A&L Goodbody

Exiting Lockdown: *Time for employers to take action*

Following the announcement of the Irish Government's 'roadmap' for lifting lockdown restrictions, the Return to Work Safely Protocol ("**the Protocol**") has been published in the past few days by the Department of Business, Enterprise and Innovation.

Focus on
COVID-19
Coronavirus

The Protocol contains practical guidance for employers on reopening their workplaces at a time when the spread of COVID-19 has been successfully suppressed but not extinguished. The Protocol is the result of the collaborative effort by the Health & Safety Authority (HSA), the Health Service Executive and the Department of Health and was developed following discussion and agreement at the Labour Employer Economic Forum. The Protocol is non-exhaustive, and will likely be revised and added to over the coming weeks as public health advice is updated.

In this briefing, our employment and health & safety teams highlight the key provisions of the Protocol and outline the steps employers should be taking now to prepare for the new normal. While the Protocol has not been issued under a statutory instrument, compliance with the Protocol has been described by the Minister for Business, Enterprise and Innovation as *"mandatory"*, so for those employers contemplating reopening over the coming weeks, now really is the time to take action.

Employer's COVID-19 Response Plan

Under the Protocol, employers must have a COVID-19 response plan in place. This plan needs to be developed in line with an up to date occupational health and safety risk assessment and safety statement. It must include a plan to deal with a suspected case of COVID-19. It must also contain contingency measures to address increased rates of worker absenteeism and implementation of the measures necessary to reduce the spread of COVID-19, which may involve changing work patterns. Being nimble and adaptable is key – employers must be able to respond quickly and alter processes where gaps are identified. Importantly, the Protocol provides that the response plan should be developed in consultation with workers and communicated once finalised. In this regard, it will be important to take account of the employment law considerations that arise in connection with any proposed change to working patterns/hours and, specifically, of the need to obtain employee consent to any material changes to their terms and conditions of employment.

Lead Worker Representative

The Protocol provides that employers must appoint at least one representative who will oversee the implementation and compliance with the employer's response plan. Larger employers will be expected to appoint multiple representatives proportionate to the size of the business. The Protocol does not contain a rule of thumb on representation (e.g. one representative per 100 employees) so it is up to each employer to determine the number of representatives they believe are required to fulfil the worker representative mandate detailed in the Protocol.

The representative's role is primarily to work collaboratively with the employer to assist in the implementation of safety measures and to monitor adherence to the measures to prevent the spread of COVID-19. The Protocol provides that employers will also communicate with safety representatives / the health and safety officer. Depending on the scale of business operations, the appointed lead representative may well be the health and safety officer. However, if operations are such that a lead representative is required in a number of different departments within a business, then those representatives will have to communicate closely with the health and safety officer to ensure the effective implementation of changes to workplace activities.

Return to Work Form and Training

The Protocol obliges employers to develop a pre-return to work form which must be issued to employees to complete at least 3 days prior to their return to work. This form should ask employees questions such as whether they have had COVID-19 symptoms in the preceding 14 days and whether they have had contact with individuals diagnosed with the disease. Employers will need to consider the data protection implications of processing this special category personal data and be sure to have associated protocols in place to ensure compliance with the Data Protection Act.

Employers must also provide induction training for all workers. This training should include an overview of the latest up to date public health advice; what to do if they develop symptoms; how the workplace is organised to address the risks; the response plan and the points of contact. It seems there is ample scope for employers to design and implement their own training provided it covers these bases and we anticipate that many employers will introduce digital solutions, not least to reduce the need for on-site training of potentially large groups of staff. If an employer rolls out digital training, it is important an electronic log is kept of those who have received the training for record keeping compliance purposes.

Temperature Checking

A notable feature of the Protocol is the expectation that employers will conduct workplace temperature checks on employees in line with public health advice and that employees will agree to such checks being undertaken. While the Protocol does not address the complex employment and data protection considerations that arise in connection with mandatory workplace temperature testing, it is clear that temperature testing by employers is likely to become a feature of the new modern workplace. As it currently stands, there is no public health advice that requires employers to conduct mandatory temperature checks on employees, other than in healthcare and residential care settings.

We recommend that employers considering introducing temperature testing as a matter of course ensure such testing complies with GDPR and is informed by public health advice once introduced.

Sick leave, Working from home and 'At risk' employees

The Protocol recommends that employers review and revise existing sick leave policies. While no essential changes are identified in the Protocol, employers would be well advised to ensure their current policies take account of the availability of the COVID-19 illness benefit, address company sick pay for COVID-19 related absences and specifically provide for a scenario where an employee has a suspected but not confirmed case of COVID-19 (for example, where an employee is temperature tested at work and their temperature exceeds 38 Celsius).

