WILLIAM FRY

// EMPLOYMENT & BENEFITS

Returning to Work in the COVID-19 World

The Roadmap for Reopening Society and Business and the Return to Work Safely Protocol

The government recently published two key documents designed to inform and guide the public in relation to the reopening of Irish society.

The Roadmap for Reopening Society and Business (Roadmap) (available here) outlines the various phases anticipated for the of easing COVID-19 restrictions with the aim of reopening Ireland's economy and society (Phases).

The second document which followed, the Return to Work Safely Protocol (**Protocol**) (available here), was stated by the government as having been

> designed to support employers and workers to put measures in place that will prevent the spread of COVID-19 in the workplace when the economy begins to slowly open up, following the temporary closure of most businesses during the worst phase of the current pandemic.

Both documents have been largely welcomed by the public as part of the move to regain a level of normality in our day-to-day lives.

The Protocol is mandatory and requires employers to introduce certain safety measures, including a COVID-19 response plan. The Protocol also requires employers to minimise the risk of exposure in the workplace.

Due to the key emphasis on the reopening of the economy, the documents raise various important considerations for employers (and employees).

Many businesses are permitted to reopen from the commencement of Phase 1 of the Roadmap. We consider specifically what the Protocol means for employers. We also consider the employment, health and safety, and data protection issues that now arise as employers start to ensure their readiness for the potential return to the workplace of their employees over the coming weeks.

Employment law considerations – what does this mean for workplaces?

With no vaccine for COVID-19 currently available, the Protocol directs employers in respect of the measures which must be put in place to ensure the safety, health and welfare of employees in the workplace. The implementation of the Protocol will lead to a seismic shift in how workplaces operate and, if workplaces are to remain open and operational over the coming months, employers must ensure ongoing compliance.

We previously considered the specific details outlined in the Protocol here.

As public health advice continues to evolve, so too will the Roadmap and the Protocol. Both have been referred to as 'living documents' and will be subject to continued revision and amendment. Further upsurges or outbreaks of the virus could see control measures reintroduced. Therefore, it is crucially important for all employers to remain up to date with the latest government and health authority guidance and requirements.

To continue to help employers in this process, we summarise below some of the key legal considerations that are likely to arise in this context.

PLANNING PHASE – COMMUNICATION AND READINESS

It is clear from the Protocol that employers will need a strong, business-wide communication system in place. Since the outset of the crisis, it is likely that most employers will have an existing COVID-19 committee. The Protocol seeks to involve employees directly by requiring the involvement of a lead worker representative to act as a liaison between employees and management to ensure safety measures are being followed. The number of worker representatives required should be proportionate to the size of the workforce and any necessary training must be provided to them.

The Protocol also refers to engaging any existing workplace health and safety structures, such as a health and safety committee and safety representative, although not all employers will have a safety representative in place. Employers are also advised to seek external guidance in circumstances where an organisation does not employ a health and safety officer to provide expert health and safety input.

Health and safety committees and safety representatives are specifically provided for in statute, under the *Safety, Health and Welfare at Work Act 2005* (**2005 Act**). Safety representatives have certain statutory duties and protections. In addition, the 2005 Act prohibits an employer from penalising an employee for acting in accordance with or performing any duty or exercising any statutory right in relation to matters of health and safety, including acting in their capacity as a safety representative. Penalisation includes dismissal, among other things. As "worker representative" is a stand-alone role provided for in the Protocol rather than in the 2005 Act, employers should take care to ensure that they are afforded adequate protections in carrying out the role in line with the Protocol.

Furthermore, the Protocol does not specify precisely how a worker representative should be appointed and whether they are chosen by way of a nomination or election process by the workforce. It is also not entirely clear if a worker representative could also be the existing safety representative (if any).

The Minister for Business, Enterprise and Innovation has referred to the designated worker representative as the "warden" to help ensure compliance. Therefore, as employers take active steps to prepare the workplace to comply with the Protocol, it is hoped issues requiring clarification, like this one, will be addressed by the Health and Safety Authority (**HSA**) or the government.

