COVID-19 Q&A: The Coronavirus Job Retention Scheme and potential Equality Act issues arising from it

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Thank you to the 180 individuals who attended 3PB Employment & Discrimination Group's first webinar on 23rd April 2020. We intend to provide another webinar on 2nd June 2020 and further details will be circulated in due course.

This article supplements the webinar that we provided and accordingly reproduces (albeit in more detail) the commentary provided on the day. As anticipated, the government's guidance has been revisited and supplemented on several occasions since the webinar! Therefore this article has been updated to take account of revisions up to 1st May 2020. In addition, we have included further considerations and detail on matters raised in some of your questions.

Q: The Coronavirus Job Retention Scheme ('the Scheme') was first announced by the Chancellor on 20th March, given its legal basis through section 76 of the Coronavirus Act 2020 on 25th March, the 1st iteration of the Guidance was published on 26th March, and the Treasury Direction was issued on 15th April, but how long is the Scheme going to run for now?

1. Having originally said that the Scheme was going to run from 1st March 2020 until the end of May 2020[1], it was confirmed by the Chancellor on 17th April 2020 that the Scheme is in fact now going to run for 4 months – that is to say until the end of June 2020 – but it may be extended if necessary and employers can use this scheme at any time during this period (an amended Treasury Direction will need to be issued to reflect this and any future extensions). In all likelihood this extension was made to deter many businesses from issuing redundancy consultation notices pursuant to section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992[2].

2. The online Portal through which claims can be made went live on 20th April and seems to be working relatively well – having received some 67,000 claims in its first 30 minutes of launching. It is estimated that about half of UK companies are going to furlough staff, with between 8 – 9 million workers due to benefit from the Scheme, and its likely cost to the economy between £40-50 billion.

Q: Which employers will qualify under the Scheme?

3. Any UK employer with a Pay As You Earn ('PAYE') scheme registered on HMRC's real time information system for PAYE on or before 19th March 2020[3] can make a claim under the Scheme.

4. So that includes businesses, charities, recruitment agencies, and public authorities.

Q: What about if an employer has more than 1 qualifying PAYE scheme?

5. In that scenario, the employer must make a separate claim in relation to each scheme, and the amount of any payment under the Scheme will be calculated separately in relation to each scheme[4].

[1] Treasury Direction, paragraph 12.
[2] http://www.legislation.gov.uk/ukpga/1992/52/section/188
[3] Treasury Direction, paragraphs 3.1 and 3.2.
[4] Treasury Direction, paragraph 4.

Q: What are the costs of employment which can be claimed through the Scheme?

6. On a claim by an employer for a payment under the Scheme, the payment may reimburse:

    a. The gross amount of earnings paid or reasonably expected to be paid by the employer to an employee;

    b. Any employer national insurance contributions liable to be paid by the employer arising from the payment of the gross amount;

    c. The amount allowable as a Scheme claimable pension contribution[5].

7. The amount to be paid to reimburse the gross amount of earnings must not exceed the lower of:

    a. £2,500 per month, and

    b. The amount equal to 80% of the employee's reference salary[6].

8. Generally, but except in relation to a fixed rate employee[7], the 'reference salary' of an employee or a person treated as an employee for the purposes of the Scheme is the greater of:

    a. The average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and

    b. The actual amount paid to the employee in the corresponding calendar period in the previous year[8].

9. The amount of 'reference salary' for the employee must disregard anything which is not "regular salary or wages"[9].

10. So that includes disregarding any performance related bonuses or discretionary payments (including tips)[10], any conditional payments[11], and any non-financial benefits (i.e. benefits in kind)[12].

[5] Treasury Direction, paragraph 8.1.
[6] Treasury Direction, paragraph 8.2.
[7] For which see Treasury Direction, paragraphs 7.6 and 7.7.
[8] Treasury Direction, paragraph 7.2.
[9] Treasury Direction, paragraph 7.3.
[10] Treasury Direction, paragraphs 7.4(a) and 7.5.
[11] Treasury Direction, paragraph 7.4(b).
[12] Treasury Direction, paragraph 7.4(c).

Q: Which furloughed employees can employers claim for?

11. Employers can only claim for furloughed employees that that were employed on 19th March 2020 and who were on the employer's PAYE payroll on or before 19th March 2020 and who were notified to HMRC on an RTI submission on or before 19th March 2020.

12. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19th March 2020.

Q: Is the Scheme limited to employees in the normal employment law sense of 'employees' and / or those on full-time contracts?

13. No. Employees can be on any type of employment contract, including full-time, part-time, agency, flexible, fixed-term, or zero-hours contracts.

14. In respect of those employees on fixed-term contracts, an employer can renew or extend that employee's contract before its natural conclusion during the furlough period without breaking the terms of the Scheme. There is no minimum period which must be left to run on a fixed term contract to enable it to be renewed or extended, but it must not have ended. Fixed-term contracts which ended, without extension or renewal, on or before 19th March 2020 will not qualify for the grant once they have ended. Employees that started and ended the same contract between 28th February 2020 and 19th March 2020 will not qualify under the Scheme.

15. And as well as employees, if they are paid via PAYE, the grant can also be claimed for: office holders (including company directors with an annual pay period and salaried individuals who are directors of their own personal service company), salaried members of LLPs, agency workers (including those employed by umbrella companies), and limb (b) Employment Rights Act 1996 workers.

16. It should also be noted that:

    - Individuals can furlough employees such as nannies provided they pay them through PAYE, and sent HMRC an RTI submission notifying a payment in respect of the employee on or before 19th March 2020;
    - Administrators can access the Scheme if the company is being taken under its management, but with the expectation that they will only do so if there is a reasonable likelihood of re-hiring the workers i.e. as a result of an

administration and pursuit of a sale of the business – ***In the Matter of Carluccio's Ltd [2020] EWHC 886 (Ch);*** and

- Apprentices can be furloughed in the same way as other employees and, unlike employees under the Scheme, they can continue to train whilst furloughed (albeit employers must pay apprentices at least the Apprenticeship Minimum Wage / National Living Wage / Minimum Wage) as appropriate for the time they spend training. This means that an employer must cover any shortfall between the amount it can claim for the employee's wages through the Scheme and the employee's appropriate minimum wage.