Employers should allow workers who can work from home to continue to do so and ensure that a working from home policy is introduced. If employers have a pre-existing policy, it should be revised to ensure it is fit for purpose. More generally, employers will need to more carefully reflect on the health and safety considerations that arise in connection with having a remote workforce and we expect increased HSA vigilance in this area in the coming months.

The Protocol emphasises that those employees in 'at risk' categories should ideally be accommodated in working from home and only where they "cannot" work from home should these employees attend the workplace. Where they do attend, an employer must provide them with preferential support to maintain a physical distance of two metres. In treating workers differently depending on characteristics such as their health or age, employers need to be alive to the potential discrimination issues that can arise. Effective consultation with those affected and the assessment of objective reasons justifying any adverse differences in treatment will be an important factor, prior to implementing measures in respect of 'at risk' workers.

Personal Protective Equipment ("PPE")

While the use of PPE does play a role and can help prevent some exposure to COVID-19, the Protocol provides that it should not take the place of other preventative measures, such as hand hygiene, respiratory hygiene and physical distancing.

Employers should first conduct a thorough COVID-19 specific risk assessment to identify the nature of the risks which their employees will be exposed to, work out how to mitigate those risks without needing PPE, and only then look at what PPE is necessary/feasible to further limit those risks to achieve the required standard. If the workplace can be adapted to facilitate social distancing, for example through the use of physical barriers (e.g. glass or plastic barriers as used in certain supermarkets), limitations on the number of people who can enter any particular space at any one time and the provision of hand sanitizer and washing facilities, it may not be necessary to provide PPE.

In other workplaces, it may be essential to provide PPE in the form of gloves, face masks and/or suits to employees in order to ensure their health and safety and that of others who may be affected, to the fullest extent reasonably possible.

Ultimately, whether and what PPE is required will depend on the specific workplace, and the risks which arise from that workplace after all other precautionary measures have been taken.

Ultimately, if PPE is to be used, employers will need to be satisfied that it is of the requisite standard.

Physical Distancing

The Protocol obliges employers to provide for the minimum recommended social distance of two metres in the workplace. The Protocol suggests ways of achieving this, including:

- Implementing a no handshaking policy
- Organising workers into teams who consistently work and take breaks together
- Considering closing canteen facilities, or staggering use
- Conducting meetings remotely as a default.

Where two metres social distance cannot be ensured, alternative protective measures should be put in place, such as:

- Physical barriers, such as clear plastic sneeze guards
- Use of face masks in line with Public Health Advice

Data Protection Law

Somewhat surprisingly, the Protocol makes no reference to the need to comply with data protection law when adhering to the Protocol. This does not mean that employers have *carte blanche* when it comes to processing employee personal data and, given compliance with the Protocol will involve the processing of employee health data, it is essential that employers have regard to their data protection obligations when designing their own bespoke return to work protocols.

The Data Protection Commission has made it clear in its guidance that data protection law does not stand in the way of the provision of healthcare and the management of public health issues. Measures taken need however to be necessary and proportionate. Employers must be able to identify a legal basis for the processing of any personal data under Article 6 of the GDPR, and where an activity involves the processing of health data (as temperature checking does), they must also identify an exemption under Article 9

of the GDPR. In its guidance on data protection and COVID-19, the Data Protection Commission noted: "In circumstances where organisations are acting on the guidance or directions of public health authorities, or other relevant authorities, it is likely that Article 9(2)(i) GDPR and Section 53 of the Data Protection Act 2018 will permit the processing of personal data, including health data, once suitable safeguards are implemented. Such safeguards may include limitation on access to the data, strict time limits for erasure, and other measures such as adequate staff training to protect the data protection rights of individuals."

While compliance with data protection law is perhaps implicit in the Protocol, we recommend employers are far more explicit in how their own return to work protocols comply with data protection law and update data privacy notices and data protection policies as necessary in this regard.

Workers' obligations

Consistent with the Safety, Health and Welfare at Work Act 2005 ("**the 2005 Act**"), the Protocol makes clear safety at work is a two way street, with employers and employees alike responsible for ensuring safety in the workplace. The Protocol repeatedly emphasises that a collaborative approach is essential to achieve success and maximum buy-in. Workers' responsibilities include making themselves aware of the signs and symptoms of COVID-19 and monitoring their own wellbeing; self-isolating and reporting to managers if they display symptoms; along with completing and returning the pre-return to work form and participating in training and temperature testing once introduced.

