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The Coronavirus
and
Employers' Liability for PPE

Part 3: Liability for
Breach of Statutory Duty

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Health and safety regulations

1. In the context of an employer's duty to provide PPE to protect against exposure to the novel coronavirus, the focus is likely to be on two sets of domestic health and safety regulations: The Personal Protective Equipment at Work Regulations 1992 (PPE Regulations), and the Control of Substances Hazardous to Health Regulations 2002 (COSHH). The application of the latter should disapply the former¹, but the two will be considered together.
2. There is no question the PPE Regulations apply on their own terms to the factual situation where an employee might be exposed to the coronavirus (to repeat, this is subject to the application of COSHH).
3. The duty to provide suitable PPE is contained in Regulation 4 of the PPE Regulations, and is closely linked to the duty to assess the suitability of the PPE contained in Regulation 6. That Regulation 4 sets a high standard can be seen from its wording:

Provision of personal protective equipment

4.—(1) Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.

(2) Every self-employed person shall ensure that he is provided with suitable personal protective equipment where he may be exposed to a risk to his health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.

(3) Without prejudice to the generality of paragraphs (1) and (2), personal protective equipment shall not be suitable unless—

(a) it is appropriate for the risk or risks involved and the conditions at the place where exposure to the risk may occur;

¹ Regulation 3(3)(d) of the Personal Protective Equipment at Work Regulations 1992

(b) it takes account of ergonomic requirements and the state of health of the person or persons who may wear it;

(c) it is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed;

(d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk;

(e) it complies with any enactment (whether in an Act or instrument) which implements in Great Britain any provision on design or manufacture with respect to health or safety in any relevant Community directive listed in Schedule 1 which is applicable to that item of personal protective equipment.

4. The case of *Threlfall -v- Hull City Council* [2010] EWCA Civ 1147 demonstrated that the duty imposed by Regulation 4 is more onerous than the common law duty to provide PPE. The claim was wrongly dismissed at first instance, partly because the trial judge had failed to consider and apply the words of Regulation 4, and had instead applied the common law test by considering whether there was a foreseeable risk of harm and the steps taken by the employer in respect of those risks.²
5. The application of COSHH to the novel coronavirus requires more of an exercise in statutory construction. Regulation 2 defines the term “substance hazardous to health” as including a substance which is a “biological agent”, which in turn is defined as “a micro-organism, cell culture or human endoparasite, whether or not genetically modified, which may cause infection, allergy, toxicity or otherwise create a hazard to human health”. “Micro-organism” is further defined as “a microbiological entity, cellular or non-cellular, which is capable of replication or of transferring genetic material”.
6. The view of *Munkman* is that this definition will “certainly cover infectious harmful bacteria, viruses and fungi, so long as such substances may cause infection, allergy etc, and this is confirmed by the ACOP [Approved Code of Practice] at para 16-22”.³
7. There is potentially an argument as to whether the novel coronavirus would be sufficiently analogous to ‘simple flu viruses’ to exempt it from the scope of COSHH, on the basis the transmission does not strictly

² [2010] EWCA Civ 1147, as per Smith LJ, para 12.

³ *Munkman: Employers’ Liability*, [26.78]

arise from a healthcare worker's work, but again the authoritative guidance in *Munkman* would point away from that: "this is an understandable conclusion for a one-off sporadic exposure. However, when a virus becomes endemic in a workplace (such as is common with norovirus – the winter vomiting bug) then it is expected that the COSHH Regulations will then apply".⁴ There may still be scope for distinguishing hospital settings from other workplaces, however.

8. The most relevant paragraphs of the ACOP are worth setting out in full:⁵

18 The general duties of COSHH apply to incidental exposure to, and deliberate work with, biological agents. However, COSHH does not cover a situation where, for example, one employee catches a respiratory infection from another. This is because regulation 2(2) specifies that COSHH only applies in those circumstances where risks of exposure are work related, and not those where they have no direct connection with the work being done.

19 Incidental exposure to biological agents can occur when an employee's work activity brings them into contact with material which contains infectious agents, eg blood, body fluids, contaminated water, waste material or bedding/laundry etc. Where there is a risk from exposure to legionella bacteria, specific information is available in Legionnaires' disease: The control of legionella bacteria in water systems.

20 Exposure can also occur as a result of deliberate planned work with a biological agent in microbiological containment facilities ('contained use' facilities), eg research, development, teaching or diagnosis, and in production facilities (pharmaceutical or veterinary medicine).

