

**Practical Tips and Traps of the Governments New Strategy on
Remote Working – Legal Updates on Current Employment
Law Matters For the Public Sector**

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Introduction

As we head into 2021 and for the next year I have been asked to look at the trends which will affect those in the public service. This will actually be the same for those in private business.

The issues which are going to be the biggest opportunities and challenges for both will be issues around remote working and flexible working.

The “Making Remote Work” Plan announced by the Government to a significant extent also looks to implement EU Directive 2019/1158. This Directive must be implemented by 2 August 2022. The Directive covers issues around work life balance for parents and carers.

In looking at remote working there are huge advantages for the Public Service and for business generally. There are also challenges. I do not say “problems” or “difficulties”. I use the word challenges as with every challenge there are solutions.

In looking at remote working, and this includes everything from e-work to platform work there is already a suite of resources for both employees and those tasked with the job of introducing it.

The Department of Enterprise Trade and Employment (DETE) and the Health and Safety Authority (HSA) have useful guides for both employers and those tasked with its introduction. Now if I had any criticism for example the DET website guide asks lots of important questions. It identifies issues to be addressed but gives little guidance on how they actually are going to do that.

But let us look at the positives first and then the challenges.

The positive advantages:

1. There will be less congestion on our roads, less commute times even where people are not working at home but in a hub or co-working.
2. Employees will be able to work closer to or at home thereby creating better work/life balances.
3. Accommodation pressure in large cities will be eased.
4. The depopulation of rural areas will decline and in the medium term be reversed.

5. The opportunity for those with young children or carer obligations to obtain good well-paying jobs will increase.
6. There will be greater opportunities for those with disabilities to obtain employment.
7. It will enable more women with children to enter or remain in the workforce.

The above are just some of the advantages.

In a talk like this I could spend the entire 25 minutes dealing with the benefits. However I often think that when looking at something like a policy on remote working where there are huge advantages, it can be a bit like buying a new car or for some of us a “new to us car”. When buying a car we look at the seats, the body work, the inside of the car. We might look at the boot. Rarely will most of us examine the engine. The danger always is that you buy the car. You drive away. The windscreen washer runs out of water and you then have to search around under the bonnet and in the manual to try and find where the container is for the water. When we get our first warning light that comes on we get into a panic because we will never have checked what the warning lights are. Most of us equate the warning triangle that comes up on the dashboard as something major. The majority of time it is something very minor but something that needs to be attended to. In the talk today I will be dealing with these issues but this paper is an addition to the talk so that those attending it will have an opportunity to consider some of the issues subsequently.

The challenge is to make sure, like when you get a car that you know what the warning signals are but that you take sufficient care of the vehicle to make sure that they don't come on. Therefore this talk is primarily going to look at the issues which those in the public service and in private business will have to deal with. You may wonder why when speaking to this body I would be referring to private business. The reason for this is that for remote working to work it must work not only for the public service. It must work for those in local authorities. It must work for those in private business whether that is a multinational or an SME.

The Targets

The target set by the Government is that 20% of public servants will work remotely. It would be my view that in private business 20% working remotely all of the time is probably a realistic target. However in private business there will be a further group who will be part time remote workers and part time in office buildings or workplaces.

What are we dealing with?

At first sight you would think that you would be dealing with the issues of the policy brought out by the DETE. In fact, as we go through this talk today I think there is an awful lot more that is involved. We certainly have the HSA when it comes to working remotely and their requirements under the Safety Health and Welfare at Work Act 2005 as amended. There will be Data Protection issues and GDPR. There will be EU Directive issues on everything from the Working Time Directive to Equality legislation which will need to be addressed. There will be issues with broadband. It might sound strange but I believe there is going to be issues with our planning laws and the attitude to planning in relation to homes and apartments both at a national level and in local authorities. There are going to be issues around compulsory vaccination and dealing with employees, in workplaces, who for one reason or another do not get vaccinated. There will be challenges for those involved in HR Management. There are going to be insurance issues. You may well say that the State is covered by the State Claims Agency. However, I think I will explain in this later there will be other insurance issues which will also have to be addressed by the public service. Those same insurance issues will apply to business also. There will be taxation issues and there will be the issues of the supports for businesses and the cost to the State of introducing remote working.

In looking at the issue of remote working I think the easiest way of dealing with this is to start at the start where somebody is looking at setting up remote working and the practical issues that are going to be needed to be addressed.

