

COVID - 19 in the Workplace

FAQ in Employment and Data Protection

Employment Law firm, CC Solicitors, and data protection experts, Pembroke Privacy, have come together to provide urgent advice and support for our clients on employment and data protection issues in the workplace arising from COVID - 19. This FAQ highlights some of the type of questions we have been recently asked.



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What immediate steps should be taken ?

An employer has a statutory duty to ensure the health and safety of employees and to take reasonable steps to identify and address risks to health and safety in the workplace. With this in mind, we have set out below some proposed steps to help organisations manage these issues:

- Conduct a risk assessment of the potential effects of COVID -19 and make contingency plans and review it as new information is released from official bodies. The situation is changing daily, and an employer needs to be alert to the health risk to the workforce as the situation evolves at a rapid pace. When conducting risk assessments, special consideration should be given to more vulnerable employees who are at greater risk from COVID -19.
- As part of the risk assessment, consider the security of "work from home" arrangements. It may be necessary to undertake a data protection impact assessment as required by GDPR.
- Appoint one person to act as coordinator to liaise with employees in respect of COVID -19 communications to ensure a consistent, factual and up to date message is communicated to employees. Let employees know who the coordinator is and how to contact them with any queries.
- This is a rapidly changing situation and HSE advice could change hourly. Review the latest HSE advice, which currently states that there is a significant spread of the virus across "restricted areas" including Italy and Spain.
- Cease all business travel and assess the situation in relation to returning employees from restricted areas. Consider whether they need to be directed to self-quarantine from home for 14 days, to protect other employees.
- Promote workplace hygiene. Place signage in the workplace regarding the symptoms and good hygiene including effective handwashing, coughing/sneezing etiquette, provision of alcohol-based hand sanitiser and other materials for cleaning workspace surfaces and workstations.
- Prohibit or limit significantly face to face meetings and encourage flexible working where you can work from home, subject to a streamlined health and safety assessment, given the exceptional circumstances, which can be reviewed at a later date. A data protection impact assessment should also be considered to identify risks to personal data being processed by employees while at home.
- Some employees may currently be unable to operate remotely but employers could consider investing now in a move to remote working such as laptops and printers, where this situation could go on for many months.
- Ensure all contact details for employees are up to date. If contacted by the HSE or other agency, as part of a contact tracing programme, employers may share contact details to allow them trace individuals who may have been in contact with a COVID -19 patient. Exercise the usual caution to ensure that the call is coming from a recognised contact tracing body. Update privacy notices to ensure that employees are made aware that their data may be shared with third parties where there is a statutory obligation to do so. Data protection law does not stand in the way of the provision of healthcare and the management of public health issues; nevertheless there are important considerations which should be taken into account when handling personal data in these contexts, particularly health and other sensitive data.
- Employers should roll out a communication programme where workplace processes (sickness and absence policies, IT, security, access control and data protection policies) are communicated to employees, as well as the specific scenarios arising now, and apply them consistently.
- Employees may be asked to keep their employer abreast of any non-work related travel plans including to a restricted area and to report any flu like symptoms so that a risk assessment can be made if they need to stay away from the workplace. Employers could consider asking employees not to travel to restricted areas where they go in the knowledge that they will be required to self-quarantine for 14 days when they get back and will not be available for work. Measures taken by employers in response to COVID -19 involving the use of personal data, including health data, should be necessary and proportionate. Decisions in this regard should be informed by the guidance of public health authorities.

What immediate steps should be taken ? cont

- Where employees are interfacing with the public, conduct a detailed assessment that takes into consideration the fact that there will be many employees who will interface with public more frequently e.g. healthcare and retail workers. Encourage and promote proper hygiene. Consider, where possible, how the workplace can be configured to enable employees to socially distance from the public for the required two metres and still carry out their job. Some shops are asking customers to hold up items to be scanned and pack their own bag so that the retail worker is not required to touch anything that the customer has touched. New protocols will need to be worked out.
- Employees should at a minimum take breaks as per the Organisation of Working Time Act, 1997 and employers should be mindful that many employees in particular sectors such as retail and health are working under increased pressure and may require additional breaks to reduce stress levels. Employers should ensure that employees do not exceed maximum working week as per working time legislation.
- Possibly the most important point to make is to encourage the public to respect those employees who are continuing to interface with the public and to treat them with courtesy. These employees deserve the utmost respect for ensuring that society and essential services continue.

What if an employee cannot attend work because they have to self-isolate because of COVID - 19 ?

The HSE guidelines state that if an individual develops symptoms of COVID -19 they must phone their GP who will assess them over the phone and arrange testing if necessary and will require them to self-isolate for 14 days. Self-isolation means staying indoors and completely avoiding contact with other people. An employee will need to do this if they exhibit symptoms of coronavirus to prevent other people becoming infected.

