MAPLES GROUP

COVID-19, DATA PROTECTION AND THE WORKPLACE

Third wave considerations for employers in Ireland: testing, vaccinations, the tracker app and outbreaks

INTRODUCTION

As Ireland comes to grips with the third wave of the pandemic and increased community transmission, employers are considering what further measures they can put in place to mitigate the COVID-19 risk for their workforce and customers. Employee personal data, and in particular their health data, will often be core to such further measures. This is especially the case in connection with temperature testing, PCR tests, the roll out of vaccinations and the use of the COVID-19 tracker app. Here, we address key issues arising for employers in connection with such measures. We also outline the practical data protection issues associated with managing COVID-19 workplace outbreaks.

EMPLOYEES IN, OR RETURNING TO, THE WORKPLACE

QUESTION	ANSWER
1. Can an employer ask employees if they have symptoms of COVID-19?	• Yes – under the Work Safely Protocol (the "Protocol"), workers are instructed to report to managers immediately if they develop symptoms of COVID-19 during work. Additionally, employers are required to issue a pre-return to work form for workers to complete in advance of returning to work. The Protocol requires that the form contain questions on whether a worker has symptoms of COVID-19. • Employers should note that pre-return to work forms should only be retained for so long as necessary and in-line with Data Protection Commission ("DPC") advice. At present, it is recommended that such forms are disposed of or destroyed securely as soon as the employee returns to the workplace, or returned to the employee at the point of entry to the workplace unless there are legitimate reasons for the employer to retain the forms for a longer period.

QUESTION	ANSWER
2. Can an employer conduct mandatory temperature testing at the workplace?	• Yes – where public health guidance mandates or advises that this should be conducted. However, there is currently no Public Health requirement to conduct temperature testing which applies across all workplaces. • Temperature testing involves processing health data and employers must comply with GDPR. The first hurdle for GDPR purposes with introducing mandatory temperature testing in the workplace is identifying an appropriate legal basis for the purposes of Articles 6 and 9 GDPR. • Employee consent is unlikely to provide a reliable legal basis for carrying out temperature tests. • Many employers will seek to rely on their obligation to provide a safe working environment under the Safety, Health and Welfare at Work Act 2005. However, in order to rely on this legal basis, employers must establish that temperature testing is necessary in order to provide a safe working environment. Public health authorities' advice will be key in the assessment of the necessity of mandatory temperature testing. In the absence of public health guidance mandating temperature testing across workplaces and/or risk factors arising in a particular workplace, employers' obligation to provide a safe working environment may not provide a valid legal basis for GDPR purposes. • Employers may also seek to rely on section 52 of the Data Protection Act 2018. Subject to suitable safeguards being in place, it permits processing of employee health data by a health practitioner where it is necessary for the purposes of occupational medicine and/or the assessment of the working capacity of an employee. • Employers must be transparent about how they process employee data in connection with the testing regime. It must not be used for any other purpose and employers should not collect more personal data than is necessary for the purposes of the testing. There must be a process in place to ensure that the data is accurate and up-to-date. Personal data must be stored securely and kept only for so long as necessary for the testing regime. Access to the data should be restricted to those who need to know. • Employers should conduct a Data Protection Impact Assessment ("DPIA") prior to implementing mandatory temperature testing. This will assist employers with complying with their obligation to demonstrate GDPR compliance.

QUESTION	ANSWER
3. Can an employer require an employee to undergo a PCR test?	• No – It is not possible to compel an employee to undergo a PCR test absent public health guidance or advice from the Department of Public Health mandating such testing. Any disciplinary sanctions imposed as a consequence may expose the employer to legal claims. • However, where the work must be done at the workplace and for example involves at-risk groups, it may be possible for the employer to decline access to the workplace for the employee for so long as they refuse to undergo testing. The employer should investigate alternative employment for the employee. • As PCR testing involves the processing of health data, all of the considerations arising in the context of mandatory temperature testing also arise with mandatory PCR tests (see question 2 above). Employers must identify a legal basis for the processing of such data for the purposes of Articles 6 and 9 GDPR. They must ensure that the core data protection principles of transparency, purpose limitation, data minimisation, accuracy, data storage, security and confidentiality are respected. A DPIA should be carried out.
4. Can an employer ask employees if they have received the vaccine?	• Yes – it may be possible for an employer to request this information. It will be considered health data and the employer must be able to justify the specific GDPR legal basis for requesting and processing this information. • For example, the employer should not ask all employees indiscriminately to disclose this information, e.g. asking employees who will continue to work remotely to provide vaccination information could not be justified on the grounds of the health and safety of the workplace. • Employers should update their existing Employee Privacy Notice, or provide a vaccine specific Employee Privacy Notice, to ensure that employees are fully informed as to why data in respect of vaccinations is being collected.

