Law Society of Ireland

Employment Law Masterclass

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Returning To The Workplace

In the talk today which is dealing with returning to the workplace there are in effect going to be a number of different categories of individuals being;

1. Those who will want to return to the workplace full time.
2. Those who will want to work remotely full time and
3. Those who will want a blended working arrangement of a number of days in the office or workplace and a number of days working from home.

When it comes to employers there will be situations for them;

1. Wanting individuals to be in the workplace full time
2. Wanting individuals to work remotely at times. Now I specifically use the word "remotely" here rather than "working from home" as some employers will opt for a hub situation rather than home working, and;
3. Those employers who will want employees to work in a blended fashion being part time in the office or workplace and part time remotely.

At first sight it would appear that these will be mutually inclusive. In reality that is far from the truth. There will be employees who will want to work from home where the employer will want them in the office.

In dealing with the return to the workplace we are heading into a situation where there are going to be a number of different categories of workers. There will be some workers who will never get the opportunity for remote working. If you are a barista the opportunity for remote working is never going to arise. There will be other organisations where it might be considered that remote working will not be a realistic option. Take for example An Garda Siochana. But even in an organisation like that there are going to be individuals who work in the office and where remote working may well be an opportunity for them.

There are of course other occupations that the opportunity for remote working just does not arise. However, even in front line organisations and jobs, there are jobs in those organisations which are not front line and which could be worked remotely.

The reason I am saying this is that the issue of vaccination is going to be one which arises. It may well be that issues are going to arise that individuals who are not vaccinated will not be able to undertake front of house services because of the risks associated with that. There will be employees who will want to work remotely whose job, as it currently stands, is not one which could be done remotely and who will seek to avoid

vaccination, or at least not advise the employer that they have been vaccinated, in the hope of using it as a method of negotiating a remote working position within an organisation.

As businesses start to reopen and looking both at the new Code of Practice on the Right to Disconnect and the issue of new legislation being introduced entitling employees to seek remote working, there is the significant potential of disputes arising in workplaces. Those disputes will not only be between the employee seeking remote working and the employer who does not wish to provide it but equally probably in respect of employees who will not be working remotely, where other employees are, and certain functions which would have been undertaken by the employee now working remotely will pass to them.

While we have all in our offices become more online friendly, if I could call it that, and we head towards the paperless office, pending that paperless office coming in place the role of paper will still have a role to play. If I take simply the legal profession and you take an office that has a number of secretaries. Let us assume that there are six secretaries. Four of them will work full time in the office. One will work in a blended fashion three days a week and one will work remotely. On the days that the individual who works blended days is not in the office the four remaining secretaries will be left with the issue of filing. Now that may not seem to be a huge issue but it may be for some.

Take two secretaries who worked side by side before the pandemic in a litigation section. If one of them is working remotely the other individual will be left with the job of scanning, putting together Court documents (until we have online filing) binding books of pleadings and the physical file management. The secretary working remotely will simply be typing. Whereas before the physical tasks of looking after files and getting document ready for filing in Court or getting books of pleadings out was shared now there is the potential that one employee is going to be doing less interesting work being the employee in the office. I am simply giving this as an example of an issue which will arise, or will probably arise, as businesses seek to get back to work fully.

As we move forward there are going to be huge challenges for businesses, business owners and employees.

There are of course going to be issues under the General Data Protection Regulations (GDPR), the Safety Health and Welfare at Work Act 2005, the Payment of Wages Act, Equality Legislation, Unfair Dismissal Legislation, Redundancy Payment Acts and even the Equal Status Act. The Regulation on a European approach for Artificial Intelligence has all the hallmarks for a tsunami of litigation.

One issue which has not come on the agenda recently is whether a business which will have all employees fully vaccinated is going to obtain a competitive advantage over those businesses which are not fully vaccinated.

The “No Jab No Job” which was announced by Pimlico in the UK threw up a fury of outrage. However, we have yet to get to the “No Jab No Entry” which is quietly bubbling under the surface.

The reason I am saying it at this stage is take the situation of four businesses on a street. Two are at one side of the road and two are at the other. One is a hairdresser on one side of the road and a restaurant beside it. There is a mirror image on the other side of the road. The two businesses on one side of the road have no signage up. They comply with Health and Safety requirements but that is about it as regards social distancing. The two businesses on the other side of the road have a sign up saying “all our staff are vaccinated – nobody enters these premises without evidence of being vaccinated” (unless you come within a disability that requires that you cannot be vaccinated or a religion that opposes vaccination – evidence will be required”). Now the issue which will arise there is whether when it comes to choosing which hairdresser somebody goes to or which restaurant they go to for dinner is which premises will be more attractive for members of the public to go into. You choose.

When it comes to the issue of civil liberties, those who argue constitutional rights to bodily integrity and the right not to force employees to be vaccinated will probably be up in arms with what I am saying but as I work through this paper I hope that those who will read it may see that there will be issues where business that do not have their staff vaccinated may be in a situation of having a competitive disadvantage which ultimately may lead to that business not being as viable and possibly not surviving.