NEXT STEPS - IMPLEMENTATION OF MEASURES

Employers will be required to consider and implement some or all of the following.

HEALTH AND SAFETY DOCUMENTATION/MEASURES

- COVID-19 specific risk assessments (together with a focus on vulnerable categories of employees)
- Updating of the existing safety statement for the workplace
- Preparing COVID-19 return to work questionnaires
- Temperature testing
- Contact tracing logs
- Visitor and contractor protocol
- Preparing COVID-19 induction training programmes
- Preparing other COVID-19 related training
- Specific reporting procedures for COVID-19 e.g. mechanisms for employees to raise concerns

PHYSICAL AND STRUCTURAL MEASURES

- Erecting partitions in shared office spaces
- Extensive hygiene measures, such as increased cleaning and disinfecting schedules, leaving lift and office doors open as a default (where security considerations permit), widespread use of hand sanitizers, floor markings to show appropriate social distances
- Closing shared spaces such as canteens, gyms and changing rooms or putting in place social distancing steps in those spaces
- Providing PPE, depending on sector or industry. Employers will also need to keep entirely up to date as government guidance on matters such as face coverings continues to evolve We considered this issue previously here
- Considering zoning in the workplace (particular in larger workplaces)
- Erecting signage throughout the workplace to remind employees of mandatory requirements

CONTRACTUAL AND POLICY-BASED MEASURES

- Considering a phased return to work for certain categories of employees
- Adjusting working hours to allow for staggering of start, finish, and break times
- Engaging with employee representatives/trade unions as may be relevant

Employers will also need to review and update employment contracts and/or employee policies and procedures to take account of any adjustments. Any changes must be communicated effectively to employees.

Employers are likely to need to amend their existing policies on sick leave to incorporate changes around a strict 'Stay at Home' protocol where employees develop flu-like or other virus-like symptoms. Consideration will also need to be given to directions to employees who contract the virus or who come into contact with someone who is infected or symptomatic. Amendments to policy may be needed about how sick pay will be treated in these circumstances. Additional issues, such as steps that an employer might need to take if an employee refuses or fails to comply with the amended policy, should also be dealt with.

Employment contracts may need to be revised to implement staggered working hours, days or patterns to best meet social distancing requirements in the workplace.

