

West Midlands Employers
Interpretation and Issues to consider for the implementation of NJC Circulars
for use by Local Authorities / other public sector bodies

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1. Introduction

- 1.1. In an emergency such as the one currently being experienced from the Covid 19 pandemic Local Authorities and other public sector bodies are responding at pace to the ever changing situation, and in making decisions about how to best deploy the sector workforce are being guided by a raft of information from a number of sources including Gov.uk, the Local Government Association, Local Resilience Forums and discussions with their own management teams, HR and trade unions.
- 1.2. At times such as these it is important that where practicable employers take a consistent approach. The current Circulars are “advisory” only, and employers have to make individual decisions based on the exigencies of the different service needs at the time, and these decisions may change as the situation develops and moves into a protracted phase further into the Summer.
- 1.3. West Midlands Employers has already produced guidance on deployment and redeployment, managing annual leave, virtual recruitment and onboarding as well as our ongoing FAQs for specific situations which are available on our specific Covid 19 support website wmeccovid19.org.uk. At this point however we recognise that information is being received spasmodically, with changing guidance and some unclear language which is causing local disparity in interpretation and application.
- 1.4. This document is therefore designed to provide a regional interpretation on key parts of the national guidance, so that the West Midlands as a region can take a consistent and therefore stronger stance on some of the issues most likely to cause difficulties in implementation. We will keep this document updated as the situation develops, and further advice is issued

2. Guidance point 1 – status of LGA Bulletins

- 2.1 The LGA have been producing “Advisory Bulletins” on a regular basis since the outbreak of the pandemic. These are all available on the WME website here wmeccovid19.org.uk/resources
- 2.2 The status of such bulletins though are **advisory** as stated, and do not form any mandatory instruction or collective agreement. They are however jointly agreed with the Trade Unions Joint Secretaries as shared advice and are intended to act as a model approach.
- 2.3 The LGA acknowledge however that during such a difficult time there will be issues in adhering to the letter of the guidance in all instances, and that “employers will have tough choices to make” where there are areas of interpretation and nuance, or where the specific circumstances faced by any one authority means the guidance cannot be applied in the way it was intended when written.

WME Position

At WME we have taken an approach to use the LGA guidance as the initial basis of the advice we have been providing. The guidance however is never enough to cover every situation or circumstance, so we have applied an additional level of interpretation based on sound employment practice and a pragmatic approach to the current situation to provide the best advice and support.

This would include factoring in the following considerations:



- Has the decision / action been through a considered risk assessment process to understand, measure and mitigate any potential risk? This may mean a risk from an HR perspective (i.e. the risk of tribunal) but also particularly at these times the risk of goodwill – i.e. the need to harness significant discretionary effort and the impact any decision outside the guidance may have on that, the risk of escalating impact, through disagreements with the workforce or Trade Unions on the interpretation and implementation of guidance.
- Consideration of how consistent the decision is with those being made by other councils. By gathering intelligence from across all councils who have different workforces we can measure and share the “common” approach to give councils a degree of comfort and assurance that their interpretation is in line with others. Where a decision made by a council is outside of the guidance, or an employer interprets the guidance in a way which is stretching the intent behind it, we will have a discussion to understand the particular circumstances and the nature of the risk and challenge which has led to the decision being out of step with other councils so that councils are protected as far as possible from challenge.

3 Guidance point 2 – areas of contention in current guidance

3.1 Vulnerable workers

The NJC circular of 17th March stated:

“Councils will have employees who are in the vulnerable groups where they could be looking at months of working at home. [list of [Vulnerable groups](#)].

There are some clinical conditions which put people at even higher risk of severe illness from COVID-19. Next week the NHS in England will directly contact people in this category with advice about the more stringent measures that should be taken in order to keep themselves and others safe.”

The circular at this point made assumptions about arrangements being put in place for people to work from home wherever possible, and referenced that in some cases where it was not possible for people to work from home they should take an amount of leaver and otherwise be at home on full pay.

It did not however make any reference to key or critical workers who fell into this wider vulnerable category, and were unable to work from home due to the nature of their work, and so could potentially be required by the employer to attend work.