9. To this can be added the decision of the Court of Session (Inner House) in *Miller -v- Greater Glasgow NHS Board* [2010] CSIH 40, 2011 SLT 131, where it was recorded as agreed by the parties that MRSA (the bacterium Methicillin-resistant Staphylococcus aureus) present in a hospital was a biological agent for the purposes of COSHH. The transcript in *Miller* was a decision on a strike out application in a clinical negligence case, however, and whilst the claim was allowed to continue to trial, partly on the basis it was a test case, some doubt was expressed by the Court as to whether COSHH could properly apply to the claimant patient in that context.

⁴ Ibid [26.87]

⁵ Control of substances hazardous to health: Approved Code of Practice and guidance. <https://www.hse.gov.uk/pubns/priced/l5.pdf>. This is a statutory code of practice for the purposes of Section 16 of the Health and Safety at Work etc Act 1974.

10. The SARS (Severe acute respiratory syndrome) pandemic that emerged in 2003 was also caused by a coronavirus. The Health and Safety Executive (HSE) produced guidance that classified SARS as a Hazard Group (HG) 3 biological agent for the purposes of Schedule 3 of COSHH.⁶
11. The HSE have confirmed that exposure to the novel coronavirus (causing COVID-19) would qualify as exposure to a 'biological agent' for the purposes of mandating a RIDDOR⁷ report.⁸
12. All of the above guidance points heavily (perhaps irresistibly) towards the conclusion that the novel coronavirus will meet the definition of a 'biological agent' so as to engage the duties in COSHH.
13. As for the substantive duties, again, there can be no question that COSHH, and in particular Regulation 7⁹, impose more onerous duties than the common law. The key duty in respect of exposure is contained in Regulation 7(1) and provides as follows:

Prevention or control of exposure to substances hazardous to health

7.-(1) Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.

14. In *Dugmore -v- Swansea NHS Trust* [2002] EWCA Civ 1689 it was held that Regulation 7(1)¹⁰ imposed an absolute duty to ensure exposure was prevented or adequately controlled:

22. In our view, that analysis is correct. The duty in regulation 7(1) is an absolute one: to ensure that exposure is prevented or controlled. Mr Shaw, for the hospitals, sought to persuade us that the words 'so far as is reasonably practicable' should be moved from their current position qualifying the duty to prevent exposure so as to qualify the duty to ensure that exposure is either prevented or controlled. There is no warrant for us to rewrite the regulation in this way. Its wording is even stricter than that in s 29(1) of the Factories Act 1961, where the phrase 'so far as is reasonably practicable' came between 'shall' and 'be made and kept safe'. If that was an absolute duty, then so must this be.

⁶ <https://www.hse.gov.uk/biosafety/diseases/sars.htm>

⁷ The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013, particularly Regulation 9

⁸ <https://www.hse.gov.uk/news/riddor-reporting-coronavirus.htm>

⁹ Regulation 7 is set out in full in Appendix 1

¹⁰ *Dugmore* concerned two previous versions of COSHH: the Control of Substances Hazardous to Health Regulations 1988, and the Control of Substances Hazardous to Health Regulations 1994. There are material differences between these regulations and COSHH 2002, but the Court's interpretation of the duty in Regulation 7(1), the wording of which is identical in all three sets of regulations, and the meaning of 'adequate' is likely to apply equally to COSHH 2002

23. Furthermore, the defence of reasonable practicability qualifies only the duty of total prevention. Mr Marshall argues that this is a straightforward factual matter. All latex could be removed from the hospital environment. We have more difficulty with this. Irrespective of whether foreseeability of the degree of risk and the magnitude of risk comes into the equation in deciding what is reasonably practicable, latex is so commonly used in so many products that its total elimination can scarcely be thought practicable. The Judge was entitled to accept the evidence of Dr White on this point.