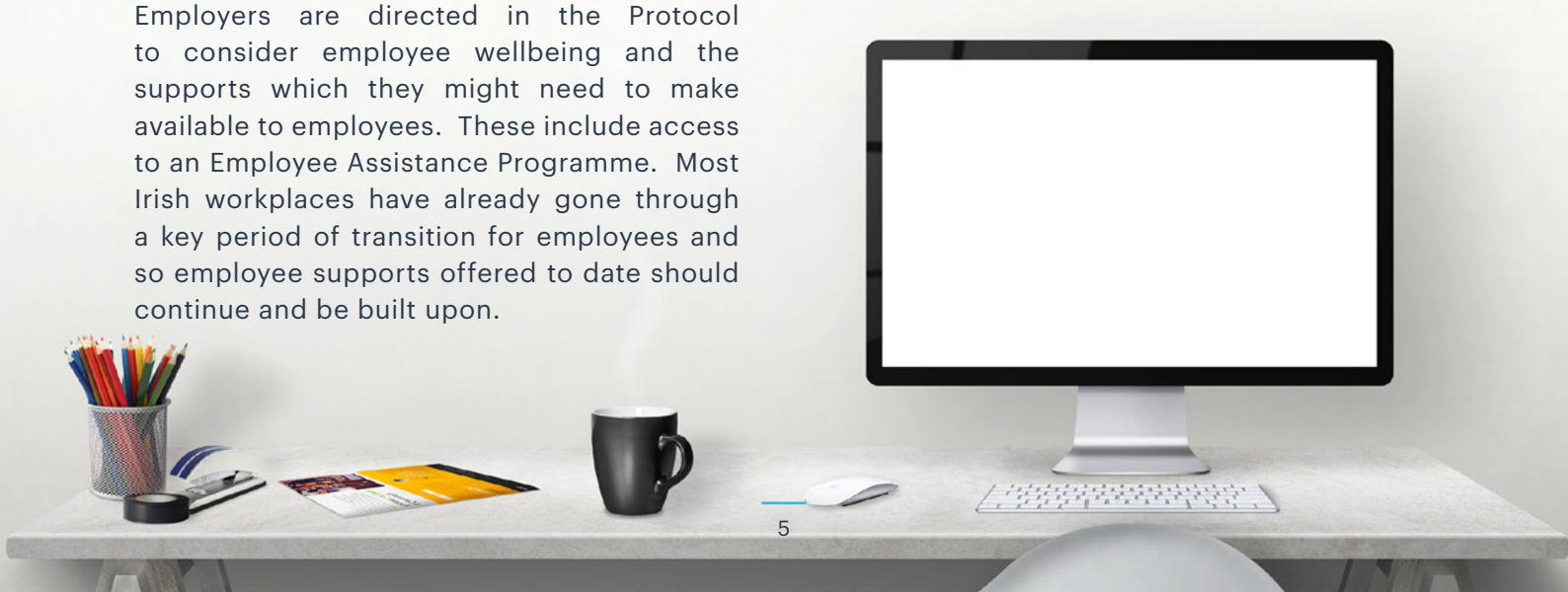
However, employers may be limited in the scope of changes that can be made based on existing collective agreements and/or sectoral employment orders. Employers may also meet employee resistance to certain changes, and industrial relations or employee relations issues may arise.

Employers are directed in the Protocol to consider employee wellbeing and the supports which they might need to make available to employees. These include access to an Employee Assistance Programme. Most Irish workplaces have already gone through a key period of transition for employees and so employee supports offered to date should continue and be built upon.

CONTINUATION OF WORKING FROM HOME

The issue of employee supports is reflected in an employer's remote working policy. For many workplaces, working from home may remain the norm for foreseeable future. The Protocol specifically states that office work should continue at home where "practicable and non-essential work".

Therefore, we recommend that employers who are in a position to facilitate continued homeworking, assess the aspects of the Protocol that will apply to their employees, even if remaining at home. The Protocol advises employers to assess and consult with employees in relation to their home working policy. Specific data protection considerations, which arise for employers when employees are working from home, are considered below.



Health and Safety Law Considerations – What are the Risks Associated with Non-Compliance?

An employer is primarily obliged under the 2005 Act to

> "ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees."

The Protocol was drafted with key input from stakeholders, including the Health Service Executive, the Department of Health and the HSA. The key message of the Protocol makes it clear that an employer's existing obligations under the 2005 Act are squarely in focus in this context.

In addition, the HSA has been identified as the appropriate regulator tasked with ensuring employer compliance with the Protocol. The HSA is currently a busy regulator with limited resources. However, given the importance of the roll out of the Roadmap and Protocol, a commitment to the provision of additional resources to the HSA has been made by government.

Employees may contact the HSA about non-adherence to the Protocol. The HSA may utilise its existing statutory powers in terms of inspecting workplaces, and potentially initiating enforcement measures to include shutting down workplaces, for non-compliance.

Employers should also note that the Protocol does not alter their obligations under the 2005 Act which applied prior to COVID-19. Therefore, any adjustments made in the workplace in implementing the Protocol should be reviewed in this regard. For example, an employer may decide to operate a particular machine or production line with fewer employees to allow for social distancing. A knock-on effect may be that a particular system of work previously risk-assessed as fit for purpose, does not now meet health and safety standards. Therefore, employers should approach their Protocol response planning from both existing and new health and safety angles.

A failure to ensure a safe place of work carries risk for both employers and personal liability for their officers and directors. Offences under the 2005 Act can attract upper limit sanctions of a fine of up to €3 million and/or 2 years imprisonment for each offence.