In the legal profession we already have the situation that the Courts are working remotely. They have done a great job in working remotely and the Court Service must be congratulated for this. However, whether it is in the Courts or in the Workplace Relations Commission or the Labour Court and it is in these forums that those at this Masterclass will normally be appearing we all know that cases are backlogged, we cannot have the same number of people in Court, and that ultimately, it will be vaccination regardless as to what anybody might think about vaccination which will ensure that these Courts and Tribunals get back operating as they normally did.

We have yet to have the discussion as to whether in the Courts, for example, where they will be able to operate fully where there is vaccination, will not be able to operate fully where only some individuals are vaccinated. We will at some stage have to address the issue as to whether vaccinated individuals will be allowed into Court and non-vaccinated will have to attend remotely. I am not saying that that is going to happen. It may well be that when we get to about 85% of the population vaccinated the answer will be that those who don’t want to get vaccinated don’t have to get vaccinated and they can take their chances. The difficulty with this is that vaccinated individuals will still be able to catch Covid-19 it is just that the effect will be

less. Therefore without vaccination some form of social distancing is required, which will be a challenge for Courts and businesses.

The reason I am saying this is that there are going to be situations arising where there are going to be employees who will say, even when we have 85% of the population vaccinated, that they are not happy being in the same room or location as a non-vaccinated person. If the Courts of Tribunals direct that once anybody can go back into a Court or Tribunal then those organisations and entities will operate on that basis. The difficulty is in workplaces where there is the potential for significant strife between employees.

For employment lawyers we are now into a whole new era of potential conflict and opportunities. Many of us will be converting into health and safety advisors. We always were but now we will be dealing with these issues far more regularly.

Conflicts around safe opening, safe working, GDPR, remote working, the right to disconnect, additional discrimination claims, bullying claims, workplace disputes and myriad of other issues because of the conflict which will arise as businesses seek to reopen will be fertile hunting grounds for employment lawyers. Now I personally do not believe that any of us would have wanted to be in this position but the reality is that we are where we are. All lawyers like certainty. We are now into an era of absolute uncertainty. That is neither good for employers or for employees and in reality it is not a good position for us as employment lawyers to be in. Uncertainty only leads to unnecessary disputes and litigation.

Returning or not returning to the workplace – the starting point – the Contract of Employment

The contract of employment for existing employees will be their existing contract. That will normally specify a set place of work at set times.

Now it is a basic principle that travel time to and from work is not working time. However, there is the potential trap for employers who look to have blended working. Because certain employees may be seen to be required to be in the workplace and may in future go to blended working or now may move to blended working where they will be part time in the office and part time at home or in a hub, it is important for employers to not fall into the trap which is there in the Tyco Case being case C-266/14.

Contracts of Employment will now need to provide that the place of work will still be the place of work but that employees may be permitted to temporarily work at home or in a different location.

The reason for saying this is that the last thing an employer needs to find is that an employee who is on blended working suddenly starts claiming that the time going from their home to the workplace is actually working time.

Now that might seem like a very small and insignificant point. However, it is small and insignificant points that sometimes give rise to an issue and particularly a working time case.

Going forward contracts are going to require significant additional clauses and effectively warranties by employees. There will also need to be clauses particularly for those who will be working from home or on blended working that they can be brought back into a workplace full time. There will be other issues to address as to whether the employer will want them back in the workplace full time.

The reason I am saying this is that you take the situation of a person who is working from home. You have had the premises checked. They comply with safety requirements. You do not have any GDPR issues where they are. They are currently living at home with their parents. An office has been set up in a spare bedroom and everything is fine. You then find that the employee moved into a two bed apartment and they propose setting up their work station right beside their fellow flatmate. Now there may well be issues relating to the workstation then being able to comply with Health and Safety but there may certainly be GDPR issues.

For this reason it is going to be necessary to make sure that contracts of employment allow employees to be called back into the workplace.

There will be other employees who the employer may never want back in the workplace. They are taken on to work remotely. The employer may never envisage them coming into the workplace other than for social functions. There will be some employers who will see this as an opportunity to get cheaper employees. Of course they then run the risk of an equal pay claim. This will mean designing contracts of employment to strip out certain functions which would allow a differential in pay. Now this may appear cold and callous. However, the reality is that those types of contracts are already being put in place.

Now it might seem unusual for a Solicitor who is or who has made his name, as an employee representative talking about putting in place contracts of employment which avoid a claim for equal pay under the Employment Equality Legislation. However, the reality of matters is that those contracts are being and will be put in place. If you take the position of a Solicitor who is going to be working full time at home it may well be that the contract will provide that they will not be “interfacing” with clients and will not be required to do so, that they will not be required to attend a Court or Tribunal (except in exceptional circumstances) where their colleague may very well have a contract providing that they will be interfacing with members of the public and clients and attending Court or Tribunals. As Solicitors we deal with the nuances of words and the contract of employment will be one of those issues which will have to be looked at carefully as individuals return or do not return to the workplace as to how

to structure them or how they will be structured at the request of our clients. Remote workers may soon become the “cheap labour”.

As we go through this paper it probably is going to identify issues which are going to have to be incorporated into contracts of employment or where contracts of employment are going to need to be amended where the employer is “facilitating” and I use that in the widest term possible, employees working from home or blended working whether at the request of the employer or the employee.