An employee may need to self-isolate:

- before they get tested for coronavirus
 - while they wait for test results
 - if they have had a positive test result for coronavirus
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Where an employee is unwell because of COVID -19 and cannot attend work as a result, the normal sick leave policy and sick pay entitlements in the contract of employment should apply. An employee who has been requested to self-isolate will also be treated as if on sick leave. However, some employers do not provide any contractual sick pay. The entitlement to sick pay is dependent on the contract of employment but if an employee is required to self-isolate and it is certified by

What should employers do when there is a suspected case of the virus?

- Employers should have in place a contingency plan, which includes a process that allows employees to safely communicate their concerns. It is reasonable to expect an employee who has the virus or who is being tested, to share this information with their employer, who has a responsibility to provide a safe place of work for all employees. Employees also have a responsibility for the health and safety of fellow staff and others that they come into contact with.
- In a situation where an employee has confirmed that they have COVID -19, advice should be sought from the HSE as a matter of urgency as to what steps should be taken. An employer would be justified in confirming to the workforce that a case of the virus has been identified but they must not disclose the identity of the affected individual to the other employees. All employees should be directed to HSE guidance in respect a suspected case of COVID - 19.

Not all heroes wear capes.

a doctor, they will be entitled to claim illness benefit.

As a result of recent changes, where an employee or a self-employed person is medically required to self-isolate or has been diagnosed with COVID -19 they can apply for an Enhanced Illness Benefit payment from day 1. In the interests of public health, this payment will only be paid where people remain confined to their home or a medical facility while in receipt. The personal rate of this payment has been increased to €305 as compared with the normal rate of €203.

The Government has urged all employers to support national public health objectives by continuing, as a minimum, to pay employees who cannot attend work due to COVID -19 illness or self-isolation the difference between the enhanced Illness Benefit rate and their normal wages if they can.

Employers should consider their policy on absences related to COVID -19. The normal sick leave procedures should apply requiring a medical certificate from the employee confirming the nature of the absence, i.e. whether it is as a result of a diagnosis of COVID -19 or a medically certified period of self-isolation. If an employer is providing company sick pay, it should be clear that this will be reduced by the illness benefit receivable by the employee (irrespective of whether it is applied for), informed by the guidance of public health authorities.

What if an employee cannot attend work because they have to self-isolate because of COVID - 19 ?

Where an employee returns from a restricted area or comes in close contact with a case of COVID -19 they may be required to self-quarantine for 14 days to prevent the potential spread of the virus, which is important to protect the health of everyone.

The countries currently considered to be restricted areas are :

- China
- Italy
- Spain
- South Korea (Daegu, Cheongdo or Gyeongsan)
- Iran

This list could change and expand.

Self-quarantine means avoiding contact with other people and social situations as much as possible.

A doctor may also require a person to limit social

interaction (which includes not attending work) because they have had "close contact" with a case of COVID -19. HSE guidelines suggest close contact is:

- Spending more than 15 minutes with face to face contact, within 2 metres of an infected person
- Living in the same house or shared accommodation as an infected person

If it is possible for the employee to work from home and carry out their duties during this period, then this can be discussed with the employee, but this may not always be possible. The State has provided a minimum safety net that employees may apply for enhanced illness benefit for a maximum period of two weeks, provided the individual remains confined to their home or medical facility. The personal rate of Illness Benefit will increase from €203 per week to €305 per week for a maximum of 2 weeks medically required self-isolation or the full duration of absence from work following a confirmed diagnosis of COVID - 19, again from day 1.

The schools and childcare facilities are closed and so what do we do if an employee cannot come to work because of no available childcare ?

This may be the most pressing issue currently facing employees and employers. With the closure of schools and creches, many people might rely on parents to provide support. However, the elderly are more vulnerable in the event they contract the virus, so working parents will be reluctant to seek their help. Employers will need to be open to discussing a range of flexible working arrangements with their employees such as:

- Compassionate paid or unpaid leave
- Allowing the employee to work remotely if possible and depending on age of children
- Allowing the employee member to 'work-up' any time taken at a future date
- Allowing the employee to avail of annual leave entitlements
- Enable employees to take parental leave (if applicable) up to 22 weeks unpaid leave for each child up to 12.

Unless a child is sick it is not possible for employees to avail of force majeure leave (see below).

What if the employee has to take time off to care for a person affected by COVID -19 ?

Where an employee's close family member becomes ill and the employee's immediate presence is indispensable, the employee may be entitled to avail of statutory force majeure leave. The maximum length of such leave is 3 days in any 12-month period or 5 days in any 36-month period. Such leave is paid by the employer and it is expected that employers, will, if at all possible, allow employees to take the full 5 days entitlement in one go.

Again, flexible arrangements should be considered as set out above.

What if an employee does not want to come to work because of the risk of infection?

This is an extremely stressful time for the workplace community therefore flexibility and compassion for each other is encouraged.