Data Protection Law Considerations - What should Employers Consider?

The Data Protection Commission (DPC) acknowledges that during the COVID-19 pandemic, employers might need to share or collect information quickly to adapt to the demanding circumstances faced and in order to maintain normal functions as far as possible. The European Data Protection Board has also stated:

> "Data protection rules (such as GDPR) do not hinder measures taken in the fight against the coronavirus pandemic. However, I would like to underline that, even in these exceptional times, the data controller must ensure the protection of the personal data of the data subjects. Therefore, a number of considerations should be taken into account to guarantee the lawful processing of personal data."

- **Andrea Jelinek**, Chair of the European Data Protection Board

The key data protection and privacy actions employers should consider are as follows:

.01

COLLECTING AND PROCESSING PERSONAL DATA / SPECIAL CATEGORY DATA

KNOW YOUR VULNERABLE EMPLOYEES

Be aware of employees suffering from underlying health conditions / symptoms to carry out risk assessments for all employees.

DATA PROTECTION IMPACT ASSESSMENT (**DPIA**)

Processing special category data (health data) may require a DPIA to inform decisions on any risks and identify mitigating safeguards. The DPC has issued guidance on DPIAs.

EMPLOYEE QUESTIONNAIRES AND TEMPERATURE TESTING

The Protocol includes a list of questions that employers are required to ask employees before they return to work. Temperature testing is not currently mandatory and should be implemented in line with public health advice. If an employer carries out such testing, consideration must be given to DPIA requirements, who should carry out such tests, false positive results, retention of the testing results, employee refusal to testing and whether less onerous alternatives exist, such as self-testing before attending the workplace.

DPC Guidance has previously listed the following measures:

- Questionnaires to be completed by staff in advance of returning to work requesting recent medical information regarding the virus such as symptoms of fever, high temperature etc.
- Employers have a duty of care and as such would be justified in requiring employees to inform them if they have a medical diagnosis of COVID-19 to allow necessary steps to be taken.

Employers should consider their obligations under data protection law when processing health data, which is discussed further below.

.02

CONSIDER THE LEGAL BASIS FOR THIS ADDITIONAL PROCESSING

Controllers will be required to have an appropriate legal basis, whether processing personal data or special category data. Guidance from the European Data Protection Board (EDPB) highlights the applicability of certain lawful basis for processing.

> "Processing of personal data may be necessary for compliance with a legal obligation to which the employer is subject such as obligations relating to health and safety at the workplace, or to the public interest, such as the control of diseases and other threats to health.
>
> Derogations to the prohibition of processing of certain special categories of personal data, such as health data, where it is necessary for reasons of substantial public interest in the area of public health on the basis of Union or national law, or where there is the need to protect the vital interests of the data subject…specifically to the control of an epidemic."

EDPB Guidance on Consent reiterates the limited situations where employers may rely on consent from an employee for processing personal data due to the imbalance of power.

It is important to note that when processing personal data, including health data, suitable safeguards must also be implemented. These may include:

- Limitation on access to the data;
- Strict time limits for erasure; and
- Adequate training for staff to protect rights of data subjects.

.03

TRANSPARENCY, DATA MINIMISATION AND PURPOSE LIMITATION

SUPPLEMENTAL DATA PROTECTION NOTICES

Data controllers are required to comply with the transparency obligations and should have information available to all data subjects, either by supplementing existing notices or providing a specific notice, about further processing of personal data which details:

- Categories of data subjects affected;
- Categories of personal data processed;
- The purpose and legal basis of the processing; and
- Information on retention of the personal data.

LIMIT THE PERSONAL DATA COLLECTED WHERE POSSIBLE

Only collect the minimal amount of personal data required in order to make a safe assessment.

The employer should only require health information to the extent that national law allows it.

