



Back to the future of work

Beyond lockdown in Northern Ireland

11 May 2020

As the Executive, employers, trade unions, public health authorities and industry bodies' work together to safeguard communities, ease the lockdown and reopen workplaces, it is clear that leadership, trust and careful planning will play a vital role in this critical next phase of COVID-19. An incremental approach will be necessary as we all seek to transition to a new way of living and working.

To guide employers as they prepare to address the challenges ahead, we are publishing a four part series of briefings and webinars, as follows:

1. reopening workplaces: returning to work safely
2. preserving organisations: redundancies and restructuring in a virtual world
3. new ways of working: adapting the workplace and changing terms and conditions
4. dealing with the fallout from the pandemic: rescuing businesses and disputes

The first briefing in the series, highlighting key issues when planning a partial or full return to work, is set out below with subsequent briefings and webinar recordings to be published shortly after.

Part 1: Reopening workplaces in Northern Ireland as the lockdown eases

Across the world, countries are managing, or beginning to manage, the structured exit from various lockdown measures. Ireland has a planned roadmap out of lockdown and we expect that the Executive will provide detail of plans for Northern Ireland in the next few days. As Northern Ireland and the rest of the UK moves towards the next phase of tackling COVID-19, including an anticipated phased opening of workplaces deemed non-essential, what can employers expect and how should they prepare? We have highlighted some points to note in the table below and provided a summary checklist at the end of this briefing.

We recommend that employers take a medium to long-term view on reopening measures, given that public health professionals are warning that COVID-19 is likely to be a risk for many months to come. It is clear that when employees start to return to the workplace, they and their employers will face a very different environment. Flexibility will be required on all sides to ensure that new working practices are implemented smoothly and safely.

Question**Points to note**

What does the law say about the employer's duty of care as employees return to work?

Employers have a legal duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees and anyone else who may be affected by the employer's business. This would include conducting regular risk assessments to identify COVID-19 related risk and appropriate measures to control that risk, and reviewing them on an ongoing basis.

Employees also have legal responsibilities: to take reasonable care for their own and others' health and safety and to cooperate with their employer to help them meet their duties.

Are there official constraints on employers as they plan to reopen workplaces?

Yes, business closure orders and restrictions on movement are currently in place and should be observed until lifted. The NI Executive and the Health & Safety Executive NI have issued guidance which is expected to be updated again shortly. Employers should refer to the latest guidance in their planning and when carrying out risk assessments and implementing measures.

Has the employer put in place a Health and Safety (H&S) COVID-19 protocol before reopening?

A protocol/policy, which reflects the employer's COVID-19 risk assessment measures, the latest guidance and the employer's key aims, will support the detailed planning required before workplaces reopen. As well as setting core principles to guide managers, such a protocol might include measures such as training employees on protective behaviours and the use of PPE, undertaking regular H&S inspections, health screening (see further below), distancing workstations, instituting regular cleaning and encouraging hand-washing, avoiding or limiting business travel and in person meetings, limiting numbers in the workplace, guidance on the use of public transport, staggering commuting times, staggering shift/opening/break times, considering arrangements for 'queuing' to enter premises, reviewing the use of refreshment areas, washrooms and other common areas, etc.

Ensure any proposed measures are first consulted upon with any trade union H&S representatives and, once adopted, are applied reasonably, fairly and consistently.

How has the employer communicated with employees?

Some employees may not want return to work due to health fears. Involving any recognised H&S representatives in risk assessment planning, and communicating openly with staff on measures adopted to safeguard their health, will be important to build employee trust, ensure a smooth transition back to work and will reduce the risk of any employees having lawful grounds to refuse a return to work (see below).

Can an employer require employees to attend work when it reopens?

An employer may require staff to attend their workplace if: the work cannot be done from home (assuming no change to the Executive guidance on this point); the organisation has not been instructed to close; the employer can meet current guidance (eg protecting the vulnerable, those shielding, and rules on social distancing) and the employer ensures, as far as is reasonably practicable, the health and safety of their employees and makes adjustments for those with conditions that amount to a disability. Care should be taken to avoid making assumptions which expose the employer to potential discrimination claims (such as whether or not an employee is ready or able to return).

How can employers support employees who may be concerned about attending work due to health concerns related to COVID-19?

Addressing the COVID-19 risks and communicating mitigating measures to employees will reduce the likelihood of any employee reasonably believing that returning to work places them in serious and imminent danger to their health.

Particular issues may arise for disabled, vulnerable or shielding employees (or employees with such people in their household) and, for the duration of the Coronavirus Job Retention Scheme (CJRS), they may be eligible for, or should remain on, furlough leave. Listen to the reasons for employees' concerns, try to find an agreed resolution and keep records. However, if the employee does not have reasonable grounds for his/her refusal and the employer has complied with H&S duties and current guidance (as outlined above), employers should act carefully and sensitively, balancing individual employee support, broader employee relations, risk and reputational aspects.

What about social distancing in the workplace?

Employers will be required to put in place new social distancing rules when workers start to return to work, reflecting the latest guidance.

A radical re-think of the working environment is therefore likely to be necessary, including access, layout, conditions of use and more.

Are there additional considerations for those employers partially reopening workplaces?

A phased or partial return to work will inevitably involve an element of selection, such as which employees return from furlough ahead of others. Employers should ensure that fair, objective criteria are adopted, such as business-driven and skills-based criteria, when selecting employees to return and any recognised unions are involved, as appropriate. Keep employees informed and communicate the process and timescales.

What happens if returning employees breach social distancing and other H&S policies when at work?

Thought should be given as to how breaches of these policies should be treated and with what level of severity. Disciplinary procedures should be clear on this point, well-communicated and sanctions should be proportionate and consistent.

