

EMPLOYMENT

COVID-19 Practical Considerations: Updated Employment FAQ

25 March 2020

Our Employment and Privacy teams are regularly updating the responses to these frequently asked questions in order to provide up to date guidance to employers. Government guidelines are changing frequently, therefore it is imperative that employers check the most up to date advice from the relevant government authority before implementing any particular approach.

Government Announcement on 24 March 2020

On 24 March 2020, the Government announced that from midnight new restrictions were to come into effect. It asked the people of Ireland to stay at home if at all possible and to only leave to go to work if attendance at the workplace is absolutely essential. It stated that people should only leave their homes to go to work, to go to the shops for essential supplies, to visit the doctor or the dentist, for physical exercise and to care for others. The Government said that external social gatherings should be restricted to no more than four people, except where people are from the same household, and non-essential indoor visits to other people's homes should be avoided. It stated that people should not undertake unnecessary travel either within the country or overseas. It also announced that Gardaí will be asked to ensure compliance with these measures.

The Government also announced that all non-essential retail outlets and stores were to close and that restaurants and cafes were to provide takeaway and delivery options only. An indicative list of what are considered essential retail outlets is available [here](#). In addition, all theatres, clubs, gyms, leisure centres, hair salons and bingo halls were shut and all sporting events, including those taking place behind closed doors, cancelled. It confirmed that the restrictions already in place, such as school, college and

childcare facility closures, have been extended until 19 April.

From an employer's perspective, revised State supports for employers and employees were also announced. Details of these supports are set out below.

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REVISED STATE SUPPORTS FOR EMPLOYERS AND EMPLOYEES

What is the Temporary Wage Subsidy Scheme?

On 24 March the Government announced the introduction of a Temporary Wage Subsidy Scheme, which will be available to employers for 12 weeks from 26 March 2020. It is available to employers who keep employees on the payroll throughout the COVID-19 pandemic, meaning employers can retain links with employees for when business picks up after the crisis. Employers are encouraged to facilitate employees by operating the

scheme, by retaining employees on their books and by making best efforts to maintain a significant, or 100% income, for the period of the scheme.

The scheme replaces the COVID-19 Employer Refund Scheme. It is anticipated that draft legislation governing the Scheme will be published shortly.

Which employers are covered by the Scheme?

The scheme is available to employers from all sectors (excluding the public service and non-commercial semi-state sector) whose business activities are being adversely impacted by the COVID-19 pandemic. Employers must retain their employees on payroll; some staff may be temporarily not working or some may be on reduced hours and/or reduced pay.

In order to qualify for the scheme, employers must self-declare to Revenue that they have experienced significant negative economic disruption due to Covid-19, with a minimum of 25% decline in turnover, and an inability to pay normal wages and other outgoings, in accordance with the guidance published by Revenue which is available [here](#). As with the Employer Refund Scheme, we expect that advices and guidance from Revenue will be updated as practical considerations arise in implementing the subsidy. The scheme applies to employers who top up employees' wages and to

those that are not in a position to do so. Employers should note that the names of all employers operating this scheme will be published on Revenue's website in due course, after the scheme has expired.

What is the level of subsidy under the Scheme?

An eligible employer will be supported by a payment of up to 70% of an employee's take home income, up to a maximum weekly tax free payment of €410 (i.e. 70% of take home weekly income of €38,000 per annum). Income tax, USC, LPT, if applicable, and PRSI will not apply to the subsidy paid.

What changes were made to the COVID-19 Pandemic Unemployment Payment?

Where the Wage Subsidy Scheme is not available, employees will be able to access the COVID-19 Pandemic Unemployment Payment, which has been increased from €203 to €350 per week, which the Government states represents around 75% of the average earnings in the sectors most affected by this crisis. This payment will also be available to the self-employed.

As the Department of Employment Affairs and Social Protection (DEASP) is experiencing significant volumes of jobseeker applications, this new payment is designed to get thousands of people into payment as quickly as possible. The payment will have a simplified application process, with the first payment made on Friday, 27 March. The Government stated that this payment will be in place for the duration of the crisis. More information on the payment, and how to qualify for it, is available on DEASP's website [here](#).

What changes were made to Illness Benefit for those affected by COVID-19?