1. Remote working is not working at the kitchen table. The HSA guidelines set out that a proper work station must be installed. This applies whether this is in the public service or in business generally. Even when individuals are working in a hub or co-working there will be a cost.
2. Where a person is partly working remotely there may well be a double cost. There will be the cost of a workstation at home and in the workplace.
3. Home workstations will have to comply with the EU Directive on Display Screen Equipment (90/270/EEC) and Directive 87/319/EEC on the basic Safety and Health issues. The HSA guide has a very helpful document entitled "Homeworking Risk Assessment Checklist" in Appendix 1 of the Guide on Remote Working. It is not simply a matter of giving the employee a laptop and sending them home. In fact the HSA guidelines would appear to indicate that there needs to be a separate screen and keyboard. It is easy to connect a laptop to a separate screen.
4. When the Pandemic started many employees in the public service and private business working from home did so on a laptop. Now the EU Directive on Display Screen Equipment means laptops are not acceptable for prolonged work. Therefore there will now be a cost for employers and the public service to provide a separate screen and

keyboard. While the laptop may not become redundant for planning going forward probably it is going to be desktop rather than laptop which is going to be required.

5. Where there is no proper workstation set up that has been properly checked then there is a real risk of personal injury claims. These will either be repetitive strain injuries, back injuries or worse, eye injuries.
6. A challenge will be the suitability of homes for remote working namely,
 - (A) Will the location in the house comply with the H & S requirements?
 - (B) Many apartment, in particular, are not suitable for a home workstation.
 - (C) We may need to see Building Regulations changed to provide for sufficient space for at least one work station. We have energy efficiency rating currently. Will we need to see a work station rating for homes going forward?
 - (D) Where a home office is not practicable for Health and Safety reasons neither the public service nor private employers can consent to home working.
 - (E) The options for the public service or private enterprise to give employees to options of the employee self-certifying is not an option because the obligations are on the employer under the Safety Health and Welfare at Work Act, 2005, as amended.

So Let us look at the solutions.

For the public service it is the Department of Finance providing the funds for upgrading workstations at home. For private enterprise clearly where they have invested in equipment such as laptops they get a rite off over five years. The same applies to static workstations. Now tax relief by way of at least 100% year one may be needed to facilitate the SME sector in particular. Large employers such as the public service or large private enterprises will not be able to plead inability to pay the cost of installing a full workstation at home. Smaller employers may be. As complaints will go to the Workplace Relations Commission, the Public Service will need investment in home working. Where that investment is not made then there is the potential of a personal injury claim. Where the employer says that the cost of installing a home work station is too high then that will be a matter which will be determined by the Workplace Relations Commission.

The suitability of premises is outside the control of any employer whether public service or otherwise. There will need to be a discussion on enlarging apartments and homes to provide for home offices. That will create its own

friction between those wanting more high density smaller homes and those involved in seeking to roll out remote working. However, if remote working is to be a reality for many, remote working requirements for homes will need to trump those looking for more compact properties. The answer may be that remote working will take place in hubs. That itself is going to delay remote working as we seek to build these hubs and in addition will create their own additional costs.

7. Broadband of course and the absence of broadband will limit the role out of remote working. Broadband issues will not affect those working in hubs or co-working.
8. In relation to hubs or co-working the challenge for these will be simply having sufficient locations. This is building or adapting of premises. Building or adapting premises will in itself create jobs which is beneficial to the economy but it takes time. There will also be significant additional management time in managing both those working at home and those in hubs, or, co-working. I understand the public service is proposing hub working with individuals from different departments working in one location. That will mean that the management skills of those managing the locations will need to be upgraded to deal with managing people from different departments. That should not be regarded as a problem. It is an opportunity to up skill the management skills both within the public service and where this occurs in private enterprise within business generally.
9. An issue which will affect those who are working remotely or away from the main premises is the issue of career progression. This has been identified as affecting those with a disability in particular. One of the advantages of remote working will be that individuals with a disability will find it easier to find a job close to their home. That is a huge advantage from a social perspective. The difficulty is managing matters to enable individuals who will be limited to the amount of travel they can reasonably undertake, and this will also particularly include with child-minding or carer duties, as to how they are going to progress in the organisation. This will affect both the public service and private business. This opens up the vista of issues under Equality Legislation and also Industrial relations disputes.
10. Remote working has somehow, in my view, been seen as an opportunity for those at a lower level within organisations primarily. The proposals cannot and do not exclude those in more senior positions. The challenge for all organisations will be how work will be organised to enable those higher up the management structure in organisations can avail of remote working without having a negative impact on their own carer progression or on the management of the organisation. Any form of glass ceiling as to the level at which an individual can progress while remote working will have a negative impact on the whole concept of remote working. It will mean that they

