



Covid-19: advice to reps on ORR’s “Guidance for dutyholders reviewing controls that have been introduced to mitigate COVID-19 transmission.”

July 2021

Introduction

The UK Government published its Roadmap out of Lockdown in February 2021 that involved a cautious step by step approach to relax measures in England introduced in response to the Covid-19 Pandemic. Based on a strategy reliant on four criteria¹ including increasing vaccinations and any surge in infection rates not putting unsustainable pressure on the NHS, the fourth and final stage of the Lockdown was supposed to have taken place in June but was deferred for four weeks until Monday 19th July 2021.

Despite the third wave surge in Covid cases since May, with over 40,000 positive cases reported on 14th July alone², the Government has confirmed that from 19th July it will be removing most of the legal restrictions that underpinned the measures that had been put in place to cut virus transmission and protect each of us.

At the same time as taking this decision, a situation compounded by a vaccination programme that is far from complete, the Government is urging restraint and caution,³ acknowledging that the pandemic is not over and its decision does not mark a return to normal. Instead, cautious guidance will remain in place.

UK Government Guidance (applies in England only)

The UK Government has provided some cautious guidance⁴ for individuals, businesses and the vulnerable that applies whilst Covid-19 prevalence remains high and which includes:

- whilst Government is no longer instructing people to work from home if they can, Government expects and recommends a gradual return over the summer;
- Government expects and recommends that people wear face coverings in crowded areas such as public transport;
- being outside or letting fresh air in; and
- minimising the number, proximity and duration of social contacts.

What is happening in Scotland and Wales?

The Scottish Government has announced that the nation will move to Level 0 at 00:01 hours on Monday 19th July 2021. This will mean that whilst social distancing and other measures will continue, some changes have been made. Subject to progress in suppressing the virus, measures could be relaxed completely from 9th

¹ See Executive Summary at: <https://www.gov.uk/government/publications/covid-19-response-spring-2021/covid-19-response-spring-2021#roadmap>

² See: <https://coronavirus.data.gov.uk/> which reported 42,302 positive tests on 14th July, 245,830 in the seven days up to that date, an 53% increase in hospital admissions and a rising death toll (229 in the seven days to 14th July). Website viewed at 1035 on 15th July 2021.

³ See: <https://www.gov.uk/government/publications/covid-19-response-summer-2021-roadmap/moving-to-step-4-of-the-roadmap> (Updated 12th July 2021 and viewed at 1041, 15th July 2021)

⁴ See Note 3. See also: <https://www.gov.uk/government/publications/covid-19-response-summer-2021-roadmap/coronavirus-how-to-stay-safe-and-help-prevent-the-spread>

August 2021. More details can be found at: <https://www.gov.scot/news/level-0-from-19-july/>

In Wales, the First Minister has published a statement in which he advises the nation that from 17th July 2021 it will move to Alert Level One and that, subject to the delta variant spread, a new Level 0 will come into force on 7th August. Details of what this means can be found at: <https://gov.wales/next-steps-towards-future-fewer-covid-rules-first-minister>

Office of Rail and Road: “Guidance for dutyholders reviewing controls that have been introduced to mitigate COVID-19 transmission.”

With the withdrawal of legislation supporting Covid-19 measures in England, many of the agreements on things like social distancing and face masks previously agreed and implemented through the Railway Industry Coronavirus Forum will come under review because their legal standing and enforceability has changed.

In recognition of this situation, TSSA and the other railway trade unions have been involved in a series of discussions with the ORR and employers in relation to a guidance document that the Railway Safety Regulator (at the ORR) will use to ensure the railway industry complies with its Covid-19 health and safety duties and responsibilities.

On the evening of 15th July 2021 the unions discussions with the ORR were concluded and reps receiving this document will also find a copy of the guidance attached.

Key messages that TSSA wants to highlight before looking at some of the elements in the ORR principles document are:

- A gradual change or easing
The purpose of the document is to ensure health and safety is maintained as gradual easing or changes are made to Covid-19 measures;
- No tolerance of a gung-ho approach
TSSA will not tolerate a “gung-ho” approach to withdrawal of Covid measures which we are aware has been the case with a few employers. Those issues have now been dealt with. However, our clear statement to employers is that where our members’ health and safety is endangered and we find it necessary, we will report the matter to the Rail Safety Regulator for his intervention. TSSA will also consider balloting members for industrial action and our members have the legal right to stop what they are doing and withdraw to a safe area if they feel in imminent danger;
- Use of the word ‘should’
At many points in the ORR’s document the word ‘should’ is used which means that an employer has a high bar to cross in justifying change.

Justifications have to be health and safety related and we believe would be extremely difficult at a time of rising infection;

- Change must mean you can continue to work safely
If members feel that their health and safety is endangered, we recommend that you should follow legal protections and the company's Work Safe arrangements, withdrawing to a safe place (see later);
- Full involvement of TSSA reps in reviewing risk assessments
The agreement is predicated on reviewing risk assessments in the light of the current situation in which, apart from a change in the Government's approach, there has been a dramatic increase in infections and the potential for transmission of the virus. Those reviews must take place with the full involvement of trade union reps. In the event that there is a failure to consult with you as a TSSA rep of affected staff, you should report it to your TSSA organiser.

How to use the ORR document

The ORR document contains a set of three overriding principles and under each of these are a series of factors to consider.

The three principles are:

- Principle A: Use of risk assessments
Any change to CV19 controls - including those that may not have been the subject of prior risk assessment - are now only to be changed following a review of the risk assessment.

Crucially, sufficient time needs to be allowed for completing the reviews and communicating the changes to employees, before implementing any changes. This may take some weeks and must include consulting with union reps "in good time" (see later) which means that the rep must have a chance to consider the risk assessment and be able to speak to their colleagues.

