

## EMPLOYMENT

# COVID-19: Return to Work Safely Protocol Ireland: Re-Opening, But Not as We Know It?

11 May 2020

On 9 May 2020, the Government published the [COVID-19 Return to Work Safely Protocol](#) (the "Protocol").

The Protocol is designed to assist employers and workers in working together to suppress COVID-19 in the workplace as Ireland re-opens for business on a phased basis. Our article on the Government's roadmap for re-opening of the Irish economy and society is available [here](#).

Employers are statutorily required under the Safety, Health and Welfare at Work Act 2005 (the "2005 Act"), as far as is reasonably practicable, to protect the safety, health and welfare of employees. The COVID-19 pandemic has now changed the steps an employer will reasonably be required to take, to discharge this statutory duty.

The Protocol emphasises the importance of collaboration and communication between employers and employees. As a result, all employers will be required to appoint employee/worker representative(s) who will be invited and encouraged to work closely with the COVID-19 management response team to develop and implement strategies for the purpose of preventing the spread of the virus. It is acknowledged that flexibility is key and that the response necessitated will vary depending on the nature of the employment in question.

## What are all employers required to do?

1. Have a COVID-19 Response Plan (the "Plan") in place to include a procedure for responding to a confirmed case

arising in the workplace. The Plan will need to assess and identify the risks attaching to work activities and put in place appropriate preventative measures to manage those risks. These measures will vary depending on the type of workplace and the presence of vulnerable workers but common features for all employers will include: social distancing and adequate facilities and work practices to ensure that hand and respiratory hygiene can be maintained. These will be essential features in every Plan and all further/ additional steps taken will be required to be in addition to, rather than instead of, these important control measures;

2. Support the implementation of the Plan through collaboration, communication, encouragement and training; and
3. Be prepared to respond and adapt processes quickly where gaps arise.

## Policies and Record Keeping

The Protocol obliges employers to keep a log of contact/group work to facilitate contact tracing and to inform workers and others of the purpose of the log. A system for recording site visits by workers, contractors and visitors should be implemented.

The Protocol requires employers to develop a return to work form, which must be completed and returned by employees at least 3 days before they return to work. Employers should

consider who will manage this process, and develop procedures for the secure retention of these records for at least the period during which the Protocol is in place.

## Physical Distancing and Good Hygiene

The Protocol imposes specific requirements relating to hand and respiratory hygiene which employers should ensure are strictly adhered to. This is unlikely to cause difficulties for many businesses who were already implementing such measures prior to the imposition of government restrictions. Cleaning must be conducted at regular intervals in accordance with guidance from the European Centre for Disease Prevention and Control.

The Protocol's requirements in respect of physical distancing are more likely to cause employers to pause for thought. The specific suggested measures outlined in the Protocol make it clear that a return to work will not – at least initially – be in a form that reflects working patterns before the crisis. Staggered shifts and breaks, reorganisation of physical spaces, utilisation of distance markers, one-way egress and entry routes and keeping face-to-face meetings to a minimum are all measures that will require employers to consider how they can run their business in an efficient and compliant manner.

The Protocol specifically addresses how employers may monitor these measures

(e.g. through the implementation of sign in systems/biometric checks), and employers should consider how they will maintain records that the measures they implement are operating in practice.

It is accepted that 2 metre separation may not be possible for all work activities. Where this is the case employers will be expected to have alternative control measures in place to prevent the spread of infection such as the use of PPE. Every effort should be made to maintain social distancing and this may require reviewing and revising existing work practices and standard operating procedures. Vulnerable workers that cannot work from home should be preferentially supported to maintain a physical distance of 2 metres.

### Personal Protective Equipment ("PPE")

How and when to provide PPE is an area that is proving problematic for employers. Whilst PPE is an important element of the Protocol, it is not "front and centre" of the Protocol. This is consistent with Health and Safety Authority ("HSA") guidance issued prior to the COVID-19 crisis – whilst PPE has an important role to play, relying on it solely can increase risks and there is also a risk that it may create an additional occupational hazard.

Employers should not rely on PPE to take the place of other preventative measures outlined in the Protocol, such as physical distancing and good hygiene. PPE should generally only be used where appropriate to manage identifiable risks that cannot be satisfactorily addressed by other measures.