will become a two tier organisation. There will be those who wish to progress higher in the organisation who will need to be seen in the workplace which is the main workplace if I can call it that and those who accept that their career can only go so far who will be able to opt for remote working. If there is any form of glass ceiling effectively put in place then into the future there is going to be significant issues around Equality Legislation particularly by those will have a disability or those who have child care issues or who are caring for a relative including a spouse or partner.

11. Working Time Regulations.

The Organisation of Working Time Act derives from the Working Time Directive. One of the requirements of the Working Time Directive, as has been applied by the Labour Court in Ireland in what is known as the Keypak Case is that there is a duty on the employer to maintain working time records and in the absence of those records and properly monitoring working time the employer will be liable for any breach. The European Court of Justice in a case known as the Deutsche Bank Case, being case C-55/18, is one where the European Court of Justice declared that the Directives relating to working time read in the light of the Charter of Fundamental Rights of the European Union precludes a national law, which according to its interpretation, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured. The European Court of Justice in effect made an order that it was necessary for the effectiveness of the rights provided in the Working Time Directive and the Charter, that member states must require employers to set up an objective reliable and accessible system enabling the duration of working time each day by each worker to be measured. The European Court of Justice set out that it is for Member States to define the specific arrangements for implementing such a system in particular the form that it may take having regard, as necessary, to the particular characteristics of each sector of activity concerned or the specific characteristics of certain undertakings according to their size. In that case and other cases on the area of Working Time Legislation, particularly places an obligation on an employer to put in place systems which are proactive and where the employer uses "due diligence" to record working time. Now working time is not only start and finish times. It also includes recording breaks and rest periods. This issue no doubt is going to end up in the Courts. There will be the practical issue of recording the time. It will not be a matter for the employer simple to pass it over to the employee. Yes the employer may be able to require the employee to record start and finishing times and that times at which they take their breaks but that information will need to be submitted. It will need to be checked. It will not be a matter of having employees fill out that they started every day at 9am, they finished at 5pm and they took a lunch break between 1-2pm. Systems will need to be put in place to effectively monitor staff. You may wonder why. Where you had organisations where individuals

came to work in the morning and went home in the evening the vast majority would not have had access to emails. Work mobile phones were not provided to every member of organisations. There will now be the real danger and the evidence is coming forward, slowly admittedly, that employees who have access to email, in particular, in their homes are more likely to check. There is equally some evidence that managers knowing the individuals will have access to their emails and the work processes, are becoming more likely to contact an employee outside working hours. There appears to be some pressure from some reports that employees feel compelled to check emails in case something comes in. All of this is going to be a challenge to be addressed. If it is not addressed the reality is there will be a significant number of claims under the Organisation of Working Time Act which will go to the WRC and possibly to the Labour Court and may even go to the European Court of Justice where an employee will simply come in and say "I did not get my rest and break periods. I worked too many hours." There is every potential that because of the way the Working Time Directive is written that that is all the employee is going to have to do and the burden of proof will be on the employer to show otherwise. In the absence of working time records properly held and completed that is going to cause significant difficulties for any employer whether the public service or private business. Therefore procedures will need to be put in place to monitor the work of employees. Now the systems are there. They can easily be installed in any computer system. The difficulty is of course GDPR. There will be issues as to the level to which an employer can install algorithms.

There will also be the practical issue of any employer whether in the public or private sector wanting to know that those staff, working remotely, are actually working remotely. Let me put it another way, that they are actually at their workstation and actually doing work. That will not be a problem where a person is in a hub or co-working. It will be an issue where somebody is working from home. Currently such basic issues as phoning employees at different times during the day, contacting them for a Zoom call on 5 minutes notice and other similarly basic checks are short term solutions. They take up a lot of management time. They are seen as intrusive by employees when they work out that this is really simply checking up on them.

Therefore we are going to need very clear and precise rules on what checks and balances can be put in place. What can and cannot be installed in computers to check productivity and the fact that somebody is actually working, the extent to which employees can have a camera on a computer system turned off or object to a camera being installed or object to taking calls where a camera will have to be turned on, to the extent to which an employer can use that equipment to know the practical issues of monitoring start and finishing times and breaks is actually going to be recorded and dealt with.

