

Rt Hon Stephen Timms MP
Chair, Work and Pensions Select Committee
House of Commons
London
SW1A 0AA

11th February 2021

Dear Stephen,

Re: COVID-19 regulations – enforcement in workplaces

Thank you for your letter to the LGA Chief Executive Mark Lloyd dated 1st February 2021 concerning COVID-19 enforcement action in relation to workplaces. I am responding in my role as Chair of the Local Government Association's (LGA) Community Safety Board, which oversees councils' local regulatory work, including health and safety.

Your letter touches on several different issues, some of which fall within councils' responsibility, but others are not issues which councils can enforce. For example, while councils and the Health and Safety Executive (HSE) have responsibility for assessing the health and safety of individual workplaces under the Health and Safety at Work Act 1974 (HSWA), the question of whether an employer/employee adheres to the Government's guidance for people to work from home where it is possible for them to do so is not something that there are powers to enforce. There are, of course, legal requirements on which public facing essential businesses can remain open, and which must close (although they do not prohibit individual employees from attending those workplaces so long as they remain closed to the public). For private workplaces, such as offices or factories, there is no categorisation of essential or non-essential businesses in terms of whether employees should work from home, and it is ultimately at the employer's discretion as to whether its employees work from home.

Before answering your specific questions, I thought it might be helpful if I set out the different frameworks under which councils are responsible for regulating local businesses and workplaces in terms of COVID-19.

As noted, councils and the HSE have shared responsibility for enforcing the HSWA. When the Government first published guidance on reopening for different business sectors last Spring, it indicated that the HSWA would be the primary route for enforcing the introduction of COVID secure measures in workplaces.

Under the HSWA, councils and the HSE have powers to issue improvement notices, instructing businesses to remedy unsafe practices, and prohibition notices, where a work activity is required to stop until specified risks/threats have been remedied. During the early stages of the pandemic, the HSE set out its view that prohibition notices would not be an appropriate action relating to COVID-19 risks because the threshold of a serious risk of personal harm – effectively of an immediate risk to health or life – would not be met by breaches of COVID secure measures.

Councils and the LGA quickly fed back that there were challenges in using HSWA for general COVID-19 enforcement following reopening. This was due to the fact that improvement notices have a 28 day lead in time, when much faster changes are required to address COVID-19 risks, and because of the challenges in being able to use prohibition notices to close premises that were not COVID secure. Additionally, the HSWA can only be used in relation to work activities and things connected to them. This, therefore, made it difficult to address issues which, although critical to prevent and contain the spread of COVID, are not necessarily workplace safety issues; for example, the collection of customer data for contact tracing purposes.

Consequently, the Government moved to introduce additional powers for councils. The Health Protection (Coronavirus, Restrictions) (No3) Regulations 2020 give councils, where there is a serious and imminent threat to public health, the power to close or restrict access to premises, as well as to events and public places. Further specific COVID-19 powers were introduced under the Health Protection (Coronavirus, Restrictions) (Local Authority Enforcement Powers and Amendment) (England) Regulations 2020, under which councils can issue Coronavirus Improvement Notices and Coronavirus Restriction Notices. However, these may only be applied in relation to breaches of COVID-19 regulations and in practice have turned out only to be applicable to a relatively narrow range of businesses mainly centered on hospitality.

1. In your view, are local authorities in the best position to enforce the closure of premises that are in breach of Covid regulations? Do local authorities need any additional powers to carry out this work? a. If not, where should responsibility for this lie?

Councils have lead responsibility for the enforcement of specific COVID-19 regulations as they relate to local businesses and premises and are best placed to lead this work given their local presence and existing knowledge of local businesses.

Councils and the HSE share enforcement responsibility under the HSWA. Broadly, councils are the enforcing authorities for sectors such as retail, offices, hospitality, while HSE would typically lead on more complex settings, as well as local authority premises including schools. This is a well-established division of responsibility, but throughout the pandemic councils have been working more closely with the HSE to share information and intelligence about workplaces of concern. There are examples of council officers undertaking visits to HSE enforced premises where appropriate, while the HSE has been using additional resources available for COVID work to undertake virtual and in person spot checks at local premises – including some local authority enforced premises where requested to do so.

