

Advice for Nurseries and Childcare Providers

Lockdown 3 -what does this mean for nurseries and
childcare settings?

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The government has just announced, as of 4 January a third national lockdown in England, which will see colleges and schools close until the end of the February half-term, at the earliest. However, nurseries and early years providers are permitted by the government to remain open to all children. This does not follow Scotland's approach where attendance at childcare settings is restricted to vulnerable children and children of key workers only, for the period from 26 December until 1 February.

Providers in England should note that the fact that nurseries and early years providers are permitted by the government to remain open does not necessarily mean that it is always safe to do so. Therefore, nurseries and early years providers must carry out their own updated health and safety risk assessments in light of the increased risk posed by the virus to determine whether it is safe for them to do so.

We note that early years providers had previously called for more clarity saying that government statements had focussed on primary and secondary schools with little attention for this sector. We understand that Neil Leitch, chairman of Early Years Alliance, wrote to Education Secretary Gavin Williamson recently saying:

'At a time when there are such serious concerns about the new strain of Covid-19 in particular areas of the country, it is completely unacceptable that to date, there has been zero reference to the early year sector, other than confirmation that providers are expected to remain open in areas where their primary colleagues have been advised that it is not safe to do so.'

'If the Department for Education is to advise early years providers to continue to provide care while instructing other education providers to close, it simply must provide a clear and unequivocal scientific basis for doing so. So far, this has not happened. If this evidence doesn't exist, then the government cannot and must not put the safety of providers at risk and instead must provide the substantial financial support that settings need to restrict their operations as is necessary to keep themselves and the children in their care safe.'

'From the very beginning of the pandemic, the early years sector has been, to put it frankly, at the very bottom of the pile of Department for Education priorities.'

We note that some of the Unions are calling for pre-schools, including nurseries, to be closed except for children of critical workers and vulnerable children.

We wait to see what the direction of travel will be.

The government updated its early years guidance on 30 December 2020 and can be accessed [here](#).

In this note, **Stone King LLP** hopes to offer some clarity on the evolving legal and practical considerations nurseries and early years providers should consider in light of these latest announcements and guidance updates.

What are the key changes to the government's guidance for early years released on 30 December 2020?

On 30 December 2020, the guidance was updated specifically in relation to staff who are pregnant, and states as follows:

- Pregnant women are considered 'clinically vulnerable' (or in some cases 'clinically extremely vulnerable') to coronavirus (COVID-19) and therefore require special consideration.
- Pregnant women of any gestation should not be required to continue working unless to do so is supported by a risk assessment. Information contained in the [Royal College of](#)

[Obstetricians and Gynaecologists and the Royal College of Midwives guidance on coronavirus \(COVID-19\)](#) in pregnancy should be used as the basis for a risk assessment.

- A more precautionary approach should be taken in the case of women who are 28 weeks pregnant and beyond, or are pregnant and have an underlying health condition.

The guidance will also be further updated following the announcement on 4 January 2021.

What are our legal requirements regarding Covid-19 risk assessments?

Early years providers must comply with health and safety law, which requires them to assess risks and put in place proportionate control mechanisms at all times. They are advised to review their health and safety risk assessments and plans prior to any re-opening, and to address the risks identified using their system of controls. It is a legal requirement for early years providers to revisit and update their risk assessments, in light of the evolving Covid-19 situation, continually.

The board – as the employer – should make the final decision on re-opening, or any partial closure of the childcare setting. It should also ensure that it takes its decisions on the basis of evidence, and within its legal powers. Where a decision to close, or partially close, is based on insufficient staff, the board may consider prioritising on-site provision for vulnerable children.

How do we respond to an employee who refuses to return to work on Health & Safety grounds?

We note that, in recent days, many Unions have stated that they consider an employer to be in breach of its members' legal rights under Section 44 of the Employment Rights Act 1996 (the Act), if an employee is subjected to detriment and/or dismissal, in circumstances of danger which an employee has a reasonable belief to be serious and imminent.

