

Covid-19 and labour law in Ireland

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Abstract

Similar to many other European countries, the Irish Government has attempted to address the employment implications of the Covid-19 pandemic through a mixture of income support schemes. Coming with the repercussions of the Great Recession remain in memory and the toll that took on the Irish banking sector, the Government seems to have endeavoured to take an approach that may be more conservative as compared to other EU Member States.

Keywords

Covid-19, income support, unemployment, workplace, Ireland

I. Overview

On 28 February 2020, Ireland reported its first case of Covid-19,¹ with the first death reported on 11 March 2020.² The Irish Government moved to a 'delay' phase on 12 March 2020 with social distancing and self-isolation for those with symptoms.³ To further the goal of reduced gatherings, the closure of all public places such as museums as well as in-person tuition at schools, universities, and childcare facilities was ordered, initially until 29 March 2020, in order to support efforts to contain the spread of Covid-19.⁴ School closures were part of a larger effort to put in place social

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^{1.} Raidió Teilifís Éireann (RTÉ), 'All those in close contact with Covid-19 patient 'notified' (28 February 2020), www.rte .ie/news/ireland/2020/0228/1118104-coronavirus-ireland/. RTÉ is the national broadcaster for Ireland.

Fergal Bowers, 'First death of patient in Ireland with Covid-19' RTÉ (11 March 2020), www.rte.ie/news/2020/0311/ 1121526-harris-Covid-19

^{3.} Department of Health, 'Statement from the National Public Health Emergency Team - Thursday 12 March', www.gov.ie/en/press-release/96eb4c-statement-from-the-national-public-health-emergency-team (12 March 2020).

Department of Education & Skills, 'Covid-19 - Statement from the Department of Education and Skills' (12 March 2020), www.education.ie/en/Press-Events/Press-Releases/2020-press-releases/12-march-2020-statement-from-the-department-of-education-and-skills.html

distancing amongst the population (a recommended distance of six feet with a minimum of three feet separation).⁵ In addition to school closures, Taoiseach Leo Varadkar also recommended the cancellation of indoor gatherings of 100 or more and outdoor gatherings of 500 or more. Education and childcare closures were extended to 19 April 2020 on 24 March 2020.⁶ Soon after school closures, the Government asked bars to shut down (15 March 2020),⁷ and by 28 March 2020 a 'lockdown' was in place affecting all but essential businesses and movement for food and medical appointments where working from home was advocated by the Government.⁸

As part of a EUR 7.2 billion package which amounted to approximately 2% of the country's GDP (a fraction of the amount spent in the UK where GBP 330 billion (15% of the country's GDP)⁹ had been allocated),¹⁰ the Irish Government announced a National Covid-19 Income Support Scheme on 24 March 2020. With an initial estimated cost of EUR 3.7 billion over a 12-week period, the Irish Government took this action 'to ensure social solidarity with workers and their families affected by the crisis.'¹¹ Touching on social security, the Government also announced enhanced protections for people facing difficulties with their mortgages, rents, and utility bills.¹² As it pertains to the workplace, the next section outlines some of the key points. The number of those with Covid-19 increased significantly during the early part of the lockdown. Eventually numbers reduced to a manageable level. As of 18 May, the lockdown began to ease and a plan of several phases was instituted for a wider re-opening of the country.

The following detail is important to note. Ireland runs a two-tier healthcare system. A medical card is available for those who qualify (low-income earners, retirees) and it entitles the holder to a range of free medical services. The majority of the population does not qualify, and private health insurance has been a widely purchased commodity.¹³

^{5.} This step is notable because the neighbouring United Kingdom initially endorsed 'herd immunity'. Keep in mind that the Republic of Ireland is on the same land as a portion of the United Kingdom (Northern Ireland).