Q: What about foreign nationals?

17. Foreign nationals are also eligible to be furloughed. Grants under the scheme are not counted as 'access to public funds', and so employers can furlough employees on all categories of visa.

Q: When is an employee a furloughed employee then?

18. An employee is a furloughed employee (and therefore an employer can make a claim for their costs of employment) if:

    a. The employee has been instructed by the employer to cease all work in relation to their employment (or a person connected with the employer or otherwise works indirectly for the employer[13]),

    b. The period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

    c. The instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease[14].

    There are 2 notable exceptions to that phrase 'ceasing all work':

    (1) Work undertaken by a director of a company to fulfil a duty or other obligation arising by or under an Act of Parliament relating to the filing of company accounts or provision of other information relating to the administration of the director's company[15]; and

[13] Treasury Direction, paragraph 6.2.
[14] Treasury Direction, paragraph 6.1.
[15] Treasury Direction, paragraph 6.6.

(2) Training activities directly relevant to an employee's employment agreed between the employer and employee before being undertaken are permissible[16].

Q: What does the term 'instructed' by the employer to cease all work in relation to their employment mean?

19. The Treasury Direction states that an employee has been 'instructed' by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment[17].

Q: Is that different to what is stated in the Scheme guidance? Which should be followed?

20. Yes, it is different. Since its initial publication, the guidance has consistently said that to be eligible for the grant under the Scheme employers must confirm in writing to their employee confirming that they have been furloughed. This left open the question as to when that notification needed to be sent to the employee i.e. whether it be before or after he or she had been furloughed.

21. The 6th version of the Guidance (significantly published after the Treasury Direction was issued) states:

"*To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. If this is done in a way that is consistent with employment law, that consent is valid for the purposes of claiming the CJRS. There needs to be a written record, but the employee does not have to provide a written response. A record of this communication must be kept for five years*".

22. Consequently, whilst there is still no apparent requirement for an agreement between employer and employee in writing prior to the employee being furloughed for the purpose of following the guidance, there is a requirement for an agreement from the Treasury Direction.

23. Thus the potential issue arising out of this inconsistency is that many businesses, perfectly understandably and in good faith, will have relied upon the guidance in the

[16]Treasury Direction, paragraph 6.8.
[17]Treasury Direction, paragraph 6.7.

legitimate expectation that the legislation i.e. the Treasury Direction, would mirror that guidance.

24. Consequently, as it is the Treasury Direction and not the Guidance which has statutory force (pursuant to sections 71 and 76 of the Coronavirus Act 2020), this could leave businesses in the position that because they didn't have agreements in writing with their furloughed employees before they were furloughed, HMRC could refuse to pay out on claims.

25. However, it appears that the reality of the situation is that HMRC is presently accepting claims under the Scheme without requiring evidence of any furloughed employee's written agreement.

26. A further issue surrounding adequacy of consent to be borne in mind is that once the Scheme ends, many employers may be left in the position that by virtue of having followed the Guidance and essentially relying on deemed consent to furlough employees, even if they have paid employees the appropriate furloughed rates, nonetheless they have opened themselves up to potentially huge unlawful deductions claims.

27. This because section 13(1)(b) ERA 1996 states that an employer shall not make a deduction from wages of a worker employed by him unless the worker has '*previously*' signified in writing his agreement or consent to the making of the deduction. It follows that applying this section strictly, an employer cannot obtain an employee's retrospective authorisation or consent for making a deduction from his or her wages after the event which caused the deduction has already occurred: see ***Abrahall v Nottingham City Council [2018] EWCA Civ 796*** for a discussion on consent to variation of employment contracts.

Q: Is there a minimum period for which an employee must be furloughed and can an employee be furloughed more than once?

28. Any employees placed on furlough by an employer must be furloughed for a minimum of 3 consecutive weeks. When they return to work, they must be taken off furlough. Employees can be furloughed multiple times, but each separate instance must be for a minimum of 3 consecutive weeks. Each period of furlough can be extended by any amount of time whilst the employee is on furlough. However, the Scheme end date is the last day you can claim for through the Scheme.

Q: Can a furloughed employee do volunteer work?

29. Yes. A furloughed employee can take part in volunteer work, if they do not provide services to or generate revenue for, or on behalf of their employer's organisation or a linked associated organisation. The employer's organisation can agree to find furloughed employees new work or volunteering opportunities whilst on furlough if this is in line with public health guidance.

Q: Can furloughed employees work as union or non-union representatives?

30. Yes. Whilst on furlough, employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of employees or other workers. However in doing this, they must not provide services to or generate revenue for, or on behalf of their employer's organisation or a linked or associated organisation.

Q: What is the position if an employee is self-isolating or on sick leave either before or after having been furloughed?

31. It is important to say at the outset before answering this question, that prior to 6th April, the Guidance stated that employers could not furlough employees on SSP until they were no longer receiving it.

32. However, the updated Guidance now states as follows:

    a. If an employee is on sick leave or self-isolating as a result of Coronavirus, they'll be able to get SSP[18] subject to other eligibility conditions applying. The Scheme is not intended for short-term absences from work due to sickness, and there is a 3 week minimum furlough period.

    b. Short-term illness / self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.

    c. Employers are also entitled to furlough employees who are being shielded or off on long-term sick leave. It is up to employers to decide whether to furlough those employees.

[18] https://www.gov.uk/statutory-sick-pay

d. Employers can claim back from both the Scheme and the SSP rebate scheme for the same employee but not for the same period of time. When an employee is on furlough, an employer can only reclaim expenditure through the Scheme, and not the SSP rebate scheme. If a non-furloughed employee becomes ill, needs to self-isolate or be shielded, then an employer might qualify for the SSP rebate scheme, enabling it to claim up to 2 weeks of SSP per employee.

e. Furloughed employees retain their statutory rights, including their right to SSP. This means that furloughed employees who become ill must be paid at least SSP. It is up to employers to decide whether to move those employees onto SSP or keep them on furlough, at their furloughed rate.

f. If a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary. Employers are required to pay SSP themselves, although may qualify for a rebate for up to 2 weeks of SSP. If employers keep the sick furloughed employee on the furloughed rate, they remain eligible to claim for those costs through the furloughed Scheme.