Can an employer undertake COVID-19 testing and other screening?

Depending on how it's carried out, it is likely that testing/other screening will involve use of personal data and should then take account of data privacy requirements, regulatory and government guidance (which is continually evolving). Specific advice should be taken. This is because information about an individual's health is a 'special category' of personal data and should only be processed in limited circumstances. In all cases, personal data collected and processed must be limited to what is necessary (in line with general data minimisation requirements). In particular, a lawful basis is required for each purpose for which the personal data will be processed (eg used, shared etc); and an additional lawful basis is required for the processing of special category personal data. The applicable lawful basis in each case will be dictated by the factual circumstances. Reliance on consent for staff screening would be problematic and should be avoided wherever possible.

Should employers require employees to report COVID-19 symptoms?

Employers can request that staff report if they are infected or have been exposed to infection, via dedicated communication channels. Policies should address how to deal with employees who appear unwell upon arrival at work or who fall sick during

the day. We anticipate that new government guidance will be provided in this area.

If an employee cannot attend the workplace due to COVID-19 infection or self-isolation, are they entitled to pay?

Statutory sick pay is available in both instances (and company sick pay, depending on the employer's policy). Alternately, for those infected, for the duration of the CJRS and depending on the length of sickness, employees may be eligible for furlough leave. Sick workers should be actively encouraged to stay at home and any incentives to return to work too early should be avoided to protect other workers and maintain trust. Official guidance setting out minimum periods for quarantine/self-isolation must be observed.

Is the employer prepared, should there be a COVID-19 outbreak in the workplace?

Despite taking all of the reasonable preventative measures outlined above, there will be a risk of infection amongst workers having returned to work. While employers should act to prevent this happening in the first place, they should also have a rapid response plan, for dealing with an outbreak, in place before they reopen. It is expected that official guidance will also provide further information on public health support for employers in this respect.

Will remote homeworking continue (where appropriate)?

It is expected that remote working will still be encouraged, or recommended as the default approach, by the Executive to reduce the risk of contagion and to respond to those employees reasonably concerned to avoid the workplace. Employers should review their legal responsibilities for ensuring a safe place of work at home and that working time requirements are met, to ensure that employees continuing to work remotely are able to function effectively and have suitable financial, practical and mental health support.

If an employee cannot attend a reopened workplace due to caring responsibilities, are they entitled to pay?

For the duration of the CJRS, employees who are unable to work because they have caring responsibilities resulting from COVID-19 can be furloughed. If the caring reasons are unconnected with the virus, the employer should seek a resolution such as agreement to unpaid or emergency dependent leave, reduced hours etc.

Can employees be transferred, redeployed or their jobs altered as part of changes required to reopen workplaces?

This will depend on the nature of the change (whether it is a contractual change), the contract of employment and/or any relevant policies. Employers should check whether there are express or implied terms entitling them to require staff to work from a different location or in an altered role. Even if such a term exists, any such request would need to be a reasonable one. If not, any changes will need the agreement of individual employees or recognised unions representing them under collective bargaining. We will be covering this topic in a future briefing.

Are there any formalities required when ending furlough?

This will depend on the terms of the furlough leave, for example, whether it involved a temporary change to employment terms. Where employees simply return to their pre-furlough employment contract, this should be confirmed in writing. However, some employers may be seeking further contractual change as part of a partial return or cost-cutting. Looking ahead, employers may wish to consider seeking agreement to revisions of employment contracts to allow for further periods of lockdown (eg lay-off clauses or other emergency measures to vary terms).

A useful checklist to support return to work planning

We have outlined below some key considerations for returning to work:

- allow sufficient time for careful advance planning, including any consultation with representatives, before fixing a return to work schedule
- revise assessments of the likely COVID-19 risks to employees by returning to work
- consider consulting with recognised union H&S representatives, if any, on the risk assessments
- consider putting in place an employee representative body to discuss issues around return to the workplace
- devise measures to mitigate the identified risks
- pay attention to the particular needs of vulnerable, caring and shielding employees, those living with shielders and consider discrimination risks in all decision-making
- put in place a H&S COVID-19 return to work protocol/policy, reflecting risk assessments and measures
- take all possible steps to inform employees of the measures taken to reduce risks arising from COVID-19
- ensure that managers are fully briefed and able to respond appropriately to staff concerns
- adapt disciplinary and grievance policies to deal with COVID-19 specific issues such as failures to comply with social distancing
- consider requiring all employees returning to work to confirm they have understood and will abide by new workplace protection rules (e.g. on screening, social distancing, hygiene practices and self-reporting illness)
- to the extent that the measures necessitate changes in working arrangements, audit employee contracts and policies to determine if the changes can be introduced without the need to change employees' terms of employment (watch out for our briefing on changing terms in response to COVID-19)
- take advice on maintaining employee confidentiality and privacy when instituting COVID-19 infection control and screening measures
- consider a sustainable policy for staff who are continuing to work at home, who are shielding, caring and vulnerable and ensure that it is applied consistently, fairly and reasonably
- establish anonymous reporting for workers to report unsafe practices and be prepared to address any such reports rapidly
- be flexible – organisations should prepare to change approach to maintain safe operations reflecting a fast-moving and evolving situation
- consider measures which may be necessary to make the business resilient in case of a further lockdown

For further information, please contact:



Lisa Bryson
Partner, Employment & Immigration

+44 28 9526 2020
LisaBryson
@eversheds-sutherland.ie



Amy Collins
Solicitor, Employment & Immigration

+44 28 9526 2021
AmyCollins
@eversheds-sutherland.ie

Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice. Please refer to the full terms and conditions on our website.

Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.