



Claims Defensibility Guidelines

For any liability claim to be successful, the claimant must prove “on the balance of probabilities” that the childcare business was negligent through 3 tests:

- 1. A duty of care was owed**
- 2. That duty was breached**
- 3. The breach directly caused the injury or illness**

It is likely to be extremely difficult for an infected individual to prove that COVID-19 was contracted at the childcare setting due to the many other potential sources of infection. If however, someone who attends the setting does become infected, documentation to demonstrate that you considered the risks carefully and took sensible steps to mitigate those risks will be crucial evidence in defence of any subsequent claim. The absence of such evidence could leave you vulnerable to being found in breach of duty and liable for losses arising.

The duty of care is not absolute, the requirement is to take measures which are reasonably practicable to reduce risk to the lowest possible level in EL claims and in PL claims to ensure that visitors such as children and parents/guardians are reasonably safe whilst on the premises.

The Government recognises that unlike older children and adults, early years children cannot be expected to remain two metres apart from each other and staff. As a result, the following measures should be followed, where possible:

- Minimising contact with individuals who are unwell by ensuring that those who have coronavirus symptoms, or who have someone in their household who does, do not attend childcare settings or schools.
- Frequent hand cleaning and good hygiene practices. Staff and children must wash their hands more regularly with soap and water for at least 20 seconds and dry them thoroughly or use alcohol hand rub or sanitiser to ensure that all parts of the hands are covered. Also, good respiratory hygiene should be ensured by promoting the ‘catch it, bin it, kill it’ approach.
- Regular cleaning of the nursery setting and equipment. In addition, cleaning frequently touched surfaces (e.g. door handles) using standard products such as detergents and bleach.

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- Minimising contact and mixing as far as possible. Children and staff, where possible, should mix in a small group away from other people and groups. The government guidance specifically provides that for pre-school children in early years' settings, the staff to child ratios within Early years Foundation Stage continue to apply and it is recommended that staff to children ratios are followed. Other ways to minimise contact include having staggered break times, changing the layout of the nursery (where possible) and allowing for small group working and a temporary cap on numbers to ensure that safety is prioritised.

Nobody wants to overburden businesses with unnecessary paperwork, but in terms of claims defensibility, practical, clear and concise policies, procedures and documentation can help everyone in the organisation follow safe working practices effectively and enable good claims defence should it be needed.

Commitment from all levels of the childcare business alongside clearly documented responsibilities and accountabilities is also important to ensure the ownership of health and safety at all levels of the organisation and encourage a positive safety culture.

Claims Defensibility Checklist

In the event of an allegation that COVID-19 was contracted at your setting, to help insurer to defend your position and demonstrate you have not breached your duty of care, the following documentation would be key.

Suitable risk assessments addressing the specific risks of coronavirus in the nursery setting. This should, where possible, consider the above measures.

- Evidence that members of staff have seen / received training on the risk assessment and understand (and/or feed back into) its contents.
- Document, where possible, the implementation/enforcement of the control measures set out in the risk assessment. Clearly, a nursery cannot and should not document every time someone washes their hands, but for example regular/daily cleaning could be documented.
- An appropriate system of supervision, a complaints process and staff encouraged to report any concerns which they may have.
- Information/advice given to parents/guardians e.g. what policies has the nursery put in place, please stay away from childcare setting if displaying symptoms etc.
- Copy RIDDOR - There is no specific framework for an incident report in respect of coronavirus but a RIDDOR report must be completed where:
 - An unintended incident at work has led to someone's possible or actual exposure to coronavirus. This must be reported as a dangerous occurrence.

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- A worker has been diagnosed as having COVID 19 and there is reasonable evidence that it was caused by exposure at work. This must be reported as a case of disease.
- A worker dies as a result of occupational exposure to coronavirus.

Given the guidance in respect of COVID-19 is constantly changing/evolving, it would be useful to print off and/or store the guidance upon which the risk assessment and any defensibility policy is based. Also to continue to do this as and when the guidance is changes and/or the risk assessment is updated. That was, if a claim is brought in say 6 months' time on the basis of different guidance, you will be able to demonstrate that at the material time, the risk assessment was compliant with the relevant guidance.

All risk assessments should be retained, rather than the original versions being overwritten.

Please find below a Claims Defensibility Checklist and COVID-19 Symptom Incident Report form created with the support of our insurers, Aviva and one of our Strategic Partners, BLM Solicitors.

Location

Date

Completed By (name and signature)

Action	Y/N	Comments
Claims Defensibility Checklist		
1. COVID-19 Site Operating Procedures and Risk Management system in place, which is reviewed regularly to accommodate the ongoing changes regarding the COVID-19 crisis and any Government advice. Reviews are dated and adaptations clearly recorded.		
2. Suitable Risk Assessments addressing the specific risks of COVID-19 in place and reviewed regularly.		
3. COVID-19 symptom incidents reported and documents maintained.		
4. Staff fully understand all potential symptoms of Covid-19 and how to manage a situation should there be an occurrence with a child or employee.		

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Action Incident Investigation	Y/N	Comments
5. COVID-19 Symptom Incident Report Form completed		
6. All staff appropriately trained and competent in managing the incident.		
7. Review of incident completed and if appropriate, any adaptations undertaken for any potential future situation.		

Action Documentation	Y/N	Comments
8. Training and competency records maintained and up to date with details of any changes undertaken.		
9. Systems are in place to keep up to date with risk exposure changes following any developments to Government or other regulatory guidelines.		
10. RIDDOR where reportable.		
11. Clear and concise communication with guardians, employees and other visitors to the nursery.		

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Action Monitoring and Review	Y/N	Comments
12. Random monitoring of quality of documentation is undertaken and recorded.		
13. There is a review of any trends.		
14. Regular review of the staff's understanding of any changes and that all requirements are completed satisfactorily.		
15. Additional comments:		