

Top Employer Queries in Ireland arising from COVID-19 shutdown – Part 2



Focus on
COVID-19
Coronavirus

The second and third week of the shutdown phase in Ireland saw the closure of more businesses, the enactment of more emergency legislation and the introduction of the Temporary Wage Subsidy Scheme, as more and more jobs are impacted by COVID-19.

The key legal development was the enactment of the Emergency Measures in the Public Interest (Covid-19) Act 2020 on 27 March 2020. As we look back over the key issues we have been advising on, the administration of the TWSS continues to dominate along with the challenges faced by employers in discharging health and safety obligations remotely and conducting employee processes from a distance.

What is the difference between the Temporary Wage Subsidy Scheme (TWSS) and the COVID-19 Pandemic Unemployment Payment (PUP)?

Pandemic Unemployment Payment	Temporary Wage Subsidy Scheme
Operated by the Department of Employment Affairs and Social Protection (DEASP)	Operated by the Revenue Commissioners
Introduced during the first wave of government measures responding to the impact of COVID-19 on employees, initially in the childcare, retail and hospitality sectors and is to remain in place for the duration of the COVID-19 crisis	Introduced on 24 March 2020 as part of a longer-term response to the COVID-19 crisis and is to remain in place until mid-June
The rate of payment has increased from €203 to €350 per week	Eligible employees will receive a maximum of €350 or €410 per week, based on average weekly earnings in January and February 2020
There is no employer eligibility criteria as the application is made directly by the employee to the DEASP. The application form requires some employer information, limited to the name of the employer and the date the applicant last worked and was paid by the employer	<p>The employer eligibility criteria is significant, and the application is made directly by the employer to Revenue. The employer must:</p> <ul style="list-style-type: none"> ▪ have been adversely affected by COVID-19 so that the employer expects a reduction of at least 25% in turnover/customer orders between 14 March and 30 June 2020, and cannot pay normal wages and other outgoings fully ▪ have the firm intention of continuing to employ the employee ▪ make best efforts to maintain employee income as close as possible to normal

Pandemic Unemployment Payment	Temporary Wage Subsidy Scheme
Available to employees who lost their jobs on or after 13 March 2020 and include those who have been laid-off, asked to stay at home and are not getting any money from their employer	Available to employees who (i) earn €76,000 gross or less per annum (ii) were paid by their employer during the period from 1 February to 15 March 2020 and (iii) were on their employer's payroll as at 29 February 2020
Available to independent contractors/self-employed who have ceased trading due to the pandemic	Available in respect of employees only
Employers cannot top up the payment, as it is only available to employees who are not in receipt of income from their employer	Employers are expected to make best efforts to top up the subsidy paid to employees

There is some overlap between the TWSS and the PUP in that both can apply to employees who have been laid off but the PUP also covers those employees who have been made redundant because of COVID-19. The PUP is an alternative option for employees whose employer does not satisfy the TWSS criteria or has chosen not to avail of the scheme, and is also an option for employees who earn in excess of €76,000 per annum and are therefore not eligible to participate in the TWSS.

Some employers are being asked by employees not to apply the TWSS to them as they wish to avail of the PUP in order to receive the flat rate payment of €350, instead of a lower payment under the TWSS. This may arise for example where an employee worked reduced hours in January and February 2020, perhaps due to being on maternity or other leave, which means that net pay for that reference period is lower than normal. Revenue guidance suggests that an employee in those circumstances can request not to participate in the TWSS and apply instead for the PUP.

Employees cannot avail of both the TWSS and the PUP. Employers must not therefore operate the TWSS in respect of an employee who is in receipt of the PUP. Revenue guidance suggests that an employee can cease availing of the PUP in order to avail of the TWSS (assuming the requisite eligibility criteria is satisfied) and vice versa.

Is the TWSS only applicable to employees who have been laid off and are no longer working?

No. The TWSS can cover employees who continue to work as normal, or on an irregular basis or reduced hours, perhaps availing of training or other alternative duties. This means that when employees have been laid off ([read our briefing for explanation of lay-off](#)) in circumstances where they are covered by the TWSS, their employer can request that they carry out work, which may be available from time to time.

Depending on the circumstances, this may involve working from home, perhaps on reduced hours and work may be limited to business development activities or participating in online training. We suggest that employers consider what duties and projects employees can avail of and try to make good use of this time so that employees remain engaged, focused, and ready to return to work.

I am availing of the UK's Coronavirus Job Retention Scheme- does this mean I am eligible for the TWSS in respect of Irish employees?

