinical negligence claim depends on gathering sufficient evidence to demonstrate that the care provided was in line with a responsible body of practitioners and it can stand up to logical analysis. To achieve that requires not only appropriate care but clear and complete records, witness statements (and oral evidence) of those involved, a review of the national and local guidance in place at the time and supportive independent expert evidence.

It may be years before we have case law commenting on the actions taken during the pandemic, but by keeping an eye on the basic principles of claims, trusts can at least start preparing their defence.

Employment and workforce considerations

Application of policies and procedures in the crisis

The Advisory, Conciliation and Arbitration Service (ACAS) have issued new guidance for employee relations during the pandemic.

- The guidance states that employers should assess whether it would "*...still be fair and reasonable to carry on with or start a disciplinary or grievance procedure*" during the pandemic. The guidance also emphasises the importance of considering employee wellbeing throughout.

There has also been NHS specific advice and guidance.

- On 1 April 2020 the Social Partnership Forum (SPF) issued a statement which then formed the basis of the approach of NHS organisations towards the application of policies and procedures for the period 1 April 2020 until 1 July 2020. Click here to read.
- The statement in April stated that NHS employers would pause disciplinary and other employment procedures "*...while the crisis lasts*". Exceptions were to be made "*...where the employee requests proceeding as it would otherwise cause additional anxiety, or where they [the concerns] are very serious or urgent*".
- The statement also recommended that "*pragmatic outcomes*" should be considered for less serious or urgent issues.

SPF then issued an updated statement on 1 July 2020. Click here to read.

The guidance says that variations to existing local trust policies and protocols may need to continue during the next phase and that any extension of these variations should be agreed in partnership unless covered by emergency plans or protocols.

- It goes on to say that any extension to temporary changes to working practices should follow appropriate consultation with staff and trade union/professional body reps.
- On the issue of organisational change, the guidance says that any proposals should remain paused where they are not necessary for the response to the pandemic, not required by statute or would be contentious. That is likely to include a lot of organisational change.
- Disciplinary, grievance and other related matters should be reviewed where they have been paused. There is also a focus, again, on pragmatic outcomes. This is entirely consistent with the "*Learning lessons to improve our people practices*" letter from Baroness Harding. Click here to read.
- The guidance will be reviewed again by 30 September 2020.

Similarly, NHS Resolution issued guidance on the application of Maintaining High Professional Standards in the Modern NHS (MHPS) (the framework for doctors in relation to concerns about capability, conduct and ill health) on 22 April 2020. Click here to read.

- At the time of publishing, this has not been updated.

NHS Resolution also recommends adopting a pragmatic approach to the management of concerns under MHPS and documenting in writing any steps taken (including the decision not to do anything). They encourage employers to complete investigations which are already nearing completion and to consider an agreed sanction/outcome process where the doctor/dentist accepts that there is a concern.

In our experience there was significant variation in how NHS organisations interpreted and implemented this guidance. In some cases, almost all policies and procedures were paused, whilst in other organisations processes were pursued in almost the normal way. NHS employers are advised to attempt to resolve disputes internally as much as possible for the sake of good employee relations but also to avoid litigation.

However, it is likely that NHS trusts will see employment tribunal claims which include complaints about delay in completing processes. Part of any defence would include reference to the national guidance and the agreement to pause normal processes. It would not be a full defence to any claims but it would be a relevant consideration for a tribunal to consider.

Managing disciplinary, grievance, capability and sickness issues (including handling investigations and hearings remotely)

For those procedures which have continued during the lockdown, there have been significant logistical difficulties.

Remote hearings, remote interviews and socially distanced meetings have been a feature of NHS industrial relations since the pandemic began.

The need to ensure that a fair hearing and reasonable investigation takes place does not disappear in a pandemic. Employment tribunals will take into account all relevant circumstances when assessing fairness but if an employer has decided to proceed with a disciplinary which leads to dismissal, for example, the tribunal will need to understand the justification for so doing given the practical difficulties involved. Similarly, a delay will be subject to judicial consideration.

Our advice to employers is to review all cases currently paused and assess whether to now proceed. The wellbeing of the employee concerned (and those involved in the investigation) should be a key consideration; so should the needs of the employer to resolve the concerns.

Absence and pay – self-isolation, shielding and sick pay

Statutory Sick Pay (SSP) is payable where an employee has been diagnosed with COVID-19 or exhibited symptoms. It is also payable for employees who are deemed to be incapacitated because they are isolating themselves (e.g. because they live with someone with symptoms or because they are "shielding").