We do not anticipate that nurseries and early years providers will be actively considering dismissal of staff in circumstances where they refuse to attend the premises on this basis, but it is worth remembering that the Act protects employees by providing that any such dismissal shall be *automatically unfair* where the reason for the dismissal is one of the reasons specified in the Act. In respect of Health and Safety matters, there are numerous grounds which can be relied upon. Whilst all of these grounds may *hypothetically* be applicable, the most likely grounds to be relied upon are:

- **Dismissal for leaving or staying away from a dangerous workplace** - where an employee reasonably believes that they are in serious and imminent danger and they could not be reasonably expected to avert it, they are protected from dismissal if they leave, propose to leave, or refuse to return to the workplace while the danger persists.
- **Dismissal for taking action to prevent danger** - employees who, in circumstances of danger that they reasonably believed to be serious and imminent, took or proposed to take appropriate steps to protect themselves or other persons from danger, are protected from dismissal on that basis.

It appears that early years providers would therefore more likely be considering the pay situation in relation to staff who refuse to attend work. Withholding pay from an employee who refuses to attend work due to a reasonable belief that they are in serious and imminent danger in the workplace under the Act could foreseeably amount to a detriment. In addition, any other detrimental action, e.g. imposition of disciplinary sanction short of dismissal, is likely to amount to a detriment for the purposes of the relevant legislation.

However, in our view such a claim would depend on:

- the employee having a *reasonable belief* that there is a serious and imminent danger: there is a reasonably low bar here, as the employee is not required to communicate their concerns to the employer prior to asserting this particular right.
- the steps that the employee took being "appropriate" to protect themselves or others.

- what steps the employer has taken to mitigate that danger, and in particular whether an up-to-date risk assessment has been completed.
- the current status of the pandemic, e.g. the serious and imminent danger test is more likely to be met where the cases have, and continue to, rise significantly.
- the steps that the employer has taken to reduce the risk. Merely taking steps does not eliminate the risk – the key question is *whether the employee believes themselves to be in imminent and serious danger*.

the employee's own health may also be relevant. For example, an employee in the 'clinically extremely vulnerable' or 'clinically vulnerable' category is more likely to be in serious and imminent danger.

It is worth noting that other claims could be brought either in an Employment Tribunal or county court arising from the employment relationship.

The Covid-19 pandemic and the need, notwithstanding various lockdown measures, for many employers to have their employees working is likely to lead to a surge in claims under the various pieces of relevant legislation. Until such cases are heard, conclusions as to how the tribunals and appeal courts deal with them is, by necessity, speculative. However, it is worth considering that:

- the authorities pre-Covid-19 have applied a wide interpretation to the concept of 'danger' in section 44 of the Act.
- the simple fact is that danger (in the form of risk of infection), over the last few weeks and at the present time, could be considered to be both serious and imminent.

any requirement for an employee to work away from home at this time increases the risk of infection (both by virtue of using crowded public transport and the obvious difficulties of maintaining social distancing in colleges), even where the employer has taken health and safety measures to reduce the risk of infection.

It is therefore, in our view, essential for all Early Years settings to carry out clear updated risk assessments to defend their position on re-opening and closure, including partial closure.

What is the legal basis for stopping/reducing on-site attendance?

Health and Safety

Employers have an ongoing legal obligation to operate under the legal regime imposed by the Health and Safety at Work Act 1974. Risk assessments must be "*suitable and sufficient*". That does not mean that control measures must ensure that there is no risk, merely that all relevant risks and hazards have been identified and, insofar as it is possible, control measures introduced such that the health, safety and welfare of employees and non-employees is ensured, insofar as it is reasonably practicable to do so.

Closure

When deciding whether to shut your provision (partially or fully) for physical attendance, you are essentially considering a safety requirement which includes both a pandemic control element and a staffing resource element.

Panic control element - the DfE Guidance Notes do not, predictably, provide a threshold at which a provider can stop attendance on Health and Safety grounds. Our advice is as follows:

- The DfE's advice that control measures should include "keeping groups separate (in 'bubbles')", means that providers should, if their circumstances allow, analyse the health and safety risk by each bubble and, if appropriate, maintain a risk assessment for that bubble which identifies the risk threshold.
- In devising and implementing the above control measures, providers must seek local health protection team advice and follow it (unless there is a clearly justified reason for not doing so).

Staffing resource element – the above deals only with the management of the pandemic in the nursery/early years population, and does not cover all the factors which need to be considered in a

risk assessment regarding potential closure, notably whether sufficient staff are available to make sufficiently safe educational provision on site.

