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## **Risk Assessment and COVID-19: Systems at work (or not) in England and Sweden\***

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- P. Andersson, *Lagom krav på arbetsmiljön. Om förelägganden och förbud och arbetsmiljöansvarets gränser* [Appropriate requirements for the working environment. On injunctions and prohibitions and the limits of occupational health and safety liability], Stockholm, Ed. Jure, 2019.

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- T. A. Novitz, « Gig Work as a Manifestation of Short-Termism: Crafting a Sustainable Regulatory Agenda », *Industrial Law Journal*, vol. 50(4), 2021 <https://doi.org/10.1093/indlaw/dwab027>

**Résumé**

Le Covid-19 nous incite à réfléchir à la manière dont nous évaluons et répondons aux risques en matière de santé au travail. En Suède, tous les risques graves doivent être évités, tandis qu'en Angleterre, ils doivent l'être « autant qu'il est raisonnablement possible ». L'évaluation des risques a une fonction préventive, mais elle constitue également un rempart pour protéger l'employeur contre la mise en cause de sa responsabilité. Nous tiendrons compte dans cette analyse du niveau de protection et des facteurs de risque pertinents, ainsi que du rôle joué par les différents acteurs et organismes publics chargés de faire appliquer la loi.

**Mots clés :** Risque, coronavirus, Covid-19, travail, prévention.

**Abstract**

Covid-19 prompts us to consider how we assess and respond to health risks at work. In Sweden all serious risks are to be averted, while in England, they are to be avoided if reasonably practicable. Risk assessment serves a preventative function but also offers a defence to an employer. We consider coverage, relevant risk factors and the role of public enforcement bodies and other actors.

**Keywords :** Risk, Coronavirus, Covid-19, Work, Prevention

England has one of the highest rates of excess deaths in Europe due to Covid-19<sup>1</sup>, while Sweden has experienced the highest among Nordic countries, although numbers are relatively low compared to European Union (EU) states more generally<sup>2</sup>. Deaths among the working population in both countries are attributable to approximately 10% of the national totals<sup>3</sup>, while many more have experienced long-term illness following infection (« long-Covid » as it has come to be known)<sup>4</sup>. This article considers how these two countries have addressed the work-related risks associated with the coronavirus pandemic, evaluating their systems of assessment and implementation of precautionary measures. The focus is on England, rather than the wider United Kingdom, as this is the level at which lockdown and other public health measures have been implemented; indeed, there has been higher praise for policies implemented in other parts of the UK, such as Scotland<sup>5</sup>. Sweden has provided an overarching national response, avoiding lockdowns. In both countries risk assessment plays a pre-emptive role (preventing harms) and a defensive role (preventing liability). Our comparative project exposes the limitations and different objectives of the English and Swedish systems. In England, risks merely need to be managed insofar as this is reasonably practicable while, in Sweden, it is necessary to avoid serious risks. We also identify three crucial factors which affect the efficiency of English and Swedish responses to the COVID-19 crisis: who is the legitimate subject of any risk assessment; what risks require preventative or remedial action; and which actors wield influence in these processes.

## **I- What is meant by « risk » and its « assessment »?**

The first Swedish law on work environment - the Work Hazards Act of 1889 - was inspired by the old English Factory Acts of the 19<sup>th</sup> century<sup>6</sup>, which stated the fundamental principle that the employer has an obligation to prevent the employee being exposed to illness or accidents. However, the scope of that duty differs in England and Sweden. In England, the Health and Safety at Work etc. Act 1974, section 2(1) states that: « It shall be the duty of every employer to ensure, *so far as is reasonably practicable*, the health, safety and welfare at work of all his employees » (our emphasis). Chapter 3, section 2 of the Swedish Work Environment Act (SWEAct) states that the employer must take *all necessary measures* to prevent the employee from being exposed to illness or accidents. The UK Health and Safety Executive (HSE) aims for risks to be « as low as reasonably

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<sup>1</sup> See <https://www.kingsfund.org.uk/publications/deaths-covid-19>

<sup>2</sup> Statistics Sweden: <https://www.scb.se/hitta-statistik/artiklar/2021/overdodlighet-i-europa-under-2020/>

<sup>3</sup> See in England: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsregisteredweeklyinenglandandwalesprovisional/weekending16april2021#deaths-registered-by-age-group>; and in Sweden: <https://www.socialstyrelsen.se/statistik-och-data/statistik/statistik-om-covid-19/statistik-over-antal-avlidna-i-covid-19/>

<sup>4</sup> E. Mahase, « Covid-19: What do we know about “long covid”? », *British Medical Journal*, 2020, p. 370.

<sup>5</sup> P. James (ed.), *HSE and Covid at Work: A case of regulatory failure*, Institute of Employment Rights, 2021, p. 20.

<sup>6</sup> H. Sellberg, *Staten och arbetarskyddet 1850-1919*, Almqvist & Wiksell, 1950, p. 14.

possible », weighing risks against the trouble, time and money needed to control them<sup>7</sup>, and has a framework for deciding tolerability of risk, under which risks can be broadly acceptable, tolerable or unacceptable<sup>8</sup>. However, there are some anomalies, since 53% of sudden injury deaths in the workplace have occurred in what are deemed low risk working activities<sup>9</sup>. In contrast, the Swedish Work Environment Authority (WEA) states on its website that the purpose or risk assessments is to make sure that *no one* becomes ill, injured or dies from the job<sup>10</sup>. Risks are to be classified as serious or not serious<sup>11</sup>, such that serious risks must be removed while others can be disregarded. The English approach may lead to more risks being identified, not all of which may reasonably be practicable to address, while there is little room for middle ground in Swedish law and practice<sup>12</sup>.