Department of Education & Skills, 'Covid-19 - Statement from the Department of Education and Skills' (24 March 2020), www.education.ie/en/Press-Events/Press-Releases/2020-press-releases/PR20-03-24.html

RTÉ, '40 new cases of Covid-19 confirmed, pubs asked to close' (15 March 2020), www.rte.ie/news/coronavirus/2020/ 0315/1123356-coronavirus-ireland

Rory Carroll, "Stay home": Varadkar announces sweeping two-week lockdown' The Guardian (27 March 2020), www.theguardian.com/world/2020/mar/27/stay-home-varadkar-urges-irish-in-drastic-lockdown

^{9.} Her Majesty's Treasury, 'Support for those affected by COVID-19', www.gov.uk/Government/publications/supportfor-those-affected-by-covid-19/support-for-those-affected-by-covid-19#to-support-people-affected-by-covid-19

^{10.} The financial challenges faced by Ireland (necessitating a restructuring of Irish banking) coming as a result of the Great Recession must be kept in mind when assessing the more tentative steps taken by the Irish Government in 2020 regarding the Covid-19 pandemic. These challenges precipitated a financial rescue plan agreed to between the Irish Government, the EU and the IMF. See further, BBC News, 'Republic of Ireland confirms EU financial rescue deal' (22 November 2010), www.bbc.com/news/business-11807730; Michael Doherty, 'Can the Patient Survive the Cure? Irish Labour Law in the Austerity Era' (2014) 5 Eur. Lab. L. J. 81.

Department of Business, Innovation and Enterprise, 'Government announces National Covid-19 Income Support Scheme' (24 March 2020), https://dbei.gov.ie/en/News-And-Events/Department-News/2020/March/24032020.html

^{12.} Ibid.

The question is whether or not those suffering from Covid-19 would have 'access, for as long as required, to adequate health care and services of a preventive and curative nature' as set out in ILO, ILO Standards and Covid-19 (23 March 2020), vers.1.2, 14-15.

II. Income Support

Three income support arrangements are largely in use to assist businesses and workers: a temporary wage subsidy, unemployment allowance, and sick pay. Drawing from Central Statistics Office (CSO)¹⁴ data published 13 May 2020, employment of 47% of the country's working residents was impacted by Covid-19, including 34% working from home, and 23% reporting a change in their working hours.¹⁵ And yet, optimism remained high amongst those who lost their jobs in some manner (dismissed, temporarily laid off, or on paid/unpaid leave) as 94% expected to return to their jobs.

a) Temporary Wage Subsidy

The temporary wage subsidy scheme has evolved since it was first announced. The different stages may be marked by the dates upon which changes were announced or the date on which the changes came into effect. The key dates are 26 March 2020, 15 April 2020, and 4 May 2020.

Eligible employers are supported through a temporary wage subsidy of up to 70% of an employee's take home pay,¹⁶ regardless of the employee's income. The scheme was set up to last 12 weeks from 26 March 2020. Employers must meet three criteria which essentially require them to have the 'firm intention of continuing to employ the specified employee'.¹⁷ The wording endeavours to give some appearance of ensuring employment after the wage subsidy scheme ends. Moreover, the scheme seems to apply to a complete cessation of work by an employee, rather than additionally covering a situation where an employee's hours of work have been reduced.

To qualify, employers (without restriction to any industries) must have 'experienced significant negative economic disruption due to Covid-19, with a minimum of 25% decline in turnover, and an inability to pay normal wages and other outgoings'¹⁸ for the period 14 March 2020 to 30 June 2020.¹⁹ Employees must have been on the payroll from 28 February 2020. The Government envisioned the subsidy being topped up by employers to 100% of employees' pay, but this is not mandatory.²⁰ The number of individuals in receipt of temporary wage subsidies was 436,925 in April 2020 and 436,344 in May 2020.²¹ It may be striking that the matter resides with employers.

^{14.} The Central Statistics Office (CSO) is 'Ireland's national statistical office and our purpose is to impartially collect, analyse and make available statistics about Ireland's people, society and economy': www.cso.ie/en/aboutus/whoweare

Central Statistics Office, 'Employment and Life Effects of COVID-19 - April 2020' (13 May 2020), https://www.cso .ie/en/releasesandpublications/er/elec19/employmentandlifeeffectsofcovid-19/

^{16.} Section 28 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 outlined the wage subsidy.

^{17.} Section 28(2) states: 'a) the business of an employer has been adversely affected by Covid-19 to a significant extent with the result that the employer is unable to pay to a specified employee the emoluments the employer would otherwise have normally paid to him or her, (b) notwithstanding the existence of the circumstances referred to in paragraph (a), the employer has the firm intention of continuing to employ the specified employee (and to pay to him or her emoluments accordingly) and is making best efforts to pay to the employee some of the emoluments referred to in paragraph (a) during the applicable period, and (c) the employer has satisfied the conditions specified in subsection (4).'