33. But there is a significant inconsistency here, as the Treasury Direction stipulates that where SSP is payable or liable to be payable in respect of an employee (whether or not a claim to SSP is made) at the time when the instruction by the employer to cease all work is given, the 21 day period in respect of the employee does not begin until the original SSP has ended (but any subsequent entitlement to SSP by virtue of the employee becoming unfit for work again after the original SSP has ended must be disregarded)[19].

34. This is particularly significant when one considers that SSP has a 28 week limit under section 155 of the Social Security and Benefits Act 1992.

35. In practical terms, it is suggested that it is more likely than not that the Treasury Direction won't be applied strictly and those employers who followed the original Guidance in furloughing employees and paying them at the furloughed rate whilst they were entitled to SSP will not be adversely affected.

[19] Treasury Direction, paragraph 6.3.

Q: What about shielding employees?

36. Employees who are unable to work because they are shielding in line with public health guidance[20] (or need to stay home with someone who is shielding) can be furloughed.

37. Also, it should be noted that the updated Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020, provide that a person is deemed to be incapable of work if they are unable to work because they fall within the extremely vulnerable category and have been advised to shield. The Regulations came into force on 16th April and are likely to be relevant in any decisions taken against shielding employees.

Q: What about employees with caring responsibilities?

38. Employees who are unable to work because they have caring responsibilities resulting from coronavirus can be furloughed i.e. employees that need to look after children can be furloughed.

Q: What if an employee has more than one job?

39. If an employee has more than one employer they can be furloughed for each job. Each job is separate, and the cap applies to each employer individually.

40. Employees can be furloughed in one job and receive a furloughed payment but continue working for another employer and receive their normal wages.

Q: What is the position if an employee is on maternity leave, adoption leave, paternity leave, shared parental leave, or parental bereavement leave?

41. The normal rules for maternity leave and other forms of parental leave and pay apply.

42. However, employers may need to calculate their employee's average weekly earnings differently if an employee was furloughed and then started leave on or after 25th April 2020 for maternity pay, adoption pay, paternity pay, shared parental pay, or parental bereavement pay.

[20] https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19

43. Employers can claim through the Scheme for enhanced (earnings related) contractual pay for employees who qualify for any of the aforementioned payments.

44. Note, however, that being furloughed could have an impact on a woman's eligibility for SMP or the rate of SMP which she receives.

45. The Guidance notes that as the Scheme does not alter maternity rights legislation, a woman will be entitled to SMP at the usual rate. Employers can already reclaim most of the cost of SMP from the Government. The Guidance notes that employers who pay enhanced maternity pay can claim as 'wages' under the Scheme.

Q: What about if the employee gets Maternity Allowance?

46. If an employee is getting Maternity Allowance while they're on maternity leave, they should not get furlough pay at the same time.

47. If an employee agrees to be put on furlough and end their maternity leave early, they will need to give the employer at least 8 weeks' notice and they will not be eligible for furlough pay until the end of the 8 weeks.

Q: What is the position in relation to claiming furlough if you've made employees redundant?

48. If you made employees redundant, or if they stopped working for you on or after 28th February 2020, you can re-employ them, put them on furlough and claim for their wages through the Scheme.

49. This applies to employees who were made redundant or stopped working for the employer after 28th February, even if they do not re-employ them until after 19th March.

50. This also applies as long as the employee was on the employer's payroll as at 28th February and had been notified to HMRC on an RTI submission on or before 28th February. This means that an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 28th February.

Q: What about if an employee had multiple employers during the last year?

51. If an employee has had multiple employers over the past year, has only worked for one of them at any one time, and is being furloughed by their current employer, their

former employer/s should not re-employ them, put them on furlough and claim for their wages through the Scheme.

Q: What is the situation if employees are working reduced hours?

52. If an employee is working, but on reduced hours, or for reduced pay, they will not be eligible for the Scheme.

Q: What is the situation where there has been a TUPE transfer or a change in business ownership?

53. A new employer is eligible to claim under the Scheme in respect of employees of a previous business transferred after 28th February 2020 if either the TUPE or PAYE business succession rules apply to the change of ownership[21].

Q: Is the issue of unpaid leave addressed in the context of furloughing employees?

54. Yes, it is. If an employee was enjoying an unpaid sabbatical or other period of unpaid leave on 28th February 2020, the 21 day / 3 week period does not begin in respect of that employee until expiry of the period of leave agreed or contemplated at its commencement or, where the duration of the leave was uncertain on 28th February 2020 because its duration is terminable by reference to a particular circumstance, completion of a particular purpose or occurrence of a specified event, the ending of the circumstance, completion of the purpose or occurrence of the event[22].

55. Notably also, the Treasury Direction stipulates that no claim under the Scheme may be made in respect of an unpaid sabbatical or other period of unpaid leave of an employee beginning before or after 19th March 2020 (whether agreed or otherwise arranged conditionally or unconditionally on, before or after that day)[23].

56. So that translates to If an employee started unpaid leave after 28th February 2020, you can put them on furlough instead.

[21] Treasury Direction, paragraphs 9.1 to 10.2 to be read in conjunction with the updated Guidance.
[22] Treasury Direction, paragraph 6.4.
[23] Treasury Direction, paragraph 6.5.

57. But if an employee went on unpaid leave on or before 28th February, you cannot furlough them until the date on which it was agreed that they would return from unpaid leave.

Q: What effect, if any, does being furloughed have on annual leave and / or holiday pay?

58. The first thing to say is that this is an extremely complicated issue which should first be put in context.

59. The right to paid annual leave is set out in the Working Time Regulations 1998[24] ('the WTR'). This sets out a right to 5.6 weeks of annual leave: made up of 4 weeks, plus an additional 1.6 weeks to reflect the year's 8 bank holidays. So far as the 4 weeks are concerned, the WTR implement the EU's Working Time Directive. Although the UK has now left the EU, it remains bound by EU law during the transition period.

