As the number of Islanders vaccinated against Covid-19 increases and the number of people infected remains at a low figure, Jersey is progressing with its reconnection plan, which means that the restrictions on the workplace continue to reduce.

The most relevant recent change for employers is that the work from home guidance has been replaced, and is no longer the default position. This means that businesses can now start to plan to reintegrate their staff into WFO ("Working From The Office").

While the experience of employees will have differed in recent months based on their field of work and individual circumstances, there are a few areas in which everyone finds themselves in the same position. One of the areas that employers of all kinds will likely have to deal with is managing employees who are reluctant to return to the office because of anxiety-related issues – employers need to be careful in handling these individuals not just as a matter of good management and best practice, but also in terms of compliance with employment legislation.

Some employers in Jersey may find getting staff to return to WFO more challenging than they expect, particularly where employees are moderate or high risk. Some employees may also be anxious about the RTW ("Return to Work"), and the potential risk of exposure to Covid-19 for them or their loved ones.

Before pushing an employee to RTW, or threatening them with a sanction if they refuse to RTW, businesses should carefully consider both current public health guidance and the individual circumstances of the employee. If businesses get RTW wrong they could face various claims including potentially a claim for constructive unfair dismissal (and possibly a discrimination claim). If the reluctant employee does return and they suffer an aggravation of an underlying medical condition through being exposed to the virus at work (difficult to prove but not impossible), then they could bring a personal injury claim.

What is the Current Guidance? (as at 12 April 2021)

The current guidance from the States of Jersey is that businesses are being advised to continue to allow working from home where it is possible and appropriate to do so. Indoor businesses can begin to step down working from home as the default and resume indoor shared space working if they choose to do so.

Businesses have been provided with specific guidance to make your RTW space as safe as possible. The key point about the updated guidance is that it offers flexibility – on the one hand, businesses are being “advised to continue to allow working from home” and on the other, they can choose to “begin to step down working from home as the default”. This should be carried out in a gradual, phased way, and, if they have not already done so, businesses need to plan how and when they bring their staff back safely.
The guidance also states that for office-based working:

- Facemasks are not required but are “strongly recommended” where two-metre physical distancing cannot be guaranteed
- Employers should consider “bubbling” teams, using digital platforms and staggering break times
- Hot-desking should be avoided
- Access to communal areas such as kitchens and small meeting rooms should be restricted

The guidance makes it clear that while the restrictions are reducing, we are not yet at the point of a return to normal, pre-Covid-19 working practices.

Managing employees in moderate or high risk categories

Some individuals are at higher risk from Covid-19 because of pre-existing medical conditions, or due to age, disability or pregnancy, all of which could be protected characteristics under the Discrimination (Jersey) Law 2013 (“the Discrimination Law”). To avoid a discrimination claim on one of these grounds, particular care should be taken to manage any RTW exercise. Where the individual has a disability, the focus should be on whether it is possible to make any reasonable adjustments to facilitate the RTW.

Where an employee in one of these categories can continue to work from home, this should be discussed with them as this may be the most appropriate way to continue until the vaccine program has concluded (or, in the case of a pregnant employee, her maternity leave ends). You should make sure these employees continue to feel part of the team as feelings of exclusion can also risk a discrimination or constructive dismissal claim.

Is anxiety about returning to work a disability?

The answer to this really depends on whether the individual is simply worried about RTW or the risk of ‘catching Covid-19’, or whether they have a clinically diagnosed anxiety condition. Simple worries are highly unlikely to amount to a disability or be protected under the Discrimination Law. Employees in this situation could be invited back into the office at a quiet time to re-familiarise themselves with the environment and should be reassured that appropriate mitigation has been put in place in the office to manage the risk of Covid-19. Ultimately, if an employee refuses a lawful order to WFO a business can consider managing them out, but this would require careful consideration of the appropriate process. A Tribunal could well frown on warnings for misconduct in these circumstances. Involving occupational health is likely to be a better solution.

Where an employee has a medically diagnosed anxiety condition, which has lasted for, or is expected to last over six months, then this is likely to be recognised as a disability. In this situation, employers will need to consider what adjustments they can make to the workplace to facilitate the individual’s participation in work.

Employers should consider:

a) Changing the way things are done, for instance moving the employee from a customer facing role to a non-customer facing role.
b) Changes to overcome barriers to the physical features of a workplace, such as assigning the employee a dedicated and secure office to minimise the risk of contact with other staff.
c) Providing additional support to help the employee overcome their anxiety, such as arranging for a car parking spot for the employee near to the office, which would allow them to avoid public transport.

It should be remembered that one of the purposes of the Discrimination Law, and in particular the protected characteristic of disability, is to reduce the barriers for individuals accessing full and rewarding employment. Employers should be looking at ways to facilitate the participation at work of all their staff, even if temporarily.
What if an employee is not moderate or high risk, but they live with someone who is?

Carers are not protected from direct or indirect discrimination under Jersey law; nor do we have what is called “associative discrimination” which is where an individual is discriminated against because they are associated or connected with someone who is disabled or has another protected characteristic.

The guidance is that those that live with someone at risk of serious complications of Covid-19 do not need to adopt shielding measures themselves. They should however stringently follow physical distancing and reduce their contact outside the house.

Despite the lack of legal protections for carers, businesses should still take care in the current environment to discuss the employee’s concerns with them on an individual basis to see if they can be managed appropriately, in particular to ensure stringent physical distancing can be put in place for them. A failure to handle an employee’s legitimate concerns in a reasonable manner could cost an employer not only a good staff member, it could also cost the business a tidy sum in Tribunal awards.