



Covid-19 – A Guide for Employers

Introduction

Following an extended period of relative calm, the British Virgin Islands experienced a surge of positive Covid-19 cases in June and July of 2021, which resulted in significant numbers of hospitalisations and deaths.

The Government of the Virgin Islands has so far avoided the type of lockdown implemented in March and April 2020 and there is clearly a desire to keep the borders open and to allow businesses to continue to operate, albeit with certain restrictions in place.

This is a period of great concern and employers are rightfully questioning how they are able to strike a balance between the desire to operate their business against their obligations with regards to the health and safety of their employees and those that come into contact with their business.

This legal guide touches upon an employer's health and safety obligations when confronting the risks associated with Covid-19 and also considers the topical issues of testing and vaccination in the workplace.

What is an employer's duty of care?

The Labour Code places obligations on employers in relation to health and safety in the workplace. These obligations require employers to ensure that:

- a safe, sound and secure working environment is provided so far as reasonably practicable;
- every reasonable precaution is taken in the circumstances for the protection of workers;
- reasonable precautions are taken in the circumstances to protect the general public who come into contact with the workplace; and
- all applicable standards and policies established by the Labour Department and other relevant agencies of the Government of the Virgin Islands in consultation with stakeholders are complied with. Practically, such agencies would include the BVI Health Services Authority and the Environmental Health Division of the Ministry of Health and Social Development.

A breach of an employer's obligations pertaining to health and safety under the Labour Code constitutes a criminal offence. Criminal liability may extend to individuals (including directors and other employees) where a breach of the obligation has been facilitated by their neglect.

Health and safety risk assessment

The Labour Code requires employers to undertake a suitable and sufficient assessment of the risks to the safety and health of both:

Revised: 22 August 2021

www.ghpbvi.com

- employees while at work; and
- persons who are not employees, but which are impacted in some way by the employer's business.

The latter category will capture persons such as customers, visitors, suppliers and persons on secondment.

The Labour Code requires an employer to review the health and safety risk assessment if:

- there is reason to suspect it is no longer valid; or
- there has been a significant change in the matters to which it relates.

If employers have not reviewed their health and safety risk assessment since the onset of the Covid-19 pandemic, or since the recent surge of cases in June/July 2021, they should do so as a matter of urgency.

Employers should expect much greater scrutiny in relation to their obligations with respect to health and safety in the workplace, including from their employees, government bodies responsible for ensuring compliance with health and safety standards, and customers. It is therefore critical that employers are prepared.

The Labour Code places additional obligations with respect to health and safety on employers with twenty or more employees, which employers should have particular regard to in the current climate.

The Government's protocols

The priority for any employer operating a business at this time must be to comply with the various protocols introduced by the Government of the Virgin Islands for adoption in the workplace. The protocols include:

- maintaining a physical distance of not less than six feet from other persons;
- encouraging customers to follow social distancing advice;
- washing hands (for at least 20 seconds) or using hand sanitiser frequently throughout the day; and
- wearing a face covering.

Specific protocols have been introduced for different business sectors and the protocols are updated frequently. In many cases these are legal requirements and failure to comply with these protocols risks an unsafe and unhealthy work environment, financial penalties, loss of reputation, and the potential for the business to be closed down.

Vaccination

The availability of freely available vaccines represents an opportunity to both protect persons from the risk of serious illness and death and also to reduce the risk of transmission of Covid-19. The Government of the Virgin Islands has encouraged all eligible persons to be vaccinated but has so far taken the stance that vaccination is a personal choice.

Notwithstanding the stance taken by the Government of the Virgin Islands, many employers are considering the role that vaccination can play to help them to comply with their obligations to protect their staff, customers and those who may otherwise come into contact with their business.

Employers looking into whether to implement some form of mandatory vaccination policy will need to consider a range of factors, including:

- the terms and conditions of employment for current employees;
- whether the results of the risk assessments undertaken by the business justify the introduction of a mandatory vaccination policy;
- the particular needs of employees who are unable to be vaccinated, including on religious and medical grounds; and
- the measures to be taken where an employee refuses to be vaccinated.

In the absence of a definitive legal pronouncement by the Government of the Virgin Islands, employers should exercise caution and it is essential to take legal advice to avoid the many potential pitfalls in this complicated and potentially contentious area.

Testing

A number of employers are also considering whether some form of testing policy could be implemented either in addition to, or instead of some form of vaccination policy.

Employers wishing to adopt some form of mandatory testing policy will need to consider a range of factors, including:

- the consequences if an employee refuses to be tested;
- whether it should be the employer or the employee that should pay for the test;
- whether both vaccinated and unvaccinated employees should be tested;
- the frequency of testing; and
- how the results of the tests should be stored.

Conclusion

This is a complicated legal area and there is no one size fits all solution. We recommend that employers fully consider all the potential legal implications before adopting a testing or vaccination policy in the workplace. Employers should also ensure that their health and safety risk assessments and policies are up to date and appropriate in the current climate. Our legal experts have worked with a range of businesses to help them to develop appropriate policies that are right for their particular circumstances.

If you would like any further information in relation to your legal obligations and how to introduce policies to mitigate the risks posed by Covid-19, please [email us](#) or reach out to your usual GHP contact.

Contact Us

SHEILA C GEORGE

Managing Partner | George Henry Partners LP

☎ + 1 284 393 7001 | + 1 284 340 3322

✉ sheila.george@ghpbvi.com

JOHANN E HENRY

Partner | George Henry Partners LP

☎ + 1 284 393 7002 | + 1 284 340 3422

✉ johann.henry@ghpbvi.com

PAUL E MELLOR

Partner | George Henry Partners LP

☎ + 1 284 393 7003 | + 1 284 340 4822

✉ paul.mellor@ghpbvi.com

JERMAINE O CASE

Senior Associate | George Henry Partners LP

☎ + 1 284 393 7004 | + 1 284 346 4422

✉ jermaine.case@ghpbvi.com

Copyright © George Henry Partners LP

The content of this guide is intended for general information purposes only and is current as at the date of publication indicated. This guide does not constitute legal advice and should not be relied upon as such. You should always seek specific legal advice that takes into account your individual circumstances.