

LAW SOCIETY SUBMISSION



PRELIMINARY OBSERVATIONS ON THE NEED FOR FURTHER GUIDANCE ON REMOTE WORKING

DEPARTMENT OF BUSINESS, ENTERPRISE AND INNOVATION

07 August 2020

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

- 1.1 The Law Society of Ireland ('the **Society**') welcomes the opportunity to participate in the consultation on the need to further develop Remote Working Guidance for the benefit of both employers and employees, which is being carried out by the Department of Business, Enterprise and Innovation ('the **Department**').
- 1.2 Our Employment and Equality Law Committee has provided observations and recommendations on issues specifically relevant to the significant increase in home working, based on practitioners' experience of the existing regime and a strong understanding of needs - both from the perspective of employer and employee. The Employment and Equality Law Committee is available to provide any further information which may be required by the Department in order to support the public consultation exercise and to assist in the development of policy and guidelines for employers and employees.
- 1.3 A key recommendation of the Committee is that legislative change, which specifically addresses the home workplace and homeworkers, should be introduced to ensure that both employers and employees have a clear understanding of how to discharge their respective duties and exercise their rights under the Safety, Health and Welfare at Work Act, 2005 as amended ('the **Act**').

2. Threshold

One of the first items that must be addressed is the nature of arrangements that may be the subject of any formal guidance or Code of Practice on remote working. For instance, will ad hoc arrangements be covered and if so, how will they be defined? Will a certain minimum number of days worked outside of the employer's premises/normal place of work be required before the guidance will apply? Or will the relevant rights & obligations only be triggered when a remote working arrangement (for any period of time) becomes a "permanent" one?

Recommendation: There needs to be clarity from the outset as to precisely when any guidance/rules around remote working are applicable.

3. Suitability of current legislation for long term home work arrangements and recommendations for change

- 3.1 The obligations, control and prevention measures which have been implemented and which apply to employers under the Act, as well as those set out in more detail in the Safety, Health and Welfare at Work (General Application) Regulations 2007-2015 (as amended) ('the "**Regulations**'), should be reviewed and expanded to clarify their application to home workers and their employers. Those statutory amendments (or amendments by way of Regulations specific to home workers) should then inform public policy and employer and employee guidance on the issue.
- 3.2 The situation in relation to home workers remains unclear under the Act and the Regulations. While the concept of "lone worker" is addressed in the Act, that concept is a much narrower one than the concept of an employee working regularly and permanently, at least for part of his/her weekly working hours, at home (as distinct from a mobile worker, a night worker or a service/maintenance type lone worker). The Regulations will need to be adapted to specifically address the situation of home workers.

Recommendation: The Regulations should be reviewed and adapted to ensure that the concept of a regular "home worker" is addressed (as distinct from an ad hoc home worker or a "lone worker").

3.3 Under Section 2 of the Act, "place of work" is defined to include:

"any, or any part of any, place (whether or not within or forming part of a building or structure), land or other location at, in, upon or near which, work is carried on whether occasionally or otherwise".

3.4 This definition clearly encompasses the home working environment which means that currently, the Act applies to the home working environment in the same way as it does to an onsite environment or another highly regulated work location such as a construction site. That said, while it is clear that the obligations apply to the home working environment, the rights and obligations of employers and employees in a permanent or enduring home working pattern are unclear in practice.

Recommendation: Primary and secondary legislation should distinguish between an ad hoc or time to time home working arrangement, and a more permanent and regular home working arrangement, with rights and obligations clarified in respect of both situations. Consideration should be given to situations where home working is mandated and where home working is requested and granted where the burden of providing a safe place of work may be different depending on the circumstances of the home working arrangement but without eroding the safety of the workplace.

3.5 Section 8 of the Act establishes the general duties of an employer in terms of the health and safety standards which they are expected to adhere to. An employer must do what is "reasonably practicable" to ensure the safety, health and welfare at work of its employees. There is no express leniency or flexibility in terms of the performance of these duties as they apply to the home working environment and that is impractical where, for example, an employer has (quite justifiably) no right to inspect the home working environment. A balance therefore needs to be struck and guidance (based on legislation/updated Regulations) should clarify the means by which a home working environment can be risk assessed, reviewed and subjected to risk mitigation, prevention and control measures. For example, can an employer issue a questionnaire and have the employee self-declare as to the safety of the work environment, including safe systems of work (such as a right to disconnect at a certain point)? Does an employer have to arrange for a physical inspection? Does an employee have to consent to such an inspection? It seems doubtful and undesirable that an employee could be obliged by law to permit a home visit by their employer so, careful consideration needs to be given to how the safety of the workplace can be verified (absent a physical inspection and mindful of employees' rights to privacy and the constitutional inviolability of the home).