The Government also announced changes to Illness Benefit for those affected by COVID-19. The current 6-day waiting period for Illness Benefit does not apply to anyone who is diagnosed with COVID-19 or is a probable source of infection of COVID-19. In addition, the personal rate of Illness Benefit has increased to €350 per week for a maximum of 2 weeks medically-required self-isolation or for the full duration of absence from work following a confirmed diagnosis of COVID-19.

PROTECTION OF EMPLOYEES

What measures should I take to protect employees?

Employers and employees both have a general duty of care to ensure the safety,

health and welfare at work of employees/colleagues as far as reasonably practicable, under the Safety, Health and Welfare at Work Act 2005. These obligations are in addition to common law duties of care.

Exposure to COVID-19 may present a health risk to employees and other persons at a workplace. While there are no explicit prevention obligations, the Health and Safety Authority is advising employers to ensure, so far as is reasonably practicable, that an appropriate assessment of the risk for COVID-19 in their workplace is carried out.

If the workplace presents an occupational exposure hazard (healthcare establishments, testing laboratories etc.) detailed biological agents risk assessments are required. For other workplaces where there is a lower potential for exposure to COVID-19, employers should take into account the most up to date official advice and guidance from the [Health Service Executive](#), [Department of Health](#) and the [Health Protection Surveillance Centre](#) on how to mitigate the health risk to employees and others at the place of work. Precautionary measures include:

- allowing and encouraging employees to work remotely/from home if it is possible to do so;
- providing practical support and assistance to employees to enable them to work remotely;
- providing updates and information to employees on the latest Government/HSE advices e.g. what to do if an employee experiences symptoms and information on preventing the spread of the virus;
- assigning to a small group of employees responsibility for reviewing the latest Government/HSE guidance and ensuring that business continuity plans, internal processes and employee updates are updated accordingly;
- ensuring that emergency contact details for all employees are up to date;
- where it is not possible for employees to work from home, implementing practical measures to prevent the spread of virus in the workplace e.g. placing HSE information leaflets in prominent places, placing handwashing guidelines in communal areas/toilet and food preparation areas, providing alcohol hand sanitisers and wipes, ensuring toilet soap/hand-wash supplies remain stocked, etc.;
- asking employees to inform management or HR if they intend to travel to, or have travelled from, an affected area or have been in close

contact with someone who has the virus; and

- reviewing business continuity plans and reviewing/testing all related contingency measures in light of the emerging and evolving situation. The Department of Business, Enterprise and Innovation has published a Business Continuity Planning checklist which outlines specific actions that can be taken by employers. The checklist is available [here](#).

Guidance for employers on COVID-19 from the Health and Safety Authority is available [here](#). Our Health and Safety Group's briefing on HSA Advice on COVID-19 is available [here](#).

WORKING REMOTELY

Should I ask my employees to work remotely/from home?

The Government has asked people to stay at home if at all possible and to only leave to go to work if attendance at the workplace is absolutely essential. It has advised that people should work remotely where it is possible to do so. Clearly, this depends on the nature of the business and the feasibility of home/remotely working. This will not be practical for every employer/business type. Guidance from the HSA in establishing whether remote working is suitable is available [here](#).

An employee who is working remotely and who is fit for work should carry out as much of their normal duties as is practicable. Ideally, this will be an arrangement by agreement. It is important that the employee has an appropriate/safe working environment at home. Employers should provide practical support and assistance to ensure that employees have the capability to work remotely in a safe environment.

Where it is not possible for employees to work from home e.g. due to the nature of the business, employers should be vigilant, monitor the latest Government/HSE guidance and take precautionary measures as set out above. Perhaps stating the obvious, employees who are sick cannot be asked to work from home and where an employee is absent due to sick leave, the employer's normal sick leave/sick pay rules should apply. If an employee is medically unfit for work, they must not be required to work remotely or otherwise.

Self-isolation is not sick leave, it is a precautionary measure, although it is possible the employee may become sick over the period of isolation. For more information on sick leave and sick pay, see section on Entitlement to Pay.

ENTITLEMENT TO PAY

Are employees entitled to pay if they are in self-isolation?

Employees' pay entitlements during periods of illness related absence will depend on the terms of their contract of employment and the employer's sick pay rules. There is no statutory entitlement to paid sick leave in Ireland. For more information on changes to the State Illness Benefit for those affected by COVID-19, see section on Revised State Supports for Employers and Employees. Employers may wish to review existing "sick pay" policies to refer to any social welfare benefit received in this context and align those payments with any sick pay rules.

