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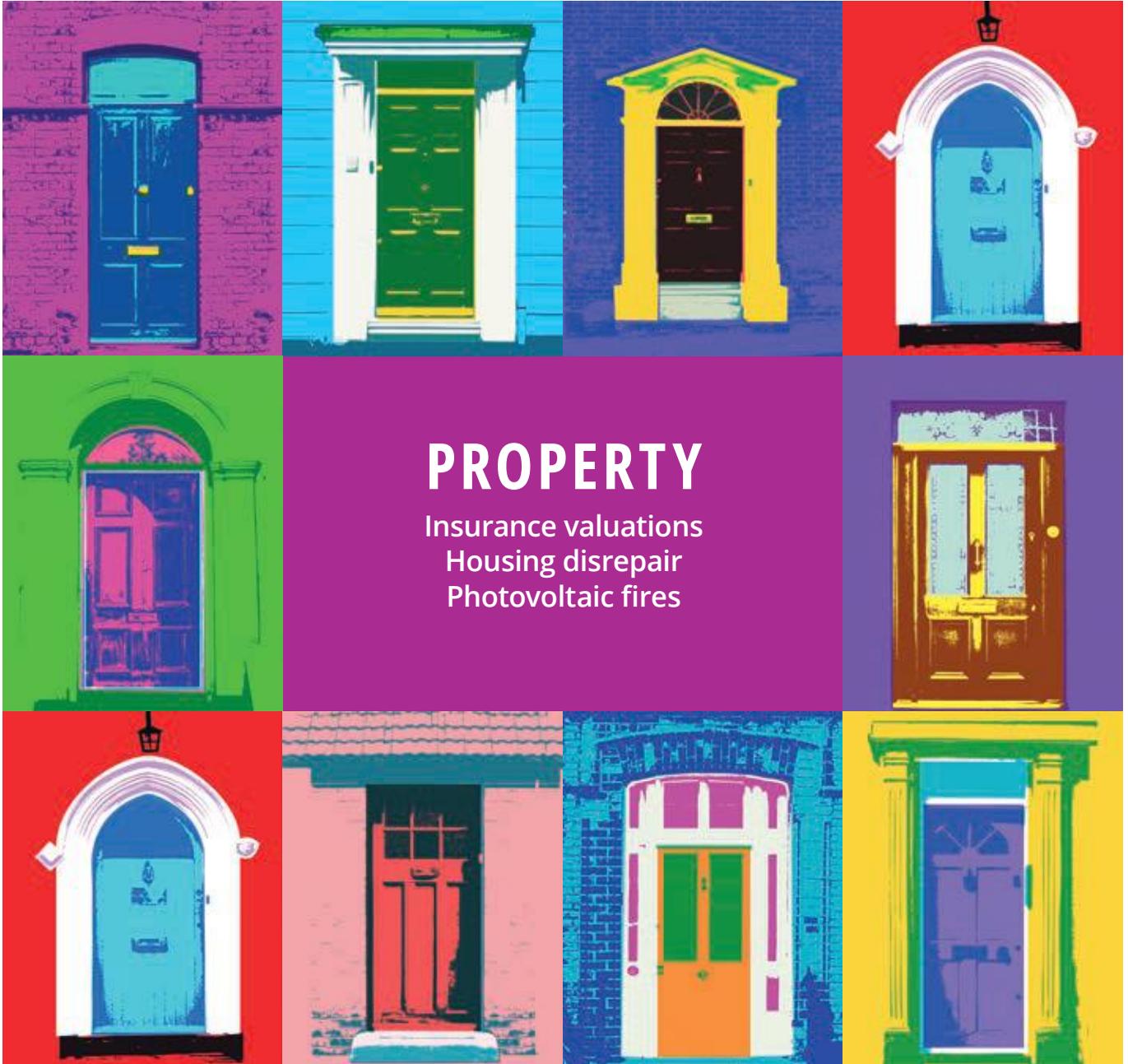
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THE  **ALARM JOURNAL**

October
2020



The rigours of *RIDDOR* for care providers

The *Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR)* presents a significant challenge to those responsible for reporting within a care setting.



AUTHORS: **Peter James**, Partner - Safety, Health and Environment Team, and **Edward Sainsbury**, Partner - Disease Team, BLM.