The guidance which followed on 23rd March further complicated the vulnerable worker question, by adding in a statement thus:

“Our circular of 17 March set out the expected announcement, made yesterday, that people with clinical conditions which put them at even higher risk of severe illness from COVID-19 will this week be contacted directly by the NHS and told to remain in their homes and await individual contact about how their conditions will be managed in order to keep themselves and others safe. The circular also listed health conditions that categorise employees who are at increased risk of severe illness from COVID-19 who are being asked to be particularly stringent in following social distancing measures. Employees in both groups should not be expected to attend the workplace. All options for working at home should be considered, as well as for those employees who live with and / or have caring responsibilities for people in the two groups. However, as previously advised, employers will have no option other than to accept that some employees will be staying at home on full pay for the duration of this emergency as they are not able to work from home”

Authorities have indicated they feel this position is not as set out in the Government Guidance, and that unless employees are high risk and required to undertake



shielding for the next 12 weeks, if they are key workers they should, with the correct risk assessment, PPE and social distancing protocols, be able to attend work.

WME Position

WME has sought further clarity from the LGA to understand the intent behind this advice. The LGA have advised that in these situations employers have to use their discretion and judgement. The NJC circular is guidance and says they should not be expected to attend work but that all options for working at home should be considered. If the employer can demonstrate that it has made every possible effort to ensure the employee's safety at work, then FAQ 9 comes into play."

FAQ 9 refers to the actions to be taken when an employee refuses to undertake work they are given [LGA FAQs](#) including the potential for disciplinary action.

"It is anticipated that employees will, as far as possible within the constraints of school closures, caring responsibilities and complying with Government advice on self-isolating and social distancing, continue to perform their duties and be flexible to ensure that services continue to be provided. [Personal protective equipment advice](#) should be followed both in relation to Covid-19 and any other risks applying to the roles that employees are asked to perform. If difficulties arise with a refusal to attend work or a refusal to carry out certain duties, managers should ascertain what the concerns are, consider what, if anything, can be reasonably done to address those concerns and take action accordingly, to encourage the individual to work.

If this has been done, but the individual still refuses to attend or perform the task then this may constitute unauthorised absence or partial performance (i.e. where they are only prepared to carry out certain tasks rather than their full range of duties). This may be a disciplinary issue, which may justify withdrawal of pay. The manager should explain the individual's contractual obligations and the consequences of refusing to work. If there is still no change in the individual's position, immediate advice should be sought from HR to ensure an appropriate and consistent response is taken."

We recognise however that to enforce such a requirement in the current climate would be challenging and potentially damaging to councils. Staff are understandably worried for their own health and that of their family, and to force someone to work where they have expressed their concerns, discussed it with their manager in an attempt to reach a compromise but a mutually acceptable solution cannot be reached, it is likely that the employee will report sick, not necessarily with Corona virus but with work related anxiety, taking them out of any kind of work for a prolonged period and leaving a legacy issue in the council to be dealt with afterwards.

It is also true however that employers need as many key workers as possible to be attending work and contributing to the effort to continue services to the public.

Councils should therefore take steps to manage these scenarios on a case by case basis, with a consistent framework approach. A manager's framework guide is attached at Appendix 1 with a list of questions and considerations for managers at Appendix 2.

As long as councils can demonstrate they have taken a consistent approach across all such cases and that the decision is made on a basis of needing to protect the vulnerable in the community in exceptional circumstances, a decision contrary to the LGA guidance would be justified.

In any situation it would be advisable to keep such "in principle" decisions under review as the circumstances change and the need for types of workers changes, other provision is stood up or stood down, or overall numbers change with fluctuating sickness and self-isolation levels.



3.2 Workers caring for vulnerable family members

The status of workers who are caring for someone who is shielding is similar to that of vulnerable workers themselves. Every effort should be made to allow such workers to work from home, and where this is not possible for them to be at home on full pay. This should only be implemented where they are a key worker and the service needs them to be working and there is no alternative

The risks for those living with someone who is shielding are far greater, and should be considered along side their personal circumstances and ability to maintain safe shielding within their home.

