

## COVID-19 – A Practical Guide for Employers

On Tuesday, An Taoiseach Leo Varadkar announced the Irish government's latest response to the COVID-19 pandemic. Deirdre Crowley, Partner and Denise Moran, Associate, consider these measures and address what implications such measures will have on employers in Ireland. This guidance is up-to-date as of 27 March 2020 and as the situation continues to develop at a rapid speed, we will continue to keep you informed.

### What did Taoiseach Leo Varadkar announce this week?

The Taoiseach acknowledged the "extraordinarily difficult times" in which we are living and he thanked the public for their continued national effort. The sentiment of Tuesday's announcement echoed his remarks on St Patrick's Day when he addressed the Irish public in a rare state of the nation style address in asking the people of Ireland "to come together as a nation by staying apart from each other."

The government's next phase of its response to the pandemic contains "unprecedented actions to respond to an unprecedented emergency". Such measures are outlined under the following three headings:

#### 1. The introduction of enhanced financial measures for employees

The Taoiseach acknowledged that the economic impact of COVID-19 "has been sudden and will be enormous". Regina Doherty, Minister for the Department of Employment Affairs and Social Protection (DEASP) has stated that the estimated figure of 400,000 employees facing a period of lay-off or unemployment is a conservative one. As of 21 March 2020, approximately 90,000 applications had already been received by the DEASP in respect of the emergency COVID-19 Pandemic Unemployment Payment which was first announced last week to address the surge of people whose jobs had been impacted by the pandemic.

**COVID-19 Pandemic Unemployment Payment:** In recognition of the fact that many employees have already lost their jobs and many more may find themselves in a similar position, the Taoiseach announced that the COVID-19 Pandemic Unemployment Payment will be paid at the increased rate of €350 per week for the duration of the crisis (an increase from the €203 which was initially put in place). This payment will be available to all employees and self-employed persons who have lost their jobs due to the COVID-19 pandemic. Varadkar stated that this payment represents almost 75% of the average earnings of employees in the sectors most affected by the pandemic. We have set out the details of this payment below.

**COVID-19 Illness Benefit:** In addition to the above, the Taoiseach also advised that the rate of the COVID-19 Illness Benefit will also increase to €350 (an increase from the rate of €305 which was initially put in place). This amount can be topped up by employers. The full details of this benefit are set out below.

**COVID-19 Wage Subsidy Scheme:** Lastly, in an effort to encourage employers to retain employees on their payroll, the COVID-19 Wage Subsidy Scheme (or the COVID-19 Income Support Scheme as it is also being referred to) was introduced. This scheme allows employers to pay their employees during the current pandemic and employers will be refunded up to 70 percent of their employees' net wages, up to a level of either €350 or €410 per week per employee, depending on their annual salaries. So, for example, where an employee is in receipt of an annual salary of €38,000 per year, the subsidy equates to a net payment of €410 per week. The full details of this scheme which are currently available to us are set out below.

The Taoiseach, in announcing such measures, stated that he strongly believed that maintaining a link between employers and employees will make the road to economic recovery much easier when this crisis is over.

#### 2. The introduction of more stringent physical distancing measures

Following consultation with the National Public Health Emergency Team and the Office of the Chief Medical Officer, the Taoiseach continued to call on the nation to play their part in slowing the spread of COVID-19 by engaging in physical distancing. He called on people to stay at home and advised that they should only leave to go to work, where they cannot work from home and where their attendance is essential; to go to the shop for essential supplies; to attend for medical or dental appointments; to care for others; or, to take physical exercise.

The Taoiseach emphasised that "the requirement that workers work from home, unless attendance is absolutely essential, is not to be read as meaning that factories or construction sites have to shut. The authorities are available to work with employers and unions on how to make physical distancing effective".

In addition to the above, the Taoiseach announced that all non-essential retail outlets are to remain closed to the public, and all essential retail outlets are to implement physical distancing measures. A list of essential retail stores has been provided and includes retail and wholesale sale of food, beverages and newspapers in non-specialised and specialised stores; retail sale of household consumer products necessary to maintain the safety and sanitation of residences and businesses; pharmacies/chemists and retailers providing pharmaceuticals, pharmaceutical or dispensing services; retail sale of medical and orthopaedic goods in specialised stores; retail sale of essential items for the health and welfare of animals; retail sale of safety supply stores (for example, work clothes, Personal Protective Equipment), etc.