60. The Working Time (Coronavirus)(Amendment) Regulations 2020 allow workers to carry over up to 4 weeks of annual leave into the next 2 leave years where it was not '*reasonably practicable*' for them to take that leave because of coronavirus[25].

61. A number of issues concerning the relationship between annual leave and furlough have been neatly and helpfully identified as follows[26]:

    a. Does annual leave accrue during furlough?

    b. Can workers take annual leave during furlough?

    c. Can workers be required to take annual leave during furlough?

    d. What rate is annual leave during furlough paid at?

62. In answer to question 1, the answer is 'yes' both as a natural consequence of workers on furlough remaining employed by their employers and the Guidance as of 17th April stating specifically that furloughed employees continue to accrue leave as per their employment contracts. Thus the 5.6 weeks of statutory annual leave will continue to accrue.

[24] Regulations 13 and 13A.
[25] http://www.legislation.gov.uk/uksi/2020/365/made
[26] FAQs: Coronavirus Job Retention Scheme, House of Commons library briefing paper, 9th April 2020.

63. In answer to question 2, whilst the Acas guidance, having remained silent on annual leave for some time after the Scheme's publication, latterly suggested that workers can continue to request to take annual leave while they are on furlough saying:

'*If an employee is 'furloughed' (temporarily sent home because there's no work), they can still request and take their holiday in the usual way. This includes taking bank holidays'.*

64. And again whilst up until 17th April the Guidance had been completely silent about the taking of annual leave whilst on furlough, it now states that employees can take holiday whilst on furlough. That position is consistent with a sick worker being able to take annual leave whilst off sick as a matter of EU and domestic law: see ***Stringer v Revenue and Customs Commissioners; Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] ICR 932***

65. The 3rd question is far more complex.

66. Under regulation 15 of the WTR, employers can require workers to take annual leave on particular days i.e. many workers will be required by their employment contract to take 8 days of their annual leave on bank holidays and there is also already case law about workers in particular sectors who are required to take their leave at certain times in the year i.e. teachers.

67. Whilst there is a range of differing and cogent legal opinion and commentary on either side of the argument as to whether employers can continue to require workers to take annual leave during periods of furlough. The reasoning behind the argument that employers cannot do this principally rests on the purpose of annual leave being to give employees the opportunity to get rest and leisure and this not being possible in a pandemic in which people are largely confined to their homes, but also because it doesn't sit well with the new regulation 13(10) of allowing employees to carry over annual leave for 2 years. However, to state the position neutrally, it is simply unclear at present whether employers can continue to do this as a matter of law. Given that uncertainty, the most prudent and risk-free course for employers is to simply avoid requiring workers to take annual leave during furlough to avoid litigation in the future.

68. As to question 4, if workers choose to take periods of annual leave during furlough, or are required to do so, there is an additional question about the rate of holiday pay which they should receive.

69. Under the WTR, holiday pay is to be paid at the employee's normal rate of pay or, where the rate of pay varies, calculated on the basis of the average pay received by the employee in the previous 52 working weeks. Therefore if a furloughed employee takes holiday, the employer should pay their usual holiday pay in accordance with the WTR. The Guidance reflects this.

70. However, under EU law, a worker must be paid their 'normal remuneration' for 4 weeks of annual leave. This does not always correspond to the 'week's pay' calculation under UK law: ***Lock v British Gas Trading Ltd [2016] EWCA Civ 983***

71. It is unclear what would constitute '*normal remuneration*' during periods of furlough.

72. The Acas guidance suggested that workers who take annual leave during furlough should be paid '*in the usual way*'.

73. Thus the Guidance indicates that employers will be obliged to pay the additional amounts above the grant, though they will have the flexibility to restrict when leave can be taken if there is a business need. This applies for both the furlough period and the recovery period.

74. If the employee usually works bank holidays, then the employer can agree that this is included in the grant payment.

75. If the employee usually takes the bank holiday as leave then the employer would either have to top up the employee's pay to their usual pay, or give the employee a day of holiday in lieu.

76. However, it is worth noting that this newly announced guidance on holiday pay during furlough is being kept under review by HMRC.

77. Consequently, whilst an argument can be made for holiday pay during furlough to be paid at the reduced 80% rate, it seems obvious to say that the most risk-free or prudent approach to adopt with employees taking annual leave during periods of furlough is to pay them at their full or 100% pre-furlough rate.

Q: What is the likelihood of discrimination complaints arising during the pandemic?

78. Section 4 of the Equality Act 2010 ('EqA') defines the protected characteristics as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief, sex and sexual orientation.

79. The Guidance has made it expressly clear that equality and discrimination law remains unchanged. Therefore, the burden on employers under the EqA remains and should not be overlooked, minimised or cast aside despite the pressing and exceptionally difficult situation that they may face.

80. The current public health and economic emergency that society and business face, has the potential to impact upon each protected characteristic. Therefore, it is considered very likely that claims under the provisions of the EqA will spike during this period. Such claims are unlikely to be heard for many months.

Q: Do those with conditions on the vulnerable or shielding lists have a disability?

81. It is first necessary to consider who is on the vulnerable or shielding list.

The vulnerable list

82. On 16 March 2020 the government issued the Social Distancing Guidance which "strongly advises" certain categories of "vulnerable groups" to practice social distancing measures including working from home and avoiding public transport[27].

