

EMPLOYMENT

Right to request remote working - *All bark but no bite?*

Following on from the sudden lifting of many public health restrictions, and amongst a flurry of media attention arising from reports of employees being overwhelmingly in favour of continuing to work from home, the draft scheme of the Right to Request Remote Working Bill 2022 was published this week.

The aim of this proposed legislation is, to use the words of the Minister for Enterprise, Trade & Employment Mr Leo Varadkar, “to get to a position whereby remote working/home working becomes a choice and that employers facilitate that [choice] provided the business gets done”.

11 MIN READ

In this update, we look at what the proposed legislation will mean for employees and employers and conclude that, in its current form, it leaves employers very much in the driving seat when determining whether to accommodate a remote working request. Many commentators have already called for this imbalance to change and it remains to be seen whether it will when the draft Bill is published and debated in the coming weeks. We will keep you updated on any significant developments but, for now, we recommend employers take heed of this development and place decision making on future hybrid working arrangements within their organisation at the top of their HR agenda.



General Scheme – the main points

- Employees have not been given a general right to work remotely
- Employees will have a right, via a prescribed process, to request a remote working arrangement, either full time or part time (**Remote Working Request**)
- The Remote Working Request must include the proposed number and times of remote working days and a self-assessment of the suitability of the proposed remote work location for the employee's role. The General Scheme refers to data protection, confidentiality, internet connectivity, ergonomic suitability and equipment requirements as issues which may be considered by the employee in his/her self-assessment
- A Remote Working Request is available to all employees who have six months service with their employer
- An employer must respond to a Remote Working Request within a 12 week period
- An employer can refuse a Remote Working Request in whole or in part
- Where a Remote Working Request is refused, the employer must provide the employee with a written statement of the grounds or reasons for refusing a request (**Refusal Grounds**)
- An internal appeal process is recommended as best practice for all Remote Working Requests that are refused. The General Scheme does not expressly direct employers to put an appeals process in place but rather assumes that this will be done and there are no consequences for employers who do not put an appeal mechanism in place
- The General Scheme does not address the health and safety aspects of remote working, but does state that the 12 week response period to a Remote Working Request allows for the engagement of a health and safety consultant (presumably by the employer)
- Where an employer has responded properly, but has refused a Remote Working Request, the employee will have to wait 12 months before submitting another request, unless he/she moves to a new role
- An employee is protected from penalisation by his/her employer which arises as a result of the employee's Remote Working Request
- Employers must have a Remote Working Policy in place to inform employees of the process to follow when making a Remote Working Request
- A Code of Practice will be published which is intended to supplement the legislation

Reasons why a Remote Working Request may be refused

There will, in many instances, be good business reasons as to why an employer refuses a Remote Working Request. A number of reasons are included in the General Scheme as business grounds:

1. The nature of the work not allowing for the work to be done remotely
2. Cannot organise work among existing staff
3. Potential impact on quality
4. Potential negative impact on performance
5. Planned structural changes
6. Burden of additional costs, taking into account the financial and other costs entailed and the financial resources of the employer's business
7. Concerns regarding the protection of business confidentiality or intellectual property rights
8. Concerns regarding the suitability of the proposed workspaces on health and safety grounds
9. Concerns regarding the suitability of the proposed workspaces on data protection grounds

10. Concerns regarding the internet connectivity of proposed remote working location
11. Inordinate distance between the proposed location and on-site location
12. If the proposed remote working arrangement conflicts with the applicable collective agreement
13. Ongoing or recently concluded formal disciplinary processes

The biggest challenge for employers in refusing Remote Working Requests will be the inherent difficulty in relying on such reasons in circumstances where employees have, in many instances, been very successfully working from home for almost two years now with little or no adverse impact on output or performance.

Other factors (not referenced in the General Scheme) such as staff connectivity and morale, the promotion of collaboration, knowledge sharing and so on, are all legitimate, rational and valid reasons as to why an employer may wish to limit the number of employees working remotely or the duration they do so. However, it seems clear from the General Scheme that where remote working is not adversely affecting business performance or a company's bottom line, it is going to be harder to justify

the refusal of Remote Working Requests.

