

COVID-19 Response: New Irish Emergency Measures Legislation

Introduction

The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (the "Act") was passed by both houses of the Oireachtas (the Irish Parliament) and was signed into law by the President on 20 March 2020.

Under the Act the Minister for Health (the "Minister") has extensive powers to restrict the freedom of all individuals in order to prevent the further spread of COVID-19 in Ireland. The emergency measures underpin the Government's strategy of protecting individuals' constitutional rights to life and to bodily integrity.

The powers include:

- (a) Restricting the movement of people;
- (b) Designating 'affected areas' and severely restricting travel to, from and within these areas;
- (c) Restricting travel to and from Ireland;
- (d) Permitting the designation of 'essential services' which can be exempted from some of the rigours of the Act;
- (e) Creating criminal offences, corporate liability and individual criminal liability for directors, shareholders, officers and employees of companies who commit

offences under the Act; and

- (f) Providing for the detention of individuals who fail or refuse to self-isolate or quarantine.

At the date of writing, none of these powers have been exercised. It is not possible to predict if these powers will be invoked by the Minister.

Much will depend on the severity of the spread of the virus as Ireland enters the 'delay' phase of COVID-19 management, as well as the level of compliance with the current preventative measures set out by the Government and the Chief Medical Officer of the Department of Health (the "CMO").

Are these emergency measures in place now?

No. Ministerial regulations will need to be implemented to give effect to many of the Act's powers. To date, no such regulations have been published. Typically, regulations can be prepared very quickly and where a cluster of infections is identified, it is safe to assume that regulations could be in place within a matter of hours, if necessary to designate an 'affected area'.

Regulations are not subject to further scrutiny by parliament. As in other jurisdictions, it is envisaged that the Minister may need to roll out increasingly strict measures under a series of regulations.

The power to make regulations under the Act is not unfettered in that the principles of necessity and proportionality must be adhered to in the making of any such regulations. However, the precise scope of the power is unclear. The Act sets out a number of considerations, which are relevant when the Minister is making such regulations, including the following:

- (a) A 'national emergency' has arisen and that there is an 'immediate and manifest' risk to human life and public health;
- (b) The public interest requires that "extraordinary measures should be taken to safeguard human life and public health";
- (c) The Irish Government must take such protective measures as are practicable to protect the life and bodily integrity of citizens against a public health risk;
- (d) The need for swift action; and
- (e) The resources of the health service and the welfare of healthcare workers require protection.

The Minister **must** have regard for the advice from the CMO and may have regard to the advice from the Health Protection Surveillance Centre of the Health Services Executive in Ireland and other international agencies.

He **must** also consult with ministers of other relevant departments where, by reference to the nature of their department, it would be appropriate to do so. For example, the Minister should consult with the Department of Finance and the Department of Business, Enterprise and Innovation before imposing any regulations that impose a mandatory lockdown on, for example, the financial services sector or on a geographical area which hosts a particular industry such as an IDA business park.

During the final debates in parliament on the text of the legislation, the Minister reassured parliament that the exercise of decision making powers would be transparent and proportionate. He stated: *"Proportionality and necessity will be at the core of what we do and we will share the rationale for our decisions with the Houses of the Oireachtas"*.

What are the restrictions on the movement of people including workers?

There are no mandatory restrictions on the movement of people including workers in Ireland at the date of writing.

All closures of schools, childcare facilities, stores, bars, restaurants and gyms across Ireland have been implemented voluntarily by the businesses without, until now, an enforcement framework. Social distancing protocols, eliminating discretionary social contact and widespread remote working are in place in response to government recommendations and the CMO's advice.

Part 3 of the Act amends the Health Act 1947 to empower the Minister to make regulations imposing the following restrictions on the movement of people (including workers):

- (a) Restrictions on travel to or from Ireland;
- (b) Restrictions on travel to, from or within geographical locations that an 'affected area order' applies;
- (c) Restricting persons or classes of persons resident in, working in or visiting affected or designated locations including: (i) requiring persons to remain in their homes or (ii) requiring persons to remain in such other places as designated by the Minister; and

- (d) An 'affected area order' will apply to an area where there is or may be sustained human transmission of COVID-19 or from which there is a high risk of importation of infection or contamination with COVID-19 by travel from that area.

What about meetings or gatherings of people?

Events which could reasonably pose a risk of infection to people can be prohibited including those:

- (a) Which due to the nature, format, location or environment of the event or the arrangements for, activities involved in or the numbers likely to be attending the event, pose a risk of infection;
- (b) Which take place in a specific designated 'affected area' (none has yet been designated); and
- (c) Where the number or likely number of proposed attendees at the event could pose a risk of infection with COVID-19 to attendees.

An 'event' includes a gathering for any of cultural, entertainment, recreational, sporting, commercial, work, social, community, educational, religious or other reasons. Where an event is permitted, restrictions and safeguards may be imposed to limit or slow the infection risk of people attending them.