Where PPE is used, employers will need to be satisfied that it is of the requisite standard. A moral question also arises when considering the use of PPE and the necessity for same where a global shortage exists which continues to pose challenges for the health service and the residential care sector.

### Temperature Checks

The Protocol provides that employers should implement temperature testing in line with Public Health advice. As it currently stands, there is no Public Health advice that requires employers to submit employees (outside of the healthcare and residential care settings) to mandatory temperature checking.

The Data Protection Commission has made it clear that data protection law does not stand in the way of the provision of healthcare and the management of public health issues. Notwithstanding this, it has also reaffirmed that very important considerations need to be taken into account when handling personal data health and other sensitive data. As

explained in our article on data protection and COVID-19, available [here](#), employers must be able to identify a legal basis for the processing of any personal data under Article 6 of the GDPR, and where an activity involves the processing of health data (as temperature checking does), they must also identify an exemption under Article 9 of the GDPR. Although the Data Protection Commission has not yet issued any guidance on how employers can adhere to the Protocol in compliance with data protection law, in its [guidance](#) on data protection and COVID-19, it noted, "in circumstances where organisations are acting on the **guidance or directions of public health authorities**, or other relevant authorities, 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 are implemented.**"

We recommend that employers continue to exercise caution in considering temperature checking as a matter of course and should continue to keep abreast of Public Health advice in this regard.

### Training and Worker Obligations

Training for all workers is also a key requirement under the Protocol, with employers obliged to provide an induction training for all returning workers – i.e. including non-employees. Contractors and visitors must also receive induction training. Certain employees, such as First Aiders, Line Managers and appointed representatives, will require specific training. The Protocol prescribes that the minimum content of the training for all employees should include:

- a. The latest up-to-date advice and guidance on public health and other sector specific advice that is relevant;
- b. Details of how the workplace is organised to address the risk from COVID-19 and an outline of the COVID-19 Response Plan;
- c. What a worker should do if they develop symptoms of COVID-19; and
- d. Identification of points of contact from the employer and the workers.

Employers should also consider including information on the reporting mechanisms to be used in the event that measures are not being adhered to. It should be noted that employees have been encouraged to report concerns to the HSA. It would be expected that where effective collaboration and co-operation exists that such reporting would be the exception rather than the norm.

Employees need to be consistently reminded of their own obligations under the 2005 Act and the potential consequences of their failure to adhere

to these to include invoking disciplinary procedures, where appropriate to maintain the health and safety of the workforce.

### Working from Home

The Protocol expressly states that office work should continue to be carried out from home where practicable and non-essential. As working from home becomes a longer term arrangement, employers are likely to come under increasing pressure from employees and their representatives to ensure that appropriate steps are taken to ensure this work can be done safely bearing in mind the particular issues caused by the COVID-19 crisis such as managing childcare responsibilities.

### Existing occupational health and safety measures

The Protocol contains non-exhaustive measures and should not be considered in isolation.

Ireland already has a sophisticated workplace health and safety regulatory regime, governed by the 2005 Act, together with its associated Regulations and Codes of Practice. Employers who now may find themselves implementing health and safety measures not previously required in their workplace (e.g. the need for workers to wear PPE) should familiarise themselves with the existing framework when implementing the Protocol.

Throughout the COVID-19 crisis, employers have been directed to take into account the most up-to-date public health advice and guidance from the Department of Health and the Health Protection Surveillance Centre, and the Protocol reiterates this requirement. The National Standards Authority of Ireland has issued guidance to employers on operating safely in the context of COVID-19, which continues to be relevant. The Protocol also provides a comprehensive list of resources which should be consulted when considering industry-specific challenges.

Whilst the Protocol does not directly address enforcement measures, it does contain a number of prescribed measures and has been drafted in collaboration with the HSA, as the state agency charged with overseeing compliance with the existing regime. The HSA has general powers under the 2005 Act to inspect premises and take steps where health and safety measures are not being implemented. The tone of the communication being issued at government level focuses on working with employers to achieve compliance and proactively assist in supporting improvement where issues arise.

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