3.6 It would be helpful to clarify the duties that employers and employees must discharge in order to demonstrate that the home working environment complies with the obligations under the Act and the Regulations. Once the home workplace is verified as safe by way of risk assessment, is it then the responsibility of the homeworker to keep it that way and take reasonable care of their health and safety until the next annual or quarterly inspection/self-declaration? It would be helpful to clarify the extent to which Health and Safety inspectors from the Health and Safety Authority would have the right to visit home workers in their homes in order to inspect their working facilities at the request of the employer/employee.

Recommendation: Primary and secondary legislation should clarify the precise obligations of the employer as well as the precise obligations (and rights) of employees which will assist both parties in discharging their duty to take reasonable care for safety, health and welfare at work. In particular, guidance is needed on how an employer conducts a risk assessment of the home working environment and how the employer ensures that the employee implements and complies with any prevention and control measures on an ongoing basis.

- 3.7 The Regulations set out health and safety standards around issues such as adequate lighting, ventilation, emergency routes and fire detection measures. At present, such standards appear to apply to home working situations (insofar as no exceptions are provided for permanent home working situations). Practical exemptions need to be defined without eroding the standards of safety in the home working environment. The key steps which need to be taken by employers and employees and the (minimum) physical infrastructure which is necessary (together with specifications) should be available to employers and employees.

Recommendation: Where possible, the guidance should provide detail of the key physical infrastructure and technical specifications for an adequate, safe and healthy home working environment.

- 3.8 Guidance on the following practical issues would also be helpful:
- (a) How employers should deal with home work-related accidents while employees are working from home, in particular any potential need for employers to make employees aware of procedures for reporting work-related accidents or ill health or any other health and safety concern whilst working from home.
 - (b) Managing working hours, rest breaks and leave to ensure that employers remain compliant and employees avail of their entitlements under all relevant legislation. The Organisation of Working Time Act ('OWTA') provides for adequate rest breaks, daily rest breaks and weekly rest breaks as well as annual leave and public holidays. The Guidance should remind employees and employers of their rights and obligations and provide guidance to employers (who are liable for any breach) around how to ensure compliance. Do home workers' managers or an appointed assessor need to make regular enquiries to ensure that the employee is following safe practices and not experiencing difficulties or symptoms of stress and if so, how regularly must such enquiries be made in order to discharge their duties? Would a remote workers self-declaration on a monthly or quarterly basis within the parameters of the OWTA suffice bearing in mind that it may not be practical for employers to collect this data on a weekly or monthly basis?
 - (c) Clear guidance (probably by way of a statutory code) would be helpful on the factors employers should consider in implementing remote working (or when considering remote working requests). The *Remote Work in Ireland – Future Jobs 2019* report ('the **Report**') indicates that many employers are concerned that permitting certain staff to work from home and not others could create issues relating to indirect discrimination. Therefore, there should be guidance on the factors that can/should be taken into account, so that employers can have regard to the guidance when making decisions to

implement (or not implement as the case may be) remote working. Also, if a right to request remote working is to be provided, the parameters should be clear, e.g. a length of service requirement, if a request is denied how long does an employee have to wait before re-applying, whether employees should have a right of appeal?

- (d) Guidance to deal with the more immediate situation of large numbers of remote workers which has been driven by the current emergency measures in response to the pandemic is to be distinguished from measures which will be in place longer term including for example, guidance around flexibility for employees who may be juggling childcare and work as well as guidance around minimum standards for working from home infrastructure and equipment during the pandemic and for so long as the emergency measures continue.

Cost of Homeworking

3.9 It is important:

- i. To define a framework for deciding who is responsible for the cost of any modifications which may need to be made to the home working environment;
- ii. That any changes to the Regulations do not create additional significant administrative and financial burdens for employers or employees; and
- iii. To clarify which party bears the financial burden of providing equipment to the home working environment, and to place clear limits on what each party is responsible for.