The remote or partly remote working employee

In looking at the issue of remote working I do think that 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. Now many will tell me that individuals are already working remotely at least part of the time but effectively getting back to basics will avoid the difficulties which are going to arise. The issues which need to be addressed will be;

1. Remote working is not working at the kitchen table. The HSA guidelines set out that a proper workstation must be installed. Even when individuals are working in a hub or co-working there will be a cost. It may well be a computer terminal, printer, scanner, desk, chair and lights.
2. Where a person is partly working remotely there will be the double cost. That will be the cost of a work station at home and in the workplace.
3. Some employers may see hot-desking as an opportunity to reduce the physical workspaces. However, that is going to create its own difficulties in relation to simple issues such as cleaning costs.
4. Home work stations 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 separate screen and keyboard.
5. When the pandemic started many employees working from home did so on a laptop. Now the EU Directive and display screen equipment means that laptops are not acceptable for prolonged work. Therefore there will now be a cost for employers to provide separate screen and a keyboard. Where a laptop may not become redundant for planning going forward probably it is going to be a desktop rather than a laptop which is going to be required.
6. Where there is no proper workstation set up that has been properly checked there is a real risk of personal injury claims. This will either be repetitive strain injuries, back injuries or worse. Eye injuries and

zoom fatigue may now become the new “whiplash” claims for PI Solicitor.

7. A challenge will be the suitability of homes for remote working namely;
   (a) Will the location comply with H&S requirements?
   (b) Many apartments, in particular, are not suitable for home workstations
   (c) We may need to see building regulations change to provide for sufficient space for at least one workstation. We have energy rating currently. Will we need to see workstation rating for homes going forward?
   (d) Where a home office is not practical for health and safety reasons no employer can consent to home working. This is going to create its own difficulties.
   (e) The option of giving employees the option of self-certifying is not an option because of the obligations on an employer under the Safety Health and Welfare at Work Act, 2005, as amended.
8. There will be the cost for the employee of working at home. Because the home will now be a workplace also the employer has an obligation to pay for heat. They will also be paying for lighting. Now that is going to be a difficulty in itself because you are going to have some employees that are in an A rated home and others in an E rated home. The heating costs of the area where they work will therefore vary.

These are some of the difficulties which employers are going to face.

Working at the kitchen table is just not allowed

The issue of workstations is being covered by another speaker here today. However, the issue that I am looking at is the practical issues which employers are going to have relating to setting up remote working. There is a significant cost. That cost cannot be passed to the employee. As the simple laptop is not going to be sufficient you now have this significant cost which employers will have.

That cost is not a once off cost that can be written off the year in which the expenditure is incurred. It is effectively written off over seven years. The cost of setting up a fully remote work station from a person’s home is going to be between €1,000 - €2,500. Let us assume it is simply €1,000. The employer will be able to write off only €150 year one.

This is going to be an economic issue for employers to address.

It might be believed that most employees will already have been properly set up. The sad reality is that many are simply working at the kitchen table or in a bedroom. Going forward, that just cannot continue. The reason for this is that the potential for personal injury claims is going to be significant.

Employers are now going to have the situation particularly for those who will be working blended hour in the workplace and at home that there will effectively two workstations and that is a cost in itself.

Hot-desking

Some employers are going to see hot-desking as an opportunity to reduce the floor area of building that they are operating in.

The difficulty with hot-desking is that effectively deep cleaning is going to be required if you are having employees using the same work station.

The further difficulty is going to be monitoring that and in particular dealing with issues such as simple matters of pens and staplers. These cannot be left just on the desk or workstation.

Suitable remote working locations

The issue of suitable remote working locations is going to arise in relation to particular matters.

The first relates to whether the building is suitable for a work station. Now again, there are creative opportunities even for the smallest apartments to put in place a work station. The difficulty would be often putting in two workstations where an apartment, in particular, is being shared.

The second issue will relate to GDPR. Again, my co-speakers will be dealing with this issue today but one of the significant issues is going to be for employers their obligation under GDPR and Data Protection. Where somebody is working from home the appropriate protections are going to need to be in place to deal with the risk of a GDPR or Data breach.

In dealing with the issue of Data breaches the issue it is going to arise as regards how those controls are put in place.

The IT industry is working in overdrive at the present time to produce a whole suite of services to employers to monitor staff. It covers everything from determining how long somebody is going to be at their workstation, when they start, when they finish, their productivity, whether they were working or not and even down to working out whether they have set up the workstation in such a way that just one particular key or two or three keys are being pushed all the time. Effectively they are putting in place systems on computers to monitor staff working remotely. The Regulations on a European Approach for Artificial Intelligence is a minefield of potential litigation and disputes.

I would see significant difficulties in relation to this. Firstly there is going to be the issue of whether it is covert or openly done. Covert surveillance is

very dangerous for any employer to get involved in and is normally not allowed except in exceptional circumstances.

The issues which are arising are ones which the IT industry is bringing forward effectively as a way to monitor staff who are not in the workplace. A lot of that monitoring itself is going to be illegal as regards the Data Commissioner who has problems even with temperature checking. At the same time there are going to be issues where the employer is going to have to monitor staff or will at a minimum want to monitor staff.

For example, take a person who is working at home compared with a person who is working in the office.

