

Ensuring a safe return to work Employees and Covid-19 Vaccine

by Derek McKay

There has been significant commentary in relation to the Covid-19 vaccine roll-out programme in Ireland with most recent announcements detailing that the Government is confident that 82% of the adult population will have received the first of their jabs by the end of June and anyone who wished to receive the vaccine will have done so by September. A considerable task but achievable if there are no further delays.

This is a very welcome message for most, if not all, businesses as it is crucial to get mass vaccination to ensure we have a successful and safe reopening of the economy, particularly within the hospitality and related sectors for the summer season.

Based on the reports we're getting from Government, and on the prioritisation of those receiving the vaccine, we expect to see the vast majority of healthy adults receiving the vaccine over late summer and early autumn. Thus, providing some optimism for employers who can start planning a return to the workplace.

Working with this date in mind, it gives ample time for employers to ensure a safe return to the workplace but a key question for employers relates to 'how or can they ensure employees are vaccinated?' Also, what can they do to ensure the health and safety of their workforce?

Provide a safe workplace

Under the Safety, Health and Welfare at Work Act, it is the responsibility of the employer to provide a safe working environment for employees, so it is not unreasonable that an employer would want their workforce vaccinated. The Work Safety Protocol was introduced in November 2020 (an enhanced version of the original Return to Work Protocols launched in May 2020) and it is essential that all employers ensure they are fully implemented if they intend to

have employees returning to the workplace, subject to the restriction levels in force. However, while it is highly recommended that everyone receives the Covid-19 vaccine, it is not mandatory in Ireland and a person's fundamental right to bodily integrity is covered under the Irish Constitution.

This leaves employers in a potentially difficult situation; while seeking to ensure a safe workplace, they cannot force employees to get vaccinated and it is highly unlikely that the Government will introduce any laws stating employees are obliged to take the vaccine. So, what are the main considerations for employers?

Assess the risk

Under the Safety, Health and Welfare at Work Act, an employer must carry out a risk assessment of the workplace and any potential risks that have been identified must be addressed and The Work Safety Protocol should be adhered to in all workplaces. It is important to note that scientists are still not clear on whether or not the vaccine prevents the spread of Covid-19, so it is important for employers to ensure that all employees follow the safety protocols that are put in place, whether they have been vaccinated or not.

Equally, employees have responsibilities under the Act to work with their employer to protect themselves and their colleagues from potential risks; this could

reasonably include the risk of Covid-19 infection. Employees must adhere to all guidelines and protocols implemented by their employers.

Communication is key; while employers cannot force their employees to get vaccinated, they can communicate out the advice from government and the HSE.

Avoid potential discrimination

Employees have protections under the Employment Equality Acts 1998 – 2015 from discrimination on nine grounds, including religion, age and disability. An employee may decide not to get the vaccine for a number of reasons that would come under these specific grounds, such as a medical condition or their religious beliefs. Any mandate by an employer that employees need to take the vaccine could constitute discrimination under the Act.

Managing the risk with employees who don't get vaccinated

Understanding an employees' concerns is important and finding solutions that meet the business needs without infringing on employee rights is crucial in managing an employees' integration back into the workplace. Extending the term of remote working may be an option but this may not be feasible for all sectors or may cause other unintended consequences.

In any case, employers need to think carefully about any action they take, and the potential legal consequences associated with these actions.

Data protection concerns

As part of assessing the risks, employers will naturally want to know who has or hasn't been vaccinated before getting employees back to the workplace. In order to process personal data, there must be a legal basis to do so, the grounds for which are set out in Article 6 of the General Data Protection Regulations. While employees are not obliged to provide personal medical information in the main, employers may seek vaccination information on the basis that they are meeting their legal obligations under the Safety, Health and Welfare at Work Acts. Realistically it will be up to individual employees to volunteer this type of information to their employer.

If employees volunteer information about whether or not they have been vaccinated, employers should take care not to disclose to other employees who have or have not been vaccinated.

Work-related and leisure travel

At the time of writing, the European Commission was considering proposals for the introduction of a Digital Green Card, or vaccine passport, for travel within the EU. Regardless, anyone travelling must follow the public health guidance and rules at the time of travel.

Any travel, whether personal or business, should be limited if at all

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possible. In fact, given the restrictions that have been in place for over a year, many businesses have turned to virtual meetings, events and conferences as the norm.

If an employee is returning from a holiday from a country badly impacted by Covid-19, they are required to follow public health rules relating to that region and must take any quarantine into consideration when booking time off. This may have implications for their availability to attend for work upon their return.

Remote working – what happens next?

As workplaces begin to reopen, a consideration for many employers will be a potential influx of requests to work remotely. The Government has signalled its support for remote working through its National Remote Working Strategy and ambition to have 20 percent of public servants working remotely by the end of the year.

Many who have been working remotely for over a year may expect to have the same flexibility when it comes to a full reopening. Unless previously agreed, remote working is being done so on an interim basis. How employers manage requests to work remotely in the future is going to be dependent on the business needs. Caution should be taken as any permanent decision for remote working may set a precedent.

Employers need to clearly establish what their policies are in relation to remote working to avoid confusion or challenges. There are also other consequences for employers to consider, particularly for employees who are working outside the country, such as employment tax, statutory employment rights, data protection and immigration.

Remote working is a permanent fixture in the employment landscape and while it presents some tough challenges for employers, developing innovative strategies to successfully navigate the challenges should be in sharp focus. Each sector is going to be different in how it effectively manages remote working and the

evolving employment landscape. But it is important that employers meet their responsibilities under employment legislation and prepare for future working practices.

Conclusion

Given the vast majority of the working population won't be returning to the workplace until much later in the year, it is hoped that the vast majority will have taken up the offer of vaccination. However, planning and communication are key to ensuring a smooth transition when the time comes.

Ensuring health and safety policies and procedures are updated, robust risks assessments are carried out and adhering to the Work Safety Protocol are key to getting people back to the workplace.

Be mindful and respectful of an individual's right not to get vaccinated and plan accordingly by offering other working arrangements where appropriate. And avoid a situation that may constitute discrimination, leading to legal issues.

And, finally, keep a watching brief on the national vaccination programme and the public health advice to assist in proceeding safely with a return to the workplace.

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