Often, the term risk is connected to a calculable probability<sup>13</sup>, but there may be complex hazards not amenable to simple calculation<sup>14</sup>. Usually, we talk about risk not only as a probability but also in terms of the severity of the negative outcome<sup>15</sup>. The concept of *risk assessment* can be defined as the overall process of risk analysis and risk evaluation. *Risk analysis* involves the systematic use of available information involving three main steps: hazard identification, frequency analysis and consequence analysis. *Risk evaluation* is a process by which judgements are made regarding the tolerability of the risk following a risk analysis and taking into account further socioeconomic and environmental factors<sup>16</sup>.

International standards regarding risk assessment can be found in the ILO Promotional Framework for Occupational Safety and Health Convention No. 187 of 2006<sup>17</sup> and Article 3 of the European Social Charter<sup>18</sup>. The obligation to evaluate and avoid risks is also prominent in Article 6 of the EU Framework Directive 89/391/EC on health and safety of workers. These obligations are transposed in the UK into the Management of Health and Safety at Work Regulations 1999, while the Swedish Work Environment Act (SWEAct) is complemented by more detailed rules in the WEA's Provision (AFS). In both the English and Swedish systems, the requirement placed on employers to assess risks and implement a plan based on that assessment is aimed at *ex ante* prevention of foreseeable harms<sup>19</sup>. The trade off is the defensive role that a risk assessment and its

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<sup>7</sup> <https://www.hse.gov.uk/managing/theory/alarplance.htm>. Also, see J. Steele, *Risks and Legal Theory*, Hart Publishing, 2004, p. 169.

<sup>8</sup> <https://www.hse.gov.uk/aboutus/timeline/index.htm>

<sup>9</sup> A. Moretta and D. Whyte, *International Health and Safety Standards and Brexit*, Institute of Employment Rights, 2020, p. 29.

<sup>10</sup> WEA : <https://www.av.se/arbetsmiljoarbete-och-inspektioner/arbete-med-arbetsmiljon/systematiskt-arbetsmiljoarbete-sam/riskbedomning/>

<sup>11</sup> *Ibid.*

<sup>12</sup> The nature of work can in some instances limit work environment responsibility, Chapter 2 Section 1 SWEAct. For example, working as a fire-fighter involves risk of fire.

<sup>13</sup> J. Steele, *op. cit.*, p. 6 ; S. O. Hansson, *The Ethics of Risk*, Palgrave Macmillan, 2013, p. 9.

<sup>14</sup> J. Steele, *op. cit.*, p. 6.

<sup>15</sup> S. O. Hansson, *op. cit.*, p. 9.

<sup>16</sup> M. Rausand, *Risk assessment ; theory, methods, and applications*, Wiley, 2011, p. 7. See also N. Luhmann, *Risk: A Sociological Theory*, De Gruyter, 1993.

<sup>17</sup> Ratified by both the UK and Sweden in 2008.

<sup>18</sup> Ratified by both England and Sweden, although Sweden is additionally party to the enhanced article 3 of the Revised European Social Charter 1996.

<sup>19</sup> P. Andersson, *Vidta alla åtgärder som behövs* [Take all necessary measures], Jure, 2013, p. 70. Also, see L. V. Westerhäll, « Risk - och händelseanalyser på arbetsmiljö- respektive hälso - och sjukvårdsområdena - en jämförelse

implementation may play, limiting an employer's liability *ex post facto*. According to Luhmann, risk assessment is akin to an « advance confessional », which implies that its proper conduct leads to absolution<sup>20</sup>.

The pre-emptive role of risk assessment is compromised if there is too much focus on the formal documentation of a risk assessment, instead of taking action to remove risks. It will depend on its coverage, namely whether all those foreseeably harmed are covered. The exclusion of certain harms will also affect its efficacy. For example, a focus on merely physical harm as opposed to psychological and social concerns may have limited impact. Moreover, there will need to be reflexivity, so that as new potential harms are identified, they are also addressed. There remains the danger that a poorly conducted or implemented risk assessment can lead to injury for the employee without responsibility for the employer. Beck has argued that the idea of responsibility has been weakened by the focus on risk assessments in industrial society<sup>21</sup>. We discuss below how this dynamic has played out in the context of English and Swedish systems for identifying and ameliorating risks in the Covid-19 crisis, and whether employers rather than workers have been protected.

## II- Coverage of risk assessments: employees, workers and those deemed self-employed

The increase in hire of services through digital platforms during the pandemic, for example in relation to home deliveries, indicates increased precarity and vulnerability, especially since those who perform such services are often hired ostensibly as independent contractors without employment or social security entitlements<sup>22</sup>. There is also evidence that ethnic minorities are disproportionately represented in those exposed to COVID-19 through their work<sup>23</sup>, including the care and delivery work which has been increasingly casualised. This can limit the coverage of risk assessment, so that responsibility by employers is effectively outsourced<sup>24</sup>.

The Swedish WEA's slogan is: « Everyone wants to and can provide a good work environment »<sup>25</sup>. In general, the idea is that « more is more »<sup>26</sup>. The UK HSE has been reluctant to embrace such a universal principle, supporting the government's technical legal distinctions between « employees », workers who are not employees (but are termed « limb (b) workers »)<sup>27</sup>, and independent contractors. These categories have implications in terms of health and safety law.