From 1 August 2020 the clinically vulnerable in England are no longer advised to shield in public health guidance and so are no longer eligible for sick pay.

Online isolation notes were introduced for employees to provide evidence to their employers to support self-isolation.

There are many potential areas for disagreement between employer and employee and it is very likely that there will be litigation in this area.

An employee who is unable to work from home but who refuses to attend the workplace due to fears for their safety may face disciplinary proceedings and dismissal if they continue to refuse.

Employers should proceed with caution because a dismissal could be automatically unfair if the employee has a reasonable belief that attending work would expose them to serious and imminent danger.

Equally, an employee with a disability may require reasonable adjustments and that could include taking steps to ensure that they can work from home.

Employee testing – making it a requirement, managing refusals

There are two key issues around employee testing: data protection and potential breach of the implied duty of trust and confidence owed to employees.

The Information Commissioner's Office (ICO) has published guidance on handling data during the pandemic and they have confirmed that obtaining health data about an individual is special category personal data and an employer can only process such data on grounds set out in the General Data Protection Regulations (GDPR). In relation to testing, the ICO guidance suggests that, if there are good reasons for so doing, testing of employees can take place.

The second concern is whether insisting on testing could be a breach of the implied duty of trust and confidence owed to employees. Our view is that employees will not be able to show that the testing requirement is a breach given the legitimate need for NHS organisations to test employees.

An employee who refuses to take the test could then be subject to a disciplinary process and could, if they continue to refuse to take the test, be fairly dismissed subject to the need for employers to follow a fair process and consider the employee's reasons for refusal. In our experience, refusals have not been a common occurrence and we do not envisage this being common in future, however, it is a risk in principle.

Discrimination issues – managing issues around disability and pregnancy (including the obligation to make reasonable adjustments)

Where an employee has a disability, for the purposes of the Equality Act 2010, employers need to consider what reasonable adjustments might be required to enable the employee to carry on working.

The Equalities and Human Rights Commission (EHRC) has published guidance on making reasonable adjustments during the pandemic. Click here to read.

They give examples such as checking in regularly with employees with mental health issues whilst they are working from home and considering providing employees with extra equipment.

Returning to work for employees with a disability might be particularly challenging and so employers should consider how this should be handled and whether further adjustments need to be made.

For pregnant employees, NHS trusts should carry out risk assessments, including travel to work, any pre-existing conditions, etc.

In addition, NHS employers may need to consider making adjustments for pregnant employees.

Employment Tribunals – how they are dealing with claims and hearings

Employment Tribunals have been struggling under the burden of too many cases for their administrative resources since the abolition of tribunal fees in July 2017. The pandemic has significantly exacerbated this problem.

When lockdown was imposed in March 2020, face-to-face hearings in the employment tribunal stopped. Telephone hearings have continued throughout.

The Tribunals have recently started using a cloud video platform which is a browser-based video facility for hearings. The guidance indicates that cloud video platforms will be used increasingly for hearings from now on with some hearings being held in person where social distancing is possible, and some hearings being a hybrid of video and in-person.

The system is in its infancy but there does appear to be a drive by the Tribunals to carry on with hearings as much as they can.

We anticipate, however, that in some areas there will be an inevitable and significant backlog of cases leading to a very significant delay in claims coming to hearing.

Governance considerations

Review of decisions taken

The COVID-19 pandemic has created an unprecedented challenge for the NHS, with decisions having to be taken at speed and/or in difficult circumstances.

Now that the initial peak of the pandemic has passed and the NHS is in phase 3 of its response to COVID-19, we recommend that trusts review the decisions that were taken at the height of the pandemic to:

1) Check they were taken in accordance with the appropriate governance processes, including any modified processes that were in place at the time; and

2) Ensure decisions were appropriately documented.

In respect of any decisions that were not taken in accordance with the appropriate processes, we recommend that trust boards consider:

- Whether any defects in process can be addressed now and the decision taken afresh; or
- Whether decisions taken at below board level should be ratified by the board.

Decisions that were not taken in accordance with the appropriate process may potentially be subject to challenge by way of judicial review.

In particular, trusts may not have engaged as they usually would with the public and/or local authorities in respect of changes to services, in the light of the urgent and rapidly changing situation created by the pandemic. If these service changes are intended to be retained for the longer term, consideration should be given as to whether public involvement is required and the form it should take (whether by consultation or some other means).