QUESTION	ANSWER
5. Can an employer require employees to be vaccinated before returning to the workplace?	• No – the National Vaccination Programme is currently being implemented on a voluntary basis. • Mandatory vaccination of employees would be vulnerable to legal challenge, including on the constitutional grounds of bodily integrity and privacy. • Additionally, it is important to note that employees with certain medical conditions which may be classified as a disability for the purposes of the Employment Equality Acts 1998 - 2015 may not be able to receive the vaccine for medical reasons. A mandatory vaccination policy on the part of an employer may therefore amount to discrimination. • Applying direct or indirect sanctions for the failure of employees to vaccinate could lead to claims for victimisation or penalisation, discrimination, and unfair or constructive dismissal where the employer's decision to make the vaccination mandatory is considered unreasonable in the circumstances. • If public health guidance later becomes available advising that certain workers in specific sectors should be vaccinated before carrying out their work, then it may be possible for an employer to implement a rule that workers must be vaccinated in reliance on that guidance.
6. Can an employer maintain a log of contacts in the workplace to facilitate contact tracing?	• Yes – the Protocol directs that employers must keep a log of contacts in the workplace to facilitate contact tracing in the event of an outbreak. This log should capture workers, contractors or visitors visiting the workplace and they must be notified about this log and its purpose. The HSA guidance notes that the log should include details such as dates, names, addresses, and phone numbers of individuals and the duration of contact if possible. The current HSE guidance directs that the log should be maintained for four weeks before being deleted or disposed of safely. The HSA guidance similarly suggests a retention period of 28 days. • The use of the personal data contained in these logs should be restricted to the minimum amount of personal data required, and should only be used for the HSE's official contact tracing procedures and to assist employees as a 'memory aid' in providing relevant information of who they have been in contact with to the HSE.

QUESTION	ANSWER
7. Can an employer instruct employees to utilise the COVID-19 tracker app while at the workplace?	• The Protocol highlights that the HSE COVID-19 tracker app is an important measure that can be adopted to support contact tracing. The Protocol recommends that employers provide advice on the HSE COVID-19 tracker app and encourage workers to download it. This, however, is not a mandatory provision and employers cannot mandate employees to download and use its contact tracing functionality.
8. Can an employer require visitors to provide specific health information and details about recent travel?	• Yes – an employer may be justified in requesting travel and health data from visitors to the workplace. A similar GDPR legal basis analysis to that outlined in question 2 above must be carried out to identify a clear legal basis to collect such data. The GDPR data protection principles must be complied with, including limiting questions to what is necessary and appropriate.

MANAGING A COVID-19 OUTBREAK IN THE WORKPLACE

QUESTION	ANSWER
1. Can an employer require employees to notify them of a COVID-19 diagnosis?	• Yes – under the Protocol, an employee is required to disclose on the pre-return to work form a positive COVID-19 diagnosis received in the preceding 14 days or if they are awaiting a test result at the time of completing the form. • If the employee has already returned to the workplace, that employee must report to managers if they develop any COVID-19 symptoms during work.

2. Does an employer have to notify Public Health authorities of a positive COVID-19 test?

- No – there is no requirement for the vast majority of employers to notify the HSA if a worker contracts COVID-19 as it is not reportable under the Safety, Health and Welfare at Work (Reporting of Accidents and Dangerous Occurrences) Regulations 2016 (S.I. No. 370 of 2016).
- However, under the Safety, Health Welfare at Work (Biological Agents) Regulations 2013 (as amended by the Safety, Health and Welfare at Work (Biological Agents) (Amendment) Regulations 2020), an employer must notify the HSA of an incident which may have resulted in the release of a biological agent and which could cause severe human infection or illness (or both), e.g. exposure to the causative agent of COVID-19 in a healthcare or laboratory setting.
- COVID-19 is reportable under the Infectious Diseases (Amendment) Regulations 2020 by a medical practitioner who becomes aware of or suspects an instance of COVID-19. This will be reported to the Director of Public Health who may in turn carry out a preliminary Public Health risk assessment and may contact the employer if it is believed that an outbreak has occurred in the workplace.

3. Can an employer disclose that an employee has COVID-19 to other employees?

- An employer should inform affected close contact employees where there has been a positive case in the workplace. Employers should not disclose the identity of affected employees to other employees without a clear justification and legal basis.

4. Is an employer required to close the workplace where they are notified of a positive COVID-19 case?

- No – where an employee who has attended the workplace is confirmed with a diagnosis of COVID-19, in the first instance the employee must be isolated in a designated isolation area. It must be determined whether the person should go home or attend hospital. The employer must arrange for appropriate cleaning of the isolation area and relevant work areas.
- The employer should then conduct its own risk assessment in accordance with its COVID-19 Response Plan to identify any hazards or risks arising out of a positive case occurring in the workplace and respond with the appropriate control measures. Each response will depend on the circumstances of the case.
- If the employer has followed the Protocol in implementing clear and robust infection prevention and control methods, including for example designating work zones and isolating teams and colleagues from one another, there should not be a need to close the workplace.

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