

# Shared Insights: the Covid-19 pandemic - workforce challenges for NHS trusts

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Helen Badger, Partner at Browne Jacobson provided an insight into the legal issues arising from Covid-19 related illness, including long COVID and PTSD.

Claire Parker, Senior Programme Lead (Health and Wellbeing) at NHS England and NHS Improvement outlined the range of national support available to NHS colleagues for health and wellbeing.

Carl May-Smith, Partner at Browne Jacobson gave practical guidance on dealing with HSE investigations where staff have tragically died during the pandemic.

Nicola Evans, Solicitor-Advocate at Browne Jacobson outlined the Coroner's guidance on holding an inquest in the circumstances of a staff death during the pandemic.

The Shared Insights were:

- What is a 'Covid-related absence' and how should it be treated? NHS Employers guidance explains this should be treated differently to other absences.
- Long COVID may bring issues in discrimination and disability claims. At this stage the long-term impact of long Covid is not clear but if the condition has a substantial adverse effect on an individual's ability to carry out normal day to day activities for more than 12 months, the tribunal are likely to consider it a disability.
- Mental health of employees has also been impacted by Covid-19, for example Covid-anxiety and PTSD. It is important to make compassionate and rational decisions about employees that are well informed of any underlying mental health conditions.
- **Helen Badger** shared her top tips to overcome the workforce related legal challenges arising from the pandemic:
  - Engage with colleagues in other organisations to ensure a consistent approach
  - Complete an audit – how many employees in the organisation may be affected by these issues and where are they?
  - Temperature check – is now the right time to adopt a tougher approach?
  - Ensure your approach is consistent with recommendations about compassionate people practices
  - Be properly informed about the individual's medical position. Utilise Occupational Health and ask the right questions.
- **Claire Parker** at NHS England and NHS Improvement has provided [this brochure](#) which sets out the various offers and details of how to access them. She outlined the work being done by them to the support employees' health and wellbeing:
  - Telephone support line, access to a range of apps, counselling offers, coaching and online options, physical health initiatives
  - Seeking to achieve a culture where all staff feel looked after and able to talk about wellbeing
  - Commitment for every NHS colleague to have regular wellbeing conversations and plans to offer national training programme to upskill line managers to feel able to confidently approach this with colleagues
  - Plans to introduce health and wellbeing champions across every NHS organisation – someone to advocate health and wellbeing and actively signpost and promote wellbeing

- Next steps – to refine the national offer so that the national programme is easy to access, and evidence based, continually use staff feedback to define the offer available. You can access that here [Supporting our NHS people](#).
- **Carl May-Smith** explained that in relation to staff deaths during the pandemic, HSE are not completing routine investigations at present. If an HSE investigation has been undertaken it is likely a result of another prompt, such as whistleblowing by staff or a Coroner or the family requesting an investigation. If an HSE investigation is undertaken:
  - The HSE's main focus will be on compliance with national guidance. If you were required to depart from guidelines, it is important to provide evidence of why this was necessary and how the departure was risk assessed at that time.
  - Provide a single point of contact at your organisation for HSE investigations to ensure full co-operation and a managed process when disclosing evidence.
- **Nicola Evans** explained that in the tragic cases where healthcare professionals have died of Covid-19, you should refer to the [Chief Coroner's Guidance No 34](#) and [Guidance No 37](#).
  - Covid-19 is a natural cause of death and so on its own is not a reason to notify the Coroner.
  - However, if the virus could have been contracted in the workplace there is a duty to notify the Coroner under Regulation 3 (1) (a) of the Notification of Deaths Regulations 2019.
  - The Coroner must then consider whether he or she has a statutory duty to open an investigation under the Coroners and Justice Act 2009.
  - The test is the usual one: does the Coroner have reason to suspect that although the death is from a naturally occurring disease (Covid-19) it may be deemed unnatural because of some culpable human failure. This is a matter for the Coroner's judgment and will depend on the facts of the case – but [Guidance No 37](#) makes it clear that if there is reason to suspect some culpable human failure in the workplace (such as infection control failures) contributed to the death, the Coroner will have a duty to hold an inquest.
  - It is a matter of judgment for the individual Coroner to decide on the scope of each inquest. The focus is likely to be on whether the employing organisation complied with national guidance in place at the relevant time and the Coroner is likely to ask for evidence of this. Guidance 37 reminded Coroners that a Coroner's inquest "*is not usually the right forum for addressing concerns about high-level government or public policy*". However, the approach will vary between different Coroners.
  - Support from HR for families and colleagues in understanding the process is key.
  - Some Trusts described the support they are providing to bereaved families to access the [NHS and Social Care Coronavirus Assurance Scheme](#).

## Contacts

**Damian Whitlam**

**Partner**

[damian.whitlam@brownejacobson.com](mailto:damian.whitlam@brownejacobson.com)

+44 (0)330 045 2332

**Nicola Evans**

**Partner**

[Nicola.Evans@brownejacobson.com](mailto:Nicola.Evans@brownejacobson.com)

+44 (0)330 045 2962

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