3.10 Clarification is needed in respect of how the parties can agree on a fair contribution to a percentage of home utilities for enduring and mandatory home working arrangements. In many situations, employers are already paying rents and utilities at a workplace and should not be required to incur a double cost for these utilities. Equally employees may feel that their utility costs would be lower but for the home working arrangement. As such, a practical solution needs to be devised which provides a framework for agreement between the parties but which recognises that the employer may already be paying utilities and rent in respect of that employee at a permanent workplace and that the employee may be making a saving in terms of commuting costs and time. It may be that the parties to the employment relationship are best placed to agree these issues within certain parameters. This could be done by way of an acknowledgment that this has been factored into the calculation of remuneration already (as is the case with Sunday working payments for certain workers for example) or it may take the form of a fixed contribution or stipend.

Recommendation: Review the Regulations so that they are fit for purpose in relation to the home working environment. Any obligations as they apply to the home should not place an undue administrative or financial burden on employers or employees. There should be a clear framework for contributions by employers and employees to equipment and utilities.

4.0 Employee Well-being

4.1 A new generation of employees and a mobile workforce means that employers struggle to attract and retain talent without offering flexible working arrangements, including remote working opportunities. Employers must offer the flexibility to work remotely, providing physical equipment (to include specialised equipment to prevent injury) at its own cost, ensuring that its workforce can easily and safely connect, and manage appropriate cyber security issues (addressed further below). This is one of many benefits that the newer generation of employee requires, and not something that is sought (in general) on a full-time basis.

4.2 “Workplace/home-place”

A key point in achieving optimum well-being for employees is to ensure the element of choice for the employee. Any employee compelled to provide a workspace, and work from their home without choosing to do so is likely to feel aggrieved. However, employees with appropriate space/facilities at home, with long commutes, or those who work independently from a larger team can thrive in a home working environment.

4.3 On a practical level, practitioners have experienced queries, concerns and complaints in relation to the following categories of employees:

- Employees with children at home, and no available or limited childcare;
- Employees in shared living accommodation, required to work from their bedrooms or other unsuitable areas, to ensure adequate confidentiality and adherence to data protection rules for company sensitive work; and
- Employees who live alone, who enjoy the social interaction with colleagues in the workplace, prevented from engaging with team members and feeling isolated.

For these categories of employees, the key issue relates to the inability to separate work and home. Their workplace is their home, and for some it has not been a positive experience. Employee well-being has suffered, and regular complaints have been received regarding mental health, difficulties with company communications and a real difficulty for some employees who struggle to find a balance between their work life and their home life. Each of the recommendations suggested is transferable to any of the situations highlighted.

4.4 Working parents

During the pandemic and for so long as it continues, employees with young children have tried and will continue to manage childcare, home-schooling and work on an over-extended basis over the course of days, often commencing work early and ending late at night. While available for work, they were often exhausted, and not available during the core working hours that clients and colleagues seek to contact and engage, due to childcare commitments.

Recommendation:

- ***While some flexibility can be expected during pandemic conditions, generally during normal conditions it should be reasonable to ensure working time can be achieved within core working hours and give guidance on which party (i.e. employer/employee) is responsible for what.***
- ***Provide clear direction that three and six month reviews should take place, with the ability to withdraw the arrangement if it is not working. Employers should not be penalised for facilitating trial periods for employees.***
- ***Require records of hours worked to be maintained and reviewed through lone-worker types of mobile applications (e.g. Clock-In), if other time management tools are not provided by the employer. Personal employee responsibility is required to ensure that time is accurately logged and employees ensure to switch off.***

4.5 Shared living arrangements

Employees in shared living accommodation raised grievances about the lack of division between their work and home day as their working time was often spent in their bedrooms. (See further below on right to disconnect and OWTA responsibilities).

Recommendation: Employers should be permitted to direct employees to take regular breaks, leave their workspace and ensure that they get fresh air during the day. Employers will not be positioned to monitor and enforce this, and guidance on best practice around how to manage this would be welcome.

4.6 Living alone

Employees living alone have experienced the above issues but have also expressed significant feelings of isolation. While, anecdotally, team engagement in many workforces was strong when the workforce initially moved to remote working, it became less engaged as the months progressed. This is indicative of how employees operating remotely may feel over an extended period of time/permanent remote work.