The person who comes to the office comes in in the morning, they turn on their computer. They may go for meetings. They may well go for lunch and the computer may remain on until they go home. Take then the position of somebody who is working from home. Will the employer want extra protections put in place to ensure that when an employee is not at their workstation that they log out? This may be particularly important where somebody is sharing a premise with somebody else. The employer in these situations is going to be hit with two issues. The first is the concern and the legitimate concern at that of making sure that there is not a Data breach which will occur when an employee is not at their workstation. The second issue is the issue of the privacy of the worker not to be overly monitored. The difficulty with this situation is that they are two conflicting and opposite sides of the same coin. There is no middle ground. When it comes to Data breaches the employer has an absolute responsibility. Monitoring the employee to make sure and to minimise the risk of a Data breach itself, may breach GDPR and Data Legislation in itself.

The solution may well be consent. The difficulty with consent is that the consent can be withdrawn. In the area of employment law I can see the difficulties that employers are going to be in if a Data breach does occur. Will they be able to discipline the employee? How are they going to be able to do this? Well it is going to mean that there is going to have to be significant and detailed policies relating to home working. They are going to have to have effectively line by line instructions as to what an employee does when they are working from home, the protections that they put in place and probably down to the fact that once they are not sitting at their work station that they are going to have to log out and log back in. Employees are going to have to be advised that a breach of data protection and these particular rules are going to be disciplinary matters in themselves. The difficulty with this, however, is how does the employer monitor it.

When it comes to workplaces very often a lot of employees will have very simple passwords. Certainly those working remotely are going to have to have more complex passwords. They are going to have to be changed more regularly. Computer systems may need to have in-built triggers that where there is no activity on the key board for a set period of time that the

computer will automatically close down. That causes Data and privacy issues in itself. You then may have the situation of monitoring that and it may be monitored and people may believe that the employee is not working. In fact the employee could well be working reading a document but just not on screen.

I have to admit that I am unsure as to how this issue is going to be addressed. The legislation relating to monitoring employees is very restrictive. There has to be a legitimate business aim. That has to be communicated to the employee but it is difficult to see that an employer can set up a camera or a system within the computer itself simple to monitor whether or not the employee is working. Yet the new EU Regulations may relax those rules for A1 but will the Data Protection Commissioner agree.

Of course I am going to be met with the argument that you have to have trust. Yes you do have to have trust. However, not every employee can be trusted to work. The systems that are put in place are going to have to apply to those employees who you can trust and those who you don't trust fully.

The issue of data protection in particular I see as the biggest threat to remote working in the long term. The potential claims against an employer for a breach are so significant that if a breach does occur employers may very well revert to a situation of bringing everybody back to the workplace. In addition, it may well be that the type of work that a person does depending on the potential risk of a data breach will dictate who is and who is not going to be able to work remotely.

Take the situation of an accountant's office. You have two employees. Both of them do farm tax returns. Both are also involved in dealing with cases where there would be tax evasion. The risk associated with a breach of a farm tax return is significant but in the normal course of events will not be as dangerous to the organisation as if there is a breach relating to a potential tax evasion case and the identity of the individual being disclosed whom they are working for.

In those circumstances, is it going to be that it will be blended working with people only working on those high risk files in the office or is it more likely that the high risk work will remain fully in the office with low risk work being done remotely. You then have the issue of who is going to be selected for working remotely, which will cause its own difficulties with employees, but also even where that can be resolved are you now in a situation that for career progression the person working in the office on the high risk cases where before they would have been dealt with equally between the two individuals is going to give that individual an advantage when it comes to promotion. At a very minimum it is going to mean that the individual working in the workplace, on those type of cases, is going to acquire significant additional expertise which will give them either the opportunity to move to other firms or a greater opportunity to get a promotion.

I am simply mentioning this at this stage for the simple fact that the issue of career progression and data protection which you might not think are interrelated may in fact be interrelated.

Certainly one of the issues which is going to arise for those who are working remotely is the likelihood of significant increased data access requests to employers to find out what controls are in place, how they are being monitored, how that monitoring takes place, who it takes place by and what the information is used for.

For employment lawyers the whole issue of data protection is now going to become a fertile ground.

The reason I say this is that the cases under data protection can go either to the High Court or the Circuit Court. There is no jurisdiction for the District Court. Therefore if there is any issue relating to inappropriate processing of data or any hidden processes those claims go to the Circuit Court. Because they go to the Circuit Court there is then the issue of Circuit Court costs.

Monitoring Working Hours

Now when I am talking about monitoring working hours I am not so much talking about monitoring the actual hours that the employee worked to make sure they worked their contractual hours but rather monitoring to see that the employee received their breaks under Section 11, 12 and 13 of the Organisation of Working Time Act and there was no breach of Section 15 relating to maximum working hours and also that the employee was not working outside their scheduled hours on the basis of some request from a more senior person in the organisation or client or customer contrary to Section 17 of the Organisation of Working Time Act.

The Organisation of Working Time Act 1997 and the Regulations made thereunder and in particular Section 25 (4) which puts the burden of proof in the absence of working time records squarely on the employer is going to be a significant issue which employers are going to need to address relating to maintaining records. The CJEU in case C-684/16 Max-Plank Gesellschaft determined that the Working Time Directive had direct effect.