Trusts should be mindful of the need to comply with their statutory duty (Section 242 of the National Health Service Act 2006) to involve the public in:

- The planning of the provision of services;
- Proposals for service change; and
- Decisions affecting the operation of services.

Trusts should also be aware that any proposal for a "substantial development" of, or a "substantial variation" in, the health service in a local authority's area will usually trigger a duty to consult the local authority.

Reviewing governance processes for urgent decision-making

We recommend that trusts review the effectiveness of their decision-making processes to date during the pandemic and consider whether these are sufficiently flexible and robust to enable urgent decision-making in the event of a future crisis, such as a second wave of COVID-19.

Matters that trusts may wish to review/consider are:

- Holding virtual meetings and using electronic communications;
- Invoking the emergency powers in their standing orders;
- Contingency plans in the event that senior staff are absent;
- The appointment of deputies;
- Quorum; and
- Written resolution process for the council of governors.

Personal liability of board members

Board members (and former board members) may have concerns about whether they could be personally liable for actions of the trust and decisions of the board, especially given the challenging conditions in which decisions are having to be taken during the pandemic. Board members (and former board members) can be reassured that, provided that they act(ed) in good faith in taking decisions, they will be covered by the trust in respect of civil claims by virtue of a statutory indemnity.

In addition, Foundation Trust Constitutions often include an indemnity for trust board members (and governors) in respect of any personal civil liability which is incurred by them in carrying out their functions.

CQC inspections

The CQC's regulatory responsibilities have not changed; the CQC remains responsible for ensuring that health and social care services provide people with safe, effective, compassionate, high-quality care. The CQC has developed an Emergency Support Framework which will underpin its regulatory approach during the pandemic and has now confirmed it will adopt a streamlined, transitionary approach to regulation and inspection to the end of the year, focussing on unplanned inspection and thematic review of 'provider collaboration' in local areas. Whilst routine inspections have been paused, the CQC continues to inspect in response to immediate risks and concerns about safety. The CQC will be confirming its regulatory approach going forwards under a new strategy applicable from April 2021.

A number of inspections during the pandemic have been as a result of concerns raised by staff or members of the public, including issues relating to PPE, infection control and the challenges posed by social distancing. Where inspections are carried out, the CQC is likely to look at the infection prevention and control measures that trusts have adopted during the pandemic. The CQC has recently issued guidance (available here) on the information gathering tool that their inspectors will be using for this area of inspection. Although this guidance is targeted at care homes, it will be adapted for other services.

Undocumented short-term arrangements

Trusts should review any arrangements that they put in place with other organisations during the peak of the pandemic that were not documented at the time, in view of the urgency of putting in place the relevant arrangements. A lack of documentation may create uncertainty about the arrangements that were put in place and risks unexpected liabilities arising for the trust. We recommend that any arrangements that are continuing are documented as soon as possible, in discussion with the other party to the arrangements.

Health and safety considerations

Applying and adhering to latest health and safety guidance

Duty holders (who are usually also the employer and trust) have statutory and common law duties to ensure the health, safety and welfare at work of their employees and members of the public.

These duties are governed by the Health & Safety at Work Act 1974 (HSWA) and the various health and safety regulations, which impose specific obligations on duty-holders applying to different work activities. These duties are in turn enforced by the Health and Safety Executive (HSE), that can impose sanctions or even prosecute organisations for breaches of the law.

The main duties imposed by the HSWA 1974 include the following:

- Assess and review the risks to the health and safety of employees whilst they are at work, and the risks to health and safety or other persons affected by their undertaking.
- The significant findings of this risk assessment must be recorded (where you have more than five employees).
- Employers must make arrangements for effective planning, organisation, control, monitoring and review of preventative and protective measures.

These duties continue to apply and be enforced by the HSE during the COVID-19 pandemic, and the HSE has stated that it will continue to investigate work related deaths across all industry sectors, the most serious major injuries and dangerous occurrences and reported concerns, including those related to social distancing and COVID-19 (see here for the full statement).

As a first port of call, duty holders should subscribe to the HSE information and advice page (click here) to receive free news and updates on health and safety topics. Also, you should be regularly reviewing the HSE guidance, Working safely during coronavirus (COVID-19) outbreak, and implementing its recommendations. The guidance provides helpful notes, COVID specific risk assessment templates and practical examples, which can be applied to the working environment. The Government has also published industry-specific guidance which can be found here.

