LK SHIELDS
YOUR LEGAL COUNSEL

EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

Remote Working And Compliance With Working-Time Rules

by **Jennifer O'Neill**

Remote Working And Compliance With Working-Time Rules

24th September 2020 | by Jennifer O'Neill

In December 2019, the Department of Business Enterprise and Innovation published a report entitled "Remote Work in Ireland", which defined remote working as a *"form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis".*

Remote working includes both working from home or working from another location that is not your office, i.e. a community hub or co-working space.

Much has changed since the publication of that report, with the COVID-19 pandemic resulting in an unprecedented and unplanned exponential increase in homeworking, which looks set to continue for the foreseeable future.

As a consequence of the pandemic, many employees have been trying to juggle home-schooling, childcare and remote working during traditional office hours. Employers were forced to implement temporary flexible remote working arrangements at short notice for almost all of their workforce.

These ad hoc arrangements have now continued for much longer than many envisaged. It is now clear that many employees will seek longer-term remote and flexible working options, which will allow them to plan where, how and when they work. The question arises as to whether employers are complying with the strict legal requirements imposed under the Organisation of Working Time Act 1997 (Working Time Act) under these new remote and flexible working arrangements.

The Organisation of Working Time Act 1997

Pursuant to the Working Time Act, employers are obliged to record working-time information for each employee on a daily basis, including starting and finishing times, rest breaks, daily breaks and weekly breaks. This information must be retained for three years. The information can be recorded electronically or in manual form.

Many employers who had workplace-based clocking in and clocking out systems to record the working hours and breaks of their employees, are now faced with the challenging requirement to record information for a totally remote workforce. Employers' obligations under the Working Time Act apply regardless of where their employees are located or what new flexible work patterns have been implemented.

Not only must employers record their employees' working hours and breaks, but they must also ensure compliance with the specific provisions of the Working Time Act. Therefore, if an employer discovers that the average maximum number of hours that an employee is working in a working week is in excess of 48 hours, then action needs to be taken. Similarly, if an employer is aware that an employee is not availing of their daily or weekly rest breaks, it is imperative that the employer deals with this.

Steps for Employers to Regularise Arrangements

The following steps should be considered by employers in order to ensure compliance with working time legislation.

- For those employers that do not currently have a software system in place to record working hours or daily and weekly breaks, immediate action should be taken. The working time legislation includes a sample OWT1 Form, which illustrates how the days and hours worked for each week for employees can be manually recorded where there is no electronic recording system in place.
- If you have a system in place, assess the output of your time recording system and ensure that it is reliable and accessible. Employers are reminded that they may need to rely on the information generated by these systems for an inspection or a hearing before the WRC. Merely having a mass of unclear data which cannot prove compliance in relation to particular employees, will not be helpful.
- Establish whether the system and arrangements for notification of missed breaks which are in place are adequate to benefit from the exemption from the requirement to record employee breaks under the Working Time Act.
- Establish whether the software system you have in place to accurately record employees' working time and rest breaks goes beyond the recording of information required under working time legislation and seeks to assess employee productivity and performance. If this is the case the necessity and proportionality of such a system should be considered under applicable data protection legislation and information relating to this processing activity would need to be communicated to employees in a compliant privacy notice.
- If a new time recording system is being introduced, then appropriate training should be provided to employees. Also, this new system and the underlying processing of employees' personal data must be considered as part of your obligations as a 'controller' under data protection law.
- It is recommended that employers review the contracts of employment of their employees and/or relevant policies, to ensure that employees are expressly required to record their hours and breaks to assist the employer in complying with its obligations under working time legislation. Ideally, such policies and contracts would clearly set out the expectations on employees in relation to how they are expected to record their hours and breaks on a daily and weekly basis and the consequences of failing to do so.
- As most employees are not meeting their line managers on a daily basis in the workplace, it is important that a proactive approach is taken by managers to review the time reports submitted by employees, particularly addressing any concerns that arise relating to issues such as excessive working hours. Having clear records of employees' working hours will not be helpful unless the employer took appropriate action when any breaches of the Working Time Act arose.
- When agreeing any changes with employees to allow flexibility in their working hours, it is important that these new arrangements remain compliant with all of the requirements of the Working Time Act so that breaks are still taken, and maximum working hours are not exceeded. Other employees may need to be aware of the flexible hours worked by team members so that they are not pressurising colleagues for responses when then are not working.
- Ensure that the working time data for employees is sent to the employer each week so that the employer can comply with the record keeping requirements under the Working Time Act and have the records available for inspection at the principal place of work.

Right to Disconnect

Employers also need to be conscious of an employee's right to disconnect. Given the sudden increase in remote and flexible working arrangements, many employees are unfamiliar with this style of working and may find it difficult to disconnect from work because they no longer physically leave the office and their devices are always accessible at home -- days, nights and weekends.

Liability

The Working Time Act requires that employees receive a minimum daily rest period of 11 consecutive hours per 24-hour period, so requiring or even permitting employees to regularly perform work and respond to emails late at night after a full day's work, may result in liability for the employer.

The Labour Court determination of Kepak v O'Hara in 2018 illustrates how an employer can be held liable for its failure to stop the excessive working of its employees. It is evident from the Kepak case that whilst training on how to manage working time efficiently is helpful, it may not be sufficient, and employers are expected to monitor and actively curtail an employee's excessive working hours.

Managers should be familiar with employers' obligations under the Working Time Act and given appropriate training to ensure that they are:

1. aware of the working time rules when agreeing flexible working arrangements;
2. regularly monitor the data on working hours and breaks which they receive from employees on their teams, and
3. take action when it appears that a breach has occurred in respect of any employee.

Responsibility of Employers to Demonstrate Compliance

The WRC and the Labour Court have made it clear that the onus is on the employer to prove compliance with their obligations under the Working Time Act and proof is necessary to defend any statutory claim. As employers who have breached the working time provisions may have to pay compensation of up to two year's remuneration and may face multiple claims across their workforce for such breaches, together with fines for failure to keep appropriate records, it is vital that employers review their systems and policies to ensure that employees' working arrangements are in line with legal requirements and are properly recorded.

For more information please contact Jennifer O'Neill at joneill@lkshields.ie.

This article was first published by Legal Island in September 2020.

About the Author

Jennifer O'Neill
Consultant

Jennifer is a Consultant in the Employment, Pensions and Employee Benefits Unit.
T: + 353 1 637 1527 **E:** joneill@lkshields.ie