Survey after survey has reported that the vast majority of employees wish to continue some form of working from home arrangement, with the [recruitment website Indeed](#) reporting that out of 1500 employees recently surveyed, 56% stated that they would only apply for flexible roles or roles that would allow them to work remotely.

Employees are therefore likely to vote with their feet to the extent that remote working will become a recruitment/retention tool, or barrier, as the case may be.

Can an employee appeal a refusal of a Remote Working Request?

An internal appeal mechanism is recommended and should be included in an employer's Remote Working Policy.

Of particular note (and surprise to many commentators) is that the General Scheme does not provide for a right to challenge an employer's decision to refuse a Remote Working Request before the Workplace Relations Commission (**WRC**).

This is confirmed in the explanatory notes accompanying the General Scheme which state that *"the right to make a complaint to the*

WRC... is not intended to extend to a right to complain in respect of the substance or merits of an Employer's decision to decline a request."

In the context of some stakeholders calling for an absolute right to work remotely (at the election of the employee), this aspect of the General Scheme is likely to be criticised. It will be interesting to see if the position evolves as the draft Bill makes its way through the legislative process, particularly as the current position is somewhat at odds with the statement made by the Minister when introducing the General Scheme that *"employers will have to give a solid reason that stands up"*. The fact the Minister also added that while that requirement may not be clear from the General Scheme it *"certainly will be clear in the final legislation when it's published"* suggests that employers will not be immune from scrutiny by the WRC when it comes to their decision making on refusing Remote Working Requests.

The Code of Practice will provide more detail on what is expected of employers in considering and accommodating Remote Working Requests. An employer's failure however to follow a Code of Practice does not constitute a breach of a legal obligation in itself (i.e. an employee cannot take a



claim against his/her employer for not adhering to a Code of Practice) but would be considered by the WRC in its consideration of other claims. For example, an employer's refusal to facilitate an employee's Remote Working Request could be a key feature of a constructive dismissal claim, a trade dispute under the Industrial Relations legislation, or a disability claim under the Employment Equality Acts.

What complaints can employees bring to the WRC?

In its current form, the General Scheme sets out a mechanism for employees to complain to the WRC in limited scenarios where an employer (a) has not made a decision as outlined above in response to a Remote Working Request; (b) has not provided the Refusal Grounds and/or (c) has incorrectly deemed a request for remote working to be withdrawn by the employee in certain circumstances.

If the WRC finds in favour of an employee, it can direct the employer to remedy the fault. For example, an employer could be directed to respond to a Remote Working Request in circumstances where it has not done so. The WRC can also award compensation to an employee, capped at four weeks remuneration.

Action points for employers

The Right to Request Remote Working Bill 2022 is expected to be enacted by the Summer, at which point employees can start submitting requests pursuant to a statutory right. However, as many employers begin the process of getting their workforce back into the workplace over the coming weeks and months, it can be expected that employers will receive Remote Working Requests well before the right to do so is on the statute books.

Given the various false dawns employers have experienced in preparing for a return to the office over the past while and the realities of managing employees remotely, it is likely that most employers will have already put serious thought into the future of their workplace, with discussion and consultation and consideration of remote working arrangements already happening.

While clarity is awaited on where the government lands on the right to request a remote working arrangement and how onerous or otherwise the obligation to accommodate this request will be on employers, there are certain actions that an employer can and should be taking now in advance of this new statutory right becoming law:

- Review and assess what impact (positive and negative) remote working has had on the business over the last two years
- Actively consider and identify areas of the business or role types that may or may not be amenable to remote working on a longer term basis
- If certain roles or functions are not amenable to remote working, pinpoint why not (by reference to the reasons in the General Scheme or otherwise)
- If certain roles or functions are amenable to remote working, consider the extent to which employees occupying those roles may work remotely, and the consequences and parameters of that
- Consider engaging with employees to understand the appetite for remote working (and the preferred options around how that might be structured)

Start preparing a policy which outlines how Remote Working Requests are to be made and how decisions on those Requests will be decided upon, to be finalised and rolled out to employees once the statutory requirements are clarified.

For further information relating to this topic, please contact [Brid Nic Suibhne](#), associate or any member of [ALG's Employment team](#).



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