Following Principle A are a series of factors that should be considered, including where maintaining them could provide wider benefit. You will notice that the word 'should' appears a lot which is why we have emphasised it on the previous page.

One such example is that of the continued use of face coverings which remain mandatory for transport services operated by Transport for London, Transport Scotland, Transport for Wales, Merseytravel, etc. Furthermore, it is UK Government guidance that it expects and recommends that people wear face coverings in crowded areas such as public transport (see above) but equally that could apply in other workplaces.

Another example is the continuing use of screens and barriers. These have proven to be a significant asset in protecting members from transmission of the virus where staff have had to either work close together (as in a vehicle) or with each other in offices or Control Centres. For staff involved in customer facing roles, they also provide additional benefits like protection from assault which has been recognised by the RSSB as a growing issue for staff on stations in particular.

For those staff in customer facing roles who have to deal with a public that no longer wear face coverings and do not observe social distancing, TSSA would additionally argue that the risk from CV19 is increasing, and risk assessments need to not only remain in place but also ramp up protection.

The ORR document also describes how risk assessments should include consideration of other factors such as the effect of changes on staff whilst also ensuring that there is a process in place to monitor and review changed measures.

- Principle B: Keeping pace with Government measures and scientific research.

This principle is essentially concerned with the company being ready with emergency plans in case a resurgent Pandemic means the need to restore controls. At the same time, there is a requirement for employers to continue to seek to reduce opportunities for the spread of the virus by considering the use of ventilation systems and engineering controls.

- Principle C: Collaboration between duty holders and with trades unions and employees

A collaborative approach between trade unions, employers and the ORR has underpinned how the railway industry has been able to work through the Pandemic to date. The ORR document seeks to reinforce this requirement and goes on to describe the need for consultation at local level but aligned with agreements made at a higher level. This aspect is in the document to prevent rogue employers trying to avoid the requirements of the agreement, perhaps by simply withdrawing all Covid control measures without risk assessment (a breach of law) or consultation with trade union reps (also a breach of law).

Similarly, the agreement references 'consistency' across the industry and explains how the ORR will drive that aspiration. Reps and members who become aware that inconsistent approaches are being adopted within their company (eg, perhaps in relation to screens and barriers or the use of face

covering) or to a neighbouring employer, should, in the first instance report that to their TSSA organiser.

Additional advice to reps

One of the things that has been highlighted from recent discussions with a railway employer has been the need to ensure a consistent approach by TSSA reps within a firm. On some occasions, this has been compounded by inexperienced reps being pressured by management into agreeing measures that aren't consistent with what has gone on elsewhere. For this reason, TSSA strongly recommends that reps within each company should ensure they remain in contact with one another (and their TSSA organiser).

Where bargaining structures and agreements allow, reps should consider arranging for risk assessment discussions with employers to be conducted by a senior or lead representative accompanied by the local reps.

Alternatively, and where agreements are not in place, reps should approach their employer about nominating one of their number (perhaps a Company or Divisional Council Rep) to act as the lead person for risk assessment matters and who would then attend such meetings with the relevant local reps (who has the expertise and connections with the people affected) to ensure consistency.

Consultation with reps: the law on risk assessments

What should happen when an employer wants to implement or review a risk assessments is that they must first consult the relevant union reps.

Consultation under a law known as the Safety Reps and Safety Committee Regulations 1977 (SRSC Regs) 1977 should take place with the recognised trade union's health and safety reps. TSSA's position - and as advised to all members - is that staff reps should be included when safety reps are not available (or perhaps do not have the relevant knowledge of the subject of the risk assessment).

Where employees are not covered by collective bargaining, the requirements of the Consultation with Employees Regulations 1996 is that either the affected group nominate a rep or all members of the group are consulted.

The important point under both bits of legislation is that consultation takes place in "good time" which means that reps and staff - those who often know the job and its pitfalls really well - should be involved from an early stage in putting the risk assessment together.

It is not good enough - and breaches the official Code of Practice and the law - if an employer presents what is in essence a fait accompli or fails to consult at all.

TSSA takes this matter very seriously and will engage with the Rail Regulator at the ORR over any breaches of legislation. We will also consult our members over industrial action where members' health and safety is put at risk by failures in this area.

Further guidance is available in the TSSA Reps Bulletin on Consultation on Risk Assessment which appears on the Union's Website. Reps are also recommended to contact their TSSA organiser for support and guidance over risk assessments to ensure that their employer does the right thing.

Stopping or Refusing to Work

You have the legal right to refuse to begin a task or continue with a task if you believe that to do so would place you or your colleagues in serious and imminent danger of potential infection by the Covid-19 virus (or any other health and safety issue). The general right originates from Section 44 of the Employment Rights Act 1996.

Your employer must have a procedure in place that allows you or those you represent to do this (for instance, in Network Rail it is called the Worksafe Procedure). Check on what your employer's procedure is and familiarise yourself with it.

If you are unable to find such a procedure, report that to your TSSA organiser or contact the TSSA Helpdesk (see below).

If you do refuse to commence work or stop working under these circumstances, you should immediately report this to your TSSA organiser or the TSSA Helpdesk.

Tell us what is happening where you work

If you are in a non-operational role, please complete the form on our website at:
<https://www.tssa.org.uk/en/campaigns/safe-at-work/index.cfm>

TSSA Helpdesk

Call: 0800 328 2673. The Helpdesk is open 9am-5pm Monday to Thursday and 9am-4pm on Fridays.

Or you can fill out a website form at any time here:

<https://www.tssa.org.uk/en/Your-union/about-us/contact-us/contact-the-helpdesk.cfm>