The solution on something like this is going to have to be quite novel. It is effectively going to require rules to be set out which, may cause difficulties for employees and employers but which will be seen as fair on both sides. Clearly there is going to have to be a system whereby any employer can monitor staff attendances at work. That means monitoring when they start work and when they finish work and when they take their rest and break periods. That cannot mean that an employee will log on at a particular time, be in their chair for that full period of time or available on two minutes notice to take a Zoom call. Equally, the rules will have to respect the right of privacy for individuals. These rules will have to be specified by Central Government. They will have to be workable. In setting these out it is my view that this is not something for the DETE, on its own, to put in place. There will need to be input from those from business. There will need to be input from those who deal with Human Resources. There will need to be input from those who deal with GDPR and there will need to be legal input from those who deal both with personal injury cases and employment law. You may ask why I would include those involved in Personal injury. There is a very simple reason. One of the issues which is now coming forward in relation to working is that in the normal workplace individuals will have a work station but they will move around the workplace. That would be to go to meetings or to meet other people if only to discuss and issues with a colleague. Now they will be dealing with this sitting at their work station and will not be moving around. In monitoring working time there will be health and safety issues not only as regards excessive working but also to make sure that the work day is organised in such a way that individuals will not work all the time on a screen, that on a regular basis that they will be required, and I use the work required, to stand up and move around and in particular to organise their work in such a way that they do not become static.

12. Insurance

You may wonder why I mention insurance when I am talking about the public service. The same issue is going to apply to private business aswell. The public service will say but any claim for a personal injury will go to the State Claims Agency. That is not absolutely right. Where there are hubs they may or may not be owned by the State. Depending on the arrangements that are put in place there may well be issues relating to what that location will cover by way of insurance. The employers will need to know what level of cover is in place for those working in hubs and who the insurer is. When it comes to private homes you might consider that again it will simple be a matter for in the case of the State Claims Agency. But again that is not the full picture. If an individual is working from home but it is not their home then there are going to be issues relating to having appropriate insurance in place and probably indemnities where a person is working from their parents or partners home.

13. I have already talked about having work stations properly monitored as regards their suitability. The reason I am raising it again is that there are going to be GDPR issues here. Employers are going to have to undertake a review of each workstation in each home. That will cover everything from proper light and heat to the workstation being properly set up. As regards the setting up of a workstation that can be done remotely and there are service providers in this area. There will however then be the issue of maintaining those records of the assessment. Contracts of Employment are going to have to be amended to include a provision that those surveys can be undertaken and in addition that both records can be maintained even after an employee leaves employment. There is a time limit to bring a Personal Injury claim of two years. A Personal Injury summons can be extended if it is not served within 12 months. Therefore effectively employers will need to be able to maintain those records for at least four years should a claim come in and if a claim does come in until the claim is disposed of.

14. Suitable Home Working

Again this is an issue which I addressed. You can only have a person work from home where the premises which they will be working from is suitable. At the present time many apartments in our cities just are not suitable for home working. This will mean that on a survey the answer will be to the employee that their premises are not suitable and they cannot home work. Now the proposals are that if there is a dispute this matter will be dealt with by the Workplace Relations Commission. The question I am asking is how are they going to do this. The WRC are going to need experts on health and safety law. At the present time the WRC effectively deal with a handful of Sections. They effectively deal with the issue of health and safety assessments for a pregnant woman and where there is a complaint of victimisation for having made a complaint under the Safety Health and Welfare at Work Act 2005, as amended. We are now going to have a situation where the WRC are going to have to have the expertise to determine whether a particular premises is actually suitable for home working. That is effectively more an engineer's qualification than a legal qualification. That means that completely different group of Adjudicators may well be required. In the alternative it will require a system whereby the WRC will have to have premises surveyed. If not, there is going to be the issue of an employee claiming that their premises is suitable. The employer saying the premises are not, issues then arising over having the premises assessed. Will the employee be able to stop the employer having an assessment undertaken, and if the employer does, and the employee disagrees with that report, how is the employee to challenge it other than getting their own assessment. The solution on this of course is that the WRC would have appointed specialists of a standing which would be acceptable to both employers and employees whether those employees are in the public or private sector. However, this is a