24. But that does not end the matter. Until the claimant became sensitised to latex protein, the substance hazardous to her health was contained in the powdered latex gloves. As Mr Marshall points out, it would have been a simple matter to replace those gloves with vinyl gloves: this was not rocket science waiting to be invented. It was for the hospital to prove that it was not reasonably practicable for them to do this. With a simple step like this questions of the degree and magnitude of the risk do not arise. But even if they did, the onus was on the employer to go out and find out about them: in this particular case, to say that they could not have done so is contrary to the evidence of Dr White and Mr Finch. The material was there from which an employer with the absolute duty of preventing exposure to health hazards could have discovered what needed to be done. To import into the defence of reasonable practicability the same approach to foreseeability of risk as is contained in the common law of negligence would be to reduce the absolute duty to something much closer to the common law, albeit with a different burden of proof.¹¹

15. So, in Dugmore the employer was found in breach of the absolute duty to prevent exposure to latex, as it failed to prove it was not reasonably practicable to prevent exposure. However, the facts of Dugmore mean the case can be readily distinguished. In respect of the novel coronavirus, it must be correct to say that it can never be eliminated from hospital settings, whose raison d'être is to treat those infected with the virus. In Dugmore, the claimant's exposure did not arise from treating patients who had been exposed to latex, it arose via an item of PPE. It should therefore be expected that at least some employers, particularly hospitals, might successfully argue it was not reasonably practicable to prevent exposure to coronavirus.
16. The second limb of the duty is to control exposure, which is qualified only by the requirement 'adequacy'. In Dugmore, the Court of Appeal said as follows:

25. If we are wrong about that, there is still the question of whether the claimant's exposure was adequately controlled. With greatest of respect to Simon Brown J, for the purpose of this regulation at least, it seems to us that his first impression is to be preferred to his later acceptance of the plaintiffs' concession. Here, the duty is to ensure that exposure is adequately controlled. 'Adequately' is defined

¹¹ [2002] EWCA Civ 1689, as per Hale LJ, giving the judgment of the Court of Appeal

*in regulation 7 without any reference to reasonableness or the foreseeability of risk: it is a purely practical matter depending upon the nature of the substance and the nature and degree of the exposure and nothing else. It cannot be adequate control to oblige an employee frequently to wear powdered latex gloves when other barriers are available.*¹²

17. Thus the defendant in *Dugmore* would, had it mattered, have been in breach of the second limb of Regulation 7(1) COSHH as well.
18. In the context of coronavirus, liability under COSHH is therefore much more likely to focus on the duty to adequately control exposure, rather than the duty of absolute prevention. Regulation 7 of COSHH specifies particular duties in respect of control in this scenario where biological agents are concerned, see in particular:

(6) Without prejudice to the generality of paragraph (1), where it is not reasonably practicable to prevent exposure to a biological agent, the employer shall apply the following measures in addition to those required by paragraph (3)–

(a) displaying suitable and sufficient warning signs, including the biohazard sign shown in Part IV of Schedule 3;

(b) specifying appropriate decontamination and disinfection procedures;

(c) instituting means for the safe collection, storage and disposal of contaminated waste, including the use of secure and identifiable containers, after suitable treatment where appropriate;

(d) testing, where it is necessary and technically possible, for the presence, outside the primary physical confinement, of biological agents used at work;

(e) specifying procedures for working with, and transporting at the workplace, a biological agent or material that may contain such an agent;

(f) where appropriate, making available effective vaccines for those employees who are not already immune to the biological agent to which they are exposed or are liable to be exposed;

¹² The gloss on the word 'adequate' referred to by Hale LJ is drawn from Regulation 7(11)

(g) instituting hygiene measures compatible with the aim of preventing or reducing the accidental transfer or release of a biological agent from the workplace, including—

(i) the provision of appropriate and adequate washing and toilet facilities, and

(ii) where appropriate, the prohibition of eating, drinking, smoking and the application of cosmetics in working areas where there is a risk of contamination by biological agents; and

(h) where there are human patients or animals which are, or are suspected of being, infected with a Group 3 or 4 biological agent, the employer shall select the most suitable control and containment measures from those listed in Part II of Schedule 3 with a view to controlling adequately the risk of infection.

19. Regulation 7(9) then expressly deals with PPE:

(9) Personal protective equipment provided by an employer in accordance with this regulation shall be suitable for the purpose and shall—

(a) comply with any provision in the Personal Protective Equipment Regulations 2002 F1 which is applicable to that item of personal protective equipment; or

(b) in the case of respiratory protective equipment, where no provision referred to in sub-paragraph (a) applies, be of a type approved or shall conform to a standard approved, in either case, by the Executive.

20. Thus, whilst there is no doubt the duties imposed by Regulation 7 COSHH are onerous, it remains possible that on the facts of any given case an employer may be able to demonstrate it adequately controlled exposure, even where it was not prevented. This is where factual issues relating to PPE and other protection measures will acquire a fundamental importance to claims.