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av preventionsarbetet » [Risk and event analyses in the work environment and health care areas - a comparison of prevention work], *Nordisk Socialrättslig Tidskrift*, no. 17-18, 2018.

<sup>20</sup> As cited in J. Steele, *op. cit.*, p. 8.

<sup>21</sup> U. Beck, *Ecological Policies in an Age of Risk*, Polity Press, 1995, p. 58.

<sup>22</sup> ILO World Employment and Social Outlook Report, *The Role of Digital Labour Platforms in Transforming the World of Work*, 2021, p. 153; and A. Adams-Prassl, T. Boneva, M. Golin, C. Rauh, « Inequality in the Impact of the Coronavirus Shock : Evidence from real time surveys », *Journal of Public Economics*, 2020, p. 189.

<sup>23</sup> See Public Health England Report, *Disparities in the Risk and Outcomes of COVID-19* (2020), chapters 4 and 5 : <https://www.gov.uk/government/publications/covid-19-review-of-disparities-in-risks-and-outcomes>

<sup>24</sup> A. Moretta and D. Whyte, *op. cit.*, p. 9.

<sup>25</sup> WEA: <https://www.av.se/om-oss/>

<sup>26</sup> SWEAct also covers categories such as persons undergoing education or training, including persons in institutional care performing work that they have been assigned. See Chapter 1 Section 3.

<sup>27</sup> By virtue of s.230(3)(b) of the Employment Rights Act 1996 (ERA).

In England, Uber drivers were unsuccessful in their challenge to exclusion from statutory sick pay and the Coronavirus Job Retention Scheme (CJRS), despite the equality-related issues raised in that judicial review<sup>28</sup>. However, subsequent proceedings brought in the High Court by the Independent Workers' Union of Great Britain (IWGB) just prior to British exit of the EU (Brexit) were successful in establishing that English law and HSE practices were in breach of the « Framework Directive » 89/391/EC and the « daughter » Directive 89/656/EC relating to PPE<sup>29</sup>. It was observed that UK employers have duties to employees, workers and independent contractors under sections 2 and 3 of the Health and Safety at Work Act 1974 to avert risks to health and safety. Moreover, limb (b) workers should have protection from detriment when they refuse to work where there is serious or imminent danger under section 44 of the Employment Rights Act (ERA) 1996, although only more privileged « employees » can claim protection from dismissal under s.100<sup>30</sup>. Limb (b) workers should also have access to PPE<sup>31</sup>.

These entitlements (curiously opposed by the HSE) are more minimal than was recommended by the Council of Europe's European Committee of Social Rights (ECSR). The ECSR has asserted in relation to UK compliance with Article 3 of the European Social Charter that « all workers, including the self-employed must be covered by health and safety at work regulations as long as employed and self-employed workers are normally exposed to the same risks »<sup>32</sup>. That approach would be more helpful, given current uncertainties regarding the boundaries of worker status in the UK gig economy<sup>33</sup>.

In Sweden, as in England, working people can be divided into various categories. Swedish classifications consist of employees, agency workers, workers equated to employees (similar to English « limb (b) workers »), and the self-employed. The SWEAct and related provisions give rights to employees, but agency workers must also be protected by both their employer, the agency, and by their « hirer »<sup>34</sup>. In this way, in relation to risk assessments, the agency worker has a kind of « double protection ». Workers that are *equated to employees* are covered by work environment risk assessments and protected from both detriment and dismissal when lawfully exercising a right to walk out where there is serious and immediate danger to their health<sup>35</sup>.

The category that is most vulnerable, when it comes to coverage of protection by the Swedish Work Environment Act, is the self-employed. However, in Sweden, those who work *via* self-employment companies or digital platforms have been targeted by a new project commissioned by the Swedish Government and carried out by the WEA<sup>36</sup>. In that way, « gig » workers can be the subject of inspections and currently 50 are planned. The legal issue is whether the companies in question have

<sup>28</sup> *R (Adiatu) v HM Treasury* [2020] EWHC 1554, 15 June 2020.

<sup>29</sup> *R (IWGB) v The Secretary of State for Law and Pensions* [2020] EWHC 3039, 13 November 2020.

<sup>30</sup> *Ibid.*, §123-128.

<sup>31</sup> *Ibid.*, §129-140.

<sup>32</sup> European Committee of Social Rights, Conclusions XXI-2 - United Kingdom on Article 3, 8 December 2017.

<sup>33</sup> Uber drivers were found to be workers in *Uber BV and others v Aslam and others* [2021] UKSC 5, 19 February 2021; but Deliveroo couriers were not so successful. See *IWGB v CAC and Roo Foods Ltd* [2021] EWCA Civ 952, 24 June 2021..

<sup>34</sup> Under Chapter 3 Section 2 and Chapter 3 Section 12 second paragraph of the SWEAct, although there are minor differences in wording. See also the WEA's Provisions on Systematic Work Environment Management, AFS 2001:1.

<sup>35</sup> H. Gullberg and K.-I. Rundqvist, *Arbetsmiljölagen* [Work Environment Act], Norstedts Juridik, 2018, p. 57.