They referred also to the Charter of Fundamental Rights of the European Union. The relevant Article of the Charter is Article 31 (2) which states;

"*1. Every worker has a right to working conditions which respect his or her health safety and dignity.*

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to annual periods of paid leave".

The CJEU has also effectively held that it is a matter for the employer (which would be in line with Section 25 (4) of the 1997 Act) to maintain and retain the said records. In particular in that case the CJEU held at paragraph 81;

"*It follows from the later provisions that a National Court hearing a dispute between a worker and his former employer, who was a private individual must apply the national legislation and ensure that, should the employer not be able to show that he has exercised all due diligence in enabling the worker actually to take paid annual leave to which he is entitled to under EU law, the worker cannot be deprived of his acquired rights…"*

This statement must be read in light of the Courts prior, but equally important statement at paragraph 46 of that judgement which stated;

"*In addition, the burden of proof in that respect is on the employer. Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, must be held as the loss of a right to such leave at the end of the authorised reference or carry over period".*

For annual leave you can insert daily and weekly rest periods along with maximum working hours. This goes back to an old case of C-484/04 Commission –v- United Kingdom where Advocate General Kokott stated at paragraph 6 of his Opinion that;

"*It is for the employer actively to see to it that an atmosphere is created in the firm in which the minimum rest periods prescribed by Community Law are also effectively observed. There is no doubt that this first presupposes that within the organisation as a firm appropriate work and rest periods are actually scheduled. In addition, it must however, be a matter of course within a business in practice, as well, that workers' rights to rest periods not only exist on paper but can effectively be observed".*

In May 2009 the CJEU delivered its Judgement in case C-55/18 referred to as the Deutsche Bank case which brought the employers duty to maintain proper records sharply into focus. The Court held that EU Member States must require employers to have objective, reliable and accessible systems enabling the measurement of time worked each day by each worker to be measured.

The relevant Regulations are the Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations, 2001 S.I. No. 473 of 2001. While that Regulation limits the provisions of Section 25 somewhat it still requires the employer to have electronic record keeping facilities and to maintain those records or alternatively effectively written hard copy records. Simply advising employees to maintain those records is not going to be sufficient. The employer is going to have to make sure that those records are checked and appropriate action taken to make sure that employees get their appropriate rest and break periods.

Working Time Records have been held to be data to which the employee is entitled.

Now, I fully accept arguments to be made under Section 3 (2) (c) of the 1997 Act that an exemption applies to;

"*A person, the duration of whose working time (including any minimum period of such time that is stipulated by the employer) is determined by himself or herself, whether or not provision for making such determination by that person is made by his or her contract of employment*".

Even when it comes to salaried partners in for example a Solicitors office that individual is an employee of the firm as was held in the case of Stekkel –v- Ellice 1971 1 WLR191.

The difficulty however is Article 17 of Directive 2003/88. Article 17 of the Directive must be construed very narrowly. In the article the exemption on which Section 3 is based actually only refers to;

"Managing executives or other persons with autonomous decision taking powers"

It is difficult to see how any employee can be exempted.

Now on that basis there is going to be the issue of employers having to maintain these working time records and having them checked.

In many businesses up to now it has been relatively straight forward. Individuals cane to work, there were set break times during the day including lunch breaks, and there would be a finishing time. The level of record keeping in Ireland is extremely low.

Unless those records are put in place and kept because now effectively the burden of proof is on the employer employees will have an opportunity to bring a claim which simply says "I did not get my rest and break periods". The burden of proof is going to be on the employer in those situations.

Now I anticipate that the WRC will seek to make the employee prove their case. The difficulty is if one of these case heads to the High Court or to Europe an even more restrictive provision will apply where the employer does not have the records. Applying the European Decisions and the Labour Court in particular are extremely competent when it comes to applying these, employers may well find themselves on the wrong end of a working time case.

The Physical Workplace

When it comes to the physical workplace itself we now have businesses reopening. The basic Health and Safety Authority advice remains at the present time pending vaccination and that is an issue I will deal with later on. Effectively, workplaces have to continue to operate the two meter rule. That will not apply where it is not practicable to do so and there is a risk assessment put in place and one metre will apply.

The difficulty with this is actually getting the numbers back into the workplace. The physical distancing rules alone are going to be that many employers will have to continue having some employees working remotely. For those who are coming back into the workplace the physical distancing is going to cause its own difficulties.

It is not simply a matter of having a policy or risk assessment document in place. It actually has to be monitored and applied.

For employers who get a complaint from an employee under the Safety Health and Welfare at Work Act 2005. If there is even the threat of any action against an employee for raising such an issue then that is a claim itself of penalisation to the WRC where up to two years wages or salary can be awarded.

At the same time employers are going to have the issue of the risk of an outbreak in the workplace which would mean individuals having to self-isolate effectively the business in many cases closing.

The solution may well be temperature checking or antigen testing. There will also be the issue of an employee who may or may not be a close contact of a confirmed Covid-19 case but is not displaying any Covid-19 symptoms. We have already have cases in the office of individuals contacting us about the legality of being compelled to submit to a test before being allowed on site.

There is an argument that an employer cannot compel an employee to undertake a Covid-19 test. The other argument is that there is a legitimate interest in protecting the business and the Health and Safety of other employees that such a test would be undertaken.

The majority of employees will probably agree to be tested where there is a reasonable basis for doing so. The problem is going to be where an employee does not submit.