21. The duty to carry out health surveillance under Regulation 11(2) COSHH is also likely to feature in any potential litigation. This arises where an identifiable disease may be related to the exposure; there is a reasonable likelihood that the disease may occur under the particular conditions of the employee's work; and there are valid techniques for detecting the indications of the disease.

Section 69 of the Enterprise and Regulatory Reform Act 2013

22. The demanding nature of the duties in COSHH will make the vexed question of the true effect of Section 69 of the Enterprise and Regulatory Reform Act 2013 all the more important to establishing liability. That provision, which came into force on 1 October 2013, amended Section 47 of the Health and Safety at Work etc. Act 1974 by inserting the word 'not' into sub-section (2) as follows:

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...

*(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall **not** be actionable except to the extent that regulations under this section so provide.*¹³

23. The legislative intention behind this amendment has been the subject of several first instance decisions in the context of accident claims. In *Cockerill -v- CXK Limited and one other* [2018] EHC 1155 (QB), Deputy High Court Judge Rowena Collins Rice considered the effect of Section 69 in the context of a tripping claim brought for breach of Regulation 12 of the Workplace (Health, Safety and Welfare) Regulations 1992 and concluded that:

*18 ... In removing the claimant's cause of action for breach of statutory duty, the 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do. However by enacting s.69, Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties. What I have referred to as this 'rebalancing' intended by s.69 was evidently directed to ensuring that any breach of those duties would be actionable by claimants if, but only if, it also amounted to a breach of a duty of care owed to a particular claimant in any given circumstances; or in other words, if the breach was itself negligent. It is no longer enough to demonstrate a breach of the regulations. Not all breaches of the statutory regime will be negligent. Before the 2013 Act, the statutory regime had produced results in which employers were fixed with legal liability for accidents even where they had taken reasonable precautions against them. *Stark v. Post Office* [2000]*

¹³ There is an exception for new or expectant mothers in respect of certain provisions of the Management of Health and Safety at Work Regulations 1999 (16, 16A, 17 and 17A) – see Health and Safety at Work etc Act 1974 (Civil Liability) (Exceptions) Regulations 2013, Regulation 3

EWCA Civ 64 became a well-known example. A component in a postman's bicycle gave way even though the machine had been sensibly maintained and checked; the Post Office was held liable to the claimant even though it had not been negligent. Section 69 changed that framework, with a view to producing different results.

24. That approach seems to reflect the opinion of the editors of *Munkman: Employers' Liability*, who address this issue in Chapter 5 as part of their treatment of an employer's liability in breach of statutory duty. *Munkman's* view, by reference to the statement made by Viscount Younger in the House of Lords to accompany the bill that became the 2013 Act, is that the sole legislative goal of Section 69 was to neuter certain duties that resulted in strict liability. The reason why these strict duties were not individually amended or repealed is because that task was considered "too complex".¹⁴
25. His Honour Judge Allan Gore QC questioned the correctness of the reasoning in *Cockerill* in obiter remarks in his judgment in the case of *Tonkins -v- Tapp* [2018] 12 WLUK 716:

*103. [In] those circumstances it is unnecessary for me to decide the unresolved issue of whether breach of a statutory duty rendered non-actionable by Section 69 of the Enterprise and Regulatory Reform Act nonetheless constitutes negligence ipso facto. Bearing in mind that what I believe was a line of authority dealing with the analogous issue of whether breach of statutory duty in the days before statutory duties were ever civilly actionable, constituted common law negligence, none of which was cited to me or discussed, as opposed to merely being referred to by Ms Rice, sitting as a Deputy High Court Judge in *Cockerill v CXK Ltd* [2018] EWHC 1155, which decision is persuasive but not binding upon me, I choose not to follow it and express my concern that the danger of producing the contrary result would be to emasculate the statutory duties.*

104. That cannot have been Parliamentary intention in 2012, for if that had been the intention, Parliament would instead have chosen to repeal the statutory duties in question. Ms Rice does identify that in [18] of her judgment but, with respect to her, I do not understand how it can be said in neighbouring sentences that, on the one hand, those statutory duties bind employers in law and continue to be relevant to the question of what an employer ought reasonably to do while, on the other hand, were evidently intended to make a perceptible change in the legal relationship between employers and employees. Those concepts seem to me to be mutually inconsistent.