The guidance on COVID-19 related incidents in respect of the *Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR)* is testing care providers¹. They are understandably concerned that notifying the Health and Safety Executive (HSE) of a non-reportable incident could result in an unnecessary HSE investigation. Some care providers are also concerned that a notification under *RIDDOR* may be misinterpreted as an admission of responsibility should criminal and/or civil action be pursued.

In part as a consequence of ambiguity within HSE guidance, recent data suggests that care providers may not be complying with reporting obligations under *RIDDOR*. The HSE accepts there are difficulties

in applying the reporting criteria in the unusual circumstances presented by the COVID-19 outbreak, so the HSE has supplemented its initial guidance with some examples setting out when to, and when not to report. It is debatable whether this has made guidance clearer.

Care providers should be aware that a failure to report deaths, diseases and dangerous occurrences in accordance with *RIDDOR* is a criminal offence that can attract a significant fine and/or imprisonment. It is essential the applicability of *RIDDOR* is considered when assessing a COVID-19 related death or occurrence.

Each incident and occurrence should be assessed on its own facts when considering if it is reportable under *RIDDOR*. The consequences of a duty holder ►

failing to comply with its obligations under *RIDDOR* can be significant, including large fines for care providers and individuals responsible for reporting incidents. We advise care providers to ensure a consistent approach by a senior member of staff in assessing if a *RIDDOR* report is required and to seek legal advice if uncertain whether a COVID-19 related occurrence or incident is reportable: *RIDDOR* duties should not be ignored.

HSE guidance

The HSE's guidance regarding reporting under *RIDDOR* and COVID-19² indicates:

- There is no requirement under *RIDDOR* to report incidents of disease or deaths of members of the public, patients, **care home residents** or **service users** from COVID-19.
- The reporting requirements relating to cases of or deaths from COVID-19 under *RIDDOR* apply only to occupational exposure, that is, as a result of a person's work.

The guidance further states an employer must report under *RIDDOR* when:

- An accident or incident at work has, or could have, led to the release or escape of coronavirus (SARS-CoV-2). This must be reported as a dangerous occurrence.
- A person at work (a worker) has been diagnosed as having COVID-19 attributed to an occupational exposure to COVID-19. This must be reported as a case of disease.
- A worker dies as a result of occupational exposure to COVID-19. This must be reported as a work-related death due to exposure to a biological agent.

To report or not to report?

While a COVID-19 associated death of an individual receiving care is not reportable under *RIDDOR*, there **may** have been occupational exposure to employees or contractors working in any care environment.

If a care worker is diagnosed with COVID-19, would this be reportable under *RIDDOR* as an occupational disease?

The care provider must make a judgement on whether the care worker contracted the disease within an occupational

Care providers often engage carers through employment agencies, which in turn may have a duty to report under *RIDDOR*.

HSE EXAMPLES

The HSE has provided further guidance which details a number of examples of reportable and non-reportable occurrences:

- Reportable**
- A laboratory worker accidentally smashes a vial containing COVID-19 on the floor, leading to people being exposed.
 - A sample from a COVID-19 patient breaks in transit leading to spillage.
- Not reportable**
- A worker, for example a police officer or prison officer, is deliberately coughed on or spat at by a person of unknown COVID-19 status.
 - A health or social care worker is providing treatment or care to a patient or service user who is not known to be COVID-19 positive, but the patient or service user subsequently tests positive.

setting. If the worker had cared for an individual who died of COVID-19, there would be a reasonable prospect the infection of the care worker was attributable to exposure to an infected resident or service user. In particular this would be the case if staff were not provided with suitable personal protective equipment (PPE), either through shortages or a failure to follow government guidance.

This further HSE guidance on *RIDDOR* says there must be **reasonable evidence** linking the nature of the person's work with an increased risk of becoming exposed to COVID-19. **Factors to take into account when making this decision could include:**

- Whether or not the nature of the person's work activities increased the risk of them becoming exposed to COVID-19?
- Whether or not there was any specific, identifiable incident that led to an increased risk of exposure?

- Whether or not the person's work directly brought them into contact with a known COVID-19 hazard without effective control measures, as set out in the relevant Public

Health England guidance, in place such as PPE or social distancing.

For an occupational exposure to be judged as the **likely** cause of the disease, it should be more likely than not that the person's work was the source of exposure to COVID-19, as opposed to general societal exposure. Responsible

persons do not need to conduct extensive enquiries in seeking to determine whether a COVID-19 infection is work-related. A judgement should be made on the basis of the information available.