Unless there is a very significant increase in local pandemic risk, the main current factor for a provider in deciding whether to stop attendance will be whether the provider has (or can obtain) sufficient staff available to make safe educational provision on that site. Consequently if, having taken an up to date and relevant risk assessment into account, the board decides that it is no longer physically safe to operate on-site attendance, it can partially or fully stop attendance at the nursery or early years setting.

Due regard must be given to DfE Covid-19 guidance. Consequently, if a nursery or early years provider decides it needs to stop on-site provision completely, it is advised to have up to date advice from PHE first (as described above) about the current local pandemic risk and whether it can be contained sufficiently by the control measures already in place or which could be put into place, and also minute that it has taken both PHE and DfE advice into account in making its decision.

If your nursery or early years provider intends to act against any specific advice from the government or PHE, it should take legal advice before making a final decision. Taking the above steps will minimise the risk of any intervention through the imposition of a direction under the Coronavirus Act 2020.

What funding support is available and how free early education entitlements funding be affected during coronavirus (COVID-19)?

Before Christmas, the Government updated its guidance in relation to funding entitlements with its plans for the 2021 spring term and confirms that in light of the coronavirus (COVID-19) outbreak, the final funding allocation to local authorities for the 2020 autumn term will exceptionally be based on their January 2020 census count.

We understand that the Government will fund all local authorities on the basis of their January 2021 census for the spring term and local authorities are advised to return to the normal funding approach (that is, 'funding following the child') for all providers from 1 January 2021.

By exception, in a local authority where attendance is below 85% of their January 2020 census levels, and where that local authority can provide evidence for increased attendance during the spring term, the government will provide a top-up to the January 2021 census. The top-up would only fund the additional places taken-up after the January 2021 census week count and would be limited to a cap equivalent to 85% of their January 2020 census.

We understand that the final funding allocation for 2020 to 2021 will be adjusted in July and further guidance for local authorities will be provided, setting out the details of how the top-up will be applied and the evidence required from local authorities to receive the top-up.

Providers are advised to keep abreast of developments.

- **What does this mean for publicly funded childcare providers?**

Local authorities should return to the normal funding approach (that is, 'funding following the child') for all providers from 1 January 2021.

The guidance on Early Years providers' access to the Coronavirus Job Retention Scheme (CJRS) has been updated to reflect this approach to funding in the Spring term.

The guidance provides that:

Local authorities must take account of the provisions within the [Early education and childcare statutory guidance](#) for local authorities in making decisions on funding for providers which have restricted attendance, or are closed or temporarily closed for reasons connected to coronavirus (COVID-19). Local authorities should ensure that providers are:

- *not penalised for short term absences of children, for example sickness, arriving late or leaving early, or a family emergency through withdrawing funding, but use their discretion where absence is recurring or for extended periods taking into account the reason for the absence and the impact on the provider*
- *aware of the local authority policy in the area in which they practice on reclaiming funding when a child is absent from a setting*

- *not penalised through withdrawal of funding for short term closures of a setting, for example, as a result of local or national elections or damage to the premises*

- **Is government support available to early years providers if income is reduced?**

If there are reductions in entitlements funding and private income resulting from Covid-19, then the CJRS scheme may be available (see link below).

Providers that have staff that are publicly funded (even if they are not in the public sector) can use such funds received to continue to pay staff, and not furlough those staff members. If income falls, it is possible for early years providers to furlough a proportion of their staff.

It is worth noting that the government guidance has been tightened since it was first introduced. Organisations are expected to consider any options to reduce their operating costs and to secure commercial loans (such as CBILS) and make savings from their existing budget or redeploy members of staff before seeking to access grant pay schemes such as CJRS or seeking specific support from the DfE. The following conditions should be met:

- the employee works in an area of business where services are temporarily not required and whose salary is not covered by public funding
- the employee would otherwise be made redundant or laid off
- the employee is not involved in delivering provision that has already been funded
- the employee is not required to deliver provision for an attending child
- the grant from the CJRS would not be duplicative to other public grants received and would not lead to financial reserves being created

The furlough criteria and early years guidance can be found [here](#).

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