



AN BILLE UM OBAIR SA BHAILE (COVID-19), 2020
WORKING FROM HOME (COVID-19) BILL 2020

EXPLANATORY MEMORANDUM

Purpose of Bill

Some workers are used to working from home, whether occasionally or regularly and whether in addition to time spent in the office or otherwise. However, a consequence of the Covid-19 pandemic has been a sudden, unplanned and very large increase in the number of such workers and this has exposed some defects and anomalies in our employment protection code, which this Bill seeks to address. Three particular issues are identified.

First, one result on the increase in the numbers of employees who are temporarily working from home has been to blur the distinction between working time and rest from work. On the one hand, the Organisation of Working Time Act 1997 continues to apply, and every employee is entitled to at least 11 hours rest in every 24. Further, an employer may not permit his or her employee to work for more than 48 hours in a week.

On the other hand, even before Covid-19 struck, communication technology in the workplace had had a massive impact on many workers' daily lives. The widespread use of smart phones and other digital devices means that always being 'on call' has become a reality for many, as continuous remote access can create pressure for employees to be constantly accessible.

The expectation that workers are available at almost any time for online or mobile communication is not only disruptive of a reasonable work-life balance, and may give rise to breaches of working time legislation, but is increasingly considered to be potentially hazardous to workers' health.

The first purpose of this Bill, accordingly, is to provide for a legal 'right to disconnect'.

The second issue addressed in the Bill is that of employee health and safety. The Safety, Health and Welfare at Work Act 2005 was clearly not passed with the employee working from home in mind. As a result, many undertakings and their employees are coping under a regulatory framework that is not fit for purpose.

For example, because the employee is working from home, then part of his or her home is a 'place of work' under the 2005 Act. As a result, the employer's duties extend to ensuring, so far as is reasonably practicable –

- the design, provision and maintenance of the 'workplace' in the employee's home in a condition that is safe and without risk to health,
- the design, provision and maintenance of safe means of access to and egress from that 'workplace', and

- the design, provision and maintenance of work equipment that is safe and without risk to health.

These duties under the 2005 Act are elaborated in greater detail in Schedule 4 of the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. 299 of 2007). These regulations place a duty on employers to manage ergonomic risks in relation to work activities that involve working at computer workstations. It is the employer's responsibility to address specific issues such as environmental factors, for example lack of space, uneven work surfaces, poor workstation design, poor lighting or anything that results in an awkward working posture. So, for example–

- the characters on the display screen must be well defined and clearly formed, of adequate size and with adequate spacing between the characters and lines
- the screen must be free of reflective glare and reflections liable to cause discomfort to a user
- the screen must be able to swivel and tilt easily and freely to suit the needs of the user
- the keyboard must have a matt surface to avoid reflective glare
- the keyboard must be tiltable and separate from the screen so as to allow the user to find a comfortable working position which avoids fatigue in the arms or hands
- the space in front of the keyboard must be sufficient to provide support for the hands and arms of the user
- the work desk or work surface must have a sufficiently large, low-reflectance surface and allow a flexible arrangement of the screen, keyboard, documents and related equipment
- the document holder must be stable and adjustable and must be positioned so as to minimise the need for uncomfortable head and eye movement
- there must be adequate space for users to find a comfortable position
- the work chair must be stable and allow the user easy freedom of movement and a comfortable position
- the seat must be adjustable in height
- the seat back must be adjustable in both height and tilt.

Expecting an employer to ensure that all these conditions are satisfied in relation to a workstation in an employee's own home is unrealistic unless the home is made subject to intense and intrusive inspection and supervision. The employer's duty to his or her employees in relation to such workstation issues needs to be reformulated.

Finally, the Revenue Commissioners recognise that working from home may give rise to additional expenses, in terms of electricity, heat and broadband. By way of an extra-statutory concession, the Commissioners permit an employer to pay workers up to €3.20 per day without deducting PAYE, PRSI or USC. This expense allowance can be paid when there is a formal agreement that the employee is required to perform essential duties of the employment, for substantial periods, from home.

Payment of this allowance remains discretionary on the part of the employer, however, rather than being a contractual or statutory right. The final purpose of this Bill is to widen access to payment of this allowance.

