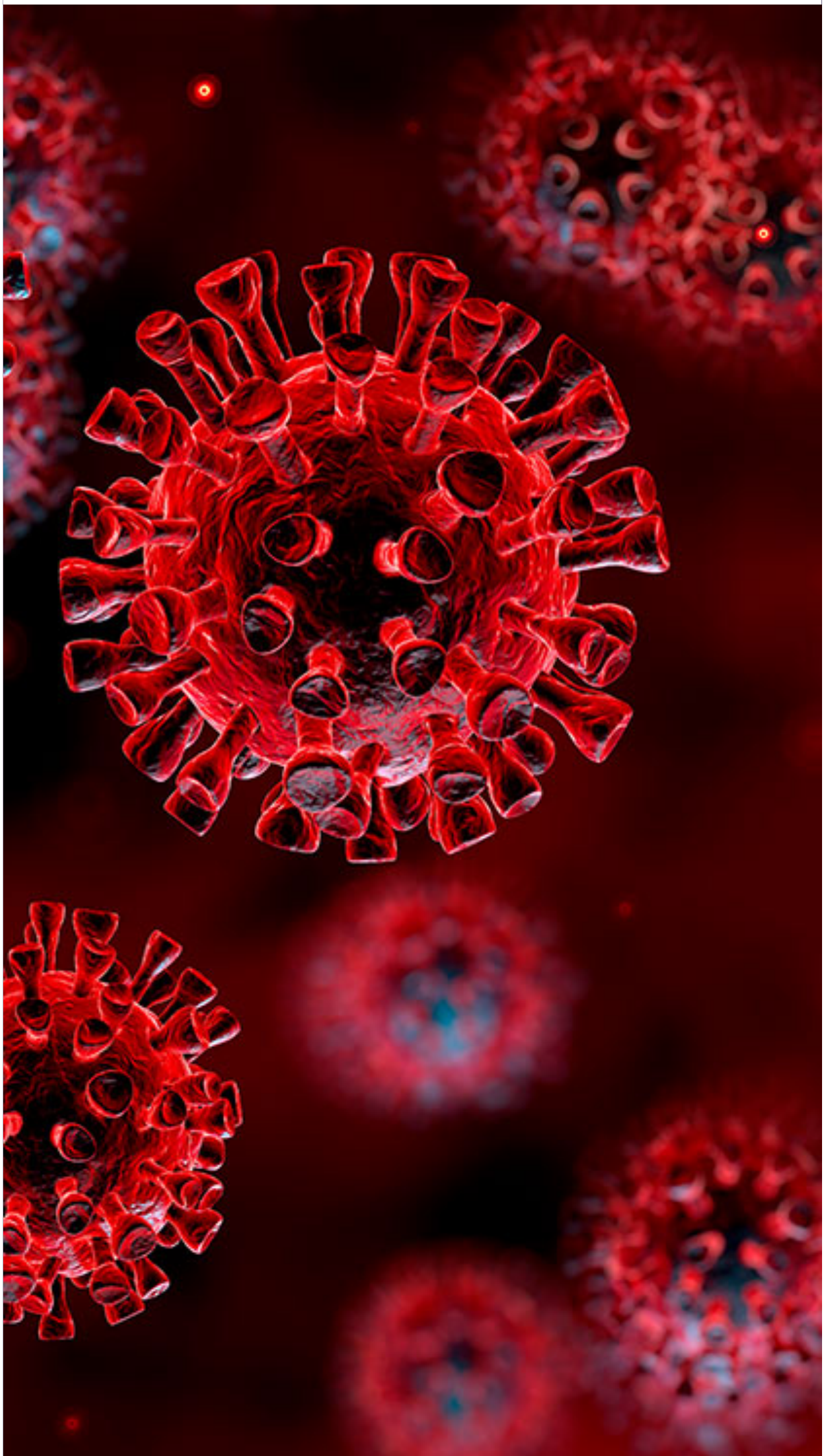


# COVID-19 *Some practical PI and Employment pointers*

Delivered by Barry Coulter and Daniel Searle



# The duty - Reasonably Safe

- ▶ THE EMPLOYER HAS ALWAYS HAD A DUTY TO TAKE REASONABLE CARE OF THE HEALTH AND SAFETY OF EMPLOYEES. THIS DUTY ARISES BOTH IN TORT AND UNDER THE HEALTH & SAFETY AT WORK ACT, AND AS AN IMPLIED TERM OF THE CONTRACT.
- ▶ THIS INCLUDES A DUTY TO TAKE REASONABLE STEPS TO PROVIDE SAFE PLACES AND SAFE SYSTEMS OF WORK.