Where an employee refuses to submit to testing it is unlikely that an employer is going to seek to invoke a disciplinary process. However, if the employee's job cannot be done from home you may have a situation where employers may say that they will not allow the employee on site. This is not forcing the employee to submit to a test but is effectively the counter argument that they will permit him or her to work on site when they have a

negative test. The issue then will be whether the employer can decide not to pay the employee for as long as they continue to refuse to undergo Covid-19 testing.

The difficulty is that most employers' contract of employment will have limited rights not to pay and where an employer makes the decision that an employee is to go home that is a decision of the employer and in those circumstances the employer under Section 5 of the Payment of Wages Act may actually be liable to pay. The argument will be that there has been a unilateral deduction from pay.

The next issue of course is going to be the GDPR issues. The employer will need to be able to identify a legal basis for processing of personal data under Article 6 of GDPR. There is an exemption for the processing of special categories of data under Article 9 of GDPR. At the present time there is no Government guidance or regulation compelling an employee to test or to submit to a Covid-19 test.

Section 31 of the Health Act 1947, as amended by the 2020 Act does have provision for the Minister to put in place mandatory vaccination but there is no requirement for mandatory testing.

Employers may look to rely on Article 6 (1) (c) that the processing is necessary to comply with legal obligations under Safety Health and Welfare at Work Act 2005 or under Article 6 (1) (e) that it is necessary to perform tasks in the public interest.

Again the issue is going to be the issue of consent and there is a concern that the Data Protection Commissioner even if the employee gives consent to ongoing testing that it may be regarded an invalid as a question will arise as to whether it was freely given and there will be the issue of the imbalance of power between an employer and an employee.

Employers will be put in the position of having to demonstrate that the processing of data by way of test results is proportionate. They will equally have to put in place sufficient safeguards to protect the personal data of individuals. These will be high tests to be met.

It is probably relevant to point out that the Data Protection Commissioner has adopted a narrow view of when temperature screening can be conducted in compliance with Data Protection Laws. Therefore it is likely that the Data Protection Commissioner is going to be even more restrictive when it comes to the issue of mandatory testing. Temperature screening is not intrusive. As more and more people get vaccinated and we get to heard immunity, if we ever to that, it will be more difficult for employers to put in place any form, of mandatory testing.

It would be my view that employers will need to be able to show the rate of Covid-19 in the wider community, possibly having to be assessed on a

weekly basis if there is going to be any form of mandatory testing and to be able to demonstrate that this is more efficient and effective in reducing the spread of Covid-19 in the workplace than other methods.

There is an exemption in Article 9 where it would include the suppressing of the spread of Covid-19 in the workplace. The difficulty with this is that under Section 52 of the Data Protection Act, 2018 that processing would need to be conducted by a registered medical practitioner.

What is clear going forward is that employers will need to conduct a thorough Data Protection impact assessment before introducing any form of mandatory Covid-19 testing. It should be pointed out that such an impact assessment is actually required under Article 35 GDPR. It is unlikely that employers can actually impose this and if employers are going to be considering mandatory testing then it is probably an issue that is going to have to be negotiated with the Unions or with employee representatives.

The reason I am raising these issues is that employers are going to be in a difficult position. Under the Safety Health and Welfare at Work Act an employer is obliged to take the necessary precautions to protect employees. So do employees have an obligation to protect their own and the health of others?

The difficulty is that Data Protection and GDPR are at odds with the Safety Health and Welfare at Work Act, 2005, when it comes to Covid-19 testing. You have the issue of the constitutional right to bodily integrity of the employee on one side and the issue of the requirement of the employer to have a safe place of work and to be able to open the business to the maximum number of employees returning to the workplace.

These are the two that will stand out. There is a third which is going to cause its own difficulties. That is those employees who will want testing for the purposes of them seeing their health being protected who will then be at odds with those employees who do not want to be tested. This has all the hallmarks of the potential for significant strife within a workplace between employees. There will be no doubt disputes between employees with some employees saying that they are not going to work with employees who have not been tested. That is going to create its own disciplinary issues. The employee so objecting is likely to do so under the Safety Health and Welfare at Work Act 2005 by raising a complaint and that puts the employer in a difficult position of putting that employee under a disciplinary process.

For those advising either employers or employees at the present time there is absolutely no guidance as to how this is going to be dealt with.

We have effectively a HSE opposition, if I can call it that, to antigen testing. However, in the UK you have a situation of employers being provided with

two free antigen tests per employee per week. There is no such support for business owners here in Ireland.

It is difficult to see how this circle is going to be squared without clear guidance from the HSA and the Data Protection Commissioner as to what testing can be done in what circumstances and when. The difficulty which employers and employees have is that our legislation was drafted at a time when we didn't have a pandemic but no effort has been made to put in place what is going to be needed to get workplaces open.

The reason I am saying this is that the 2 metre or even 1 metre rule with one way systems in offices, different groups going to canteens at different stages, lack of mixing between different groups of workers in the workplace is a regime in the workplace which is simply no going to make those workplaces work properly. The solution put forward is of remote working but in reality remote working will only work for organisations and not for all.

Mandatory Vaccination

Now I don't even know why I am even mentioning this as the minute that you mention this you end up in problems from those who are against vaccination. Those who are in favour of vaccination will normally stay quiet.