Shielding requires those very vulnerable people to isolate from members of their own household, keeping in separate rooms, using separate cooking facilities and social distancing even from the family. For many people the practicalities of this will be more difficult, with them not potentially having separate living space, a spare bathroom or bedroom etc. In this situation the family member has not choice but to completely self-isolate with their family member for the required period.

It does not mean however that these people have an automatic right to refuse to work because of their situation, and the government guidance does not require people in this situation to shield in the same way as the individual in the highly vulnerable category.

3.3 Refusal to work

The LGA guidance sets out the position for councils if they have employees who refuse to work:

“It is anticipated that employees will, as far as possible within the constraints of school closures, caring responsibilities and complying with Government advice on self-isolating and social distancing, continue to perform their duties and be flexible to ensure that services continue to be provided. [Personal protective equipment advice](#) should be followed both in relation to Covid-19 and any other risks applying to the roles that employees are asked to perform. If difficulties arise with a refusal to attend work or a refusal to carry out certain duties, managers should ascertain what the concerns are, consider what, if anything, can be reasonably done to address those concerns and take action accordingly, to encourage the individual to work.

If this has been done, but the individual still refuses to attend or perform the task then this may constitute unauthorised absence or partial performance (i.e. where they are only prepared to carry out certain tasks rather than their full range of duties). This may be a disciplinary issue, which may justify withdrawal of pay. The manager should explain the individual's contractual obligations and the consequences of refusing to work. If there is still no change in the individual's position, immediate advice should be sought from HR to ensure an appropriate and consistent response”

WME Comment

HR teams are not reporting, to date, any incidences of employees refusing to work on any scale, and individuals are in most cases doing above and beyond to support. It should be noted of course that the situation is not static, and a number of factors will impact on the likelihood of this continuing in the future, including the length of time, the numbers at work and the nature of work being asked of staff.

In principle WME does not favour adopting a strict approach to disciplinary action in these circumstances. The nature of the employment contract currently means the relationship is already on a different footing and expecting things to continue as normal is unrealistic. There may be specific circumstances in which an employer may feel such action is



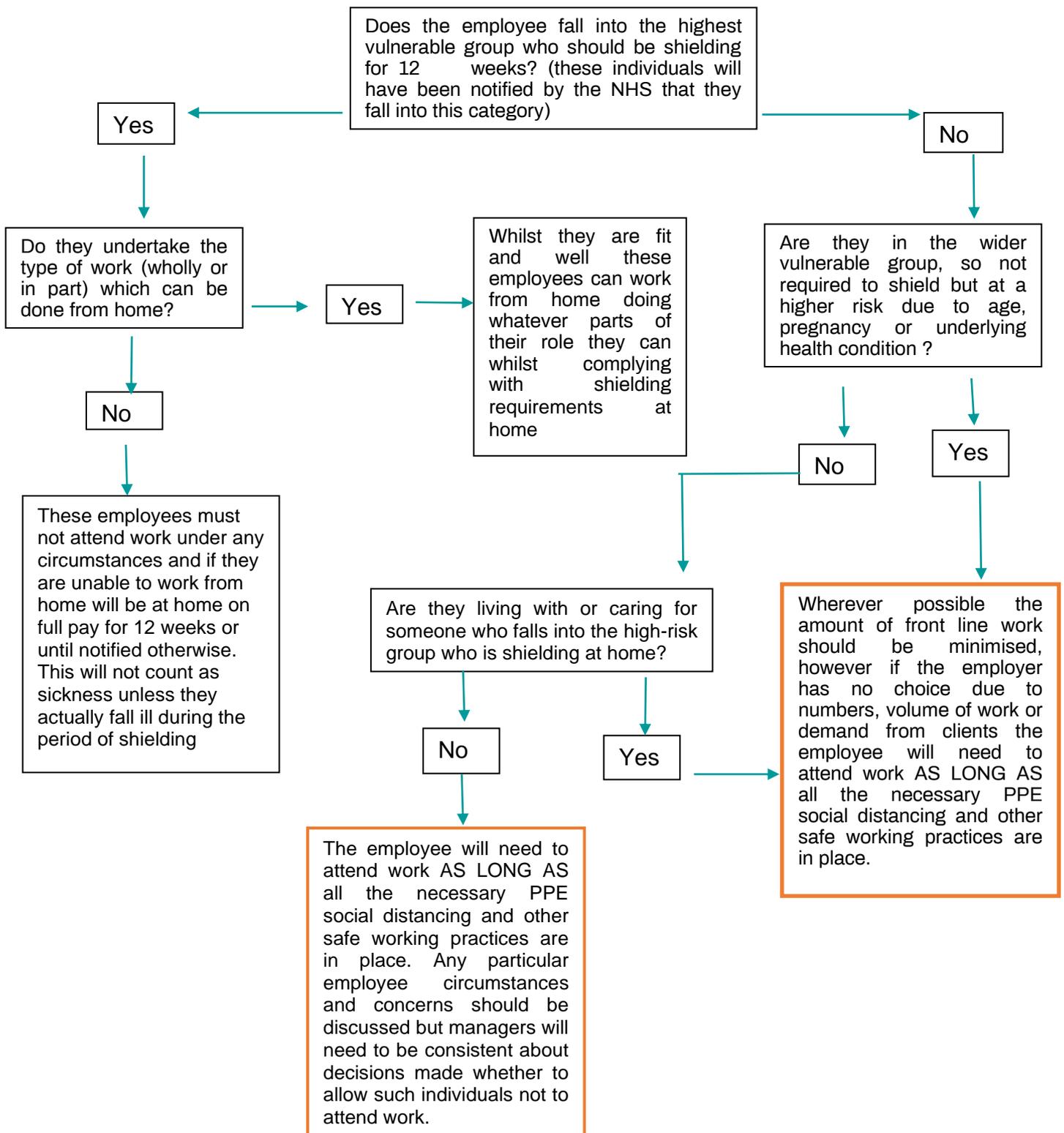
justified, and the employer retains the right to take disciplinary action. Examples may be those such as