Applying the HSE 'Plan, Do, Check, Act' approach will further stand you in good stead when managing health and safety during this pandemic. We would, however, recommend adding to this approach:

'Record' - evidence your actions, considerations and decision-making with, if possible, contemporaneous notes.

Given the changing scientific and governmental advice, health and safety guidance is in turn changing rapidly; reviewing this guidance and news articles regularly (and acting accordingly) is a must for organisations to keep updated and evidence informed decision-making.

Health and safety obligations in relation to agency workers or more transient staff

An employer has health and safety responsibilities in relation to its 'employees' (as well as contractors and members of the public). But, does it have the same duties towards agency workers? Ask yourself: who retains ultimate control over the agency worker's services/ actions day-to-day? Who provides the worker a uniform, pays the wages, controls the premises and environment where work takes place, directs the worker's activities?

If the answer to one or more of these questions is your organisation, then it is likely that, even if a worker is being recruited for brief periods of time, or introduced via an agency, your organisation has health and safety responsibilities and liabilities in the same way as it does for all its other employees.

If this is the case, then a more considered approach needs to be adopted as extra risks arise in relation to workers who are new to the workplace than regular employees, as they may not recognise hazards, understand or follow warning signs or rules, or have the confidence to raise concerns.

The HSE have recommended six steps to follow, which will help to protect the new starter, maintain safe standards of practice and keep training and competency up to date.

Capability – consider what training, experience and qualifications are necessary for the job, and check that that worker has completed the necessary occupational qualifications, skills and/or experience required to do the job safely before they start work.

Induction – carefully plan an induction using plain and simple language.

Control measures – provide protective equipment at no cost to the temporary worker, and agree arrangements for supplying and maintaining it, involve employees in discussions about risks, emphasize the importance of reporting accidents or near misses.

Information – provide relevant information, instruction and training about risks and precautions to take to minimise these risks.

Supervision – provide adequate supervision of the staff.

Check understanding – (especially during the first few days and weeks) check staff have understood the instruction and training and are acting on it. If not, provide additional materials and/or training, shadowing to assist that worker.

Ultimately, co-operation and communication between all those involved in the using and supplying of temporary workers is key to protecting their health and safety and meeting your obligations. Continuing to communicate and working together will help to ensure that responsibilities are clear, and measures are implemented effectively.

Can employers, trust boards and directors be prosecuted with corporate manslaughter if an employee contracts COVID-19?

Where a worker has been diagnosed as having COVID-19 and there is reasonable evidence to suggest that it was caused by occupational exposure, employers are required to report the case to the relevant enforcing authority e.g. the HSE, under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR).

Given these reporting obligations, it is possible, during this pandemic, for trusts to be investigated and then (if appropriate and the statutory elements met) prosecuted for health and safety offences; including the offence of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007, as a result of 'serious management failures resulting in a gross breach of a duty of care which causes a person's death'.

Note, however, that as this offence is concerned with corporate liability, it does not apply to directors or other individuals who have senior roles in the organisation. Alternatively, existing health and safety offences and gross negligence manslaughter can apply to individuals and prosecutions against individuals could be brought if there is sufficient evidence and it is in the public interest to do so.

In reality, it would be difficult, although not insurmountable, for the regulator to determine that there is a direct link between an organisation's actions/ omissions, and 'work-related' exposure of COVID-19 resulting in death, due to the number of potential human interactions and thus sources of transmission of the virus.

COVID-19 Personal Protective Equipment (PPE)

According to Article 3 of the PPE Directive 89/656 (which the PPE Regulations are supposed to implement into UK law), PPE should only be relied upon where the risks posed by work cannot be avoided by other means. This means that employers need to have made a suitable and sufficient assessment of the risks their employees will encounter at work, and considered options for controlling those risks which do not involve exposure of employees to any risk, before looking at the "last resort" of PPE (Art 5 of the PPE Directive 8/656). However, in the healthcare context, the reality is that this "last resort" is often going to be the first line of defence.

Regulation 4(1) of the PPE Regs provides that "every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective".

To be suitable, the PPE must:

- Be appropriate for the relevant risks and the conditions under which it is used.
- Take account of the user's health, ergonomic requirements and his workstation.
- Fit the user to be effective in dealing with the risks without increasing the overall risk and comply with legislation implementing PPE Directive 89/686.

