



## Employment Law Brief With Darren Newman

The past year has involved major changes for everyone. Our lifestyles have been transformed and our working patterns - even for those who cannot work from home - have also been drastically altered. Local authorities face a particular challenge as so much of their work consists of delivering vital public services to communities - often focussing on particularly vulnerable people. So much of this work simply cannot be done from a laptop on a kitchen table. The challenge is to get this work done while also keeping colleagues and members of the public safe.

Masks and social distancing are obviously a major part of the mix. But testing is also a vital component. Clearly if someone has covid - and it is estimated that up to 1 in 3 people with the virus will have no symptoms, then it is better if they are kept away from the workplace no matter how 'covid-secure' the employer has made it.

Covid testing needs to be thought through carefully. The employer needs to make sure that the results of covid tests are handled carefully. They will count as special category data under the GDPR. That should not present a major difficulty - the need to protect public health or health and safety at work will provide a lawful basis for the processing. There is no need for the employee to give explicit consent to that processing provided one of those criteria are met. But whatever the basis for collecting the data, the employer should be very careful about who has access to the data and ensure that it is not stored for longer than is necessary.

From an employment law perspective, the main problem with testing is that it is intrusive. The process is unpleasant and the consequences for someone who tests positive can involve considerable inconvenience. What if an employee refuses? The employer obviously cannot hold them down and test them against their will - but what can be done? Can the employee be disciplined? Dismissed? Sent home without pay? And isn't there a human rights issue underlying the idea that

individuals can be pressurised into undergoing a test that they might not want to take?

The idea of requiring employees to undergo workplace testing is not new. Drug and alcohol testing is well established in many industries - such as public transport - where employers have a particular need to ensure that employees are not 'under the influence'. Such tests may be random in that the employer does not need to have specific grounds to believe that a particular employee has been drinking or taking drugs and it is perfectly normal for a refusal to take a test to be treated as a disciplinary matter.

In those cases of course the duty to submit to testing is a contractual requirement. The employer has made agreeing to the testing regime a condition of employment. I am not aware of any employers that have made similar provision for covid testing.

Do they need to? The question is whether, in the current circumstances, requiring an employee to subject themselves to testing is a reasonable instruction. The contract of employment is an inherently flexible thing and employees have a duty to obey reasonable instructions given to them by their employer. But is it reasonable to require employees to submit to a covid test?

Government guidance is likely to be an important factor. The latest government guidance for schools is that 'testing is



voluntary, but strongly encouraged'<sup>1</sup>. The Government's latest guidance on care homes similarly states that staff should not be 'compelled' to provide their consent<sup>2</sup>. An employer in these settings may struggle to explain why it was necessary to go further in imposing testing on employees than is currently envisaged by the Government.

There are no straight answers in employment law, so it is of course open to an employer to explain why it is reasonable to require all employees to be tested. It may be that the level of infection in the local community, or the difficulty of observing social distancing or other precautions makes the need for testing more compelling. It may be that the employer has attempted to introduce testing on a voluntary basis but the take-up has not been sufficient to ensure that the workplace will be safe. Clearly, however, a general feeling that all employees should participate will not do. An employer will have to show that it has carried out a detailed risk assessment that concluded that introducing testing as a mandatory requirement was necessary. These matters should, of course, be kept under review. Mandatory testing should not be kept in place for longer than is justified by the evidence.

If an employer is confident that mandatory testing is needed, then it has a choice. The legally cautious approach is to propose a requirement to cooperate with its testing programme as an amendment to contracts of employment. That may not be a practical option. It is time consuming and risks creating resentment. If employees resist the change then the employer is left with the option of dismissing and reengaging on the new terms, which is far from risk-free in legal terms. Employees

could sue for unfair dismissal and if more than 20 employees hold out then that can trigger the obligation to go through the same collective consultation process as for 20 or more redundancies.

That leaves mandatory testing as a reasonable instruction not requiring a formal change in contracts. An employer going down this route should make its position clear to employees and invite those who have concerns to discuss them. It may be that there are legitimate reasons why an individual is unable to consent to being tested and the employer should make allowances wherever possible. It may also be possible to redeploy the employee to a role where the need for testing is not so acute.

Sending an employee home without pay - or taking disciplinary action - should really be a last resort. Since the outcome may well be litigation - with no certain outcome - employers will only want to rely on this approach if they believe that the case for mandatory testing is overwhelming.

**Don't forget to check more about Darren Newman on his blog at [A Range of Reasonable Responses](#) or on twitter at [@DazNewman](#)**

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<sup>1</sup> [Schools coronavirus \(COVID-19\) operational guidance - GOV.UK \(www.gov.uk\)](#)

<sup>2</sup> [Care home testing guidance for residents and staff: PCR and rapid lateral flow \(England\) \(publishing.service.gov.uk\)](#)