Compliance

The Protocol does not directly address enforcement measures and is drafted in a way that is focussed on assisting employers with a return to work. Minister Humphries has however cautioned that the HSA will be monitoring compliance and will shut down workplaces in cases of serious or persistent non-compliance.

The primary obligation under the 2005 Act is for employers to *"ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees."* Employers must be able to demonstrate that they have done all that was reasonably practicable and that to do more would have been grossly disproportionate to the risk. While there is no expectation that employers will be able to guarantee that staff do not contract COVID-19 at work, the 2005 Act requires employers to introduce specific health surveillance and protection measures in order to discharge their obligations which are specific to their particular context and workplace.

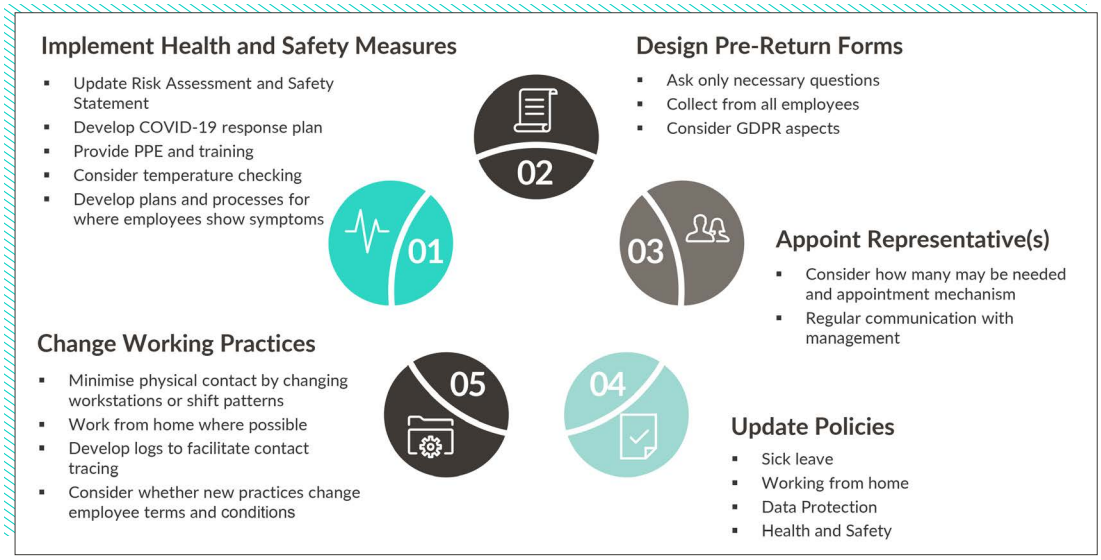
Any decision by the HSA on whether to prosecute will be informed by an assessment of what measures an employer put in place to protect employees and their culpability for an employee contracting the virus. That will not always be clear-cut. In many instances, and without effective contact tracing, it will be difficult to establish whether an employee became infected with COVID-19 at work, or elsewhere.

Failure to implement appropriate health and safety measures carries serious legal risks not just for the company, but also its officers. The consequences vary and any penalties which may be imposed would depend on a variety of factors, such as the nature of the harm suffered, historic compliance record and the existence of any mitigating circumstances. The upper regions of sanctions under the 2005 Act include a fine of up to €3m and/or two years imprisonment, per offence, on criminal conviction. There is further risk in that the company's directors, managers or officers can be prosecuted personally where it is shown that they have managed health and safety inadequately.

Employers should expect that worker representatives and employees themselves will also be monitoring compliance with the Protocol. Employers would be well advised to be receptive to employee feedback on compliance and remember that workers can raise protected disclosures about health and safety related concerns to third parties such as the HSA.

Action Plan

We recommend employers develop their own return to work action plan now informed by the Protocol. Key tenets of that plan include:



While the Protocol contains useful guidance for employers and workers on reopening their businesses and returning to work, there are important associated legal risks and requirements, which will need to be kept under review as employers adjust to operating in a materially different environment to the one they are used to.

For tailored advice on compliance with the Return to Work Safely Protocol, please do not hesitate to contact any member of the Employment or Health & Safety teams.

We will continue to provide regular updates for employers on return to work considerations as well as all other COVID-19 related developments. Please regularly check the A&L Goodbody COVID-19 Hub to ensure you are up to date with the latest developments.