<sup>36</sup> WEA report 2020-02-18 no. 2018/035377: <https://www.av.se/globalassets/filer/publikationer/rapporter/delrapport-regeringsuppdraget-om-tillsynsinsats-med-inriktning-pa-nya-satt-att-organisera-arbete.pdf>

work environment responsibility, and the merits of this project have been fiercely. So far the WEA has not been successful in attributing employer responsibility to platform companies in court.<sup>37</sup> Regardless of that dispute, a remaining difficulty is that the Swedish model is based on collective rights and state supervision. Self-employed persons that are not union members often in practice fall outside that protection, lacking the capacity to make demands concerning risk assessments and their implementation. In this sense, despite the greater efforts made in Sweden to secure wider universal coverage, there are still notable gaps.

### III- Which are the main risks?

The scale of the risks associated with Covid-19 and its appropriate classification as a biological agent remain controversial, as we are seeing in litigation at EU level<sup>38</sup>. According to the Swedish WEA website, a « risk is the probability of a dangerous event or exposure occurring and the consequences if it occurs, in the form of injury or ill health »<sup>39</sup>. In England, the HSE, has a similar definition, stating on its website that under the relevant rules employers must identify hazards and « decide how likely it is that someone could be harmed and how seriously (the risk) »<sup>40</sup>. After an initial attempt to underplay coronavirus-related risks, the HSE 2020-21 report has recognised that: « Industries and sectors that were previously considered low risk from a worker protection or public safety perspective, are now considered high risk »<sup>41</sup>. Both Swedish unions<sup>42</sup> and the WEA<sup>43</sup> see performing risk assessments as vital to prevent Covid-19 at work.

HSE guidance on risk assessments relating to Covid-19 invited UK employers to identify what work activity or situations might cause transmission of the virus, think about who could be at risk, decide how likely it is that someone could be exposed, and act to remove the activity or situation, or if this is not possible, control the risk<sup>44</sup>. This guidance has to be read in tandem with more detailed Government advice, applicable in England in the form of « Guidance » regarding what is safe in different types of workplace, on which there was consultation with Public Health England

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<sup>37</sup> Kammarrätten i Göteborg, case 4120-21, 19 November 2021. Also, see WEA: <https://www.av.se/globalassets/filer/publikationer/rapporter/delrapport-regeringsuppdraget-om-tillsynsinsats-med-inriktning-pa-nya-satt-att-organisera-arbete.pdf>.

<sup>38</sup> See Case T-484/20 *SATSE v Commission*: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020TN0484>

<sup>39</sup> WEA: <https://www.av.se/arbetsmiljoarbete-och-inspektioner/arbets-med-arbetsmiljon/systematiskt-arbetsmiljoarbete-sam/riskbedomning/>

<sup>40</sup> <https://www.hse.gov.uk/simple-health-safety/risk/index.htm>

<sup>41</sup> HSE Business Plan 2020/21: <https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan2021.pdf> (p. 21).

<sup>42</sup> [https://www.arbetskydd.se/arbetsmiljo/stor-oro-hos-vardepersonal-efter-coronadodsfall-6993941?source=carma&utm\\_custom\[cm\]=302753248,33270&=](https://www.arbetskydd.se/arbetsmiljo/stor-oro-hos-vardepersonal-efter-coronadodsfall-6993941?source=carma&utm_custom[cm]=302753248,33270&=)

<sup>43</sup> Arbetskydd: [https://www.arbetskydd.se/arbetsmiljo/har-ar-arbetsmiljoverkets-rad-om-corona-6989415?source=carma&utm\\_custom\[cm\]=302753248,33270&=](https://www.arbetskydd.se/arbetsmiljo/har-ar-arbetsmiljoverkets-rad-om-corona-6989415?source=carma&utm_custom[cm]=302753248,33270&=)

<sup>44</sup> [https://www.hse.gov.uk/coronavirus/working-safely/index.htm#risk\\_assessment](https://www.hse.gov.uk/coronavirus/working-safely/index.htm#risk_assessment); <https://www.hse.gov.uk/coronavirus/assets/docs/risk-assessment.pdf>

(PHE)<sup>45</sup>. Indeed, PHE<sup>46</sup> frequently revised health-related guidance on tolerability of Covid-related risks<sup>47</sup>, but did not always respond with more stringent standards, retaining questionable advice on PPE<sup>48</sup>. Moreover, « Guidance » focused on reducing physical risks at work through handwashing and social distancing, not the psychological harms arising from potential exposure, or increased workloads and work-related stress<sup>49</sup>.

The UK Government advised that employers « share the results » of their completed risk assessment with employees and that larger businesses (with over 50 employees) publish it on their websites. Afterwards, employers and businesses should display « a notification in a prominent place in your business and on your website » indicating they are « COVID-secure »<sup>50</sup>. This nomenclature « COVID-secure »<sup>51</sup> has arguably created a false sense of confidence in the formalistic measures taken, regarding hand sanitizers or use of screens. Very few notifications regarding Covid-19 infections at work have been made to the HSE<sup>52</sup>, which may be due to a problematic assumption that if there is employer compliance with official « Guidelines » then this did not happen at work.

The Swedish WEA has received more than 40.000 notifications of serious Corona incidents<sup>53</sup>, but there is a concern that sending a notification can lead to a false sense of having acted to protect workers against the virus, while in reality having done nothing<sup>54</sup>. In 2020, the WEA quickly acknowledged the virus as a work environment hazard (risk class 3) and took regulatory steps in accordance with the Provisions on Risk of Infection 2018.<sup>55</sup> While physical risks of infection are a clear priority, the WEA has addressed fear and anxiety relating to infection on its website as an important issue<sup>56</sup>. When it comes to stress and heavy workloads, the general WEA Provisions on

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<sup>45</sup> <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>, now updated as of 15 April 2021. Note that PHE has since been replaced by the National Institute for Health Protection, see: <https://www.gov.uk/government/publications/the-future-of-public-health-the-nihp-and-other-public-health-functions/the-future-of-public-health-the-national-institute-for-health-protection-and-other-public-health-functions>

<sup>46</sup> A. Watterson, « COVID-19 in the UK and occupational health and safety : predictable not inevitable failures by government, and trade union and nongovernmental organization responses », *New Solutions: A Journal of Environmental and Occupational Health Policy*, vol. 30(2), 2020, p. 89.

