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Can employers enforce tests for Covid-19?

As restrictions ease, employers are considering how to make workplaces safe as their staff return. Some are intending to ask staff to take tests now that kits are more readily available. The question here is, to what extent is the testing of staff lawful and are there any risks that an employer should consider?

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Testing, is it necessary and proportionate?

Offering voluntary Covid-19 testing to staff is likely to reassure employees that the workplace is a safe environment and that you feel responsible for your employees' health and welfare. Test results are classed as 'special category data', so employers must use and store this sensitive data in accordance with the General Data Protection Regulation (GDPR).

The Information Commissioner's Office published guidance on testing during the pandemic, which explains that, in order to be compliant with relevant laws employers must show their approach to testing is "reasonable, fair and proportionate to the circumstances". You can read more about the ICO's guidance here: https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/testing/

Can a business make testing mandatory?

As everyone knows, anyone displaying symptoms can and should book a test through the NHS, but what about testing in the workplace as a pre-emptive measure to "spot" asymptomatic cases? The Government updated their guidance on 10th February to say that companies in England with over 50 employees can register on a Government website to order the lateral flow tests for use in the workplace. More information can be found here: https://www.gov.uk/get-workplace-coronavirus-tests. Even if you have less than 50 employees, you may find that this active approach is still valuable in making your employees feel safe. But can you make this testing mandatory? Employers have a duty to protect the health and safety of their employees, and it is likely that they can reasonably instruct an employee exhibiting symptoms to be tested.

If the employee fails to follow the employer's instruction to arrange a test, the employer may be justified in asking the employee to remain at home. Remember – an employer may be able to instruct the employee to take a test but they cannot force the test to be taken.

Companies with more than 50 employees will be offered rapid Covid testing - what you need to know…

According to a statement, cabinet ministers have been tasked with encouraging their sectors to take up the offer of rapid workplace testing, in an effort to normalise the practice across both public and private sectors.

A total of 112 organisations across almost 500 sites have already joined the Government-backed rapid testing scheme, and now more medium and small companies are able to sign up, due to the criteria change.

Businesses that have already signed up to workplace testing include the likes of Royal Mail, Tate & Lyle Sugars, Primula, Moy Park, Octopus Energy, Apetito and DVLA.

Where testing is considered **necessary and proportionate** (in other words, "mission critical"), businesses may seek to make testing a contractual obligation. If the obligation to be tested is validly incorporated into the employee's contract, failure to comply **could** be a breach, which may entitle the employer to take disciplinary action. However, **discussion and dialogue** with employees should always be the first port of call. Talk to your employees about what concerns they may have about testing and try to create a mutually agreeable way forward. Perhaps they can work from home or move to an area of the business where testing is not required? Having an open and honest dialogue will always be preferable to resorting to disciplinary actio**n.**

How to encourage voluntary testing?

Businesses wishing to implement routine testing of their workforce will do so with the consent of their staff. Employees are more likely to consent if they have confidence that their employer will handle personal data sensitively and securely. Employers should consider extending the sick pay policy to employees who test positive and are required to self-isolate (if they cannot work from home) or maintain those employees on their normal pay.

'Strongly urge businesses to sign up for rapid testing' Health Secretary Matt Hancock said: "To save lives and protect the NHS, we have again asked for everyone to work from home. But we know that for some, this is not possible, which is why the workplace rapid testing programme is so important".

Can an employer sanction an employee for refusing?

Before taking disciplinary action for refusal to consent to testing, an employer must consider the employee's individual circumstances and any mitigating factors, as individuals may have valid reasons for refusing to be tested. The requirement to be tested could also disproportionately affect some protected groups, such as those with certain disabilities, and so there are many legal issues to consider.

We are here to help

If you have any questions, please call our employment team for a free initial discussion on 01285 64972.

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