There is no requirement for *RIDDOR* reports to be submitted on a precautionary basis if there is no evidence to suggest occupational exposure was the likely cause of an infection.

Situations that remain unclear

There are some likely scenarios that aren't covered by HSE guidance, which could potentially fall within either the reportable or non-reportable bracket. These are scenarios which some care providers will undoubtedly find themselves in.

A situation may arise where a person at work has not been diagnosed as having COVID-19, but there has been a failure to provide staff with suitable PPE. Exposure or potential exposure to COVID-19 could be construed as 'an accident or incident at work' which 'has or could have led to the release or escape of COVID-19' and as such, is reportable as a dangerous occurrence. This does not however fall within one of the examples of a reportable incident.

A specific example is given of a health or social care worker providing treatment or care to a patient or service user who is not known to be COVID-19 positive, but the patient or service user subsequently tests positive. According to the guidance, this would not be reportable as a dangerous occurrence.

Who must report?

The provision of care is often provided through multiple service providers working together, like councils augmented by privately funded care. In such circumstances it may not be apparent as to who is ultimately responsible for reporting under *RIDDOR*.



RIDDOR stipulates that 'responsible persons' include employers, the self-employed and people in control of work premises. If a council funds a care package provided by a third-party, employing carers providing domiciliary or residential care, that third-party as the employer will have

responsibility for reporting under *RIDDOR*. There may be circumstances however, where a council controlling a workplace and a private company providing care within that workplace, are both required to report in respect of the same incident.

Care providers often engage carers through employment agencies, which in turn may have a duty to report under *RIDDOR*. The HSE's guidance note *RIDDOR – Who Should Report?*²³ states: 'the employment status of agency workers is not always clear to the worker, or to the organisations who are supplied with labour. In many cases, the employment agency is the legal employer, and is under the same legal obligations as any other employer to report accidents and ill-health to their employees. In other cases, for instance where workers are self-employed, the duty is on the host business to report accidents as the person in control of the premises where an accident occurs. Self-employed persons are responsible for reporting accidents which occur on their own premises, and ill-health conditions.'

'In practice, agencies should ensure that responsibility for reporting under *RIDDOR* is clearly assigned to an appropriate person based on the particular facts of the employment relationship. Agencies should ensure that reporting responsibilities are clearly understood by host businesses and the workers.'

Potential for under-reporting

According to the Office for National Statistics (ONS) based on figures updated on 3 July 2020, up to 12 June there were around 19,394 reported COVID-19 associated deaths of care home residents. Those deaths are a potential marker of COVID-19 exposure within the working environment. So, while these deaths are not reportable, the circumstances surrounding those deaths may well be, especially considering the challenges that care homes face, like lack of PPE and lack of resources. ➤

Between 10 April and 8 August 2020 there were 3,168 notifications (48 fatal and 3,120 non-fatal) to the HSE and councils by employers undertaking residential care activities.

While this HSE figure seems substantial, the HSE considers there to be under reporting. In the notes attached to the published figures of disease reports made by employers to the HSE to 11 July, the HSE states: ‘RIDDOR suffers from under-reporting. Not all employers report cases as required under the regulations. However, as there is no reliable estimate of the number of occupational COVID-19 cases, it is not possible to quantify the extent of under-reporting. However, in terms of reporting workplace non-fatal injuries, it is estimated that around half of RIDDOR reportable injuries to employees are reported to the enforcing authorities (for self-employed the proportion is substantially less). It is likely that disease reporting is lower.

This suggests that care providers may not be fully satisfying their reporting requirements under RIDDOR and more than half of COVID-19 related incidents may go unreported. ●

References

¹hse.gov.uk/coronavirus/riddor/index.htm

²hse.gov.uk/coronavirus/riddor/riddor-reporting-further-guidance.htm

³hse.gov.uk/riddor/who-should-report.htm

Peter James (peter.james@blmlaw.com) is a Partner and leads the Safety, Health and Environment Team at BLM’s London office. He represents organisations and individuals investigated by the police, HSE and Care Quality Commission, following accidents and deaths at care settings, and regularly represents care settings at inquests.

Edward Sainsbury (edward.sainsbury@blmlaw.com) is a Partner in the Disease Team at BLM and specialises in complex occupational disease claims, insurance disputes and health and safety matters.

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