specialist area. It will not be a matter of simply sending it to the HSA as they do not have the appropriate resources unless they are heavily resourced to enable those assessments to take place. There is also going to be the issue of the WRC being sufficiently resourced to enable complaints to be dealt with in a very speedy and effective way. Prior to the pandemic the average length of time for a case lodged in the WRC to receive a decision was a period of 8 months. That is longer at the present time. There is 42 days in which to put an appeal to the Labour Court and the Labour Court then are very efficient in hearing cases. In reality with the best will in the world a complaint is probably going to take on current resources within the WRC, even in a non-pandemic situation if matters go the full way to the Labour Court, at least a year to resolve. There is then going to be the issue as to how this is going to be managed as part of the process, Will be have a fast track system within the WRC. The WRC was originally opened up on the basis that you were going to lodge a claim. You would get a hearing within eight weeks or mediation and you would get a decision either weeks afterwards. That time limit never applied. This is going to be a practical issue as to what happened in the interim. Will the employee be working under protest where the employer says the home is not suitable for a home work station? This is an issue which is going to affect both employers in the private section and in the public sector.

15. Planning For Properties

Again I mentioned this before but I am going to mention it again. If we are going to have home working as part of any solution then individual's homes are going to have to be suitable for home working. This means that planning for a high density or compact premises may not be suitable. The answer may be that remote working will only take place in hubs, However that is not going to be suitable for everybody, If home working is going to be in homes, if I could call it that rather than just simply remote working in hubs then the whole planning laws that are now being looked at to make properties more compact will need to be amended. There is no way that an employer whether public or private sector will be able to allow employees to work in a premises that does not comply with basic health and safety. There is little point in people having properties built and moving into them and then finding out that property is or is not going to be suitable for home working. It is going to require an approach that properties are going to have to be advertised a bit like the energy rating as to whether they are suitable for home working and how many people the property the accommodate to provide suitable home working for one or more people. The average 3 bed semi-detached or terraced property probably can accommodate 2 people home working in a bedroom each provided that if they are a couple, that there are no children. From a practical point of view an employee could be told that they can homework. What happens then if you have a couple who have a child will there be a requirement to tell the employer that they have a child. If so, which employee from which organisation

will now be told that they can no longer work from home? This is going to create significant issues under equality legislation. Take a situation as I have set out of one individual working for the public service and the other for private enterprise. The HSA then say the property is only suitable for one home working station. Both parties bring the claim to the WRC to get a direction that they can work from home. How is the decision going to be made as to whether it is the public servant or the person in the private enterprise who is going to have to return to the workplace? As between employers how is that decision going to be made. I am simply raising this as an issue that I don't know the answer to at the present time but I am quite sure that Employment Lawyers will be bringing claims in those circumstances if somebody is not allowed home work.

16. Taxation

We are told that there are going to be taxation reliefs for those working from home. For the public sector the issue of tax relief for employers setting up individuals working from home is not an issue that will affect the public sector as it will be paid for from the Department of Finance. However, it is going to be an issue if remote working is going to work. Where employers have to incur the cost of what could be two work stations particularly where somebody is only going to be working part time at home then in those circumstances there is going to be the issue of the allowances and how they can be written off as a cost to the business or what grants or other supports will be available for home working. On the issue of tax reliefs that is going to affect all employers public sector or otherwise. You may say that the tax relief will be on the basis of a certain amount in respect of light and heat. The difficulty is going to be where an employee does not own the home themselves but is home working from that location. They could well be in a property owned by their parents. Their parents may be the ones paying the light and heat and other expenses. Is the tax relief going to go to the employee or is it going to go to the person or persons who actually own the property. If the person gets the allowances themselves even though it is not their own property and they pay that over will that be treated as income of the person to whom they pay it or how is it going to be addressed. I don't believe that this is terribly difficult to work out but it is going to be one of those issues which is going to arise. It has the possibility of being an anomaly and it is one that we are going to have to all address. It would appear reasonable that if somebody is in a property owned by somebody else and is receiving a tax allowance that they can pay that over to that person because it is there to defray expenses and in doing so would not in itself create a tax charge,. Again I am raising this as an issue in that if you have one employee who is in a very energy efficient house and another who lives in a g=house that was build it 1900, the cost of hearting is going to be substantially different, For one it might be negligible. The other it may be significant. If it is on the actual cost them one employee will receive more than the

other. If it is a flat allowance then one employee will actually be making money whereas for the other employee it might be actually costing them to work at home. Clearly a flat allowance is probably the easiest solution. I am simply mentioning this because there are health and safety regulations relating to the level of heat that must be in a workplace and therefore it will be a requirement of any employee working from home that they keep the heat at that level.

