

13 reasons why Irish employers can refuse remote working requests

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| The right to request remote working

Heads of The Right to Request Remote Work Bill 2021 (the “Bill”) were passed by the Irish Cabinet yesterday, 25 January 2022. Up until now, remote working has been implemented by many employers due to public health restrictions, however, as of yesterday, the Tánaiste and Minister for Enterprise, Trade and Employment, Leo Varadkar (the “Tánaiste”) published details of the Bill giving employees the legal right to request remote working, and employers the right to *reasonably* refuse any such request.

The timing of this Bill is pertinent given that it was announced last Friday that restrictions were being lifted and there could be a gradual move back into the workplace by employees.

Reasonable refusal

Under the Bill, employers must give due consideration to a remote working request, however, there is no obligation on employers to accede to any such request. Employers can refuse a remote working request provided that such refusal is reasonable, having considered its suitability to their organisation.

The Bill provides 13 business grounds which employers can rely on when refusing a remote working request. This includes:

- the nature of the work not allowing for the work to be done remotely
- cannot reorganise work among existing staff
- potential negative impact on quality of business product or service
- potential negative impact on performance of employee or other employees

burden of additional costs, taking into account the financial and other costs entailed and the scale and financial resources of the employer's business

concerns for the protection of business confidentiality or intellectual property

concerns for the suitability of the proposed workspace on health and safety ground

concerns for the suitability of the proposed workspace on data protection grounds

concerns for the internet connectivity of the proposed remote working location

concerns for the commute between the proposed remote working location and employer's onsite location

the proposed remote working arrangement conflicts with the provisions of an applicable collective agreement

planned structural changes would render any of (1) to (11) applicable

employee is the subject of ongoing or recently concluded formal disciplinary process

The above is not an exhaustive list and other grounds for refusal may also be accepted as being reasonable.

Right of appeal

An employee can bring an appeal either internally, or through the Workplace Relations Commission (the "WRC") under the Workplace Relations Act, 2015 where the employer has either:

- failed to return a decision within the time frame set out in the company's remote working policy, but in any event no less than 12 weeks from the date of the request
- has failed to provide notice of the grounds for refusal.

It should be noted however, that under the Bill, an employee cannot action an appeal in the WRC until two weeks after an internal appeals process has been exhausted.

Remote working policy

The Bill also requires employers to establish and maintain a "Remote Working Policy" (the "Policy"). The Policy should identify, at the least, the following:

- the manner in which remote working requests will be managed
- the time frame for which a decision will be made, including the appeal process
- the specific conditions applying to remote working requests generally within the company

The Bill also creates an offence for employers for failure to have a remote working policy in place.

It is imperative that employers not only have a remote working policy in place, but that the Policy is also brought to the attention of its employees.

An employer may rely on the defence that it exercised due diligence and took all reasonable precautions to ensure that its obligations under the Bill were complied with.

A person guilty of an offence under this Bill shall be liable to a class C fine, i.e. not exceeding €2,500, face summary proceedings by the WRC.

Disputes

Where disputes are referred to the WRC or the Labour Court, an adjudication officer (the “AO”) or the Labour Court may:

- make a declaration that the complaint was or was not well founded
- where the AO finds in favour of the employee
- direct the employer to return a decision within a period of 4 weeks
- provide notice of grounds for refusal within a period of 4 weeks
- award compensation in favour of the employee to be paid by the employer

An award of compensation shall be of such amount that the AO or Labour Court considers just and equitable, having regard to all the circumstances, but shall not exceed 4 weeks’ remuneration.

It should be noted that issues may arise where disputes are referred to the WRC or Labour Court, given that it can take weeks, if not months, to obtain a hearing date. Questions now arise as to whether or not the employee will be required to attend their workplace in the intervening period until such a hearing date is assigned.

Other key points to note

Minimum service to submit a request: employees must have at least 26 weeks continuous service with their employer in order to submit a remote working request.

Limitation on timeframe to submit another request: an employee shall not be entitled to submit another request until after 12 months continuous service following the employer’s final decision to the employee and the date of the final decision in any appeal process.

Protection of employees: Employees should not be penalised for proposing to exercise or having exercised their right to request remote working.

In the event that the penalisation of an employee constitutes dismissal within the meaning of the Unfair Dismissals Acts 1997-2015 (the “UDAs”), employees cannot seek relief under both this act,

and the UDAs.

For the purposes of the Bill, penalisation includes, but is not limited to:

- suspension, lay-off, dismissal, or the threat of suspension, lay-off or dismissal
- demotion or loss of opportunity for promotion
- an unfavorable change in conditions of employment (e.g. reduction in wages or the transfer of duties)
- imposition or the administering of any penalty (e.g. a financial penalty)
- coercion or intimidation

Key points for employers

Given the benefits identified as a result of remote working since the beginning of the COVID-19 pandemic, employers should prepare for an influx of remote working requests and familiarise themselves with the obligations placed on them under the Bill. Since the Bill is only at an early stage, it is likely that there will be some further changes to the Bill before it is finalised and agreed.

A remote working policy should be put in place as soon as possible, or, reviewed and updated where one already exists. Employers should assess the business needs of their organisation and clearly identify if it has grounds for refusing these types of requests.

If you require advice regarding how this Bill will affect your organisation or assistance in drafting a Remote Working Policy, please contact Marianne Norton by emailing marianne.norton@ogier.com.

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