The Department of Public Expenditure and Reform has confirmed that Civil and Public Service employees are entitled to special leave with pay in the event that they contract COVID-19 or if they are forced to self-isolate following recommendation by the Government/HSE. However, there is no such entitlement for employees generally.

If an employee is unable to work due to self-isolation on foot of HSE advice, it may be considered good practice for their usual sick leave entitlements to apply, however that is not compulsory. Suspending pay where an employee has been advised to self-isolate could open an employer to a claim under the Payment of Wages Act 1991 on the basis that pay is "properly payable". While such a claim would not be a certainty for an employee, it is not difficult to envisage the WRC looking at future cases with the benefit of hindsight and having sympathy for employees who have acted proportionately and responsibly. Questions such as who imposed the isolation (employer or employee), the extent to which the employee can perform his or her duties and if the employee has refused to perform his or her duties will all be material considerations.

What if an employee does not want to attend work?

Given the closure of schools and childcare facilities and other businesses, and in circumstances where remote working is not possible, employers are likely to see a rise in employees who will not want to or not be able to attend work due to childcare requirements. Flexibility and proactive engagement with employees is important when approaching public health situations, particularly where it is not possible for the employees to work from home. The current situation is not restricted to individual employees or workplaces. For more information on remote working, see section on Remote Working.

Employers should listen to concerns of employees and explore all reasonable and practical solutions. Advice from the Department of Health on reducing workplace contacts is available [here](#). Employers may be able to offer flexible working arrangements or agree with employees that they take annual leave or unpaid leave. Some employees may look to commence maternity leave early or take parental leave or other forms of leave. All requests should be looked at reasonably, particularly in light of the latest Government measures to close schools, colleges and childcare facilities.

While an employer does have a duty of care to provide a safe place to work, a refusal to work by an employee without a valid reason, could lead to withdrawal of pay or disciplinary measures.

TRAVEL ADVICE

Can I prohibit employees from travelling?

The Government has asked that people do not undertake unnecessary travel within the country or overseas. The Government is also advising against all travel to Italy and all non-essential travel to other countries. This applies to Great Britain but not Northern Ireland. It also includes all cruise ship travel. Anyone coming into Ireland, apart from Northern Ireland, will be required to restrict their movements on arrival for 14 days. This includes Irish residents. Essential supply chain services such as hauliers, pilots and maritime staff are exempt. Up to date information is available on the Department of Foreign Affairs [here](#).

It is prudent to advise employees against all but essential business travel. Employers should consider holding meetings and conferences by video conference where possible.

Many employers have taken further precautionary measures such as asking all visitors to their premises whether they have travelled to an affected area in the last 14 days or been in close contact with someone who has.

While employers cannot prevent employees from travelling in a personal capacity, there are an increasing number of Government restrictions on travel being imposed by both Ireland and destination countries. Therefore, it is advisable to ask all employees to inform their managers if they are planning to travel outside of Ireland.

If an employee has knowingly travelled to an affected area or an area with travel restrictions in place, he or she should be required to self-isolate on their return. Best practice suggests the employee's normal contractual sick leave entitlements

be applied for the isolation period, as supplemented by the Government's extended social welfare benefits. However, the decision on whether to pay or not may still require case by case consideration e.g. if the employee travelled contrary to the employer or Government request/direction.

It must be noted that employees are also responsible for ensuring that they do not pose a threat to the safety of others at work under the Safety, Health and Welfare at Work Act 2005.

Finally, it is worth noting that the Government has a range of further control mechanisms available to it under public health legislation should such controls become necessary.

GUIDANCE FOR EMPLOYERS ON BUSINESS DISRUPTION, LAY-OFF AND SHORT-TIME

What happens if I must close some or all of my operations and require employees to work from home?

Following updated Government advice, people should work from home if at all possible. Given this advice, the requirement for individuals to work from home is clearly a proportionate response to the situation.

However, proactive engagement and communication with employees is still important to reduce the risk of any claims for alleged discrimination or breach of contract. While not currently a necessary measure, it is also important to acknowledge the possibility that it may become necessary for an employer to close some or part of its operations.