Recommendation:

- ***Employers should be able to direct employees who work remotely to attend at their workplace for a number of days each week or month, to ensure that there is an opportunity to check in with employees.***
- ***Virtual (and when permitted face to face) engagement through coffees/meetings or other incentives should be recommended, to include more frequent meetings among teams with remote working members.***

5. Flexible Working Arrangements

- 5.1 Employees in other jurisdictions (such as the UK) have a statutory entitlement to apply for flexible working arrangements. While not currently available in this jurisdiction (except in a very limited way under the Parental Leave Acts), EU Directive 2019/1159 on work-life balance for parents and carers ('the **Directive**') requires legislation to be enacted by 02 August 2022 to provide such a right. The benefits envisaged by the Directive include paternity leave, parental leave and carers' leave. All such leave entitlements are already available under Irish law. One of the key extra/new benefits is the requirement to permit "workers" with children up to the age of at least 8, and carers, the opportunity to apply for flexible working arrangements, and for such working patterns to continue beyond the finite period of time in which such employees would qualify for this benefit. There is no provision for any other category of employee to apply to work in a flexible way.

Recommendation: Legislation to appropriately address the aspects of the Directive not yet enacted should be placed on the Priority List of the Government's Legislative Agenda, placing employee entitlements regarding flexible working on a statutory footing. In implementing the Directive, legislation should provide all employees with the opportunity for flexible working arrangements.

6. Right to disconnect

- 6.1 The boundary between work and home life continues to shrink, even more so since the massive transition to home working over the last few months. In the absence of a dividing line between the workplace and the home, it is inevitable that workplace stress will flow into the home. These blurred lines with 24/7 "switched on" employees will potentially result in a higher volume of workplace stress-related personal injury actions and OWTA claims.

If it is accepted that home workers' place of work is "at home", consideration must be given to ensuring that these employees can (and will) switch off. The alternative is that employees will feel the need to respond to emails at all times, stemming in part from their absence from the workplace and not wanting to be perceived negatively.

- 6.2 In France, the government introduced the El Khomri law to reform working conditions for employees to ensure their right to disconnect. The right is applied by each company in its own way, giving scope to employers to find the most practical way to implement the right, based on the nature of the particular business. It is mandatory for businesses employing 50 or more to include this right in their Mandatory Annual Negotiation (MAN). Employers are subject to criminal prosecution for failing to include this in their MAN.

Recommendation:

- ***Introduce guidelines for employers outlining recommendations to operate core hours, and to ensure that employees are not required to respond to emails or messages outside core working hours.***
- ***Recognise that employees are often required to work across different time zones. In acknowledgement of the requirement for such employees to be available for work, start and end times for the normal working day should reflect the actual hours employees are required to be available.***

7. Data Protection Issues

As remote working becomes more regularised, a key concern for employers is how the business can ensure and monitor compliance with its legal obligations when employees are working remotely. Data protection is one such area of concern particularly given the onerous nature of obligations under the General Data Protection Regulation 2016/678 (the GDPR) and the Data Protection Act 2018. As businesses gradually re-open, many employees will continue working remotely for at least part of the working week. As such, the temporary and informal remote working arrangements put in place as an immediate response to Covid-19 should be formalised in order to ensure the arrangements comply with applicable data protection obligations.

Many employers may already have had policies in place to manage remote working within which they have addressed data protection compliance, others may not. In this regard, the Data Protection Commission's *Guidance for Controllers on Data Security* ('the **DPC's Data Security Guidance**') provides guidance on data security measures for data controllers. It notes that the GDPR does not specify the exact security measures which data controllers or data processors must have in place when processing personal data, and stipulates that controllers and processors must implement "Data Protection by Design" and "Data Protection by Default" and have "*appropriate, technical and organisational measures*" to ensure data security. While the DPC's Data Security Guidance provides a helpful overview of such measures, more detailed guidance is required to ensure that employers and employees implement and maintain the required data and cyber security standards when engaged in remote working.

Recommendation: The Society agrees with the Department's findings on remote working (detailed in the Report) which acknowledge that guidance is needed on balancing data security and cyber security when engaging in remote working. We believe such guidance is needed both for employers and employees in order to ensure that remote working arrangements comply with all applicable data protection obligations.