The closure of schools, colleges, childcare facilities and cultural institutions has also been extended to 19 April 2020, and the following are also included in the more restrictive measures which were announced: all cafes and restaurants are to limit supply to deliveries and take-aways only; all sporting events are to be cancelled, including those being held behind closed doors; all playground and holiday parks are to close; social events or gatherings involving more than four people are to be cancelled; non-essential indoor visits to other homes should be avoided; social outdoor gatherings of individuals should not constitute more than four persons, unless all are from the same household; no unnecessary travel should take place within Ireland or overseas; theatres, gyms, hairdressers, casinos and bingo halls are to close, etc.

We continue to see the harrowing impact of the virus, particularly from the recent reports emerging from Italy and Spain. However, the statistics illustrate that social and physical distancing works. The measures implemented in China confirm that such restrictions yield positive results; the amount of confirmed COVID-19 cases in a 24-hour period peaked on 12 February 2020 at 14,108 cases, and on Wednesday China reported only 67 new cases, all of which were confirmed as imported. These statistics reinforce the importance of physical distancing and serve as a reminder that there is no room for complacency.

#### 3. The Dáil and Seanad are being asked to enact emergency legislation before the end of the week.

Lastly, the Taoiseach outlined that the Dáil and the Seanad are being asked to enact the [Emergency Measures in the Public Interest \(Covid-19\) Bill 2020](#) this week. This draft legislation includes measures which aim to prevent both the termination of residential tenancies and any rent increases for the duration of the COVID-19 emergency, make it easier for healthcare professionals to re-register and return to work, and to enable former members of the Defence Forces to re-join at the rank at which they left. The COVID-19 Wage Subsidy Scheme is also provided for and the details of its operation will be made available by Irish Revenue.

These above measures were announced by An Taoiseach on Tuesday and we are now taking the opportunity to share themes we have seen emerging in client queries in recent days and weeks, and we offer comments on where we see matters going. This draft legislation was passed in the Dáil yesterday and will be debated, and likely passed, in the Seanad today.

### What are the details of the recently amended COVID-19 Illness Benefit?

Where an employee has received a positive COVID-19 diagnosis or where he/she is medically required to self-isolate, they can apply for an enhanced illness benefit payment of 350 per week for a maximum of 12 weeks of medically required self-isolation, or for the full duration of his/her absence from work due to a confirmed COVID-19 diagnosis.

The DEASP will provide income support to people affected by COVID-19, the details of which are as follows:

- the current six day waiting period for ordinary illness benefit will not apply to anyone who has COVID-19 or is medically required to self-isolate;

- COVID-19 related illness benefit will be paid at a rate of €350 per week (an increase from the ordinary illness benefit of €203 per week, and an increase from the rate of €305 which was initially introduced last week as part of the emergency measures);

- the normal social insurance contribution conditions for ordinary illness benefit have been amended.

Where a person has already applied or is already in receipt of this payment before Tuesday's announcement of the increased rate, the employee does not need to do anything. The next payment will be automatically paid at the increased rate.

The government has urged all employers to support the national public health objectives by continuing to pay employees the difference between the COVID-19 illness benefit and their normal wages in circumstances where an employee cannot attend work due to COVID-19 illness or to medically required self-isolation, i.e. employers are being encouraged to top up employees' pay in such circumstances. There is no statutory obligation to do so. Where an employee is absent from work due to a positive COVID-19 diagnosis or where they are unfit to attend for work due to illness, then the company's illness absence policy will apply and any discretionary sick pay policy which is in place will be triggered. Typically, where employers have a sick pay policy in place, they reserve the right to be reimbursed for any state illness benefit which may apply.

### Are there any limitations imposed on applying for this COVID-19 illness benefit?

Eligibility for this payment is restricted to persons confined to their home or a medical facility. In practice, however, this will be very difficult to enforce.

Further, as part of the application process, a doctor needs to complete a medical certificate on an employee's behalf which is then sent to the DEASP. It is likely, however, that many employees will seek to avail of this entitlement and that certification from a doctor that the employee is required to self-isolate because they are showing symptoms will not be difficult to get in these exceptional circumstances where the public is being encouraged to take all precautionary measures available.

### What is the COVID-19 Pandemic Unemployment Benefit?

The COVID-19 Pandemic Unemployment Payment is a payment of €350 per week to support employees and self-employed persons who have lost their jobs due to the COVID-19 pandemic. This is an increase from the amount of €203 per week which was introduced last week. The COVID-19 Pandemic Unemployment Payment will be in place for the duration of the crisis.