<sup>47</sup> *Ibid.*, p. 90.

<sup>48</sup> As reported by K. D. Ewing and Lord J. Hendy, « Covid-19 and the Failure of Labour Law », *Industrial Law Journal*, Part. 1, vol. 49(4), 2020, p. 529; <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/construction-and-other-outdoor-work>

<sup>49</sup> See the risks for example identified by the Government guidance in shops, for which see: <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/shops-and-branches>. The stresses associated with, for example, covering for missing colleagues or managing breaches of face covering protocols are not identified.

<sup>50</sup> For the form of the notice, see: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/951736/staying-covid-19-secure-notice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951736/staying-covid-19-secure-notice.pdf)

<sup>51</sup> See HSE Business Plan 2020/21: <https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan2021.pdf>, p. 22.

<sup>52</sup> R. Agius, « Disease and Death from Work: RIDDOR and covid-19 », *Occupational Medicine*, vol. 70, 2020, p. 470; and <https://www.theguardian.com/world/2021/may/22/thousands-of-work-related-covid-deaths-go-unreported-in-uk>

<sup>53</sup> WEA: <https://www.av.se/om-oss/press/jobbrelaterade-coronaanmalningar/tillbudsanmalningar/>

<sup>54</sup> Confederation of Swedish Enterprise: [https://www.svensktnaringsliv.se/sakomraden/arbetsmiljo/arbetsmiljooverk-ets-tvara-kast-anmarkningsvarda\\_1168048.html](https://www.svensktnaringsliv.se/sakomraden/arbetsmiljo/arbetsmiljooverk-ets-tvara-kast-anmarkningsvarda_1168048.html)

<sup>55</sup> AFS 2018:4. In accordance with the Work Environment Act 1977 and Provisions on Systematic Work Environment Management 2001; AFS 2001:1.

<sup>56</sup> WEA: <https://www.av.se/halsa-och-sakerhet/psykisk-ohalsa-stress-hot-och-vald/oro/>



Organizational and Social Work Environment apply<sup>57</sup>. Heavy workload in the health care sector during the pandemic, in combination with limited possibilities to recuperate, have numerous times in the Swedish debate been described as a « ticking time bomb »<sup>58</sup>.

In England, new emphasis on remote working did not lead to specific guidance on risk assessments concerned with work at home. The rather lax implementation of the EU Telework Framework Agreement of 2002 through consultative practices and advice from the HSE continues without discussion of its relevance in the coronavirus pandemic<sup>59</sup>. However, in Sweden, it is acknowledged that this type of work leads to new work environment risks and new types of risk assessment. An old rule excluding « uncontrollable work » from home from the scope of the SWEAct was abolished in 2005<sup>60</sup>. The main legal issue is to what extent the employer can exercise power in the worker's home<sup>61</sup>.

Finally, both English and Swedish regimes regarding risk assessment are problematic in that they do not factor in dependents at home who, in a high risk group, may need to be protected from exposure to coronavirus. In England, « who should go to work » was considered in the « Guidance », making provision for those who were symptomatic or were otherwise required to self-isolate or shield<sup>62</sup>. There was also acknowledgement of PHE's identification of those more prone to serious illness if exposed to coronavirus, alongside a recommendation of sensitivity relating to « protected characteristics ». However, the issue of « associative » disability<sup>63</sup>, including the need to protect a vulnerable family member from potential infection, was not explicitly considered as a relevant risk. While employers could (and should) opt to respond under discrimination law, they were not prompted to do so. Similarly, in Sweden, risk of illness for a worker is the responsibility of the employer but less attention is paid to the need for protection of a vulnerable family member. It is possible to get compensation from social security for staying home from work to protect family member that is vulnerable to Covid-19, but only under very special circumstances, where the worker is paid by the government to care for the family member<sup>64</sup>.

In summary, the risk assessment process in England has failed to deal with crucial issues relating to the coronavirus pandemic, concerned with psychological risks, risks associated with home work and risks to vulnerable dependants. The Swedish system, while imperfect regarding the latter, has offered more effective intervention. In both systems, there will now need to be further reflection

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<sup>57</sup> AFS 2015:4.

<sup>58</sup> See for example Etc: <https://www.etc.se/debatt/corona-gor-psykisk-ohalsa-till-tickande-bomb>; and Swedish Radio : <https://sverigesradio.se/artikel/7607016>

<sup>59</sup> See [https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002 Framework%20Agreement%20-%20EN.pdf](https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002%20Framework%20Agreement%20-%20EN.pdf); there seems to have been no meaningful HSE activity on this issue since 2007: <https://www.hse.gov.uk/research/rrpdf/rr600.pdf>. See T. Prosser, « Europeanization through procedures and practices? The implementation of the telework and work-related stress agreements in the UK and Denmark », *Transfer*, vol. 18(4), 2012, p. 447.