It should be noted that if the employee is ready, willing and available for work, and it is the employer who seeks to suspend the contract of employment (and in particular, pay), there may be consequences for the employer. However, these consequences are less likely to materialise where the employer is following the latest Government/HSE guidance. Conversely, an employee cannot elect to "opt out" of their contract of employment where the employer is following the latest guidance.

What is "lay-off" and what is "short-time"?

The impact of COVID-19 on the economy means that many employers are now considering whether to lay off employees or put them on short-time for longer periods of time.

In certain circumstances, if employees are laid off or put on short-time, they may be entitled to a payment under the Redundancy Payments Acts 1967-2014. This payment is separate to any State

benefit that such employees may be entitled to when laid off or placed on short-time. For more information on these State benefits, see section on State Benefits For Employees On Lay-Off Or Short-Time.

In order to qualify for redundancy payments, the lay off or short-time must come within the specific definitions contained in the Redundancy Payments Acts 1967-2014. For the purposes of the Acts, **lay-off** occurs where an employer is temporarily unable to provide an employee with the work for which they were employed. **Short-time** occurs where an employee's hours of work or pay are reduced to less than 50% of normal weekly working hours or normal weekly pay.

In both cases the employer must reasonably believe that the situation will not be permanent and must give employees notice to this effect. The legislation does not stipulate a minimum period of notice. Exceptional circumstances, such as the COVID-19 pandemic, are likely to justify a short notice period.

The employer's reasonable belief regarding the temporary nature of the period of lay-off or short-time will be construed in accordance with the circumstances prevailing when the decision is made.

A period of lay-off should not be confused with sick leave or a period of self-isolation in accordance with current HSE guidelines. For more information on sick leave, sick pay and self-isolation, see section on Entitlement to Pay.

Employers should exercise care when selecting employees for lay-off or short-time, apply objective selection criteria and be mindful of not discriminating, directly or indirectly, against employees on any of the nine grounds prohibited by the Employment Equality Acts 1998-2015.

Am I legally obliged to pay my employees during a period of lay-off or short-time?

At common law an employer cannot unilaterally place an employee on unpaid lay-off or short-time working with reduced pay unless there is an **express contractual right** to do so. An example of an express term is a provision in the employee's individual contract of employment or in a collective agreement which applies to the employee concerned.

Alternatively, the employer might have an **implied** right to do so, for example, pursuant to an established custom and practice within the employing entity of laying employees off without pay in circumstances of economic downturn or other periods of financial hardship.

Furthermore, there have been first instance decisions in relation to claims under the Payment of Wages Act 1991, which found that even where there was no contractual right to impose lay-off and no evidence of custom and practice in the employment concerned, that the employer may still be permitted to lay off employees without pay. In one such case the rationale for the decision was expressed as follows: *"It is a well established practice in this jurisdiction that lay-off without pay is operable where an employer can demonstrate it has been the custom and practice of the trade and/or workplace and that the custom must be reasonable, certain and notorious"*.

Is an employee on lay-off or short-time entitled to a statutory redundancy payment?

If an employee has been laid off or on short-time for (i) 4 or more consecutive weeks, or (ii) 6 or more weeks within a 13-week period of which not more than 3 are consecutive, the employee may notify their employer in writing of intention to claim a statutory redundancy payment assuming they satisfy the qualifying criteria, for example, having at least 2 year's continuous service. The notice must be given at the latest within 4 weeks after the lay-off or short-time has ended.

Within 7 days of the employee's notice, the employer can give counter notice contesting liability to pay a redundancy payment. This applies if it is reasonably to be expected that within 4 weeks of the employee's notice the employee will be permitted to work for at least 13 weeks without being laid off or placed on short-time for any week.

Can I require employees to take annual leave at this time? Are there other options available?

An employer can decide when employees take their annual leave provided the employer takes account of the employee's family responsibilities, opportunities for rest and recreation and consults with employees (or their trade union) at least one month in advance. It is of course open to employees to waive the one-month notice period and take the annual leave on a voluntary or agreed basis, notwithstanding the absence of that notice.

Employers can also facilitate requests from employees to take annual leave in order to discharge family obligations they have as a result of the current school closures. Other options that can be explored are facilitating parental leave or other unpaid leave or employees commencing maternity leave early.