83. The vulnerable groups identified have an increased risk of severe illness from coronavirus (COVID-19) and are advised to be particularly stringent in following social distancing measures. Within the Social Distancing Guidance the government has identified "vulnerable groups" as individuals who are:

    (a) aged 70 or older (regardless of medical conditions)

    (b) under 70 with an underlying health condition listed below (ie anyone instructed to get a flu jab as an adult each year on medical grounds):

        i. chronic (long-term) respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis
        ii. chronic heart disease, such as heart failure
        iii. chronic kidney disease
        iv. chronic liver disease, such as hepatitis
        v. chronic neurological conditions, such as Parkinson's disease, motor neurone disease, multiple sclerosis (MS), a learning disability or cerebral palsy
        vi. diabetes
        vii. problems with your spleen – for example, sickle cell disease or if you have had your spleen removed
        viii. a weakened immune system as the result of conditions such as HIV and AIDS, or medicines such as steroid tablets or chemotherapy
        ix. being seriously overweight (a body mass index (BMI) of 40 or above)

    (c) those who are pregnant

[27] https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults

The shielding list

84. In addition, to those on the vulnerable list, there are some clinical conditions which the Government advises put people at even higher risk or "extreme" risk of severe illness from COVID-19. Those in that category should have now received direct communication from the NHS with advice about the more stringent measures that they should take in order to keep themselves and others safe.[28] To support this on 21 March 2020 the Government issued the Shielding Guidance which sets out the categories of people the government consider fall within this remit[29].

85. The list of conditions falling into the extremely vulnerable group is as follows:

    (a) solid organ transplant recipients;
    (b) people with specific cancers;
    (c) people with cancer who are undergoing active chemotherapy or radical radiotherapy for lung cancer;
    (d) people with cancers of the blood or bone marrow such as leukaemia, lymphoma or myeloma who are at any stage of treatment;
    (e) people having immunotherapy or other continuing antibody treatments for cancer;
    (f) people having other targeted cancer treatments which can affect the immune system, such as protein kinase inhibitors or PARP inhibitors;
    (g) people who have had bone marrow or stem cell transplants in the last 6 months, or who are still taking immunosuppression drugs;
    (h) people with severe respiratory conditions including all cystic fibrosis, severe asthma and severe COPD;
    (i) people with rare diseases and inborn errors of metabolism that significantly increase the risk of infections (such as SCID, homozygous sickle cell disease);
    (j) people on immunosuppression therapies sufficient to significantly increase risk of infection; and
    (k) women who are pregnant and who also have significant heart disease, congenital or acquired.

[28] A BBC article published on 7th April 2020 reported that many people have in fact been overlooked: https://www.bbc.co.uk/news/uk-england-52123446

[29] https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19 (updated on 17th April 2020).

86. The NHS communications include informing individuals to remain inside for 12 weeks (from receipt of the letter). In some cases, this means not going outside in any circumstances including a home garden.

87. NHS Digital, which compiled the list of those to receive the communications, said it had identified about 900,000 patients who should have already received an official letter or text. However, the BBC reported on 7 April that GPs and hospital doctors were now adding a further 600,000 patients.[30] It is therefore clear that this could potentially extend to hundreds of thousands in the work.[31]

Q: Are vulnerable and shielding employees likely to have a disability under the EqA?

88. It is arguable that some of the conditions (if not most) listed in the government's guidance are more likely to result in disability. But such conditions do not automatically amount to a disability just because they are referred to, and some will not satisfy the test for disability under s6(1) EqA on a case by case basis.

89. Deemed disabilities are contained in para 6 of Schedule 1 to the EqA and the EqA 2010 (Disability) Regulations 2010 SI 2010/2128 and are not changed by the government's guidance. However, there is some overlap between the statutory deemed disability and the government's lists e.g. MS, HIV.

90. Therefore, for the majority of cases it is still necessary to consider whether an employee's condition meets the definition of 'disability' under s6(1) EqA. It should not be presumed that treating doctors will not be able to assist during the pandemic. But this may well be met with practical difficulties during the pandemic because GPs and medical practitioners are understandably overwhelmed. Regardless, employers will need to take steps to assess a potential disability which will include consultation with the employee and if possible, referral to occupational health remotely. Employers are well advised to evaluate disability cautiously during the pandemic.

[30] https://www.bbc.co.uk/news/uk-england-52123446

[31] Guidance on the shielded patients list can be located on the NHS website: https://digital.nhs.uk/coronavirus/shielded-patient-list/spl-guidance-for-hospitals

Q: Are employees protected under the EqA if they refuse to attend work because they have a disability during the pandemic?

91. It might be tempting for employers to consider disciplinary action or sanctions for employees who refuse to attend work but caution is needed. Employers have reported that some employees are refusing to attend work due to cited disabilities. The concern expressed by the employee is often that they believe the disability puts them at high risk of serious illness if they catch COVID-19 or that they are self-isolating under NHS guidance because they are in a shielding category.

92. The government has made clear that some conditions make individuals particularly vulnerable during the COVID-19 pandemic to serious illness or death. The government lists do not cover all conditions that might be aggravated.

93. If the reason for the employee's refusal is directly linked to a disability or something that arises from it then they will be protected under the provisions of the EqA. Accordingly, disability action, detriment (such as withholding pay) or dismissal might result in a claim of discrimination, harassment or victimisation. Employers will note that those covered by the shielding guidance are subject to stringent restrictions on social distancing and should not be attending even supermarkets etc. For those shielding, the position for the employer will almost certainly be that they are sent home utilising lawful methods in light of the guidance. Any detriment to those covered under the shielding guidance is likely (on balance) to risk being unlawful under the EqA and otherwise.

94. How this might arise is considered in the context of a refusal to attend work is considered below (please note only the more complex claims under s19, 15 and 20-21 are considered in detail and it is entirely possible that claims of direct discrimination harassment and victimisation complaints might arise in these circumstances).

Q: Refusing to attend work: How might claims of indirect discrimination arise under s19 EqA?

95. Claims under s19 (indirect discrimination) require there to be a provision, criterion or practice by an employer. During the pandemic there is an indefinite number of PCPs that might be applied such as the following requirements:

    (a) To attend work;
    (b) To travel on public transport;

(c) To work in a public place;
(d) To work with or without certain equipment (protective or otherwise);
(e) Specific hours of work;
(f) To attend specific places of work; and/or
(g) The application of attendance/absence, capability, disciplinary or other policies.

96. A claim for indirect discrimination under s19 requires the PCP to put those with the employee's disability at a particular disadvantage compared to those without it. Going back to the example of a refusal to attend work, the following are likely to be relevant considerations in assessing "particular disadvantage" at this early stage in the pandemic:

(a) The government guidance on vulnerable conditions, social distancing and shielding indicates certain conditions are likely to be greater effected by the pandemic.

