Legal problems arising from COVID-19

The pandemic has given rise to many legal problems, and a glut of regulations and official guidance that changes almost daily. One barrister, expert in employment law, tweeted that his brain was boiling! For that reason, I have been reluctant to give advice unless the position is absolutely clear, but I am reasonably sure that the following is correct, though there are no guarantees!

1.Testing for infection with COVID-19 cannot be done without the patient's consent. This is always the case, as also, for example, with drug and alcohol testing, but in some cases the employer can draw adverse inferences from a refusal to submit to a test. An employer might exclude an employee who refused a test from the workplace in the interest of others.

2.The result of a test is confidential information, which according to general principles of common law and the ethical rules of the health care professions cannot be disclosed to third parties without informed consent. The GDPR applies to a COVID-19 test result as personal data. Official guidance is that the lawful basis for processing such health data is under Article 9(2)(h) GDPR: preventive or occupational medicine. This is subject to Article 9(3) which states that only a professional with a duty of professional secrecy or another person also under an obligation of secrecy can use (h) as a lawful basis, thus bringing in the common law and professional ethical duty of confidentiality. A letter from the GMC to Dr Blandina Blackburn, published by her on the ALAMA website, advises that a report of a positive result in a COVID-19 test can be made without consent to an employer in the public interest, because of the need to prevent the transmission of infection, but that a negative result needs the patient's consent to disclosure. It may be argued that it is also in the public interest for an employer to know that the test has proved negative, so that an employee can return to or remain in work, but this is more controversial and the GMC has been cautious.

3.COVID-19 has been included in the list of notifiable diseases under the Notification of Infectious Diseases Regulations 2010. Notification is to the local public health authority and there is a legal duty ***on registered medical practitioners*** to notify confirmed or suspected cases. The consent of the patient is not required because the regulations override the duty of confidence. It is a criminal offence not to notify.

4. Do not confuse notifiable diseases (above) with reportable diseases under the Reporting of Injuries, Diseases and Dangerous Occurrences (RIDDOR) Regulations 2013 which impose a duty on an employer to report to the Health and Safety Executive (HSE) cases of dangerous occurrences, diseases and deaths related to occupational exposure to COVID-19. The duty is imposed ***on the employer*** in the case of a disease or a death where there is reasonable evidence that it was caused by exposure to a biological agent at work. The employer only has an obligation to report in such a case where there is a diagnosis in writing by a registered medical practitioner, who may be a GP, hospital doctor or occupational physician. There is no duty imposed by these regulations on the physician - RIDDOR does not override the duty of confidence - but where public interest is engaged a report can be made without consent. Reasonable evidence means on a balance of probabilities, more likely than not. In practice, it is likely that a report will be justified in most cases where a health care worker is infected while caring for COVID-19 patients. If exposure to the virus occurs through a dangerous occurrence, for example the breaking of a flask in a laboratory, that is reportable as a dangerous occurrence on a separate form. The main purpose of RIDDOR is to collect reliable statistics and the fact that a case was reported to the HSE does not necessarily lead to enforcement action, though it may do so.

Detailed guidance from the Chief Coroner was published on 29th April 2020. It clarified the legal situation after there had been some conflicting guidance about the effect of Coronavirus Act 2020

on the Notification of Deaths Regulations 2019. I am grateful for research done by Professor Raymond Agius clarifying the law and his findings are now repeated by the Chief Coroner (Professor Agius obtained a first in Forensic Medicine at medical school!). Where the medical practitioner completing the medical certificate of cause of death suspects that the person's death was due to an injury or disease attributable to any employment held during the person's lifetime there must be a report to the coroner. If the medical cause of death is COVID-19 and there is no reason to suspect that any culpable human failure (for example a failure to provide adequate personal protective equipment) contributed ***to the particular death*** there will usually be no requirement for an investigation to be opened. The coroner may carry out reasonable pre-investigation enquiries to determine if there is any basis for opening an investigation.

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