Measures can be imposed requiring owners or occupiers of a premises (such as a workplace) or a class of premises (restaurants, gyms, hotels for example) to implement measures to minimise or slow the risk of infection to people attending the premises, including temporary closure. By way of example, in the context of employers, this could require temperature screening.

The Minister also has the power to *"take any other measures necessary to prevent, limit, minimise or slow the spread of COVID-19"*.

The Liability of Directors, Officers, Managers and Shareholders for Breaches of the Act

Business and employers have considerable responsibility under the Act to ensure that they remain fully compliant with any regulations which are issued. It is critical that businesses are fully informed on the scope of the Act and any regulations made under it that apply to their businesses.

This is important so that companies and company boards make informed and correct decisions on their business continuity plans during any lockdown period. Businesses and business owners should be aware that, where an offence under the Act is committed by a company or organisation and where that is done so with the *"consent, connivance or... wilful neglect"* of a director, manager, secretary or other officer, the individual as well as the corporate body faces prosecution in respect of that offence.

For example:

- (a) A business will need to assess carefully whether it and its workers (or some of them) fall within the category of essential services designated under any regulations (see below);
- (b) A business should have little scope to decide unilaterally whether or not to stay open if the business is situated within an area designated as an 'affected area' unless there is a clear carve out for that business. A direction by a senior manager / business owner to keep a business open could be an offence under the Act. Workers who are officers or managers in 'essential services' businesses will want to be reassured that their business is out of

scope in the event of a lockdown order as otherwise they could face criminal prosecution.

- (c) Employers and business owners will need to co-operate fully with all 'relevant persons' tasked with the enforcement of the Act including in relation to the provision of prompt and accurate information relating to, for example, their workforce or the volume of customers or visitors to their premises.
- (d) Business owners should take note that there is also provision in the Act for the prosecution of the members of a company where management of the company is, in effect, carried out by the members. In such a situation, both the company and the individual members potentially face criminal liability for breaches of the Act.

How will the Act affect the provision of essential services? Who are 'essential workers'?

The Act provides for the Minister to make exemptions from regulations for persons who perform 'essential services', including (but not limited to) "*statutory duties or other specified public or other services*". Apart from the inclusive language, the Act provides no further guidance on what is meant by the term 'essential services'.

The precise nature of 'essential services' will be decided in the coming days and weeks. In the UK, workers in the following sectors have been designated as 'critical workers' under guidance published by the UK government¹:

- (a) Healthcare;
- (b) Transport;

- (c) Key public services including those essential to the running of the justice system, religious staff, charities and workers delivering key frontline services, funeral directors, journalists and broadcasters who are providing public service broadcasting;
- (d) Local and national government workers;
- (e) Public safety and national security workers;
- (f) Utilities, including workers in oil, gas, electricity and water sectors;
- (g) Communication workers including postal and telecommunications workers; and
- (h) Financial services.

Several other jurisdictions have produced lengthy lists of critical infrastructure and essential workers broadly reflecting the above categories.

What are the enforcement powers?

Regulations made by the Minister may be enforced by 'relevant persons' who will be designated as such by the Minister. The list is non-exhaustive and includes officers from the Department of Health, and Justice and Equality. There is no specific mention of the defence forces or Garda Síochána (police) but they will almost certainly be deployed to support enforcement if necessary.

What are the penalties for breaching the Act?

There are various offences under the Act including:

¹ <https://www.gov.uk/government/publications/closure-of-educational-settings-information-for-parents-and-carers/closure-of-educational-settings-information-for-parents-and-carers>

- (a) Contravention of any regulation made under the Act;
- (b) Impeding a 'relevant person' in carrying out a power under regulation;
- (c) Failing or refusing to give a 'relevant person' relevant information or giving false or misleading information; and
- (d) Failing to comply with the direction of a member of a Garda Síochána who suspects, with reasonable cause, that a person has contravened a regulation under the Act.

Sanctions for committing any of the offences listed above are liable to a fine of up to €2,500 and / or imprisonment for up to six months. As noted above, individual business owners, directors, officers and managers potentially face individual criminal liability. The Garda Síochána also have express powers of search, arrest and detention under the legislation.

What about powers of isolation and detention of individuals as has happened in other countries?

The Minister has such powers. Individuals who are a potential source of infection or risk to public health can be mandatorily detained and isolated where they are otherwise failing or refusing to do so.

The sunset clause – when will it all end?

The emergency powers continue in operation until 9 November 2020 on which date they will cease to have effect unless a resolution is passed by both houses of the Oireachtas (parliament) to approve the continuation of the measures.

The Act also sets out a series of amendments to the Social Welfare Act Consolidation Act 2005. This provides a statutory basis for the recently announced State welfare payments to workers who have lost their jobs either permanently or temporarily and who are either ill or mandatorily self-isolating. This includes the State Illness Benefit and the COVID-19 Unemployment Benefit as outlined in our previous update². These measures remain in force until 9 May 2020.

Further Information

The information in this article is subject to change. This article does not contain legal advice.

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² <https://maples.com/Knowledge-Centre/Industry-Updates/2020/02/Coronavirus-Contingency-Planning-for-the-Workplace-in-Ireland>

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