(b) The possibility that contraction of COVID-19 could make those with particular conditions more susceptible to severe symptoms and the long-term effects which might impact physical health.

(c) The stress and pressure of the pandemic may exacerbate mental health conditions.

97. Whether there is a particular disadvantage will be fact specific in every case. However, it is entirely possible that the aforementioned example PCPs could put those with a disability at a particular disadvantage compared to those without the same.

98. Claims of indirect discrimination are subject to the defence of objective justification (which is considered below).

Q: Refusing to attend work: How might failure to make reasonable adjustments arise under s20-21 EqA?

99. The duty to make reasonable adjustments arises in three scenarios under s20 EqA:

(a) Where a PCP is applied to a disabled employee that puts them at a substantial disadvantage;

(b) Where a physical feature puts a disabled person at a substantial disadvantage; and/or

(c) Where a disabled person would be put to a substantial disadvantage but for the provision of an auxiliary aid.

100. The substantial disadvantage is assessed by comparison to persons who are not disabled. The duty is only to make reasonable adjustments that are reasonable.

101. In terms of reasonable adjustments, the obvious considerations which arise when employees refuse to attend the workplace will be working from home or in an alternative role. If after proper consideration the reality is that reasonable adjustments are not possible it cannot be presumed by an employee that failure to pay them will amount to a failure to make reasonable adjustments. The purpose of making reasonable adjustments is after all to keep the employee in or to return to work (see for example, ***O'Hanlon v Commissioners for HMRC [2007] IRLR 404***). However, the point is not necessarily unarguable and this is likely to be something that the Employment Tribunal will need to determine in due course especially in light of the furlough scheme. Reasonable adjustments should be fully considered and aired before any decision to dismiss etc. as this will also be relevant to any claims where the defence of objective justification is relevant.

102. It should be noted that the updated Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020, provide that a person is deemed to be incapable of work if they are unable to work because they fall within the extremely vulnerable category and have been advised to shield. The Regulations came into force on 16 April and are likely to be relevant in any decisions taken against shielding employees.

Q: Refusing to attend work: How might discrimination arising from disability arise under s15 EqA arise?

103. In order to bring a claim of discrimination arising from disability under s15 EqA the following must be established:

(a) Unfavourable treatment of the employee;

(b) That unfavourable treatment is because of something arising in consequence of the employee's disability;

(c) Knowledge of disability (but not that the "something" arises in consequence of that disability);

(d) The employer cannot show that the treatment is a proportionate means of achieving a legitimate aim ('objective justification').

104. The standard for establishing that treatment is unfavourable is relatively low. Therefore, any disciplinary or performance sanction or process including dismissal or pay impact is likely be unfavourable treatment.

105. The reason for the unfavourable treatment must be something arising in consequence of disability. Broadly, if the employee is refusing to attend a place or work because of disability then it is likely to be because of something arising from it perhaps vulnerability to severe symptoms of COVID-19 or self-isolating because of the risk. However, if the employee is refusing to attend work because of matters not arising from the disability then they will not fall within s15 EqA. Such a link can often be difficult to determine.

106. However, there are limits where a belief raised by an employee is mistaken. In ***IForce Limited v Wood [2019] UKEAT 0167/18/3001***, the employee erroneously perceived that working in her employer's warehouse would aggravate her osteoarthritis. The Respondent had identified that her belief was erroneous and issued a final written warning because she refused to obey an instruction to work in a particular section of the warehouse. When a s15 EqA claim was brought, the EAT concluded that it must fail. A broad approach had to be adopted in determining whether the "something" that had led to the unfavourable treatment, had arisen in consequence of the complainant's disability under s15 EqA. However, it is an objective test and although the requisite connection could arise from a series of links, there still had to be some connection between the "something" (here the refusal to obey the Respondent's instruction to work in the warehouse) and the complainant's disability (osteoarthritis), the former had to arise in consequence of the latter. In ***Wood***, the complainant was mistaken that the something and disability were linked. Whilst the EAT left the door open on the possibility of linking the disability to an erroneous belief e.g. caused by pain or the disability itself this was not the complainant's case in ***Wood***. Therefore, in ***Wood***, the erroneous belief did not arise in consequence of the disability and the s15 claim failed.

107. In light of ***Wood***, where an employee refuses to attend work due to a perceived risk or alleged increased risk because of disability, advice from their GP or Occupational Health should be sought as soon as possible. The employer should ask what the risks are and whether any reasonable adjustments can be implemented. Erring on the side of caution is to be preferred.

108. In any event, claims under s15 EqA are of course subject to the defence of objective justification which is considered below.

Q: Will an employer's prima facie discriminatory treatment under ss15 and 19 EqA be objectively justified because of the pandemic?

109. In order to establish that treatment is objectively justified an employer must be able to show that it was a proportionate means of achieving a legitimate aim. It is possible that many employers will be able to establish this defence in light of the pressures arising during the pandemic.

110. Legitimate aims could include meeting business demands, health and safety, ensuring adequate conduct/performance of staff or ensuring adequate staffing levels. This will always be determined by the employment context.

111. The question of proportionality is often more complex evidentially. The EHRC Employment Code puts it in slightly (although not materially) different terms:

"…Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts…" (para 4.30).

112. The following factors are relevant:

(a) The needs of the employer: The conduct must correspond to a real need of the employer, the policy must be appropriate in achieving the legitimate aim and it must be reasonably necessary.

(b) The discriminatory effect: The number or proportion of individuals effected and how long lasting or final the damage is. Generally, the greater the discriminatory effect the greater the burden on the employer to show it is objectively justified.

(c) Assessment of alternatives: It is not necessary to that there were no alternatives to the treatment. But the availability of a less discriminatory but equally effective measure undermines an argument of proportionality.

(d) Conduct of the employer: There is a line of authority in case law which suggests that if the means adopted by an employer is manipulative or otherwise inappropriate, they will not be objectively justified.