# The Regulations & Guidance

## Coronavirus Regulations 2020

- [Construction and other outdoor work](#)
- [Factories, plants and warehouses](#)
- [Labs and research facilities](#)
- [Offices and contact centres](#)
- [Other people's homes](#)
- [Restaurants offering takeaway or delivery](#)
- [Shops and branches](#)
- [Vehicles](#)

# Apply the Guidance

## 5 steps to working safely:

1. Carry out a COVID-19 risk assessment
2. Develop cleaning, handwashing and hygiene procedures
3. Help people to work from home
4. Maintain 2m social distancing, where possible
5. Where people cannot be 2m apart, manage transmission risk



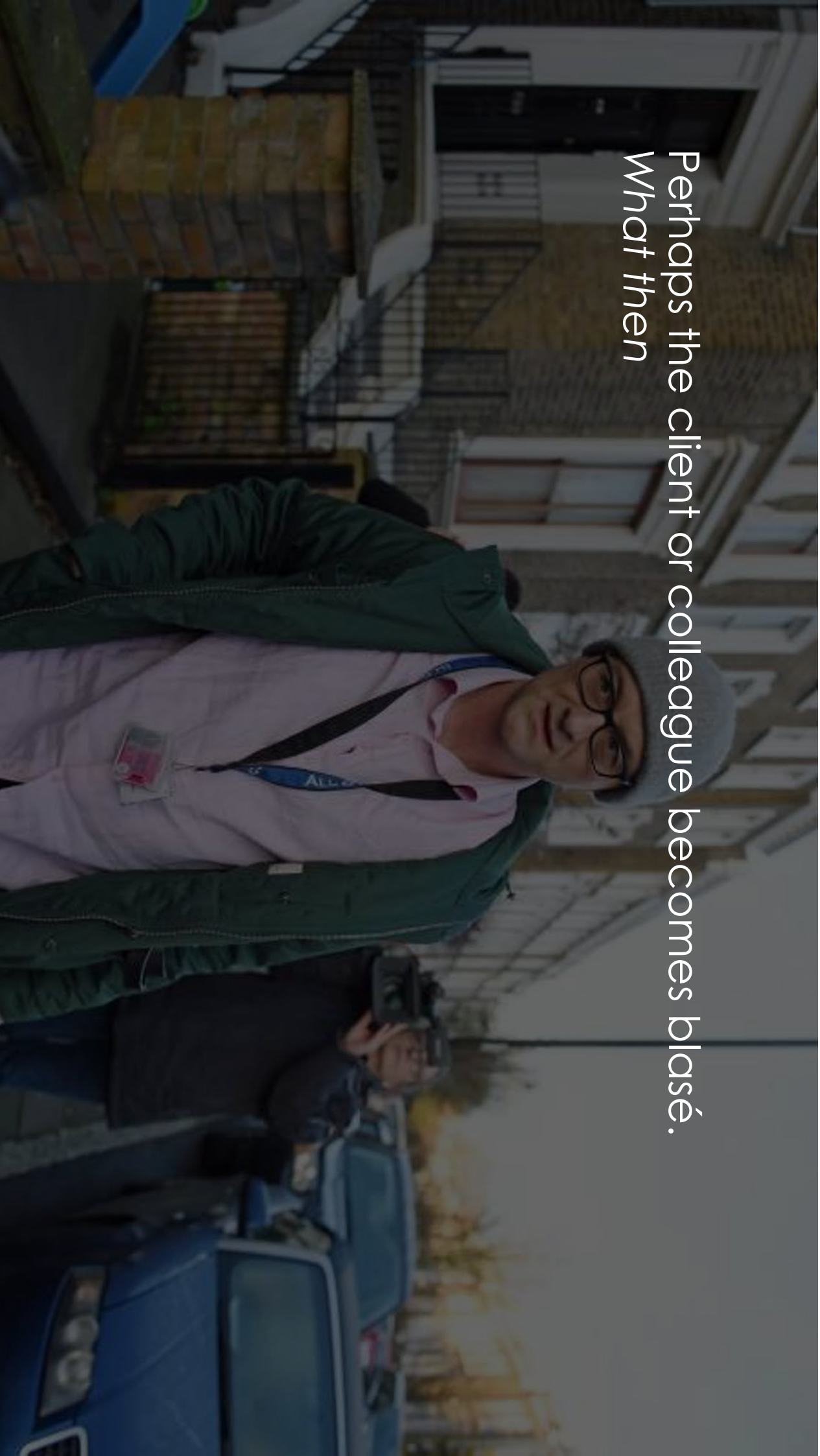
# PPE



# Lawful Orders

- ▶ An employee may be summarily dismissed if he or she wilfully disobeys any lawful and reasonable order of his employer
- ▶ Ottoman Bank v Chakarjian [1930] A.C. 277
- ▶ Buckoke v GLC [1970] 1 W.L.R. 1092