<sup>60</sup> See Chapter 3 section 4 and Chapter 6 SWEAct; also <https://www.av.se/halsa-och-sakerhet/sjukdomar-smitta-och-mikrobiologiska-risker/smittrisker-i-arbetsmiljon/coronaviruset/arbetsmiljon-vid-hemarbete/>

<sup>61</sup> Swedish Agency for Work Environment Expertise: <https://mynak.se/individuella-forutsattningar-spelar-stor-roll-for-arbetsmiljon-nar-vi-arbetar-hemifran/>

<sup>62</sup> See again, for example, <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/shops-and-branches#shops-3-1>

<sup>63</sup> C-303/06 *Coleman v Attridge* [2008] ECR I-5603.

<sup>64</sup> The Swedish Social Insurance Agency: <https://www.forsakringskassan.se/privatpers/coronaviruset-det-har-galler>

on the role of testing and vaccination, given recent developments. In Sweden, especially in the public sector, employees have strong protection against employer's demands to get vaccinated<sup>65</sup>. The right for the employee to refuse to take a Covid test is somewhat weaker<sup>66</sup>. In England at present there is no requirement of compulsory vaccination other than that controversially now introduced with respect to workers in registered care homes and new plans for NHS staff<sup>67</sup>. In both systems, measures can only be taken in response to risks that are regarded otherwise as lawful and human rights compliant.

#### IV- Actors and issues of agency

We might expect the chief health and safety actors in both England and Sweden to be the two statutory bodies responsible for inspection, namely the HSE and the WEA, respectively. However, the HSE suffers in comparison with its Swedish counterpart, to the extent that the Government and PHE disrupted exercise of its statutory role, prompting concern that the HSE had « gone missing »<sup>68</sup>. Also significant was the 40% reduction in Government funding of the HSE between 2010 - 2020<sup>69</sup>, which could not be remedied by a quick injection into its budget at the start of the pandemic<sup>70</sup>. Not only were risk assessments limited in their scope, but there was little attempt by the HSE to check their implementation by employers. Spot checks were outsourced and carried out by telephone calls<sup>71</sup>, so that few improvement notices or prosecutions were issued<sup>72</sup>. In Sweden, the Director General of the WEA stressed the need for thorough inspection of whether an employer made and implemented a risk assessment<sup>73</sup>.

Further, the relative efficacy of the HSE and WEA may be attributed not only to funding, but to the respective roles of safety representatives in the English and Swedish systems (**A**), the scope of the right to stop work in response to risks (**B**), and other post facto options for enforcement by workers (**C**).

##### A- Safety representatives

Under UK law, safety representatives are provided for where there is a trade union formally recognised by the employer<sup>74</sup>. Where there is no recognised trade union, the employer can choose

<sup>65</sup> P. Herzfeld-Olsson in *Lag och Avtal* : <https://www.lag-avtal.se/arbetsratt/chefen-kan-inte-tvinga-dig-att-ta-vaccin-7006696>

<sup>66</sup> Swedish Trade Union Unionen: <https://www.unionen.se/story/aktuellt/kan-jobbet-krava-corona-test>

<sup>67</sup> The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, which may have set a new precedent. Discussed at: <https://www.gov.uk/government/news/everyone-working-in-care-homes-to-be-fully-vaccinated-under-new-law-to-protect-residents>. For Government proposals concerning NHS staff, see: <https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-the-health-and-wider-social-care-sector>.

<sup>68</sup> A. Watterson, *op. cit.*, p. 89.

<sup>69</sup> <https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan0910.pdf>; <https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan1920.pdf>

<sup>70</sup> P. James, *op. cit.*, p. 29.

<sup>71</sup> *Ibid.*, p. 30.

<sup>72</sup> Work and Pensions Committee report, *Department of Work and Pensions' Response to the Coronavirus Outbreak*, published on 5 February 2021 HC 178 (2019–21), discussed by K. D. Ewing and Lord J. Hendy, *op. cit.*, p. 525.

<sup>73</sup> <https://www.arbetarskydd.se/arbetsskador/det-finns-mer-att-gora-pa-arbetsplatserna-7011496>

<sup>74</sup> See section 2 of the Health and Safety Act 1974; and the Safety Representatives and Safety Committees Regulations 1977.

whether to consult employees directly or through elected representatives<sup>75</sup>. The HSE brochure issued in 2013 on « Consulting employees on health and safety: A brief guide to the law » sets out these legal obligations<sup>76</sup>, but has not been updated and is downplayed by the HSE in relation to coronavirus risk assessments. The HSE now recommends merely that employers « talk to workers », since « they will usually have good ideas »<sup>77</sup>, seemingly suggesting that it is lawful to bypass established safety representatives. In another pamphlet, « Talking with your workers about preventing coronavirus », consulting health and safety representatives is presented as an option only once (on page 2) and then is not mentioned again<sup>78</sup>. In this way, English employers neglected the energetic representations made by trade unions regarding checklists, PPE guidance and other matters<sup>79</sup>.