No. There are a number of significant differences between both schemes:

Key differences	TWSS	Coronavirus Job Retention Scheme
Declaration of employer eligibility	An employer must submit a declaration to Revenue confirming that it satisfies the eligibility criteria. This is part of the application process.	N/A
Eligible employers	An employer must satisfy certain eligibility criteria to demonstrate that it has been adversely impacted by COVID-19.	There is no requirement for an employer to demonstrate any financial hardship.
Eligible employees	The scheme applies to all eligible employees including employees who continue to work as normal, are working reduced hours, or have been laid-off and are not working at all. Employees can continue to work as normal whilst their employer avails of the scheme.	The scheme applies only to employees who have been furloughed (placed on a temporary leave of absence.) Generally, employees cannot carry out any work during this time.
Subsidy and threshold	The scheme subsidises employee wages up to a maximum of 70% (with weekly payments capped at €350 or €410). The scheme does not apply to employees who earn in excess of €76,000 gross per annum.	The scheme subsidises employee wages up to a maximum of 80% (with monthly payments capped at £2,500). There is no threshold applicable to employees who are deemed to be higher earners.
Employer top-up payments	The legislation provides that employers must make “best efforts” to pay employees some of their wages and this is a condition of eligibility. Guidance from Revenue has confirmed that employers are not required to top up wages but we suggest that where possible, employers make some efforts to top up wages (in light of the potential penalties outlined below). Employers should at a minimum consider whether they have the capacity to top up employee wages and retain documentary proof of the decision making process in this regard.	Employers have been encouraged to top up employee pay but this is not a requirement under the scheme.
Publication of employers	A list of names of employers who have availed of the scheme is to be published on the Revenue website.	There does not appear to be any plan to publish the names of employers who avail of the scheme.
Penalties	Penalties may apply to an employer who “knowingly or wilfully” delivers any incorrect return or statement in connection with the declaration as to the impact of COVID-19 on its business, or who abuses the scheme in some other manner.	The Government has indicated that it will retain the right to retrospectively audit all aspects of the scheme with scope to claw back amounts claimed fraudulently or in error.

My employees have never worked from home before – what steps do I need to take from a health and safety perspective?

With the closure of all businesses, bar those on the list of essential services ([read our briefing on those services](#)) unprecedented numbers of employees are now working from home, many for the first time. Employers continue to owe their employees a duty of care, regardless of where they are working, but that duty needs to be considered in light of the very good health and safety rationale for requiring employees to work from home during the COVID-19 outbreak.

Health and safety law requires employers to carry out a risk assessment of workplaces (wherever they are located, including workplaces in the home) to identify and minimise risks to which their employees may be exposed. It is obviously not feasible in the circumstances for employers to carry out a physical risk assessment of employees' work places but employers can require employees to fill in an online assessment. Employers can also provide practical guidance to employees on good working practices such as setting up a safe and ergonomic working environment and taking breaks and sticking to regular working hours. Regular communication with employees is key to keep employees engaged, to boost morale and to ensure employees have an outlet to raise any issues.

Employers should also consider whether it is practicable to extend their insurance policy to include cover for any injury or damage that may be suffered by employees working from home.

How can I manage employee processes like performance improvement plans, investigations, disciplinary and grievance issues when employees are working from home?

- These processes can be carried out where employees are working remotely and in many cases should be carried out to avoid delay. As with many elements of work practices at this time, such processes will need to be adapted.

- Performance improvement plans can commence or continue, but consideration should be given to adapting the requisite targets or key performance indicators. For example, reducing targets or perhaps pausing a performance improvement plan for a week or so to provide the employee with the opportunity to adapt to working remotely may be necessary. In a similar vein, it may be necessary to pause probation periods if an employee cannot be assessed as normal during this time.
- Other processes can be adapted and conducted via email/phone/video conference as applicable. For example, a disciplinary meeting and any subsequent appeal can be carried out by phone or video call, along with an exchange of emails to ensure that the employee has had every opportunity to participate and submit all relevant information to the decision maker. The employee's companion and a note taker can be present on the call.
- Employers should be mindful that employees may be experiencing an increase in stress levels, juggling increased childcare responsibilities and other personal commitments, and may be finding it difficult to adjust to working remotely. All of these factors need to be considered so that any necessary adjustments can be made to a process, including extending timelines, ensuring regular support from management, human resources and perhaps an Employee Assistance Programme or occupational health. The key principle of reasonableness, which underpins all dealings an employer has with its employees remains unchanged during these times and will be the standard employers are benchmarked against in any future complaint.

For further information please contact [Brid NicSuibhne](#), Associate or any member of the A&L Goodbody [Employment](#) team.



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