

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. Employers should keep up to date with the current HSE advices and take precautionary measures to protect their employees. Such measures include:

- 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;
- 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;
- ensuring remote working policies and capabilities are up to date and reminding employees to bring laptops/mobile phones home and to check that their remote access connectivity works (where applicable); and
- reviewing business continuity plans, stress-testing remote working capability/capacity 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 preparatory actions that can be taken by employers.

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

Clearly, this depends on the nature of the business and the feasibility of home/remote working. This will not be practical for every employer/business type.

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.

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. The Government is currently taking legislative steps to provide social welfare benefits for employees who find themselves in this situation. 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.

An employee who is asked to work from home (or requests to work from home) 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.

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

It is important to acknowledge the possibility that some or all healthy employees may need or wish to work remotely or it may become necessary for an employer to close some or parts of its operations. Any requirement for individuals to work from home must be a proportionate response to the situation in line with the latest medical and government guidelines.

For example, if an employee has recently been in an area with spread of coronavirus but is not showing symptoms, the Government/HSE guidance at the time of writing is that there is no need for them to stay off work. In this situation, the employee may wish to work remotely and/or self-isolate, however it may not be a proportionate response to require them to do so. Proactive engagement and communication with employees is important to reduce the risk of claims for alleged discrimination or breach of contract.

Fundamentally, the question of whether the employee is available and willing to work will inform many of the subsequent decisions. 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. Conversely, an employee cannot elect to “opt out” of their contract of employment where the employer is following the latest guidance.

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. Social welfare benefits, including extended benefits to address self-isolation will be provided by the State.

If an employee is unable to attend 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?

Flexibility and proactive engagement with employees is important when approaching public health situations. The current situation is not restricted to individual employees or workplaces.

Employers should listen to concerns of employees and explore all reasonable and practical solutions.

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.

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.

Can I prohibit employees from travelling?

Employers should not send people on business travel to areas which are classified as ‘affected’ by the HSE. It is prudent to advise employees against all but essential business travel.

Employers should consider holding meetings and conferences by video conference where possible.

Some 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.

Employers cannot prevent employees from travelling in a personal capacity in the absence of Government restrictions imposed by the home or destination country. However, it is advisable to ask all employees to inform their managers if they are travelling to or from an affected area.

If an employee has knowingly travelled to an affected area, 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 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.

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.

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.

1. 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.
2. Communication and proactive engagement with employees is key.
3. 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”.
4. 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.
5. Stress test business continuity plans and remote working capabilities.
6. Review/consider implementing flexible working measures.
7. 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.
8. Review existing privacy policy/notice to ensure it is adequate in light of any additional measures being considered.