Provisions of Bill

The Bill is by long title ‘an Act to provide employees working remotely with a right to switch off from out of working hours work-related electronic communications, to amend subject to conditions certain provisions of the Safety, Health and Welfare at Work Act 2005 in the case of certain employees working temporarily from home, and to provide for related matters’.

Section 1 amends the Terms of Employment (Information) Act 1994 by inserting a new paragraph into section 3. As a result, an employer shall be required, within 2 months of an employee commencing work, to furnish a statement in writing containing particulars of the terms of the employment, including–

‘where the employee’s work involves the use of electronic communications (meaning email, text messages or other digital means of conveying data electronically), the policy of the employer regarding the use by employees of electronic devices to send or receive work-related communications outside the hours of work (including overtime) ...’.

Section 2 amends the Organisation of Working Time Act 1997, by inserting a new section 17A.

The new section provides that an employer shall not require an employee to access any work-related electronic communications during the period between the employee’s normal or regular or notified finishing time of work and his or her next starting time of work.

It is stated, for the avoidance of doubt, that any time spent by an employee in accessing, considering and responding to work-related electronic communications is ‘working time’ within the meaning of and for the purposes of the Act of 1997.

A second amendment inserts a reference to the new section 17A into section 5 of the 1997 Act. The effect of this is that the employer is not obliged to comply with the section where due to exceptional circumstances or an emergency, the consequences of which could not be avoided despite the exercise of all due care, or due otherwise to unusual and unforeseeable circumstances beyond the employer’s control, it would not be practicable for the employer to comply with the section.

It is important to note that the ordinary complaints procedure provided under the Act of 1997 would apply to complaints about breach of the new section 17A. Equally, under that Act an employer may not penalise or threaten to penalise an employee who invokes any right conferred on him or her by the Act.

Section 3 applies to an employee who normally for the purposes of his or her work makes use of a workstation, and to his or her employer, during any period when, due to Covid-19 measures, the employee is not working wholly at his or her normal place of work and is instead working wholly or partly from home.

‘Covid-19 measures’ is defined as meaning measures required to be taken by an employer in order to comply with, or as a consequence of, Government policy to prevent, limit, minimise or slow the spread of infection of Covid-19, while ‘workstation’ has the same meaning as in Regulation 70 of the Safety, Health and Welfare at Work (General Application) Regulations 2007 (S.I. 299 of 2007), and includes each component part of a workstation, i.e., keyboard, display screen, desk, and so on.

Where *section 3* applies, then the employer's duties under section 8(1) (c) of the Safety, Health and Welfare at Work Act 2005, and under any regulations that give fuller effect to that paragraph, are deemed to be complied with if—

- in the case of an employee who does not have one, the employer provides or provides for a workstation at the employee's home that is adequate and appropriate in relation to the work of the employee concerned, and
- the employer gives to the employee tax-free flat rate payment, of such amount as may be approved by the Revenue Commissioners, to meet the additional expenses incurred by the employee in working from home.

However, if *section 3* applies and those two conditions are not satisfied, then the employer's duties under the legislation and regulations duties continue in full force and effect. Further, the fact that an employee is temporarily working wholly or partly from home due to Covid-19 measures will not of itself be sufficient grounds for considering that it is not reasonably practicable to ensure compliance with those statutory duties.

Finally, *section 3(2)* provides that the section applies to employment in the public service if but only if its application would result in less cost being incurred by the employer than would be incurred if the employer had instead to ensure compliance with his or her duties under section 8(1)(c) of the 2005 Act and associated regulations.

Section 4 provides for the short title of the Bill when enacted.

Exchequer implications

The Bill does not impose a charge on the people or on the Exchequer. Provision is made for the payment of a tax-free expense allowance to certain employees. However, this is clearly a relief from a charge, rather than the imposition of a charge, upon the people.

The Bill may apply to and financially benefit employees of public bodies funded by the Exchequer. It should be noted, first, that the payment of a tax-free allowance to such employees is entirely optional under the Bill. If payment is made, then aspects of existing legislation are ameliorated in their application to the employer while, if the payment is not made, then the only result is that the existing legislation continues in its full force and effect. Second, as mentioned above, *section 3* applies to employment in the public service if but only if its application would result in less cost being incurred by the employer than would be incurred if the employer had instead to ensure compliance with duties under health and safety legislation relating to home workers.

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Samhain, 2020.