Persons can apply for the COVID-19 Pandemic Unemployment Payment if they are an employee or if they are self-employed; aged between 18 and 66 years old; live in the Republic of Ireland; have lost their job due to the COVID-19 pandemic; or have ceased trading due to the pandemic where that person is self-employed. The DEASP has confirmed that this payment applies to non EU/EEA employees and students who have lost employment due to the pandemic and to part-time employees.

### What is the COVID-19 Wage Subsidy Scheme?

The COVID-19 Wage Subsidy Scheme (the "Scheme") was introduced by the Irish government to provide financial support to Irish employees and companies affected by the crisis. It is important to note that the Irish Revenue is issuing regular updates on the Scheme and how it will operate in practice. Any employer engaging with the Scheme should consult all Irish Revenue guidance.

This Scheme aims to put employers in a position to continue to pay their employees during the current pandemic. It is a condition of the Scheme that employees are retained on the payroll for the duration of the crisis. The Scheme is confined to employees who were on the employer's payroll as at 29 February 2020.

Where an employer self-declares to the Irish Revenue that it has experienced significant negative economic disruption due to COVID-19, with a minimum of 25% decline in turnover or customer sales, an inability to pay employees' normal wages and other outgoings, that employer will be able to claim a refund of 70 percent of its employees' net wages, up to a maximum of €410 per employee per week. This amounts to 70 percent of an employee's net weekly income on an annual salary of €38,000. The Scheme will provide support to employees in receipt of annual salaries up to €76,000, but the refund will be capped at a net weekly payment of €350 for employees' incomes between €38,000 and €76,000. The Irish Revenue has stated that this self-declaration by the employer is not a declaration of insolvency.

The scheme will run for 12 weeks from 26 March 2020. The Irish Revenue will initially refund employers up to a maximum of €410 per each employee earning up to €38,000, on the basis of his/her weekly "net take home pay or €410, whichever is the lesser", and to a maximum of €350 for employees in receipt of annual salaries of between €38,000 and €76,000. However, from April, the Revenue will move to a subsidy payment as outlined above, i.e. based on 70 percent of the weekly average net pay for each qualifying employee up to the maximum amounts of €410 and €350, as set out above.

The Scheme applies to employers who top up employees' wages and those who are not in a position to do so. The Irish government has called on employers to maintain, as close as is possible, employees' wages at their current level of earnings for the subsidised period. In an effort to encourage employers to do so, the Irish Revenue has confirmed that PRSI, Income tax or USC will not be deducted from the subsidy provided under the Scheme. Employee PRSI will also not apply to the top up payment made by the employer, and employer PRSI will be reduced from 10.5% to 0.5% on any top up payment made. However, the subsidy will be liable to Income Tax and USC on review at the end of the year.

The payment is based on the employee's "weekly average take home pay". It is important to note here that while the guidance does not clarify how such is to be calculated, our view is that it seems prudent for an employer to calculate this on the basis of the calculation of holiday pay and/or weekly remuneration for the purposes of the Unfair Dismissal Acts or the Redundancy Payments Acts. Therefore, an employee's average commission would need to be included when determining what an employee's "weekly average take home pay" is.

The Irish Revenue has also outlined that where an employer has been hit by a significant decline in business but has strong cash reserves, that are not required to fund debt, that employer will still qualify for this Scheme but the Irish government expects the employer to continue to pay a significant proportion of its employees' wages.

A very important consideration for employers is the fact that, after the Scheme has expired, the names of all employers operating this Scheme will be published on the Irish Revenue's website. It is also important to be noted that the Irish government has outlined that there will be severe penalties for any abuse of the Scheme.

This Scheme replaces the DEASP's Employer Refund Scheme which was introduced last week, and any companies which received refunds under that scheme do not need to reapply. The Irish Revenue will contact such organisations directly to confirm that they meet the conditions for this new Scheme.

### Are employers obliged to continue paying their employees?

There is an important distinction to be made between employees who are in a position to work remotely and those who, because of the nature of their role for example, are not in a position to do so.

Where employees can work remotely, they should do so and be paid accordingly. The Taoiseach advised on Tuesday that employees should not attend at the workplace unless their attendance is "absolutely essential". Therefore, where employees are not in a position to work remotely because of the nature of their role for example, the consideration around pay is a more acute concern. These decisions may be challenged before the WRC or the courts so employers need to consider how best to position themselves to defend any such matters.

It is to be reiterated that there is no statutory entitlement to employee pay in circumstances where an employee who is fit to work but who cannot, due to the nature of the role for example, work remotely. However, the Irish government's position of expressly calling on employers to protect employee income and the unprecedented financial supports recently introduced are an important consideration for employers to consider when determining if they will continue or cease to pay its employees who are not in a position to work from home.