113. Employers should retain records for decisions and evidence of any matters relevant to the confines within which they are making decisions. For example, where reasonable adjustments have not been made or properly considered an employer is unlikely to establish the defence. It should also be remembered that the Tribunals will be considering such defences many months (if not years) after the COVID-19 pandemic in light of the significant delays in the justice system. Therefore, it cannot be assumed that they will appreciate or give weight to the urgency or burden of the COVID-19 pandemic (without proper records).

Q: What can an employer do when there is no EqA angle but an employee refuses to attend work?

114. If there is no EqA angle, employers might consider disciplinary or capability proceedings (as appropriate) for an employee who refuses to attend work.

115. However, this should be done cautiously in light of the protection afforded to employees who raise a health and safety concern, stay away from a dangerous workplace or take action to prevent danger. Such employees are protected against dismissal which would be automatically unfair under s100(1)(c)-(e) Employment Rights Act 1996. These provisions might become relevant for front line workers, those working in large warehouses, supermarkets and delivery companies etc.[32] Such decisions will not be easy for employers given the novel situation that the pandemic has created.

116. It may be that the employee qualifies for SSP or company sick pay. In addition, those shielding will benefit from the Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020, unless on furlough (although the Regulations also extend to other individuals as set out above).

117. In addition, it is possible that the communications/objections from the staff member might amount to a qualifying disclosure for the purposes of the whistleblowing regime.

[32] There is also the possibility of protection against dismissal and detriment under the whistleblowing regime in similar circumstances e.g. a compliant that the workplace is unsafe but that is beyond the scope of this article.

118. A qualifying disclosure is defined in s43B Employment Rights Act 1996 as *'any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following'*;

a) that a criminal offence has been committed, is being committed or is likely to be committed (s43B(1)(a));

b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject (s43B(1)(b));

c) that a miscarriage of justice has occurred, is occurring or is likely to occur (s43B(1)(c));

d) that the health or safety of any individual has been, is being or is likely to be endangered (s43B(1)(d));

e) that the environment has been, is being or is likely to be damaged (s43B(1)(e));

f) that information tending to show any matter falling within any one of the above has been, is being or is likely to be deliberately concealed (s43B(1)(f)).

119. It is highly likely that complaints and communications from the workforce during the pandemic might fall within the whistleblowing regime. For example, disclosures relating to the provision of equipment or safety arising from PPE, social distancing guidance or compliance with the government's policies (including the job retention scheme). Workers, as defined under s43K(1) Employment Rights Act 1996, benefit from protection under PIDA against detriment or dismissal.

120. As to the issue of dismissal, given that the job retention scheme does appear to apply to those within the vulnerable category or shielding, it is envisaged that a large number of employers are likely to utilise this scheme when employees are unable to work from home.

121. Therefore, whilst employers can still undertake disciplinary proceedings (or other processes), they will need to ensure that they are not acting contrary to the wide range of legal protections afforded in the context of employment some of which are considered above.

Q: Is there any protection under the EqA where an employee refuses to attend work due to living with someone in a vulnerable or shielding category?

123. This might arise where a partner, child, parent or other individual living with the employee is vulnerable/shielding etc. This is likely to cause difficulty for employers and they will need to be careful before rejecting their employee's concerns.

124. The Government's own shielding guidance does not provide any entitlement or presumption that family members have to remain at home with a vulnerable relative in the household. Instead it appears to provide for the following of social distancing within the home to avoid any spread of COVID-19. The guidance does not therefore require someone in the same household as the vulnerable individual to stop working. Accordingly, a refusal to attend work in these circumstances might be dealt with as a disciplinary or performance issue. It is too early to predict how sympathetic the Tribunal will be to claimants in such cases.

125. The first consideration will always be whether the employee can work from home (which is the Government's primary position in any event) whether in their own role or potentially an alternative position. Despite the guidance, some employers are allowing home working in alternative roles, unpaid leave[33] without any disciplinary repercussions or are in fact paying employees. It is entirely possible that employees might find that they are furloughed under the Scheme in any event thus removing (at least temporarily) the concern. The furlough scheme is available to, *"employees who are unable to work because they have caring responsibilities resulting from coronavirus"* but an employer is not necessarily obliged to take this action. This guidance might also apply to those caring for individuals who are no longer looked after due to school, care homes or other institutions having closed.

126. In respect of the EqA, employers should be particularly alert to the consideration of whether the relative (or person with whom the employee lives) might have a disability by reason of their vulnerable status. For example, a child with severe asthma or a husband receiving cancer treatment. In such circumstances, the employee might be protected under the provisions of the EqA on the basis of associative discrimination. Associative discrimination applies to claims of direct discrimination (***Coleman v Attridge Law and another [2008] ICR 1128)***.

[33] Employees on unpaid leave cannot be furloughed unless they were on unpaid leave after 19th March 2020.

127. Harassment and victimisation by the nature of the statutory wording do not require the complainant to possess the protected characteristic and can effectively be brought by "association". However, it is not permissible by reason of the wording of s15 and 20 of the EqA to bring claims for discrimination arising from disability or reasonable adjustments (***Hainsworth v (1) Ministry of Defence; (2) Equality and Human Rights Commission (Intervener) [2014] EWCA Civ 763)*** on the basis of associative discrimination.

128. Whilst there is no UK appellate authority on whether indirect discrimination is capable of application on the basis of associative discrimination, the ECJ decision in ***CHEZ Razpredelenie Bulgaria AD v Komisia za zashika ot diskriminatsia [2015] IRLR 746*** suggests that it might be (depending on the circumstances). This decision is not easily reconcilable with the express wording of s19 EqA and there is no UK authority on this point. However, there is a potential argument that s19 EqA is not an accurate reflection of the EU Equal Treatment Directive (and does not go far enough). An appellate decision on this issue is welcomed by practitioners. It may also be that BEXIT negates this issue in due course.

Q: Will the EqA protect an employee refusing to attend work due to fears about COVID-19?

129. There is an increasing number of staff who are refusing to attend work because they are fearful about contracting COVID-19. If the issue relates to health and safety the above considerations in relation to automatically unfair dismissal and detriment protections are relevant to this issue also. In addition, protections under the whistleblowing regime may become relevant if the employees concern amounts to a protected disclosure under the Public Interest Disclosure Act 1998.

