

Key Components of a Workplace Exit Strategy from Lockdown



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It is accepted that there will not be a snap return to our former way of working and that we will be living with the virus in our community for the foreseeable future. The COVID-19 shock to the economy is unprecedented and while the future remains uncertain, businesses should consider what an exit strategy from lockdown might look like and take steps now to prepare for the future world of work.

In this article, we consider how employers might manage a return of some or all of the workforce; how employers might adapt to a new way of working but at the same time manage the business and take critical decisions that do not result in unnecessary legal claims.

While there is a softening of restrictions in some countries, once public health advice does issue in Ireland allowing more businesses to reopen employers will be able to require employees to return to work. This will require careful planning.

STEP 1

Appoint a person to Manage the Return to Work

Health and safety of employees, customers and third parties will be key and it would be advisable to appoint a senior person as the "COVID-19" manager/coordinator who will be responsible for carrying out a detailed risk assessment, which should prescribe control measures to be implemented ensuring necessary health and safety as well as a plan to coordinate a response to a suspected case of the virus in the workplace. It would be advisable to draft a specific and tailored COVID-19 Policy for staff and a separate one for customers to include persons entering the workplace detailing the steps and measures to be taken. Tasks may be delegated to the Human Resources and Facilities teams, for example, but overall responsibility should lie with this senior individual.

STEP 2

Identify Key Health and Safety Measures for the Workplace and Continued Remote Working

Employers have an obligation to provide employees with a safe place of work and employees also have a responsibility to assist their employer to fulfil its health and safety obligations. There are a range of measures that can be implemented to reduce the risk of transmission of this highly infectious virus in the workplace, as well as to ensure continued safe working from home.

Workplaces providing essential services are already taking some of these steps.

For example:

- reconfigure the office to ensure appropriate distancing between staff to ensure minimum distance of 2 metres apart
- stagger/rotate office attendance including breaks, and split key personnel into teams
- consult with staff where possible and/or a recognized trade union to formulate a COVID-19 policy – utilise feedback/ Survey Monkey for suggestions or ideas
- continue to utilise teleconference facilities for meetings – external and internal
- implement new work practices to ensure distancing for customers, third party agents and staff
- consider if you need to redraft your existing policies, sick leave, IT Policy, home working, data protection and confidentiality
- encourage off-peak travel, i.e. reconfiguring work hours
- prohibit the sharing of equipment of any kind
- elimination of "touch points" such as door handles, e.g. by way of automatic doors (subject to employer resources) or ready access to sanitizer at all such points
- potential use of Personal Protective Equipment (PPE) such as face masks or gloves
- nominate an occupational health provider who will assess employees remotely where required
- keep a "contact log" to record instances of direct contact between staff or between staff and visitors to the office, for contact tracing purposes
- for staff that continue to work from home, the key issues are data protection and health and safety - ensure you obtain updated contact details for staff
- amend confidential and data protection policy to take account of working from home arrangements to ensure data is secure and confidentiality is maintained
- review IT systems and ensure home working is safe – e.g. send out an ergonomic questionnaire to assess if changes are required to the home working environment
- staff resilience is key during this period and the requirement to provide a safe place of work extends to the physical and mental wellbeing of staff, remind employees to continue to take breaks, and consider drafting/revising home working policy and maintain regular contact with staff and ensure positive culture is fostered.

STEP 3

Testing for the virus in the Workplace

As a general rule, employers should at all times follow the Department of Health Guidelines on testing and ideally wait for any specific guidelines on the screening of employees in the workplace and/or before returning to the workplace.

Employee consent to undergo testing will always be required and this should be recorded in writing in a document, which explains how the results are shared, stored and used, to ensure compliance with employment and data protection laws. The nature of the virus is that an employee whose test is negative on a Monday could have contracted the virus by a Friday.

Businesses should always be guided by the Department of Health in this regard and by its nominated occupational health practitioner. The current recommended period for self-isolation is 14 days from first symptom and at least 5 days' fever-free.

The Irish Data Protection Commissioner has indicated that measures taken in response to COVID-19 involving the use of personal data, including health data, should be necessary and proportionate and that decisions in this regard should be informed by the guidance and/or directions of public health authorities, or other relevant authorities.

In such circumstances, the DPC has said that it is likely that Article 9(2)(i) GDPR and Section 53 of the Data Protection Act 2018 will permit the processing of personal data, including health data, once suitable safeguards to protect the data protection rights of individuals are implemented.

It is not clear yet what specific measures will be recommended by the Department of Health and we recommend taking further advice on this once guidance.

In the event an employee displays symptoms of the virus, it would be best practice to refer the employee to a nominated occupational health advisor who will contact the employee directly and discuss their symptoms with them and notify the business of their recommendation whether the employee ought to stay home for a designated period. Other issues that we foresee arising in the future are potential discrimination claims, where employees who have had or are suspected to have the virus are treated less favourably or victimised by other employees.

STEP 4

Workforce Requirements

Some employers may find that the changed circumstances and needs of the business mean they have to consider redundancies. Employers should avoid a knee jerk reaction but objectively assess the business and consider other avenues to achieve cost savings such as a reduced working week or temporary pay cuts to be agreed with staff. Where redundancies unfortunately must be made employers should take careful advice on the correct process to follow to avoid unnecessary litigation, which could defeat the purpose of any cost cutting exercise.

Many employers have asked whether the COVID-19 pandemic has meant that any of the usual requirements for making collective or individual redundancies have been lifted. The answer is that they have not, nor has there been any suggestion that any changes will be made. This differs from the position on temporary lay-off and short-time where changes have been implemented for the emergency period. Employers when carrying out redundancies, collective or otherwise, are expected to:

- ensure any decision that a role is redundant is based on the objective fact that the role not the person is redundant – key element of any redundancy that it is impersonal and involves change
- apply fair and objective methods of selection
- consult with the affected employees; and
- seek alternatives to redundancy such as redeployment.

There are also special rules for collective redundancies, which legally require employers to consult over a period of 30 days where about 10 per cent of a workforce in excess of 20 is being made redundant. Formal notification to the Minister must be made in conjunction with consultation with employee representatives during the 30-day period, during which no notice of termination of employment can issue to an employee.

Employees with one year's continuous service are entitled to claim unfair dismissal and the maximum compensation in an unfair dismissal claim is two years' gross remuneration. This means it is critical, irrespective of the pandemic, that a fair procedure is followed. Employees with two years' service or more whose employment is being terminated by reason of redundancy are entitled to a statutory redundancy payment equal to two weeks' gross pay per year of service to be paid tax free up to a ceiling of €600 per week plus one week's bonus pay, which is also subject to the ceiling of €600. The employee will also be entitled to their contractual notice and accrued but untaken annual leave. Many employers will also pay ex-gratia termination payments in addition to the contractual and statutory payments.

We have all endured huge change in such a short space of time in our working and personal lives including for some a sudden transition to home working where possible, to managing the day to day impact on cash flow, laying off of staff, cutting pay and working around and accessing the new government supports. What we have shown is that we can adapt and adapt quickly but it is important in the next phase that business takes legally sound decisions around their business to ensure that this period does not generate unnecessary costly legal action at a later date.

If you require any further advice on any of the issues raised in this article, please do not hesitate to contact the specialist employment law team at CC Solicitors.

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