Consequently, prudent employers may provide their employees with a suite of flexible options to discuss and explore together, in advance of making any decision regarding employee pay. Below are examples of such a range, which are in line with the government's recommended approach of showing employer support for employees through flexible arrangements;

- Allowing employees to avail of their annual leave entitlements;
- Allowing employees to 'work-up' any time taken at a future date;
- Flexible start and finish hours to accommodate childcare, for example;
- Agile working practices which can be discussed and explored between the employer and the employee; and
- Parental leave.

We are seeing this list continue to evolve over the last number of days as employers identify new solutions. The key to these discussions being effective lies in the communication between the employer and the employees. An employer can outline to its employees that it is responding to the government's call to support employees during these precarious times and that it, in turn, urges its employees to outline their commitments so that together, the employer and employee can address what flexibility is required and what solution will work. For example, an employee who has to care for a vulnerable child or parent may require extra flexibility in these circumstances.

Ensuring that a reasonable and flexible approach to employees before any decision is communicated regarding employee pay would likely stand the employer in good stead before the WRC should any such claim arise.

However, where an employer meets the conditions of the Scheme, as outlined above, it may seek to rely on the financial resources made available by the State in ensuring that its employees receive their wages, or a portion thereof. Lastly, and as outlined above, the COVID-19 Pandemic Unemployment Payment is available to employees and self-employed persons who have lost employment due to a downturn in economic activity caused by the pandemic.

### Some employees are not in a position to attend for work because they are required to care for their children whose schools and crèches have closed, are they entitled to be paid?

There is no statutory entitlement to pay in such circumstances and for this reason, it is likely to be one of the most pressing issues facing employers and employees following Tuesday's announcement that the closure of colleges, schools and childcare facilities will be extended until 19 April 2020.

Further and as a matter of contract, where an employee is not in a position to perform the duties required of him/her pursuant to their employment contract because they cannot either, attend for work at the company premises or work remotely, due to the fact that they are required to mind their children following the closure of childcare facilities and schools, then there is no corresponding obligation on employers to pay employees.

However, it is important to note that any such decision to withhold pay in such circumstances may be viewed negatively in light of the government's call to assist and support the national health objectives. Consideration must also be given to the broader impact which the publicity of such a decision may have on the company's brand. In line with the government's response, employers should explore the following options:

- Allowing employees to avail of their annual leave entitlements (subject to our comments below on annual leave);
- Relaxing the rules around Force Majeure leave so that employees can take their full three year entitlement of five days in these exceptional circumstances (as opposed to their three day entitlement over a 12 month period);
- Allowing flexible and agile working practices to accommodate childcare needs;
- Offering discretionary pay, to be reviewed on an ongoing basis; and
- Parental leave.

The most obvious leave option available in such circumstances is parental leave. However, parental leave is unpaid, unless there is a company policy to the contrary, and therefore does not provide employees with the attractive solution. There is a risk that insisting on employees taking unpaid parental leave, where the government has mandated the closure of schools and childcare facilities, might present employee relations issues.

In that regard, we have seen some clients put in place a once-off, paid parental leave arrangement for a short duration to assist employees in these circumstances. If such an arrangement is used, we recommend that employers, particularly in light of the extension, make it clear that this arrangement is being implemented on an exceptional basis and solely at the discretion of the employer with a view to alleviating the pressure on working mothers and fathers.

The key takeaway is to ensure that, to the extent possible, employers review and consider measures with employees as far as this is possible to agree arrangements that ensure that employees are supported and that employers' businesses remain viable. Consultation with employees in this regard may be difficult in practice as employers are faced with making business-critical decisions on the basis of government guidance with little or no notice. However, any form of consultation with employees about available options should increase the chances of buy-in from the employees for the more severe measures that need to be taken and, of course, assist in mitigating the risks associated with any challenges that may arise down the line.

### An employee has applied for force majeure leave due the school closures, is this type of leave applicable to these circumstances?

Force majeure leave is available to an employee where, "for urgent family reasons, owing to an injury or the illness" of that employee's child or adopted child, spouse or partner, parent or grandparent, brother or sister and person to whom the employee is in loco parentis and where "the immediate residence of the employee at the place where the person is, whether at his or her home or elsewhere, is indispensable".

Such leave, therefore, only applies where the child (or indeed any other person included in the definition) falls ill with COVID-19 or is experiencing the symptoms. However, employees who face the very difficult position of having to ensure their children are cared for on such short notice are not entitled to force majeure leave.