At the present time the issue of mandatory vaccination is not one that employers will be seeking to impose. The very reason for it is that not everybody has been offered a vaccine. I am therefore looking at a situation when everybody has been offered a vaccine and employers will be saying well everybody has been offered a vaccine, it is now safe to have the workplace open as it was previously and everybody back in the workplace. In the alternative at least a significant number of individuals back in the workplace who are able to mingle and move around in that workplace as they would have prior to Covid-19.

The current position is that there is no Government guidance or regulation compelling individuals to be vaccinated. A mechanism does exist under Section 31 of the Health Act 1947 -2020 which I have referred to previously but the history in Ireland has always been of voluntary vaccination rather than compulsory vaccination.

The health evidence which is coming out is that having individuals who are vaccinated and not vaccinated in the workplace will mean that the current infection control mechanisms of physical distancing and face coverings as just two examples will have to continue. In the absence of any form of compulsory regulation the argument is going to be made by employees that his/her constitutional right to bodily integrity is such that they can refuse to comply with the requirement of their employer to be vaccinated.

Section 8 of the Safety Health and Welfare at Work Act 2005 -2014 imposes general duties on employers to ensure the safety health and welfare at work of all employees.

While there is no legal basis for insisting that employees be vaccinated employers may well decide that they want to introduce such requirement for employees to gain access to the workplace.

So what is the position with employers who want to have vaccination?

The Code of Practice for the Safety Health and Welfare at Work Act (Biological Agents) Regulations 2013-2020 came into effect on 24 November 2020. The Regulations apply to activities where work is undertaken and there is existing or potential exposure to a biological agent. Covid 19 in November 2020 was identified as a biological agent.

I would have thought that this would have occurred earlier but it was in November 2020 that it was added to the Schedule. Where there is a specific biological agent a written risk assessment must be completed and there must be measures put in place to protect the health and safety of employees.

The Code of Practice helpfully assists employers by setting out;

- Where the risk assessment shows there is a risk to the health and safety of employees due to working with or exposure to a biological agent (which would include Covid-19), for which an effective vaccine is available (and they are now available) the employer must offer vaccination, free of charge to employees.
- In offering vaccination, employers are obliged to advise employees of the benefits and drawbacks of both vaccination and non-vaccination.
- Vaccination should only be seen as a useful supplement to the correct use of engineering controls, safe working procedures and instructions, information and training, and should not replace them and;
- The risk assessment should consider non respondents to vaccination or employees who do not wish to have a vaccination as additional control measures may be required.

Some employees will not wish to be vaccinated.

Therefore employers need to be careful of potential claims. These claim will probably come under the Employment Equality Acts 1998-2015. There are two main ones. This will be either a disability or the religious ground. Now in relation to a disability while a disability is broadly defined the issue will be whether the employee can say that they have a disability where they cannot be vaccinated. This will be in a tiny minority of cases and there are a minority of disabilities where a person cannot obtain a vaccine. In relation to religion and religious beliefs all the main churches and religions provide that vaccination is not something that is against religion.

Where an employee does not wish to be vaccinated then employers are going to have to look at the issue of redeployment or remote working. Enter claims for redundancy and Unfair Dismissal.

I would anticipate that there will be some employees who will refuse to say whether they were vaccinated or not (and they may well have been vaccinated), for the purposes of trying to negotiate effectively remote working or working from home which will be suitable to them or an exit. Where an employee refuses to get vaccinated the issue is going to be that using the disciplinary process is going to be extremely difficult.

On that basis are there going to be alternatives?

There is. And that is the Redundancy Legislation. The Redundancy Legislation may very well be put in place and used for the purposes of an employer determining that the work needs to be done in a particular way which will require individuals to be in close contact which will not be feasible where somebody is not vaccinated. Again, this is going to be an issue which is completed untested. However, it will be tested.

Again, there is going to be issues between employees who are vaccinated and who are not vaccinated. There will be employees who will again object to working with employees who are not vaccinated or who do not disclose that they are vaccinated. This in itself is going to create significant Data Protection and GDPR issues. You are also going to have the situation of employers where you have some employees who will say that they have been vaccinated and therefore setting up the workplace for those individuals who have been vaccinated and as regards the other individuals whether they have been vaccinated or not on the basis of whether they say they have been vaccinated or not or have refused to say that they have been vaccinated or not will be a separate group. No matter how you organise matters in those circumstances it is going to be clearly identified to everybody in the workplace who is and who is not vaccinated. Maybe putting it a different way there will be those who have said that they were vaccinated and will prove it and there will be those who are neither vaccinated or who have refused to say whether they 2were vaccinated in an alternate group. Again, there is going to be the question as to how employers square that particular circle without falling foul of the Data Protection Commissioner. So selection for Redundancy will be that more difficult

Competitive advantages

There is absolutely no doubt that there are going to be competitive advantages for workplaces that are fully vaccinated. While I previously referred to the issue of “No Jab No Job” an issue which I see arising is going to be “NO Jab No Entry”. No that is going to create its own difficulties but again there are very few disabilities where somebody cannot get a vaccination and there are very few religions where an individual cannot the

vaccine as being against their religious beliefs. It may well be reasonable for an organisation to have such a sign up but to exempt those who come within the disability of religions category subject to compliance with furnishing evidence of that disability or religious belief. The competitive advantage which those businesses will have will be take for example simply a hair dressers or a restaurant. The issue which may people will raise is whether they are happier going to a restaurant or hair dresser where everybody going in is vaccinated and where all the staff are vaccinated or going to one which has no vaccination clarification.