130. In the context of the EqA, employees with pre-existing mental impairments such as anxiety and depression might be more affected by the tremendous social and economic changes that are taking place and/or fear about contracting COVID-19. In addition, it is entirely possible that a larger number of employees might start to develop such conditions over the next few weeks and months. This could lead to genuine ill-health absence and the usual statutory sick pay/contractual sick pay provisions will be relevant.

131. Such mental impairments are capable in principle of amounting to a disability. Whether they do in any particular case will be determined by the facts. Therefore,

caution will again need to be deployed in determining the reason for the refusal to attend work, available alternatives to attendance and how to deal with the issue. Employers are best advised to be alert to disability issues around any refusal to attend work out of fear or concern.

Q: What are the specific duties on employers in relation to a pregnant employee's health?

132. The guidance makes clear that pregnant women are vulnerable. Therefore, employers should already have taken steps to protect any pregnant employees which is commonly being done using home working or the furlough scheme.

133. Outside of the Government's guidance employers have additional legal duties to protect the health and safety of new and expectant mothers in the workplace including:

(a) To conduct risk assessments in the workplace;

(b) Alter working conditions or hours to avoid significant risk (regulation 16(2) Management of Health and Safety at Work Regulations 1999 (MHSW Regulations);

(c) To offer suitable alternative employment on terms that are not substantially less favourable (where it is not possible to alter working conditions or hours) (regulation 16(3) MHSW Regs and s67 ERA 1996);

(d) Where suitable alternative employment is not available or the employee reasonably refuses it to suspend the employee on full pay (regulation 16(3) MHSW Regs and s67 ERA 1996).

134. Pregnant employees have been strongly advised to socially isolate, avoid travelling on public transport and work from home where possible. If the employee's job does not allow for this and there is no suitable alternative employment available it is strongly arguable that the employer should consider suspending the employee on full pay in accordance with regulation 16(3) MHSW Regulations (opposed to say furlough at 80 per cent).

135. It is also worthwhile noting that whilst an employer cannot lawfully force an employee to commence maternity leave early, it will start automatically (i.e. before the employee's chosen commencement date) if the employee is absent from work wholly or partly because of pregnancy after the beginning of the fourth week before the

expected week of childbirth. The maternity leave period will commence automatically on the day after the first day of absence under regulation 6(1)(b) Maternity and Paternity Leave etc Regulations 1999.

136. Alongside the above regimes pregnancy and maternity is a protected characteristic under the EqA. Whilst specific anti-discrimination provisions in relation to pregnancy and maternity are contained in s18 EqA. There will also be in some circumstances the possibility of bringing claims under the EqA under the protected characteristic of sex subject to s18(7) EqA.

137. Beyond maternity leave employers will undoubtedly be faced with many employees who have increased childcare pressures arising from the overwhelming closure of schools and nurseries. In such circumstances, employers will need to be alert to possible issues that may arise under the sex discrimination provisions of the EqA. In addition, there may be an increased number of flexible working applications precipitated by the unique and urgent pressures arising from the pandemic.

Q: What should an employer do about staff aged 70 or over?

138. It is obvious from the Government's guidance that employers should be taking steps to protect employees who are in the vulnerable category because they are aged 70 or over. Claims of direct and indirect age discrimination are both subject to the defence of objective justification. Many of the matters discussed above will therefore be relevant in the context of a prima facie case of age discrimination.

139. It can be assumed that the majority of employees aged 70 or over will agree to work from home or will be furloughed. However, what happens if the employee refuses to do so or raises complaint?

140. Sending such an employee home without consent might amount to direct or indirect discrimination even if the contract of employment permits it. However, it is certainly arguable that following the government guidance and taking into consideration an employer's health and safety duties is a legitimate aim (in some ways it would be difficult to see how it would not be). However, the employer must act proportionately in the circumstances.

141. In such circumstances, the employee may well be entitled to full pay subject to the terms of the contract of employment or any subsequent agreement between the

parties. It is also entirely possible that such employees may be furloughed in any event. However, the amendments to the SSP regime for COVID-19 also assist.

Q: Is an employer liable for harassment linked to COVID-19?

142. There have been reported instances of employees being harassed by other employees because they are from a country associated with a high incidence of COVID-19. The press has reported instances of racial harassment of Asians and Italians in relation to COVID-19 in the UK. There are also many inappropriate videos and 'jokes' circulating on social media which might filter into the workplace.

143. Harassment under s26(1) EqA takes place if:

(a) A engages in unwanted conduct related to a relevant protected characteristic; and

(b) The conduct has the purpose or effect of violating B's dignity; or

(c) Creates an intimidating, hostile, degrading, humiliating or offensive environment for B.

144. Whether the conduct has the 'effect' the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect are considered (S26(4)).

145. It can be envisaged that harassment might arise from colleagues or third party's such as customers. Liability for third party harassment by an employer is limited and an employee would need to show that the employer created the 'hostile environment' (***Unite the Union v Nailard [2018] EWCA Civ 1203, [2019] I.C.R. 28, [2018] 5 WLUK 457; Bessong v Pennine Care UKEAT/0247/18/JOJ***). However, an employee may have a claim for direct discrimination under s13(1) EqA if he or she can show that, in failing to prevent the harassment by a third party, the employer treated him or her less favourably because of a characteristic protected by the EqA. Indeed, it is also possible that the way in which an employer deals with harassment once it has happened (third-party or otherwise) might amount in itself to harassment.

146. Under the EqA anything done by an employee in the course of their employment is treated as having also been done by the employer (s109(1) EqA). It is not necessary for the employer to know about the harassment or approve it. An employer may have a defence to harassment if it took all reasonable steps to prevent it taking place (s109(4) EqA). Employers should therefore now be considering communications

about these issues to the workforce to establish a clear zero tolerance approach. If the workforce is working remotely this can still be undertaken via email, video conferencing etc. Associated policies should be updated and if possible, training given.

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