Employers should avoid a kneejerk reaction, insisting an employee attend for work. Employers should seek to understand the employee's concerns and consider whether the individual may be in a vulnerable or high-risk group (which includes pregnant and elderly employees as well as persons with underlying health

conditions). Check if the employee is certified for self-isolation/quarantine, if so, they will qualify for social welfare. Again, discuss this with the employee and see if they have good reason for not wanting to come to work and consider a range of alternatives such as;

- Unpaid leave
- Allowing the employee to work remotely
- Allowing the employee member to 'work-up' any time taken at a future date
- Allowing the employee to avail of annual leave entitlements
- Parental leave (if applicable)

A refusal to work by an employee without a valid reason may result in non-payment of salary and even potentially disciplinary action. However, an employer has an obligation to provide a safe place of work, and any concerns must be listened to, if the employee feels unsafe and believes that there is a serious health and safety issue in the workplace. In such circumstances, it is possible that the employee could make a health and safety complaint or protected disclosure. The employee would thereafter be protected by law from any act of retaliation against them as a result of that complaint or disclosure.

Can an employer ask employees stay away from work ?

Employers are requested to follow public health advice and should not ask employees to stay away from work except in accordance with advice. Where employers send employees home in circumstances where they are not advised to do so, then they will be required to pay employees as normal. In the event of a complete lockdown, while in theory employees should be paid, many SME business will not be able to afford to do this and it is likely the employer will either lay off staff or implement redundancies.

Many organisations are implementing a “work from home” protocol. This protocol should take into account all appropriate technical and organisational measures that are necessary to ensure the safety and confidentiality of any personal data processed by the organisation. Before implementing a “work from home” programme, employers should review their policies such as Data Protection, IT, Security, Access, and Social Media policies. It may also be necessary for employers to undertake a data protection risk assessment before undertaking this course of action. Employees should be reminded of their confidentiality obligations and also reminded to review the relevant policies. The Data Protection Commission has issued guidance on COVID -19 on working from home.

What is the advice on business travel ?

The advice from the relevant authorities is that, in light of rapidly changing conditions and restrictions, people must exercise a high degree of caution before travelling. As it is such a fast-moving issue best practice would suggest desisting from any business travel given the changing travel restrictions and chaos in airports. Non-essential travel to restricted countries (currently: China, Iran, certain regions of South Korea and Spain should be avoided and there should be no travel to Italy. Anyone coming back from these countries are required to self-quarantine for 14 days. The list of countries that are restricted changes daily, so it is important to check the current Department of Foreign Affairs and Trade with HSE guidelines for up to date information.

Can employers stop employees who have been to certain countries coming to work ?

Employers should follow HSE advice in relation to individuals who have been to restricted areas and the approach should be consistent. All employees returning from the restricted areas China, Iran, certain regions of South Korea, Spain and Italy would be required to self-quarantine as per HSE guidelines for 14 days. Employees will be entitled to claim illness benefit for the self-quarantine period.

What about employees who come from the restricted areas – Does an employer have any particular obligations towards them ?

It is possible such employees could be subject to isolating or bullying treatment because of their nationality. Harassment of individuals based on nationality, race or ethnicity is contrary to the Employment Equality Acts. Employers have a duty to take reasonable steps to prevent any harassment in the workplace and to reverse the effects of harassment promptly, if it does occur. Employers should be mindful that there could be a surge in racism, and they must take steps to prevent it. In such circumstances, it is possible that the employee could make a health and safety complaint or protected disclosure. The employee would thereafter be protected by law from any act of retaliation against them as a result of that complaint or disclosure.

Can employees be placed on lay-off, short time or be made redundant ?

Where, due to the effects of COVID -19 an employer experiences a downturn in business and is unable to provide work for employees on a temporary basis, it may be able to place employees on short time or lay-off. Any period of lay off is generally unpaid but eligible employees may be entitled to social welfare payments. However, a right to lay off must already be established by the contract of employment, as a result of custom and practice or agreed with the employees. If the layoff continues, the employees may be entitled to a redundancy payment if they have been laid off or placed on short time for 6 weeks or for a total of 6 weeks in any 13-week period. We have seen some employers moving quickly to make employees redundant such is the harsh reality of the current situation. The usual protections must apply to employees who after one-year service have the right not to be unfairly terminated. While redundancy is potentially a fair reason to terminate an employee, an employer is also required to go through a fair process when terminating the employee for that reason if they want to avoid a claim for unfair dismissal. Employees in excess of two years’ service are entitled to a statutory redundancy payment together with notice and any accrued but untaken annual leave.

It is a tragedy of the current circumstances that the voluntary closure of pubs and possibly restaurants and hotels to prevent the spread of the virus may result in employees being laid off with no pay or being made redundant. However, there is a baseline protection for workers that are put on short time or laid off to apply on line for jobseekers benefit where their employer cannot afford to continue to pay their wages.

Please note this is an evolving situation and the Government response is changing on a daily basis. These answers are not comprehensive advice about an employer’s obligations in response to the spread of COVID -19. They do not amount to legal advice. For specific questions in relation to your own organization, please contact the team at CC Solicitors and Pembroke Privacy for employment/data protection advice.

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