When it comes to the legal profession and Courts the reality is that without vaccination the Courts are not going to open the way that they previously worked. Social Distancing is quite difficult in those Court rooms and remote hearings, while they work well, are not the way forward for all types of cases. Therefore there will be pressure for vaccination or for individuals to be saying to a Court we are all vaccinated and therefore we should all be allowed in.

When it comes to travel for business the green pass which we are talking about will limit, to a certain extent, individuals travelling. At the present time it has been proposed that this would be either vaccinated or a negative test. As vaccination rolls out and is offered to everybody I fully expect to see the issue of vaccination becoming the green passport.

As an employment law Solicitor I was always trained on the issue of looking at the legislation, reading the legislation and applying that legislation by way of advice to clients or running a case. The difficulty which I see applying to Employment Law Solicitors is the same as is going to apply to our clients. There is no legislation. To the extent that there is legislation it is contradictory. We will be acting for employers who will want to reopen their business, get clients and customers back into their business and buying from them or buying their services and getting staff working together as they did prior to the pandemic. Of course there is going to be some that are going to be working remotely as part of that process. The difficulty is that we are in a situation where issues from how accomodation is going to be build going forward to the cost of setting up remote working, to the difficulties with testing and vaccination and the conflict between those who will be arguing on civil liberty grounds that individuals cannot be deprived of their right to earn a living because they do not wish to get vaccinated will have to be considered as to what is going to happen if a business cannot open without vaccination. I can leave it at this and say that one of the issues that is going to come up in this whole debate is how businesses reopen and if I take the simple concept of a hair dressers that had in February 2020 ten chairs where everybody would have been very close to each other they may now be moving to a situation without vaccination that they reduce to seven chairs. On that basis individuals will lose their jobs. There will then be the issue equally of those businesses which are renting premises being financially viable with reduced capacity without reduced rent. You then have the issue of landlords who are relying on the rent for a pension accepting a

reduced pension or alternatively where they have borrowed from the bank going back to the banks and looking for a reduction in repayment and with those investors seeing the value of their premises reducing.

There are no easy answers in relation to this issue of reopening the workplace. The biggest problem, as I see it, is the reluctance of the government and political parties to take the hard decisions that are going to have to be taken one way or the other.

If it comes to the issue of vaccination it is unlikely that they are going to be prepared to bite that particular bullet of directing compulsory vaccination.

At the same time, the issue of job losses because of lack of vaccination is one that they are unlikely to wish to address. The Government is unlikely to say to those who do not get vaccinated that that is their choice but that employers will have no liability to them if they go into the workplace, work normally beside other people, and contract Covid-19 that they will have no claim against the employer in those circumstances. Equally the Government has no plan to set out how businesses are going to be viable and operate with social distancing in place. Now that applies to everything from the Courts, to a Solicitors office, to hairdressers or a restaurant or any shop on the high street.

At the present time it would be my view that employment law Solicitors and Barristers who will be advising employers are effectively going to be operating to a significant extent in the dark.

That is neither good for employers or employees. It is not good for business. It is not good for opening up the economy. It is not good for creating or maintaining jobs.

What is certain is that there is going to be a considerable amount of litigation. That litigation is going to be expensive litigation. Employment lawyers are probably going to be very busy fighting for vaccination, against vaccination, for compulsory testing, against compulsory testing, for records having to be kept of working time, against them having to be maintained, for allowing employees to work remotely and against allowing employees to work remotely.

Effectively we have a perfect storm with no legislation and to a certain extent the WRC, the Labour Court and the Courts are going to have to make up the law and the practice as we go along. That may be a cynical view as a conclusion but unfortunately I think it is one that we are going to have to address and accept as something that we have to just deal with.

Right to Work Remotely

I deal with this at the end. The legislation has not arrived. How an employer refuses such as the 8 grounds in the UK may not apply here.

If it comes to suitable premises how will the WRC decide without an expert report? How ill an employee seeking remote working compete against an employer who produces an engineer's report that says the premises are not suitable?

Will cases of refused consent be treated like the Banded Hours cases so that no right exists until the WRC decides? So will an employee have to work for a year in an office before a case gets on?

If the WRC finds against an employer's objections such as H&S issues or Data breach potentials will they be indemnifying an employer if an employee suffers an injury or a data breach occurs? Unlikely.

Conclusion

My conclusion is that currently the whole area is a mess. It is a perfect storm about to erupt. It may well be that the increase in cases will be such that compared with what has been referred to as a Tsunami of Redundancies coming will actually be that these numbers of redundancies will unfortunately still arise but will be a trickle compared with the Tsunami of claims around remote working and getting individuals back to workplaces.

It might be said I am being negative but the lack of integrated thinking, guidance, and legislation from government is likely to be the major reason workplace disputes will escalate.

That is great for employment Lawyers, but bad for employers, employees, business generally and job retention and growth.