The Government has responded to councils calls for specific COVID-19 powers, but there is a need to ensure that the Coronavirus Improvement and Restriction Notices can be applied in relation to breaches of all COVID-19 regulations, and for these regulations to include issues that are currently only in guidance and therefore not enforceable.

2. Under the Health Protection (Coronavirus, Restrictions) (No3) Regulations 2020, local authorities have the power to close or restrict access to individual premises. Can local authorities use this power to close a premise on the grounds that the individual working there may be at risk? a. In your view, do local authorities have sufficiently robust powers to close workplaces where employees may be at risk?

As noted above, the HSE has indicated that it does not believe a HSWA prohibition notice could be used to close a business in relation to COVID, although an improvement notice could be issued. The no. 3 regulations are not specifically focused on workplaces but on premises, events and public spaces which are open to the public. There has been some concern that the threshold for using the power requiring a serious and imminent threat to public health is high, although the Government has sought to reassure councils that the risk of COVID-19 meets this test. There are also specific exemptions from using the powers in regard to essential infrastructure, which includes a wide array of business premises including food producers and sites or locations involved in the production and manufacture of goods. Subject to these restrictions, we do not believe there is a reason why a council could not use the no 3 powers if there were concerns that included risks to employees at a workplace, although where there have been outbreaks, councils have generally preferred to work with employers and encourage them to voluntarily close their premises.

The Joint Biosecurity Centre is responsible for collating details of all directions issued, in line with the requirement to notify the Secretary of State when they issue a direction, and may be able to provide further information on any directions relating to non-public facing workplaces.

3. Local authorities can issue a “Coronavirus Improvement Notice” to businesses that are failing to fulfil any of the provisions in the relevant regulations. In your view, how effective has this measure been at requiring employers to ensure that their premises are Covid secure?

A Coronavirus Improvement Notice is intended to be used to require businesses to take rapid steps (24-48 hours) to introduce specified COVID-secure measures, but it is not specifically targeted at businesses in their role as employers. The notices can only be used in relation to breaches of certain COVID-19 regulations (rather than guidance), and in practice their usage has been limited by the fact that most of the relevant COVID-19 regulations are specific to hospitality premises. Councils and the LGA have asked for the notices to be available to be applied to a wider range of expectations set out in regulations and guidance, as well as to a wider range of businesses. The notices are not a tool that could be generally applied to any workplace, where the expected measure would be an improvement notice under HSWA.

4. What guidance has the Government provided to local authorities on using their powers to close workplaces that may be unsafe? In your view, is there a need for more detailed guidance?

Councils are experienced in using a variety of compliance approaches and enforcement tools, set out in different pieces of legislation including food safety, health and safety and licensing laws. Given this experience, we do not think there is a need for guidance that is specific to how to use the powers. However, it has been very helpful to have a single body, the Office for Product Safety and Standards, developing template powers for councils to use, and providing guidance and responding to frequently asked questions on the interpretation of the COVID-19 regulations.

On health and safety, the HSWA sets out some specific requirements but most expectations are set out in guidance. HSE and the Department for Business, Energy and Industrial Strategy have set out benchmark standards that are viewed as being reasonably practicable for businesses to implement, though businesses can do something else if they can justify a different approach.

What councils do need, and what hasn't always been in place during the pandemic, is enforceable legislation, supported by a range of appropriate enforcement tools and backed up by clear guidance which aligns with what is in the regulations. Often, measures that are set out in COVID-19 guidance are not set out within the law, creating expectations about what can be enforced that councils cannot meet. It would be helpful for anything that businesses or workplaces are expected to implement to be specified in law, thereby enabling councils to take action where they are not implemented.

5. Given the current lockdown and number of coronavirus cases, do local authorities have the resources and staffing levels they need in order to investigate and take action against premises that may be operating in breach of Covid regulations?

Local regulatory services have risen to the challenge of responding to COVID-19, redirecting their efforts to an ever-changing set of regulations and the need to alternately enforce lockdown regulations and business closures then support businesses to reopen safely. Councils will always target their resources according to local intelligence and need and have redeployed other officers to support their enforcement functions to investigate and take action where necessary. However, this has had knock on effects for business as usual activity and there have been significant challenges in meeting the full range of expected, visible compliance and enforcement activity across businesses and public spaces with an overall lack of capacity relative to the demands being placed on the services. The additional funding provided by Government has been necessary and helpful in this regard and should be extended.