In Sweden, safety representatives have played a more active role. They are commonly appointed by a trade union which has concluded a collective agreement to which the employer is party<sup>80</sup>. Although the number of appointed safety representatives and the total time they spend on their task may be decreasing<sup>81</sup>, they still devote an equivalent to more than 5000 full time jobs<sup>82</sup>, compared to less than 300 WEA inspectors<sup>83</sup>. A safety representative « is responsible, within her or his safety area, for monitoring the safeguards against illness and accidents and compliance by the employer with the requirements » of risk assessments<sup>84</sup>. In the context of the coronavirus pandemic, the WEA has called upon employers to « get help from safety representatives and have good dialogue with the staff » when making risk assessments. Also, « safety representatives and employees participating in the various tasks must be involved »<sup>85</sup>. Further, under Swedish law, safety representatives can call upon employers to comply with risk assessments without delay, and if not satisfied with the response can seek intervention from the WEA<sup>86</sup>. For example, in November 2020, the WEA approved the request of a safety representative for a specific risk assessment in a preschool regarding prevention of coronavirus infection<sup>87</sup>. As of November 2021, 294 safety representatives had used the legislative provisions to make demands against employers concerning Covid-19 risk assessments<sup>88</sup>. The power to inform the WEA may sound weak, but in practice this usually carries considerable weight prompting employer compliance.

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<sup>75</sup> Health and Safety (Consultation with Employees) Regulations 1996, Regs 3 and 4.

<sup>76</sup> See <https://www.hse.gov.uk/pubns/indg232.pdf> (p. 2).

<sup>77</sup> See <https://www.hse.gov.uk/simple-health-safety/risk/steps-needed-to-manage-risk.htm>

<sup>78</sup> See <https://www.hse.gov.uk/coronavirus/assets/docs/talking-with-your-workers.pdf> (p. 2).

<sup>79</sup> See for example <https://www.tuc.org.uk/tuc-covid-19-risk-assessment>; <https://unitetheunion.org/campaigns/coronavirus-covid-19-advice/>; and <https://www.unison.org.uk/coronavirus-rights-work/>. Discussed by A. Watterson, *op. cit.*, p. 90.

<sup>80</sup> Chapter 6 Section 2 SWEAct.

<sup>81</sup> J. Sjöström et K. Frick, *Worker participation in the management of occupational safety and health - qualitative evidence from ESENER*, Country report Sweden (European Agency for Safety and Health at Work), 2017, p. 21.

<sup>82</sup> In 2012: <https://arbetet.se/2012/10/19/saknas-100-000-skyddsombud/>

<sup>83</sup> Arbetet: <https://arbetet.se/2018/01/15/svart-na-malet-om-300-arbetsmiljoinspektorer/>

<sup>84</sup> Chapter 6, Section 4 SWEAct.

<sup>85</sup> WEA: <https://www.av.se/halsa-och-sakerhet/sjukdomar-smitta-och-mikrobiologiska-risker/smittrisker-i-arbetsmiljon/coronaviruset/systematiskt-arbetsmiljoarbete-och-riskbedomning/>

<sup>86</sup> Chapter 6, Section 6 SWEAct.

<sup>87</sup> Arbetsmiljöverket enheten för region nord, decision 2020-11-05, 2020/040441.

<sup>88</sup> WEA: <https://www.av.se/om-oss/press/jobblaterade-coronaanmalningar/begaran-om-atgarder/>

## B- The right to stop work

Swedish safety representatives arguably gain greater influence from their ability to suspend work temporarily pending a decision by the WEA<sup>89</sup>. Before doing so, the safety representative must make a kind of risk assessment concerning the work that he or she is stopping, considering whether the work involves a *serious* and *immediate* danger to the life or health of an employee. That the danger must be *immediate* means the injury can occur after being exposed to a hazard for a short period of time. By October 2021, there had been 134 stoppages of this nature concerning coronavirus, which is a significant number<sup>90</sup>. For example, in the Serafen-case<sup>91</sup>, work was stopped to ensure that PPE included face coverings as well as visors, and the WEA in due course agreed, prohibiting work proceeding until this was done. However, this was not always a successful approach, in a case concerning handling of cash on buses, in March 2020<sup>92</sup>, the WEA argued that work should resume on the basis that Covid-19 would not spread through handling of objects.

Notably, this right to stop work which involves immediate and serious danger to life or health is also available to all kinds of workers in Sweden without detriment or dismissal,<sup>93</sup> although not the self-employed. This is consistent with entitlements recognised under Article 13 of ILO Convention No. 155 (ratified by Sweden although not the UK) and arising by virtue of Articles 8(4) and 8(5) of the Framework Directive 89/391/EC. Such a stoppage is permitted in Sweden where the aim is to consult urgently with a supervisor or safety representative<sup>94</sup>. Before exercising the right to refuse work, the worker in question must have assessed the danger. If that assessment subsequently turns out to be incorrect, there will still be protection from liability if at the time of the stoppage that assessment seemed reasonable and therefore justifiable<sup>95</sup>. However, there will be a right to dismiss where the assessment is clearly unreasonable or where a stoppage is called despite a finding by the WEA that there is no immediate and serious danger<sup>96</sup>.

In the UK, « in circumstances of danger » which « are reasonably believed to be serious and imminent », it is possible to leave the workplace (and refuse to return) or to take appropriate steps to avert that danger. Workers can now claim protection from detriment<sup>97</sup>, while employees have a superior claim to protection from dismissal<sup>98</sup>. At the time of writing, there has been only one English employment tribunal case where a claimant relied on these provisions to assert that potential coronavirus infection constituted such a danger. On the facts, the tribunal found that the employee was stopping work due to general concerns regarding the vulnerability of his children during the lockdown, rather than any specific risk of infection at work<sup>99</sup>. Other case law indicates that this is only an option *in extremis*, where there is no safety representative to take up the

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<sup>89</sup> Chapter 6, Section 7 SWEAct.