7.1 Data Security Issues

Where employees work remotely, they will most likely use portable devices such as laptops and mobile phones. They may be accessing the employer's network remotely via their own external connections in a shared living space. This naturally raises data security concerns and employers should be clear on the appropriate technical and organisational measures which are needed to ensure that personal and sensitive data is kept confidential and secure when their employees are working remotely.

As a general point, any guidance in the context of data protection and remote working should deal with current data protection law and the obligations on both organisations and their staff to keep data secure when working remotely. The guidance should also address what should be included (and any amendments required) in the employer's data protection policies and privacy notices to address issues arising from remote working arrangements.

More specifically, the guidance should expand on the issues already referred to in the DPC's Data Security Guidance and in particular:

7.1.1 Network access

As remote access can leave a server open to attack, specific guidance should be provided to employers on what technical security measures, security assessments, contractual agreements and agreed standards of management are required to appropriately manage the risks associated with remote access to the network. Specifically, guidance on trusted networks or cloud services and multifactor authentication for remote access is needed for businesses which are engaged in remote working without dedicated IT departments. For their employees, guidance is needed on the rules and procedures around cloud or network access, login procedures, appropriate use of wireless networks, secure web sessions and data sharing when accessing the employer's network.

7.1.2 The use of portable devices

The use of portable devices when working remotely poses a number of concerns from a data protection perspective. Updated guidance on acceptable encryption / pseudonymisation standards and guidance on the storage of decryption keys should be provided to all employers and employees engaged in remote working.

7.1.3 IT security & updates

The DPC's Data Security Guidance highlights the importance of appropriate anti-virus software, firewalls and patch management systems to protect portable devices and networks from infection and malware. Additional guidance should be provided which details the recommended technical specifications of anti-virus software and clarifies the responsibility of employees and employers to maintain and ensure such protective measures are kept up to date when working remotely. Further detail on the DPC's recommendation to retain records of the employee's patch installations on an employer's system should be provided. The guidance should also clarify whether incident response plans may need to be updated to report data security incidents which arise in the context of remote working.

7.1.4 Physical security

As set out in the DPC's Data Security Guidance, in addition to the technical security measures, data controllers should consider what physical security measures are necessary to ensure the security and integrity of any personal data they process. Further guidance on the appropriate physical security measures to adopt when remote working should be provided to employers and employees. For example, the guidance should outline the importance of ensuring confidentiality in the remote working space (particularly where it is a shared living space), the importance of securely locating the employee's remote working devices so that the screen cannot be viewed by other household members, and ensuring devices are locked/switched off when not in use. Any guidance should also outline the proper procedure for storage and disposal of hardcopy files containing personal data.

7.1.5 Monitoring of remote working arrangements

The DPC's Data Security Guidance notes that maintaining logs and audit trails and monitoring processes are helpful in the effective administration of the security system, and act as a deterrent to staff who may be tempted to abuse the system. It would be beneficial to provide additional guidance to employers which outlines the extent of monitoring and accessing of devices which is permissible where employees are working remotely. Any amendments required to an employer's data protection privacy notice and data protection policy to explain such monitoring activity should also be addressed in the guidance to ensure that employees are informed in line with the data protection principle of transparency.

7.1.6 Training

In complying with the principle of accountability under data protection legislation, it is important for businesses to ensure that employees are appropriately trained on data security measures. This is highlighted in the DPC's Data Security Guidance which notes that, no matter what technical or security measures are in place, the most important security measure is ensuring that staff are aware of their responsibilities when processing personal data. Given the fact that supervision and oversight is more difficult in the remote working context, additional guidance on the level of training which employers should provide to employees (to ensure both that they are aware of their responsibilities and that they comply with data security requirements when processing personal data remotely) should be provided.

7.2 Transfer of Data

In addition to the above, guidance on the appropriate security measures for the transfer of personal data where employees are working remotely and not necessarily within the EEA should be provided in light of the recent CJEU decision in Schrems II which has called into question the use of Standard Contractual Clauses where personal data is transferred to the USA .

Recommendation: We agree with the Report's finding that it would be beneficial to have a framework for employers and employees specifying appropriate data security measures for remote working arrangements and recommend that further guidance to expand on the DPC's Data Security Guidance, which specifically addresses data protection issues in the context of remote working arrangements, is provided to enable employers to develop appropriate security policies and practices for remote working.

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