

# The Provision of PPE in Extraordinary Times

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## Introduction

1. Covid-19 has brought challenges for all of us but one particular challenge that employers have faced up and down the country has been the battle to find appropriate PPE for their employees, often Key Workers, to enable them to continue doing their job safely and in accordance with the law. This article discusses the duty on employers (and employees) and the potential ramifications of PPE not being provided.

## The Law

2. The law has remained the same and we continue to be guided by the Health and Safety At Work Act 1974, which places a duty on every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
3. The Personal Protective Equipment Regulations 1992 provide more specific guidance in relation to the provision of equipment, at Regulation 4:  
Provision of personal protective equipment

*4.—(1) 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.*

## Risk Assessments

4. In these extraordinary times the starting point must therefore be for employers to carry out a risk assessment to determine the risk of exposure to Covid-19 on behalf of their employees be they doctors, nurses or supermarket staff. Each employer must look at the specific risks associated with the particular work that their employee does as the risks are likely to vary. It is common sense that NHS front line staff are more likely to be

exposed to the virus than a bricklayer or an office assistant and so different controls will need to be applied according to the work environment.

5. The Regulations provide that where other controls can be put in place to guard against the risk of exposure to the virus then those steps ought to be followed in the first instance e.g. screens at check outs across the country have been erected with some speed providing a barrier between customers and employees and thereby controlling the risk of exposure. Many office workers have been allowed to take IT equipment such as monitor's home from work to allow them to carry on working from home in line with government guidance. Generally employers are encouraging employees to follow more strict hygiene practices and to socially distance as much as possible but where the risk cannot be adequately controlled by other means PPE must be supplied by the employer.
6. It is not enough to simply supply 'one size fits all' equipment. The Regulations provide that the equipment must be suitable for the wearer i.e. that is to say the equipment should fit correctly and take account of the health of the person for whom it is intended. Not just that but the Regulations also stipulate that equipment must be maintained and kept in good repair and safely stored when not in use. This of course raises practical implications for employers who may need to safely store additional equipment or put in place new systems to hygienically and safely clean equipment which is to be used more than once.

### **The qualification under the 1974 Act**

7. It is worth noting that the duty under the Act has an important qualification; which is to provide PPE as far as is *reasonably practicable*. What is reasonably practicable will of course always turn on the facts but it is likely that the Courts will be more understanding of employers who have faced difficulties in sourcing PPE during the peak of Covid-19. The HSE has issued guidance for NHS Staff encouraging multiple use of certain types of PPE previously designated as having been for single use which shows just how extraordinary the circumstances are and it suggests, in the writers opinion, that the Courts are likely to side with employers who have taken steps but perhaps been unsuccessful in obtaining appropriate PPE. Any re-use of PPE must be closely monitored by employers as part of the risk assessment process and procedures ought to be put in place to prevent over-use or cross contamination between employees.
8. But where does this leave the employee who has had to go to work without PPE or with PPE which is inappropriate either due to its size, fit or because it has been used multiple times when that was not the manufacturer's intention? If no risk assessment and no

steps were undertaken to procure the correct PPE then, on the face of it, the employer will be in breach of the Regulations and potentially find themselves liable for any injuries that result. But where a risk assessment was undertaken and PPE could not be sourced the situation is less clear cut. Employees who are concerned about going to work without correct PPE ought to raise this with their employer and work together to see if a solution can be found. Where a solution cannot be found then the employee should consider whether there is a serious and imminent risk to their health and they may want to seek advice on their worker rights.

## Comment

9. The news of health professional deaths has caused alarm all across the world and so employers must keep their risk assessments under constant review and continue to engage with employees to ensure everybody, particular those on the front line, feel safe at work. Whether any of those deaths were caused because PPE was not provided and whether there has been a breach of the Regulations leading to liability are questions that the courts may have to determine in due course.

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