<sup>90</sup> WEA: <https://www.av.se/om-oss/press/jobbrelaterade-coronaanmalningar/skyddsombudsstopp/>

<sup>91</sup> Förvaltningsrätten i Stockholm, 2020-04-30, case 8036-20.

<sup>92</sup> Förvaltningsrätten i Falun, 2020-04-03, case 1301-20.

<sup>93</sup> Chapter 3, Section 4 SWEAct.

<sup>94</sup> Prop. 1976/77:149 p. 395. AD 2001:10.

<sup>95</sup> AD 2001:10.

<sup>96</sup> AD 2001:10.

<sup>97</sup> Following the *IWGB* case n.29 above; by virtue of the s.44 ERA.

<sup>98</sup> Under s.100 ERA.

<sup>99</sup> *Rodgers v Leeds Laser Cutting Limited*, Employment Tribunal, per Judge Anderson, 1 March 2021.

concerns<sup>100</sup>. Notably, one cannot seek protection from dismissal when taking strike action in response to a potentially dangerous situation<sup>101</sup>. These rights are not easy to exercise.

### C- Other options for enforcement

In England, there remain residual criminal penalties<sup>102</sup> and the prospect of civil litigation<sup>103</sup> as a deterrent to mitigate risk, which could arise in relation to Covid infection at work. However, the fact of risk assessment (whatever its paucity) may indicate that liability would be inappropriate, given the tendency for the statutory provisions regarding health and safety to inform the content of any duty of care owed by an employer to employees<sup>104</sup>. Further, enforcement through a statutory tort is no longer available due to legislation introduced in 2013<sup>105</sup>.

In Sweden individual employees and workers cannot make legal claims in courts against employers for breach of their statutory obligations. The safety representatives can inform the WEA, which can take legal action against the employer<sup>106</sup>. Further, compensation for work injuries are covered by social security law and collective insurance, although it is often difficult to get compensated for work injuries caused by illness rather than a sudden accident<sup>107</sup>. An incentive for employers to agree on collective insurance is that, once they do, employees are not able to make any claims against the employer for occupational injuries<sup>108</sup>. This means there are no tort or contract cases about work injuries in Sweden - for coronavirus or otherwise. This lack of individual agency in Swedish work environment law may seem troubling, but the English model does not necessarily ensure risk averse behaviour from employers either.

### Conclusion

Covid-19 has exposed the tendency of severe health and safety risks to be tolerated in England. Judicial review brought by an independent trade union led to some extension in protection for those in precarious occupations who are deemed « workers »<sup>109</sup>. However, that litigation was not supported by the HSE, which also did not promote the active involvement of trade union and safety representatives in the handling of Covid-19 risk assessments. The Guidance for risk assessments seemed focussed on making English workplaces appear « COVID-Secure », rather than addressing physical or psychological risks systematically. One suspects that measures were taken to avert

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<sup>100</sup> See *Castano v London General Transport Services Ltd* [2020] IRLR 417.

<sup>101</sup> *Balfour Kilpatrick Ltd v Acheson* [2003] IRLR 683.

<sup>102</sup> Breach of Management of Health and Safety at Work Regulations 1999, Reg. 8 can lead to a fine of up to £20,000; deliberate or serious negligent conduct can lead to unlimited fines and/or imprisonment under the Corporate Manslaughter and Corporate Homicide Act 2007, ss1-2. See regarding the small numbers of prosecutions, A. Moretta et D. Whyte, *op. cit.*, p. 9.

<sup>103</sup> See *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, HL; and *Barber v Somerset County Council* [2004] IRLR 475 HL. Discussed in Smith and Wood's *Employment Law*, 14<sup>th</sup> ed. (OUP, 2020), p.163.

<sup>104</sup> *Ibid.*, p. 176.

<sup>105</sup> See the Enterprise and Regulatory Reform Act 2013, s.69.

<sup>106</sup> Chapter 6, Section 6 SWEAct.

<sup>107</sup> Chapters 39-41 the Swedish Social Insurance Code 2010 and collective agreement insurance «Trygghetsförskring vid arbetsskada».

<sup>108</sup> Section 35 in «Trygghetsförskring vid arbetsskada».

<sup>109</sup> *IWGB case, op. cit.*

responsibility rather than genuinely avert risk. The HSE emerges in this process as an underfunded body with relatively minor influence when compared to its Swedish counterpart, the WEA. A right to stop work remains available to English employees (without fear of dismissal) and to « workers » now without fear of « detriment », but only in very limited circumstances, remaining a poor substitute for an effective risk assessment and public inspection system. While criminal prosecutions and civil litigation in the UK may offer a deterrent, there is little evidence of their use (as yet) in response to risks arising at work in the context of the coronavirus pandemic.

The Swedish work environment is based on the idea that employers must take all measures necessary to prevent injuries, illness and death. This is a more ambitious aim reflected by a wider embrace of those who should be protected. There is also greater capacity for safety representatives to demand that risk assessments be carried out and implemented. Rights to stop work provide a basis for the influence of workers' collective representatives, with residual protections for individual employees and workers who see the need to take that initiative. While better funded and more actively promoting coronavirus precautionary measures, the Swedish system of work environment law limits the capacity of individuals to take litigious action in contract and tort. Prevention and implementation are both channeled through the WEA, while compensation comes not from the employer but the state. We appreciate that no system is perfect, but we do acknowledge that if we return to *ex ante* objective of effective risk assessment, the Swedish system has been shown to be operative and active in response to Covid-19, offering a better justification for any defence than is to be found in England.