### Can we insist on employees taking annual leave to care of their children where they are not in a position to work from home?

The government included the option of allowing employees to take annual leave as one of the options employers can provide to support their workforce. An open and reasonable discussion around this option would be crucial and employees would need to be specifically advised that where they are considering taking this option, their entitlement will diminish commensurate to the days taken, as annual leave entitlements are exhaustive.

However, the Organisation of Working Time Act (OWTA) provides for certain notification requirements and for account to be taken of the "opportunities for rest and recreation available" and the need for an employee "to reconcile work and any family responsibilities" when granting employee annual leave. There is a risk that the company may be exposed to a claim for a breach of the OWTA where an employer is requiring employees to take annual leave in these circumstances.

### If public transport stops and employees cannot attend for work, is there an obligation to continue paying employees where they cannot attend for work as a result?

Where public transport is restricted but the workplace remains open, and that employee is unable to attend for work as a result, there is no entitlement to pay in such circumstances. Employers should explore alternative and flexible arrangements with their employees, as outlined above, before determining that employee pay will be withheld. This would certainly be viewed in a more favourable light by the WRC or courts.

### We are facing a situation where we don't think we will have work for our employees to do because of the effect COVID-19 is having on our business, can we place our employees on a period of lay-off?

Yes, an employer may be placed on a period of lay-off where, subject to the satisfaction of the conditions set out in the Redundancy Payments Acts 1967 to 2014 (RPA), his/her employer is unable to provide the work for which the employee is paid to do, and it is reasonable in the circumstances that the employer believes that the cessation of employment will not be permanent and the employer gives notice to the employee prior to the cessation. There is no statutory minimum timeframe in relation to such notice but we suggest that an employer gives as much notice as is reasonably possible in the circumstances.

There is also the option of placing employees on short-time, which occurs where there is a shortage of work (but not a complete cessation of work). The RPA provides that an employee is deemed to be on short-time where his/her hours of work or remuneration are less than half of their normal weekly amount by reason of a diminution in the work provided for the employee by the employer. The employer must give notice to the employee prior to the reduction and the employer must have a reasonable belief that the diminution will be temporary.

### Do we have to pay our employees for periods of lay-off and short-time?

There is no general right under Irish employment law to lay-off employees or put employees on a period of short-time without pay. Accordingly, in the absence of an express clause permitting lay-off or short-time without pay or in the absence of an implied right established by way of custom and practice, prior agreement from the employees should ideally be obtained in order to lawfully withhold wages during any such period. Where no such consent is obtained, there is a risk that the employees could take a claim for unlawful deduction of wages under the Payment of Wages Acts 1991 (PWA) or a claim for constructive dismissal.

While this is the legal position as it currently stands, it is of course open to an employer to proceed to lay-off/short-time in the absence of a clause and without pay where, for instance, the employer believes the risk of insolvency is higher than the risk of a number of employee claims, and it is prepared to take the employee-side risk. It is likely that the many employers who have placed their employees on temporary lay-off over the last number of days and weeks, have taken this risk.

Where such a situation arises, there are certain steps that an employer can take to mitigate that employee-side risk such as providing advance notice of the measure in question to employees, engaging with employees to seek their agreement (including advising them of the implications of the measure not being agreed to) or looking at alternative options such as different forms of paid leave.

The Irish government's webpage [COVID-19 \(Coronavirus\) Information for Employers and Employees](#) provides that employees who are temporarily laid off or put on a period of short-time can apply for job seekers' allowance and short-time work support (a type of job seekers' allowance).

Further, the Scheme (as detailed above) may apply to employers who are facing these difficult times.

It is also noteworthy that the Irish government has also provided that employees who are laid off temporarily, without pay, due to a reduction in business activity, can apply for the COVID-19 Pandemic Unemployment Payment. Such advice can be accessed [here](#). However, we understand that this is a "fall-back" measure, intended to cover a situation where an employer is not in a position to make the payment provided under the Scheme for cash-flow reasons for example, or where it does not meet the eligibility conditions for the Scheme in the first place.

It is unusual to note that employees who are placed on a period of lay-off are not unemployed so their eligibility for this unemployment benefit is important (and the title of the benefit is misleading). However, we note that these measures have been introduced quickly and in response to the emergency that is unfolding and the government is seeking to ensure that employees are protected in these precarious times. It is important for employers to note, however, that where employees are placed on a period of short-time or lay-off, they are still employees of the company and remain on its payroll.

This article is accurate as of 27 March 2020.

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