Department of Business, Innovation and Enterprise, 'Government announces National Covid-19 Income Support Scheme' (24 March 2020), https://dbei.gov.ie/en/News-And-Events/Department-News/2020/March/24032020.html

^{19.} Section 28(3) of the Emergency Measures in the Public Interest (Covid-19) Act 2020

^{20. &#}x27;The employer is expected to make best efforts to maintain as close to 100% of normal income as possible for the subsidised period': Department of Business, Innovation and Enterprise, 'Government announces National Covid-19 Income Support Scheme' (24 March 2020), https://dbei.gov.ie/en/News-And-Events/Department-News/2020/March/ 24032020.html

^{21.} https://www.cso.ie/en/releasesandpublications/er/lr/liveregistermay2020/.

In the UK, by way of contrast, employers and employees must have 'agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment.'²²

Initially, the scheme covered incomes up to EUR 76,000 or twice the average earnings, up to a maximum weekly tax-free amount of EUR 410 per week to help affected companies keep paying their employees. For incomes between EUR 38,000 and EUR 76,000, support was capped at EUR 350 per week.

The Government amended the scheme on 15 April 2020 to address those earning at the lower end.²³ These changes came into effect for payroll submitted on or after 4 May 2020. For employees annually earning about EUR 24,400 (approximately EUR 412 per week), the Government increased the wage subsidy by 15% (from 70% to 85% of regular wages).²⁴ Those annually earning between EUR 24,400 and EUR 31,000 (EUR 412 to EUR 500 per week), the subsidy is up to EUR 350 per week. Employees earning in excess of approximately EUR 38,000 (over EUR 586 per week) are subject to a 'tiered approach' where the maximum subsidy of EUR 350 per week applies in fewer cases than originally noted. The Department of Finance produced the following chart:²⁵

| Gross Amount paid by Employer | Subsidy |
|--|------------------------|
| Up to 60% of employee's previous average net weekly pay | Up to EUR 350 per week |
| Between 60% and 80% of employee's previous average net weekly pay | Up to EUR 205 per week |
| Over 80% of employee's previous average net weekly pay ²⁶ | No subsidy payable |

Based upon the revised wage subsidy, EUR 38,000 stands out as a threshold salary. According to CSO data,²⁷ 2018 (the last year for a full set of data available) saw annual average earnings stand at EUR 38,871.²⁸ This figure was 3.3% higher than the 2017 figure (EUR 37,637) which was about half the 2018 increase (1.7%) on the 2016 figure (EUR 36,933). And so, 2018 would be at the higher end of a threshold (bearing in mind a 7.1% increase in total annual labour costs for the same year) and may present a squeeze (of sorts) on middle-class incomes at a challenging time.

^{22.} Her Majesty's Treasury, The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction (15 April 2020), [6.7]. This guidance was given after no requirement for an agreement in writing had been made on a few occasions.

^{23.} https://www.revenue.ie/en/corporate/communications/covid19/temporary-covid-19-wage-subsidy-scheme.aspx

^{24.} Department of Finance, 'Minister Donohoe announces update to the Temporary Wage Subsidy Scheme to ensure greater staff retention and links between employer and employee' (15 April 2020), https://www.revenue.ie/en/corpo rate/press-office/letters/minister-of-finance-signed-letter-to-chairman-revenue-160420.pdf

Department of Finance, 'Minister Donohoe announces update to the Temporary Wage Subsidy Scheme to ensure greater staff retention and links between employer and employee' (15 April 2020).

^{26.} A more pointed modification to eligibility for the subsidy also came about (effective 16 April 2020) for those employees whose pre-pandemic salary was greater than EUR 76,000, 'and their post-Covid salary ha[d] fallen below €76,000, subject to the tiered arrangements and tapering to ensure that the net pay d[id] not exceed €960 per week': https://www.revenue.ie/en/corporate/communications/covid19/temporary-covid-19-wage-subsidy-scheme.aspx

Central Statistics Office, 'Earnings and Labour Costs Annual 2018' (11 June 2019), www.cso.ie/en/releasesandpu blications/er/elca/earningsandlabourcostsannualdata2018

 ^{&#}x27;Average annual earnings for full-time employees in 2018 were €47,596 (up 2.6% on 2017) while the average for parttime employees were €17,651 (an increase of 3.5%).'