¹⁴ *Munkman: Employer's Liability* (17th Edition), [5.99]

26. The conflicting judgments in Cockerill and Tonkins both make logical arguments but give rise to very different results: on the one hand only a 'negligent' breach of the regulations will be actionable; on the other, any breach of the regulations will be *ipso facto* negligent.¹⁵
27. Whilst the Cockerill approach is consistent with Viscount Younger's statement, it still begs the question of exactly how and to what extent the health and safety regulations are supposed to inform the common law duty of care, especially when they plainly impose more onerous duties. Should they just be ignored if inconsistent with the existence of a reasonable care defence? Perhaps the approach of Akenhead J in Smith and Others -v- South Eastern Power Networks Plc [2012] EWHC 2541 to a similar legal question¹⁶ is helpful:
30. *Although it is, rightly, common ground (having regard to the Supreme Court decision in Morrison Sports Ltd & Ors v Scottish Power [2010] UKSC 37) that these Regulations and their predecessors do not give rise to any claim for breach of statutory duty, they must inform any given case relating to negligence. Thus, where there has been a breach of the Regulations by a given distributor, that does not mean that it was culpably negligent; however, such a breach may point to a breach of the duty of care although in practice evidence which goes beyond the mere breach may well be required to establish negligence. A simple failure consistently to perform or discharge a statutory duty with no reasonable explanation or justification therefor may provide grounds for a claim in negligence. However, a party which owes a statutory duty which it has not discharged may avoid a claim for negligence by showing that even if it had performed the duty with care the events complained of (be it fire, explosion or other calamity) would have occurred.*
28. With no decision from the Court of Appeal (or higher) on the point, the issue remains open to argument. The Court of Appeal touched on Section 69 in the case of Goldscheider -v- Royal Opera House Covent Garden Foundation [2019] EWCA Civ 711, where McCombe and Bean LJ observed that it "remains to be seen" whether Section 69 has altered the position that the burden is on the employer to make out the defence of reasonable practicability in the context of a claim under the Control of Noise at Work Regulations 2005. But, the Court expressly did not decide the main point or even offer an obiter view.
29. The lack of a binding authority on the effect of Section 69 (some six and a half years hence) might be explained by the fact that, in most standard accident claims that do not involve an allegation of strict or absolute liability, the difference between the standard of duty imposed by common law and the standard of duty imposed by a relevant statutory duty may be very difficult to discern if it exists at all. For example, in a

¹⁵ HHJ Cotter QC in Deborah James -v- The White Lion Hotel (A Partnership) [2020] 1 WLUK 39 gave the (obiter) view that negligence 'must surely still follow' ipso facto for breach of regulations other than in situations such as Stark -v- Post Office [2000] EWCA Civ 64

¹⁶ The extent to which the Electricity Supply Regulations 1988 interacted with a claim in common law negligence

tripping claim, the difference in the test for liability under Section 2 of the Occupiers' Liability Act 1957 on the one hand and under Regulation 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992 on the other is unlikely to determine the outcome of a claim: if a claimant fails under the former, she will probably fail under the latter as well.

30. The same probably cannot be said of a potential claim for personal injury arising from COVID-19 due a lack of PPE, which pleads a breach of the Personal Protective Equipment at Work Regulations and/or COSHH. Thus, the question mark over Section 69 of the Enterprise and Regulatory Reform Act 2013 will almost certainly have to be resolved as part of any civil claims related to coronavirus exposure.

Conclusion to Part 3, and a look to Part 4: Liability for breach of EU Directives

31. The question mark that continues to hang over the status of the domestic health and safety regulations since 1 October 2013 is likely to lead to renewed attention on the principle of direct effect of EU Directives. This will be considered in more detail in Part 4: Liability for breach of EU Directives.

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Appendix 1

Prevention or control of exposure to substances hazardous to health

7.—(1) Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.

(2) In complying with his duty of prevention under paragraph (1), substitution shall by preference be undertaken, whereby the employer shall avoid, so far as is reasonably practicable, the use of a substance hazardous to health at the workplace by replacing it with a substance or process which, under the conditions of its use, either eliminates or reduces the risk to the health of his employees.