Perhaps the client or colleague becomes blasé.  
*What then*







Then the boss is responsible.  
A failure to reinforce the rules is a breach of duty.

# COVID-19 *Discrimination and Whistleblowing*

# Government Guidance

- ▶ The government's social distancing guidance defines those who are "clinically vulnerable" as:
  - ▶ Individuals aged over 70
  - ▶ Women who are pregnant
  - ▶ Individuals with an underlying health condition
- ▶ Protection may be afforded by the Equality Act by recognition of the protected characteristics of age (section 5), maternity (section 4 and 18) and disability (sections 4 and 15).

# Indirect Discrimination

- ▶ Employees with relevant protected characteristics are protected from discrimination suffered as a result of provisions, criteria and/or practices ('PCPs') imposed by the employer (section 19 of the EqA 2010).
- ▶ Examples of PCPs which are likely to cause issue during the pandemic include:
  - ▶ Requiring employees to travel to work.
  - ▶ Requiring employees to work from a location where social distancing is not possible.
  - ▶ Requiring work to be undertaken without provision of appropriate PPE.
- ▶ Employers should ensure that any PCP which has the potential to subject those with protected characteristics to a disadvantage is objectively justified and proportionate.

# Discrimination arising from disability

- ▶ Section 15 of the EqA 2010 specifically protects those with a disability from unfavourable treatment because of something arising in consequence of the employee's disability.
- ▶ Given that many with disabilities will currently be shielding in line with government policy, the application of attendance management procedures is likely to be brought to the fore.
- ▶ It is a further defence to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim (section 15(1)(b)). Employers should consider:
  - ▶ Likelihood of an imminent return to work
  - ▶ Reasons for the absence
  - ▶ Nature and extent of the absence
  - ▶ Whether reasonable adjustments can be made to improve attendance



# Reasonable Adjustments

- ▶ Section 21 imposes a duty on an employer to take reasonable steps to prevent employees with disabilities suffering substantive disadvantages as a result of their disability.
- ▶ The duty is one imposing *proactive* steps.
- ▶ The purpose of section 21 is to facilitate a disabled employee to remain in work or return to work (*O'Hanlon v Commissioners for HM Revenue & Customs* [2007] IRLR 404).
- ▶ Medical advice should be sought from the employee's GP or Occupational Health to determine what adjustments, if any, should be made to assist the employee in continuing to work.

# Association

- ▶ The government's shielding guidance, under the heading "living with other people", states:

*"The rest of your household do not need to start shielding themselves, but they should do what they can to support you in shielding and to carefully follow guidance on social distancing."*

- ▶ Associative discrimination only protects against:
  - ▶ Direct Discrimination;
  - ▶ Harassment; and
  - ▶ Victimisation.

# Practical Steps

- ▶ Ringfencing work which is appropriate for homeworking for those with relevant protected characteristics.
- ▶ Permitting employees to take unpaid leave.
- ▶ Ringfencing parking spaces or permitting flexi-time working to avoid travelling at peak times.
- ▶ Obtaining medical advice from GPs and Occupational Health to determine reasonable adjustments.
- ▶ Undertaking risk assessments, particularly for those with protected characteristics.
- ▶ Considering discounting shielding-related absence for the purposes of absence management policies.
- ▶ Medical testing for *all* staff.
- ▶ Employees should alert their employer to any potential disability, preferably with medical evidence.

# Whistleblowing

- ▶ Governed by sections 43A to 43L and 103A of the Employment Rights Act 1996.
- ▶ Disclosures should be made in accordance with the employer's whistleblowing policy.
- ▶ Recent reports have shown that some employers have requested that their employees not make complaints in the current circumstances; this runs entirely contrary to the spirit of the Act.
- ▶ Employers should consider designating a specific case handler to deal with whistleblowing disclosures as there is likely to be an increase in such disclosures being made.

# Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

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