17. GDPR

The issue of GDPR is only now starting to be looked at. Where you have people working in an office or workplace the issue of information being lost or moving outside the organisation is more limited, It is more likely to be due to a computer hacking. It may be done by mistake. There will be times when it is done on purpose. However, when we get to remote working there are additional concerns. All employers will be looking at a situation where information is now moving outside of their workplace, they will not have the same control over the remote workstation. If you have an individual working on a sensitive subject there is always going to be the potential that if they are sharing that premises with somebody else that without very strong GDRP protections put in place as regards procedures there is always the potential of that information being shared. By that I mean if you gave two individuals sharing a property with their workstations in the same room and there is information on a computer screen it is probably going to be relatively for the other person to see it. In the public service that could relate to procurement. It could relate to planning relating to a Finance Act proposal or a myriad of other issues. The same will apply in the private sector. This is going to mean that there is going to have to be detailed policies and procedures put in place by all employers to protect sensitive data. At the present time somebody comes to the workplace. They turn on their computer. They may move around during the day. They go and get a coffee. They go for a rest break. They go to see and talk to a colleague or go to a meeting. They go to lunch. They may never close down their computer until they go home. Now we are going to have to have a situation that if somebody is leaving their workstation, for whatever reason, for GDPR, the screen will have to be shut. It may not even be sufficient that they just close it down so that the screen is blank. It may well be to protect sensitive information that it will have to be turned off and then turned on again. This issue has yet to be fully addressed. There are then going to be issued with employee privacy if an employer is monitoring in those circumstances and where that information is received that somebody has turned on and turned off their computer ten times during the day, the issue relating to seeking information as to why that happened is going to be a GDPR issue. Let me put it at its most simple. A person comes to the workplace on a Friday. On Thursday night they had gone out with some work colleagues and had gone for dinner. They suffered some food poisoning, Not serious food poisoning but one that causes a discomfort. If they are in the workplace they equally leave their work

station six or ten times during the day because of it but they will never be turning off their computer. That may sound fairly petty but the reality on it is this is what we are going to be dealing with, The danger of a breach of GDPR is no greater or no less if a work station is left turned on which can be accessed for five minutes or for an hour. It takes second to copy and transmit a file somewhere else. You may say it would be very unusual for somebody sharing a property with somebody else that that person would seek to access information and send it somewhere else while their flat mate or house mate went to get a coffee but that is going to be a risk that every employer is going to have to address. It will equally apply where you have a person working from home who has children. Children are more computer literate than most of their parents. You could well have a seven or eight year old who wants to get onto YouTube while their parent is away from the workstation, for example making lunch for themselves and their child, for that child to access the computer and to actually transfer all the data somewhere else. So what we are going to have to have is very detailed protocols for employers and employees. For all employers because of the issue of Data Protection breaches this is going to have to be signed off by the Data Protection Commissioner, There will need to be practical solutions coming forward as to how we manage GDPR issues outside the workplace and in the virtual workplace. The current protections that individuals have as regards data being transferred leaves all employers whether public or private sector seriously at risk.

18. Vaccination

We are now seeing the roll out of the Covid-19 vaccinations. That is very good news. In the short term the issue of workplace risk assessments will have to be kept under constant review. However, there may be an issue that infection control measures such as physical distancing, hand hygiene and face coverings and a combination of remote working will actually be a requirement until the pandemic is beaten. All employers are going to need a strategy for communicating issues relating to Covid-19 vaccination sooner rather than later. Of course there are no legal issues whatsoever in employers being positive and proactive in encouraging individuals to take up the covid-19 vaccinations. The issue which is going to arise is whether there is a legal basis on which employers can say to an employee that they must get the Covid-19 vaccination.