(3) Where it is not reasonably practicable to prevent exposure to a substance hazardous to health, the employer shall comply with his duty of control under paragraph (1) by applying protection measures appropriate to the activity and consistent with the risk assessment, including, in order of priority—

(a) the design and use of appropriate work processes, systems and engineering controls and the provision and use of suitable work equipment and materials;

(b) the control of exposure at source, including adequate ventilation systems and appropriate organisational measures; and

(c) where adequate control of exposure cannot be achieved by other means, the provision of suitable personal protective equipment in addition to the measures required by sub-paragraphs (a) and (b).

(4) The measures referred to in paragraph (3) shall include—

(a) arrangements for the safe handling, storage and transport of substances hazardous to health, and of waste containing such substances, at the workplace;

(b) the adoption of suitable maintenance procedures;

(c) reducing, to the minimum required for the work concerned—

(i) the number of employees subject to exposure,

(ii) the level and duration of exposure, and

(iii) the quantity of substances hazardous to health present at the workplace;

(d) the control of the working environment, including appropriate general ventilation; and

(e) appropriate hygiene measures including adequate washing facilities.

(5) Without prejudice to the generality of paragraph (1), where it is not reasonably practicable to prevent exposure to a carcinogen, the employer shall apply the following measures in addition to those required by paragraph (3)–

(a) totally enclosing the process and handling systems, unless this is not reasonably practicable;

(b) the prohibition of eating, drinking and smoking in areas that may be contaminated by carcinogens;

(c) cleaning floors, walls and other surfaces at regular intervals and whenever necessary;

(d) designating those areas and installations which may be contaminated by carcinogens and using suitable and sufficient warning signs; and

(e) storing, handling and disposing of carcinogens safely, including using closed and clearly labelled containers.

(6) Without prejudice to the generality of paragraph (1), where it is not reasonably practicable to prevent exposure to a biological agent, the employer shall apply the following measures in addition to those required by paragraph (3)–

(a) displaying suitable and sufficient warning signs, including the biohazard sign shown in Part IV of Schedule 3;

(b) specifying appropriate decontamination and disinfection procedures;

(c) instituting means for the safe collection, storage and disposal of contaminated waste, including the use of secure and identifiable containers, after suitable treatment where appropriate;

(d) testing, where it is necessary and technically possible, for the presence, outside the primary physical confinement, of biological agents used at work;

(e) specifying procedures for working with, and transporting at the workplace, a biological agent or material that may contain such an agent;

(f) where appropriate, making available effective vaccines for those employees who are not already immune to the biological agent to which they are exposed or are liable to be exposed;

(g) instituting hygiene measures compatible with the aim of preventing or reducing the accidental transfer or release of a biological agent from the workplace, including—

(i) the provision of appropriate and adequate washing and toilet facilities, and

(ii) where appropriate, the prohibition of eating, drinking, smoking and the application of cosmetics in working areas where there is a risk of contamination by biological agents; and

(h) where there are human patients or animals which are, or are suspected of being, infected with a Group 3 or 4 biological agent, the employer shall select the most suitable control and containment measures from those listed in Part II of Schedule 3 with a view to controlling adequately the risk of infection.

(7) Without prejudice to the generality of paragraph (1), where there is exposure to a substance for which a maximum exposure limit has been approved, control of exposure shall, so far as the inhalation of that substance is concerned, only be treated as being adequate if the level of exposure is reduced so far as is reasonably practicable and in any case below the maximum exposure limit.

(8) Without prejudice to the generality of paragraph (1), where there is exposure to a substance for which an occupational exposure standard has been approved, control of exposure shall, so far as the inhalation of that substance is concerned, only be treated as being adequate if—

(a) that occupational exposure standard is not exceeded; or

(b) where that occupational exposure standard is exceeded, the employer identifies the reasons for the standard being exceeded and takes appropriate action to remedy the situation as soon as is reasonably practicable.

(9) Personal protective equipment provided by an employer in accordance with this regulation shall be suitable for the purpose and shall—

(a) comply with any provision in the Personal Protective Equipment Regulations 2002 F1 which is applicable to that item of personal protective equipment; or

(b) in the case of respiratory protective equipment, where no provision referred to in sub-paragraph (a) applies, be of a type approved or shall conform to a standard approved, in either case, by the Executive

(10) Without prejudice to the provisions of this regulation, Schedule 3 shall have effect in relation to work with biological agents.

(11) In this regulation, “adequate” means adequate having regard only to the nature of the substance and the nature and degree of exposure to substances hazardous to health and “adequately” shall be construed accordingly.

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