To mitigate these risks as far as is possible, we would advise that the following measures are taken:

- Act proactively to protect the safety of staff in the workplace by the provision of suitable and adequate PPE.
- Proactively review risk assessments and control measures on a regular basis.
- Monitor and adhere to guidance from government and other public health bodies.
- Ensure staff are trained in the correct use of PPE including the donning and doffing of equipment.
- Ensure staff know what PPE they should wear for each setting and context.

- Ensure staff know which items are subject to single use/reusable, and are aware of appropriate disposal and decontamination processes.
- Keep clear and comprehensive records of what PPE staff have available, including detail about the various specific types of equipment.
- Record those to whom it is provided.
- Keep good records of requests for more equipment and the responses to such requests.
- Log, collate, investigate and, where reasonable, respond to complaints from staff about the lack of PPE. Division and delegation of H&S responsibility within larger trusts and subsidiary organisations.

Division and delegation of H&S responsibility within larger trusts and subsidiary organisations

In general, the duty holder who has health and safety responsibilities tends to be either:

- The employer; and/or
- The owner of a premises which is being used as a place of work; and/or
- The organisation that has 'clear responsibility/control' for the maintenance/repair or access of that premises.

The understanding of who has 'clear responsibility' or 'control' is broad and so it can be more difficult to separate or identify duty-holders. However, the best way to approach this is to think practically: if a subsidiary manages the interactions between other sub-contractors and the trust, and arranges the day-to-day repair or maintenance works done at premises, then on that basis, it is safe to assume they 'control' a premises and are a duty-holder with the accompanying responsibilities that entails. However, the trust also is a duty-holder on the basis that it is an employer and owns premises.

In another example, it may be that the trust employs workers, but the premises in which the employees work is not owned by the trust. In this scenario, there will be a duty on the owner/controller of the premises as well as a duty on the trust to ensure the health and safety of its employees. As such, in most cases multiple organisations will have health and safety responsibilities to fulfil.

These responsibilities can be delegated and shared between organisations, but this delegation does not absolve the original duty-holders of their legal duties. In practical terms, the first step is openly communicate with the other duty-holders so that expectations are clarified and actions progress. Clear and collaborative approaches and policy documents further reduce the risk of responsibilities being passed between different bodies and no one taking ownership of health and safety obligations. From our experience, it is usually when bodies defer to others that mistakes occur and risks at work increase.

General considerations for Trusts about potential H&S and medical treatment issues that might arise

Here are a few considerations that should be on your radar at this current time:

COVID secure measures for hospital trusts and private hospital providers: hospitals need to make sure that, where practicable, COVID-secure measures are adopted to protect staff, patients and visitors to hospital settings. The latest advice as at 23 July 2020 can be found here.

The provision of PPE in health and social care settings: we recommend reviewing the '*Rapid Evidence Review*' produced by the HSE assessing evidence on the use of PPE as protection against coronavirus, and further sources of advice promoted by the HSE here.

COVID risk assessments and workers with a BAME background: as an employer with more than five employees, you have a duty to perform and record a risk assessment to protect your employees and others. The HSE have advised the application of a COVID specific risk assessment to keep a record of the identification of risks, vulnerable workers, control measures and actions recommended. However, it is also worth keeping in mind that different workers, including those from different ethnic minority groups, are more vulnerable than others as discussed in this article by the BMA (here) and reviewed by Public Health England (here).

The engagement of Article 2 of the European Convention on Human Rights: Article 2 of the ECHR protects an individual's right to life. This imposes a positive obligation upon the State (which includes trusts) to protect life. Trusts therefore need to consider a patient's right to life when making decisions affecting a patient's life expectancy. This was all the more relevant at the outset of this pandemic when prioritisation decisions of life-saving machinery, and allocation of surgical resources were happening daily. Alternatively, this right could arguably be engaged in a working environment where an employer should be taking steps to protect a worker's right to life e.g. through the provision and implementation of adequate PPE/other safety measures. Whether Article 2 is applicable could be extremely relevant at forthcoming coronial inquests and have consequences on the coroner's conclusion and potential criticisms of NHS trusts /Regulation 28 Prevention of Future Death Reports.

Conclusion

While this guidance is necessarily broad, a common theme throughout is that context is vital when looking at liabilities some time after the events in question. Trusts may find some of the national guidance documents and information available on the NHS Providers website useful in identifying prevailing national directives and guidance available at a particular time: https://nhsproviders.org/topics/covid-19/coronavirus-member-support.

We hope that this guidance will prove useful, not just during the first stages of the pandemic, but over time for trust leaders and their boards.

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