COVID-19 has highlighted the impact of falling budgets and capacity in regulatory services over the past decade, and COVID-19 activity has been at the expense of normal business activities, which will need to be restored as work on the pandemic reduces. It has also highlighted the limited pipeline of qualified officers available to be recruited by councils even where there are funds to do so. The LGA is urging the Government to take the necessary steps to help increase the resilience of local regulatory services following the pandemic.

6. We have seen evidence that some local authorities take different approaches to enforcement of Covid regulations than others. Who, if anyone, is responsible for ensuring that local authorities take a consistent approach? a. What guidance or support, if any, does the LGA provide to local authorities on enforcement of the regulations?

There will inevitably be differences in how councils enforce regulations, linked to the differing business base of local places and compliance history of local businesses. In some cases, there may also be different levels of risk appetite for pursuing more contentious cases, particularly for smaller authorities facing businesses unwilling to cooperate and which might seek to challenge any action taken by councils. The Government's guidance is intended to promote a consistent approach, although in relation to COVID there have been some challenges linked to the fact that the guidance is not always consistent with the regulations themselves. On health and safety matters, the HSE's Local Authority Unit works with councils to share information and promote a consistent approach, while the Office for Product Safety and Standards has been tasked with providing ongoing guidance and information to councils on COVID. The LGA does not replicate this guidance (although we have produced guidance where we have perceived gaps in what councils need), but has held a series of webinars for councils to promote best practice on

compliance and enforcement, as well as working extremely closely with councils and the Government to highlight and address barriers and challenges.

I hope the above information is helpful to the work of your Committee. If it would be helpful, we would be happy to have a briefing call with you to discuss this matter in more detail. Please contact jade.hall@local.gov.uk if this would be of interest.

Yours sincerely,

Cllr Nesil Caliskan
Chair, Local Government Association's Community Safety Board



Work and Pensions Committee

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From the Chair

Mark Lloyd
Chief Executive
Local Government Association

1 February 2021

Dear Mark,

I am writing to you following recent reports that, despite Government advice that people should only leave their home for work where they cannot reasonably work from home, some employees have reported being pressured by their employers to return to their workplace. Others have reported being told to return to work in businesses that have remained open despite being “non-essential”.

Despite some employees reporting that their workplaces are still not Covid secure, the Committee has seen reports that the Health and Safety Executive has not taken any enforcement action against employers during the current lockdown. It would be helpful to have answers to following questions on action taken by local authorities:

- 1. In your view, are local authorities in the best position to enforce the closure of premises that are in breach of Covid regulations? Do local authorities need any additional powers to carry out this work?**
 - a. If not, where should responsibility for this lie?**

- 2. Under the Health Protection (Coronavirus, Restrictions) (No3) Regulations 2020, local authorities have the power to close or restrict access to individual premises. Can local authorities use this power to close a premise on the grounds that the individual working there may be at risk?**
 - a. In your view, do local authorities have sufficiently robust powers to close workplaces where employees may be at risk?**

- 3. Local authorities can issue a “Coronavirus Improvement Notice” to businesses that are failing to fulfil any of the provisions in the relevant regulations. In your view, how effective has this measure been at requiring employers to ensure that their premises are Covid secure?**

4. **What guidance has the Government provided to local authorities on using their powers to close workplaces that may be unsafe? In your view, is there a need for more detailed guidance?**
5. **Given the current lockdown and number of coronavirus cases, do local authorities have the resources and staffing levels they need in order to investigate and take action against premises that may be operating in breach of Covid regulations?**
6. **We have seen evidence that some local authorities take different approaches to enforcement of Covid regulations than others. Who, if anyone, is responsible for ensuring that local authorities take a consistent approach?**
 - a. **What guidance or support, if any, does the LGA provide to local authorities on enforcement of the regulations?**

It would be helpful to have a response by Friday 12 February.

Yours sincerely,

A handwritten signature in black ink that reads "Stephen Timms". The signature is written in a cursive style with a horizontal line above the name.

Rt Hon Stephen Timms MP
Chair, Work and Pensions Committee