At the present time there is no Legislation requiring compulsory vaccination. There is no guidance or Regulations which will compel any employee to be vaccinated. There is no Legislation or otherwise which provides that all employees in a workplace must be vaccinated. There is a legal basis under Section 31 of the Health Act 1947/2020 where the Minister for Health can introduce regulations making vaccination compulsory for the general public. The Infectious Diseases (Amendment) Act Regulations 2020 did add Covid-19 to the list of

infectious diseases covered by the 1947 Act, as amended. Personally, I doubt if the Government will attempt to introduce legislation to compel mandatory vaccination because of the constitutional issues. There is going to be discussion as to whether an employer could decide to put in place a mandatory vaccination requirement. My own view is that this is not going to happen and that there will be significant legal issues if it was to be attempted. The Safety Health and Welfare at Work Act 2005, as amended, in Section 8 sets out a general duty on employers to protect the health, safety and welfare at work of their employees. It includes putting in place plans and procedures and measures to be taken in the case of an emergency and clearly this is an emergency. The HSA has published a Code of Practice for the Safety, Health and Welfare at Work (Biological Agents) Regulations 2013 and 2020 and from the 24th November Covid-19 has now been included in the list of biological agents covered by the Regulations. Those Regulations require that specific written risk assessment is completed and put in place to protect the health and safety of employees. Those guidelines set out that there is a limit on what an employer needs to do in those circumstances and it is limited to dealing with individuals who have not been vaccinated. Those guidelines do not provide for mandatory vaccination. However, when it comes to vaccination there are some minimum issues which arise namely;

- (a) Where a risk assessment shows that there is a risk to health and safety of an employee and clearly Covid-19 comes clearly within that then the employer must offer vaccination free of charge to employees.
- (b) Vaccination is not the answer in itself. It can only be seen as a useful addition to the correct use of controls and safe working procedures and instruction and information along with training. It is not there to replace those.
- (c) Where an employer is advising employees about vaccination then the employer must advise the employee of the benefits and drawbacks of both vaccination and non-vaccination. This will be quite technical.
- (d) Any risk assessment will have to take account of the issue of those who do not want to get vaccinated. In reality most employees will want to be vaccinated but there will be those who will have objections. There will be objections on the disability ground and the religious ground particularly. There will also be possibly objections from these younger individuals who are hoping to start a family who will object for a period of time that they do not want to get vaccinated. There is going to then be issues under the Employment Equality Acts 1998-2015 which every employer both public and private sector is going to have to be aware of. Despite reports that 85% will want to get the vaccination the 15% is going to cause challenges. There will be issues of staff who are vaccinated possibly not wanting to work with those who are not but where it is an essential service requiring attendance . Will we have to have segregation between them. Will

non vaccination be seen by some as a way of getting home working which might otherwise be denied ?

Coming back then to the issue of GDPR and Data Protection employers are going to need to be extremely careful in relation to maintaining records in relation to vaccination and how that is distributed and dealt with within any organisation. If employers are checking with employees about whether the employees are willing or not willing to be vaccinated than this is going to be a special category of data that is going to have to be carefully processed particularly where the employee might raise a health, family or religious belief. Again, the legal basis for processing such data will need to be identified. There will be provisions under Article 6 of the GDPR and the exemptions under Article 9 which would be there to assist. There will equally need to be a Data Protection Impact Assessment where the categories of personal data are protected on a large scale and measures will need to be adopted to reduce the risk of that information being distributed.

Conclusions

In a paper like today I am simply covering the main points. You may wonder that I am raising issues but not actually giving an awful lot of answers. The reason for this is that the announcement is very recent. Employment Lawyers, those dealing with GDPR and Personal Injury lawyers are only beginning to become fully aware of all the nuances. The traditional working model is changing substantially. Our legislation has been designed effectively for static workplaces where people go to work, do their work and go home. The issue with remote workers has been there always but invariably it was for higher grade workers who were less likely to be bringing claims to the WRC.

There are challenges for both the private and public sector. There will be a new way of working. Old ways of working will have to change. There will have to be controlled mechanisms put in place. There will be a trade-off between privacy and the need of the employer. There will need to be flexibility by both the employer and the employee. For remote working to work there are going to have to be detailed plans put in place, there will need to be detailed protocols. There will need to be detailed guides. In traditional Codes of Practice, if I can call it that, the principles are set out but how they are applied in practice are rarely written down on a step by step basis. If remote working is to work then we are going to have to have a situation where there are step by step guides. They will effectively be checklists. If a particular issue is a yes then remote working is allowed. If it is a no it will not be for the particular employee. How you get to a yes and no may well be 20 or 30 questions. How we deal with GDPR is going to be a significant issue., How we make sure that an employer whether public or private sector is not subject to an investigation by the Data Protection Commissioner if they comply with step by step guides to protect data is one that is going to have to be put in place. In relation to the issue for Personal Injuries than again employers whether public or private

are going to need to have a step by step guide from the HSA in relation to assessing work stations and properties as suitable for remote working, Our planners will have to make sure that homes in particular, are available to be used for remote working,. The Organisation of Working Time Act is going to have to have again step by step guides for the recording of working time for compliance with the minimum rest and break periods and maximum working hours. However, we are equally going to have to have a situation of appropriate guides for employers to give to employees to ensure that employees are not static for the entire day but at the same time that the employer is going to be able to check that they are actually working at the times that they are supposed to be working but taking into account the normal breaks that somebody would have in the workplace.