STATE BENEFITS FOR EMPLOYEES ON LAY-OFF OR SHORT-TIME

What benefits are available to employees on lay off or short-time?

Employees who are laid off by their employer due to a reduction in business activity related to COVID-19 may apply for Jobseeker's Payments. Further information on the different payments available and eligibility requirements is available [here](#).

Employees who are put onto short-time working by their employer due to COVID-19 may apply for a Short Time Work Support payment. For example, if an employee's working week has been reduced from a 5day work pattern to a 3-day work pattern, the employee may be entitled to receive support under the Short Time Work Support under the Jobseeker's Benefit scheme for the other 2 days. Further information on the payments available and eligibility requirements is available [here](#).

Has the Government put in place any additional measures to assist employers and employees as a result of the disruption caused by COVID-19?

For more information on the measures put in place to assist employers and employees, please see section on Revised State Supports for Employers and Employees.

DATA PROTECTION/ PRIVACY CONSIDERATIONS

Can I impose mandatory checks on employees? Are there data protection/ privacy concerns?

Where additional information is requested from employees regarding their health or travel there must be a valid lawful basis for doing so under both Articles 6 and 9 of the GDPR. Any information that is collected must also be necessary and proportionate for the purpose of ensuring the safety and health of employees. This means excessive information gathering or sharing, over and beyond what is required to determine if an employee poses a material risk or has the virus and to protect other colleagues, is not lawful. Employers should also be transparent about any new practices that involve processing of additional information that may not be covered in existing employee privacy notices which may need review or temporary amendments.

As a reminder, employers should be wary of relying on consent to request health or travel information from an employee as the employee may feel they do not have a genuine choice in which case the consent would not be valid.

However, health information may be processed without the consent of the employee on the basis of certain exemptions, the most common of which is where processing of this information is necessary and proportionate for specific employment law obligations (such as the obligation to ensure the safety and health of employees).

Employers should also be vigilant of employee confidentiality and ensure where an employee has confirmed they have the virus that their identity is not shared with other employees. While, it may be necessary to ask other employees in contact with this person to work from home, this may be communicated as a general direction without including any identifying details.

As always, all employees should be treated equally regardless of nationality, race or ethnicity. Employers should also be aware of the risk of bullying or harassment in the workplace towards people of certain ethnicities and people who have travelled to high risk countries.

On 12 March, the Data Protection Commission issued a helpful set of tips titled [Protecting Personal Data When Working Remotely](#). The tips provide a practical and common sense approach to personal data security but are also equally applicable to ensuring that highly sensitive and confidential data is kept safe.

FURTHER EMERGENCY MEASURES

What further emergency measures have been implemented?

The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 was signed

into law by the President on 20 March 2020. The Act allows the Government to impose restrictions on travel, prohibit the holding of events, allow the designation of affected areas, provide for the temporary closure of places, and for the detention and isolation of persons in certain circumstances. For more information on this legislation, please see our [COVID-19: Key features of Irish Emergency Legislation](#) briefing.

What further emergency measures should be expected?

On 24 March 2020, the Government announced that the Cabinet had approved the [Emergency Measures in the Public Interest COVID-19 Bill 2020](#), which is expected to be passed into law in the coming days. The Bill, for the duration of this emergency, will: freeze rents, prevent evictions, make it easier for health care professionals to re-register and return to work, and enable former members of our Defence Forces to rejoin at the rank they left.

KEY POINTS

As the situation is constantly evolving, these advices will be updated from time to time to try and keep abreast of the latest developments.

- It is essential that employers keep themselves constantly up-to date with HSE recommendations and Government guidance as the situation evolves daily and sometimes more frequently.
- Employers should provide practical support and assistance to enable employees to work remotely, where possible.

- Communication and proactive engagement with employees is key.
- Employers should advise against all but essential business travel. Employers should give serious consideration to the prohibition of all business travel to the "affected areas".
- Where it is not possible for employees to work from home, take precautionary practical measures to protect employees e.g. installing hand sanitisers, holding meetings by video conference, postponing substantial gatherings or hosting such events online.
- Stress test business continuity plans.
- Review/implement flexible working measures.
- Review sick/absence and sick pay policies in light of the changing environment and to align with the proposed revisions to social welfare benefits and eligibility.
- Review existing privacy policy/notice to ensure it is adequate in light of any additional measures being considered.

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