.04

DATA SHARING AND RETENTION

SHARING PERSONAL DATA

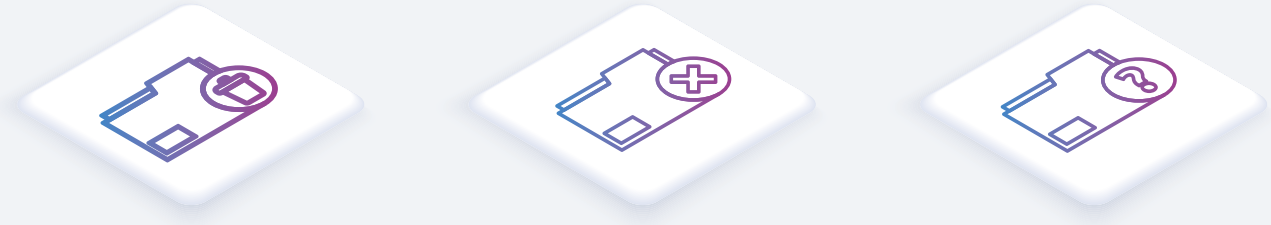
Employers are permitted to inform staff about COVID-19 cases and take protective measures, but should not communicate more information than necessary.

In cases where it is necessary to reveal the name of the employee(s) who contracted the virus (e.g. in a preventive context) and the national law allows it, the concerned employees shall be informed in advance and their dignity and integrity shall be protected.

RETENTION OF ADDITIONAL PERSONAL DATA COLLECTED

Do not retain information for any longer than is required to carry out the purpose for which the data was collected.

As soon as assessments are made, consider if deleting the supplemental personal data is possible and appropriate. For instance, health data gathered from temperature checks should not be retained unless required.



.05

PRIVACY CONSIDERATIONS FOR CONTINUED REMOTE WORKING

DATA SECURITY

During this time and with much more focus on remote working, employers should be vigilant and minimise the risks posed by cyber security by reminding staff of current best practices. For further information, please see our earlier articles on:

- Protecting your business from cybercriminals; and
- Cybersecurity: Key threats and practical tips when working remotely.

The DPC has recognised these risks and has provided guidance:

- DPC Tips on Avoiding Data Breaches; and
- Protecting Personal Data When Working Remotely

COMMUNICATIONS

How employers communicate with employees will be important.

Employers may allocate a designated way to communicate with staff during this time to avoid cybercriminals taking advantage of the current situation.

Employers should review plans in light of further government guidance. Continue to monitor the effectiveness of the policies and procedures in place and revise them as necessary

Risks for Employers

As the economy begins to re-open and employers seek to operate within the parameters of the Protocol, various employee-related risks or claims may arise.

As mentioned above, employers may experience difficulties in terms of industrial relations or employee relations, as changes are made to the workplace e.g. employee work patterns.

In addition, employers cannot eradicate the risk that returning to the workplace will present difficulties for certain employees. To ensure that potential issues from an employment equality perspective are minimised, employers should be particularly cognisant of the difficulties which may arise, and consider those with specific needs, such as employees with underlying health conditions, physical disabilities, caring or childcare responsibilities.

Employees may face disciplinary issues connected to a refusal to return to work. Employees may also report employers to the HSA or seek to rely on the protection of the Protected Disclosures Act 2014 if concerns are raised about workplace health and safety. Claims of constructive dismissal may arise if an employee is not satisfied with the measures put in place by an employer. Employees might also attempt to assert that unsafe working conditions caused them to contract COVID-19, leading to the possibility of a personal injuries claim.

As the situation continues to evolve, employers must stay up to date with the latest public health and Government advice to ensure they are best-placed to deal with any such risks/claims.

Please check in regularly with the William Fry COVID-19 Hub for up to date analysis and advice on the latest developments.

Contact Us

Catherine O'Flynn
PARTNER
Employment & Benefits
+353 1 639 5136
catherine.oflynn@williamfry.com

Leo Moore
PARTNER
Technology
+353 1 639 5152
leo.moore@williamfry.com

Nuala Clayton
SENIOR ASSOCIATE
Employment & Benefits
+353 1 489 6648
nuala.clayton@williamfry.com