- Where an employee is initially attending work but then fails to attend without proper notification
- Where an employee has agreed to attend work and work under agreed risk assessed protocols but then withdraws consent without proper notification or discussion of the reason for the change.
- Where the actions of the employee puts other workers or clients / the public at risk – failing to follow agreed working practices, not wearing PPE or other such breaches of health and safety.

These types of scenario will hopefully be rare. Where an employee refuses to work and expresses genuine anxiety or concern, the employer will need to consider how reasonable the concerns are and, if agreement cannot be reached consider whether putting the employee on reduced pay is the only resort – again having due consideration to the fact that the employee may then go off sick, leading to a breakdown in the relationship which will become potentially irreparable in the future.



Appendix 1 Flow chart for managers



Those employees responding to finish in the **orange** boxes should now be taken through a series of questions to ascertain the "reasonableness" of responses. This should be noted as a formal record for any potential future issues.



Appendix 2

Managers Questions – reasonable responses

Having taken the employee through the flow chart above, if the employee is then in the **orange** group some or all of the following further questions can be used to understand and address the particular situation and concerns of the employee. Managers will know their teams, but should not make any assumptions about individuals situations, or treat staff differently because of stated anxiety levels where there is no justification for this, whilst trying to be empathetic and considerate to the individual ways we all respond to crises. The following questions are a guide to the sorts of areas you should probe to help you in making a decision about an employees need to come to work in a consistent way.

Is the employee concerned for their own health or that of others in their household?

If the concern is for the shielding of others, is there a particular situation in their household which makes that more difficult? (multiple people needing to shield, problems with accommodation and lack of space,

Can the service help the employee to access any other support to help with this? Are they clear about the guidance? Can they remove themselves from the situation for a time?

If they are concerned for their own health, does this concern relate to the safety protocols in place (PPE / Social distancing etc) or is a more general anxiety?

If it relates to work protocols, are their fears grounded? Do they have any evidence or an already identified higher risk form working practices?

If it is a more general anxiety can they get some counselling support to help with managing this?

Does the employee have an existing health condition which they feel makes them a greater risk or a situation which is not taken into account in the flow chart?

Does the employee feel that all or any of their job can be done from home, or would a move of base or location help them (for example by reducing the need to use public transport?)

Can the service support the proposal of the employee for a change to working practices, if not has this been clearly explained to the employee?

Do they fully understand the implications and consequences of not attending work at this time?

