

The Right to Request Remote Working – Key Employer Questions Answered

Introduction

The Right to Request Remote Working Bill 2022 is expected to be enacted by this coming summer, and provide a legal framework for requesting, approving or refusing a request for remote work. It is important to note at this point that the introduction of any new Bill will not be an automatic right to work remotely. Some key proposals include:

- Employers across all sectors including the nonprofit should have a Remote Working policy in place, which is available to all employees and can be inspected by the Workplace Relations Commission (WRC).
- Any employee with six months (26 weeks) continuous service can make a request to their employer to work remotely. Employers must respond to the request within 12 weeks, and this must be clear in the Remote Working policy.
- An employer may propose different arrangements to that proposed by the employee and it is envisaged that this would be achieved through engagement and discussion with the employee. The employee then has one month to accept or reject the proposed alternatives with a rationale provided by the employee in the case of a rejection.

Employees must provide the following information in their application:

- The proposed remote working location,
- The proposed start date,
- The proposed number, and timing, of working days to be worked remotely,
- If applicable, employees must advise the employer of any previous request they have made to work remotely and the date thereof,
- A self-assessment of the suitability of the proposed remote working locations in relation to specific requirements for carrying out the job such as data protection and confidentiality, minimum levels of internet connectivity, ergonomic suitability of the proposed workspace and any equipment or furniture requirements.

Q. Can a Remote Working Request be Refused?

A. An employer can refuse a Remote Working Request in whole or in part and must provide the employee with a written statement of the grounds or reasons for refusing a request. There are 13 grounds on which an employer can refuse a request, these are:

1. The nature of the work not allowing for the work to be done remotely,
2. Inability to reorganise work among existing staff
3. Potential negative impact on quality of an organisational product or service,
4. Potential negative impact on performance of the employee or other employees,
5. Burden of additional costs, taking into account the financial and other costs entailed and the scale and financial resources of the employer's organisation,
6. Concerns regarding the protection of organisational confidentiality or intellectual property,
7. Concerns regarding the suitability of the proposed workspace on health and safety grounds,

8. Concerns regarding the suitability of the proposed workspace on data protection grounds,
9. Concerns regarding the internet connectivity of the proposed remote working location,
10. Inordinate distance between the proposed remote location and the employer's on-site location,
11. If the proposed remote working arrangement conflicts with the provisions of an applicable collective agreement,
12. Planned structural changes,
13. The employee being subject to ongoing or a recently concluded formal disciplinary processes.

This is a draft Scheme of Bill and therefore the reasons for refusal are not exhaustive.

It appears that employers have full discretion to decline a request, so long as the refusal is grounded in an objective assessment of the needs of the nonprofit organisation, e.g., the requirement to provide services from a specific location. Also, an employer may consider a request as withdrawn where a 12-week request period has passed and there has been no engagement by the employee with the employer relating to additional information sought and/or meetings.

An application to work remotely is restricted to one every 12 months unless the employee changes role within the organisation.

Q. How does the Appeals Process work?

A. It is recommended that an employer has an internal appeal mechanism in place and that this should be included in an employer's Remote Working Policy. It should be noted that the General Scheme does not provide for a right for the employee to challenge an employer's actual decision to refuse a Remote Working Request to the WRC. The right to make a complaint appears to only relate to the employer's **failure to comply with the procedural aspects of the legislation and not the merit of the refusal** – for example, an employee would have a right to make a complaint if the employer did not respond with a decision to a remote working request, or if the employer did not provide the Refusal Ground in its response.

The draft Scheme sets out that the employee has the right to appeal the employer's refusal to the WRC two weeks after the internal appeals process has begun.

The WRC can do one of the following:

- Declare that the complaint was/was not well founded,
- Direct the employer to provide reasons within four weeks or,
- Award up to four weeks remuneration

It is expected that the Code of Practice will provide more detail on what is expected of employers in considering and accommodating Remote Working Requests. An employer's failure however to follow a Code of Practice does not constitute a breach of a legal obligation but would be considered by the WRC in its consideration of other claims.

Q. What happens if a remote working application is approved?

A. An employer must confirm the approved arrangement in writing and this confirmation should address:

- If the approval is for a trial or temporary period and if so, when it ends,
- If the approval is for an indefinite period and if there is any review requirement,
- Any equipment to be provided by and/or costs payable by the employer to the employee.

Q. Are There Any Other Considerations at this point?

A. The draft scheme envisages that the failure to have a Remote Working Policy in place that is brought to the attention of employees will be an offence liable on summary conviction to a fine of €2,500. However, it will be considered a defence if an employer can show they exercised due diligence and took all reasonable precautions to comply.

- WRC inspectors can also issue fixed payment notices for failure to comply with the requirement to establish and maintain a Remote Working Policy.
- The General Scheme does not address the health and safety aspects of remote working but does state that the 12 week response period to a Remote Working Request allows for the engagement of a health and safety consultant (presumably by the employer).
- The draft scheme notes that Remote Working records should be retained for a period of 3 years.

Q. What next steps should nonprofit Organisations be considering?

With the lifting of restrictions, many employers are implementing plans to return to the workplace and can reasonably expect to receive Remote and Hybrid Working Requests prior to the enactment of the legislation. While it is anticipated that there may be changes to the General Scheme prior to the transposition of the Bill into legislation our advice to employers in the nonprofit sector is:

- To commence preparing a draft policy which provides clear detail as to how Remote Working Requests are made, considered and decided upon, in preparation for the upcoming legislation.
- If not done so already, consider communicating with employees to understand preferences for remote working, hybrid working and a return to the office, then seriously consider these preferences and identify roles that may and may not be eligible for remote working. Clear communication on why some roles are not suitable will be required.
- Where a role is considered eligible, consider any arrangements that may need to be made.
- Where a role is not considered eligible, prepare a clear and objective business reason as to why not. Also consider any alternative possibilities for that role – for example flexi-time or a compressed working week.

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