You might think from the talk today that all I am putting forward is problems. In my view they are not problems. They are challenges. They are matters where we have to reach a solution. They have to be workable solutions. I believe that that can be done. However it is going to be a combination of appropriate Legislation and appropriate guides and Regulations. There is a significant amount of technical work that is going to have to be done by the Government to bring in the appropriate legislation. AT the same time there needs to be proper consultation with businesses and with professional advisors to make sure that any Legislation of Regulations which are brought in will be workable and will not result in unnecessary cases going to the Courts or to the WRC. The WRC will have to be properly resourced to deal with its oversight provisions. The WRC being able to effectively determine how a business is going to work is putting a significant level of responsibility onto them. Unlike other situations in this country where legislation is produced and where there is resistance from Government Departments we really need to operate more like the UK. We need to have Draft Legislation for consultation purposes which is there as a consultation document where appropriate input can be made. Same will apply to any Regulations. Once the legislation is going through the Dail there is then going to be a required period of time for businesses to adapt. By businesses I mean both the public service and the private sector. The roll out of the right to request remote working will have to have a period of time to enable both the public and private sector to adapt.

As I said at the start I believe there are huge advantages for the State, for businesses generally, for employees and for our economy to have remote working. The danger is going to be that we have badly drafted legislation which does not deliver anything except an avalanche of litigation.

In the area of Employment Law there has been a history of poorly drafted legislation., The most recent example was the legislation dealing with Banded Hours Contracts where the Labour Court to interpret the legislation had to go back to the intention of the legislation rather than what was actually written down , due to serious issues with its interpretation. We do not need that when it comes to remote working.

I am in favour of remote working, I believe it will work. What concerns me is that it could be a bonanza for Lawyers. You might say why as an Employment Law Solicitor why would I be concerned about a bonanza for Lawyers. The reason is that the last thing any Employment Lawyer wants is Legislation which unnecessarily creates disputes and where there is a lack of certainty.

The proposals by the Government to introduce remote working and to have Legislation passed this year is ambitious. There will be political pressure to get the Legislation through quickly. In my view it is more appropriate that the Legislation is introduced in a way that we have robust legislation which is clear and precise and easy for any person having to manage it from the most complex public sector branch of Government to the smallest SME.

The issues which I have raised today are ones we are all going to have to address. Working together we have to find solutions. The challenge will be to make sure that the solutions are workable for businesses generally and the public sector.

Finally, I hope that I would not be coming back here in possibly two or three years' time to give a talk on a review of the Legislation and cases that have arisen because of it and the difficulties that both the public sector and private business have encountered in implementing remote working or to be talking about cases which have indicated that remote working is a concept rather than a reality for most. To make it work a different approach to finding the solutions and making it work will be required with all stakeholders having to have an equal input. It will be Government's role to set out the principles. It will be everybody from Human Resources professionals, to Employment Lawyers, to GDPR Lawyers, to Personal Injury Lawyers, to Health and Safety experts to medical practitioners covering issues such as stress and how to avoid it, to medical advice relating to avoiding medical issues due to static working, to Engineers, to Planners, to those dealing with the Socio and Economic benefits, to Union and Employer representatives and an army of other specialists whose advice would need to be obtained to make this work.

One final point I would make is that in all this talk of remote working we will also have to address the issue of those sectors to which remote working will never be a possibility. A Barista to a Lorry driver and a Doctor to an Engineer in a power plant and numerous other jobs will never be suitable for remote working. There will be a challenge in dealing with those jobs also. They are as important as any other job and we have to make sure as part of the process that those individuals do not get left behind or those jobs and professions become less attractive.

Remote working will create a two tier workforce. One group being those who have the potential to be remote workers and the other that will never have that potential. That is a part of the discussion which I hope will not be ignored.

Richard Grogan