The Government's changes to the wage subsidy scheme (soon after its initial announcement) may be viewed as refinements. And yet, these modifications suggest more than subtle amendments. The move expresses concern about the low uptake of the subsidy amongst employers, as numbers have been much higher for the unemployment payment (discussed further in the next section). Moreover, it illustrates that there remain challenges in fully understanding the nuances of workplace issues such as annual earnings at the lower end of the pay scale. For example, part of the reason for the change to the wage subsidy at the lower end of the scale was that workers originally earned more if they were receiving unemployment payments than the wage subsidy.

While subsidies had been given regardless of the employee's income, this ended from 4 May 2020 onwards. From this date, subsidy payments were based upon employees' previous net weekly income as set out by the Irish Revenue Commissioners.²⁹ Where gross pay paid by employers plus the subsidy exceeded the previous average net weekly pay, the subsidy was accordingly diminished.

The situation for workers experiencing a reduction in working hours was not as clear. Two schemes applied to this circumstance. First, an employee may access short time work support which is a form of jobseeker's benefit.³⁰ This is available for those who work no more than three days per week and must have been employed previously on a full-time basis. Further criteria include satisfying the pay-related social insurance (PRSI) conditions. An individual may receive the benefit for up to 234 days, but entitlement will depend upon the number of PRSI contributions made. The sum paid will depend upon the average amount of weekly earnings in the year in which an application is made and the nature of the change in the work pattern. Second, where a worker is unemployed for four or more days out of every seven, the jobseeker's benefit may be available.³¹ The PRSI conditions must also be met. A qualified adult can receive the increased rate of EUR 147 (up from EUR 134.70) for a 12-week period. The increased rates expired the week of 15 June 2020.

b) Unemployment Payment

The National Scheme of 24 March 2020 also enhanced the Covid-19 Pandemic Unemployment Payment for workers who lost their jobs due to the crisis. These individuals receive EUR 350 per week, increased from EUR 203, and the payment is in place for 12 weeks (from 24 March 2020).³² Self-employed individuals are also eligible for the Covid-19 Pandemic Unemployment Payment of EUR 350 directly from the Department of Employment Affairs and Social Protection. The Department of Employment and temporary wage subside, respectively. These plans have been put in place with an initial timeline of 12 weeks, but they will likely 'be in place for the duration of the crisis.'³³

^{29. &#}x27;Revenue has calculated each employee's Maximum Weekly Wage Subsidy (MWWS) based on the employee's Average Revenue Net Weekly Pay (ARNWP) and is providing this, along with other necessary information, to each employer (who is operating the scheme) in respect of each active employee', https://www.revenue.ie/en/corporate/ communications/covid19/temporary-covid-19-wage-subsidy-scheme.aspx

^{30.} www.gov.ie/en/service/c20e1b-short-time-work-support/

^{31.} www.gov.ie/en/service/1221b0-jobseekers-benefit

Department of Employment Affairs and Social Protection, www.gov.ie/en/service/be74d3-covid-19-pandemic-unem ployment-payment

^{33.} Ibid.

Early data (from 2 April 2020) from the CSO suggests that the preponderance of workers (283,037) were dealt with through the unemployment payment with 25,104 individuals under the temporary wage subsidy. As of 27 March 2020, 12,650 companies had applied for the temporary wage subsidy (affecting 25,104 workers).³⁴ While some distinction can be attributed to the way figures are collated by the CSO (where the Live Register was not set up to speak to unemployment),³⁵ these figures seemed to prompt the Government's increase of the subsidy at the lower end of the pay scale (as noted above). As of 9 April 2020, the unemployment rate (treating all Covid-19 unemployment payment recipients as unemployed) was 16.5%.³⁶ By the end of April 2020, unemployment had reached 28.2%.³⁷ It is important to note that the Labour Force Survey for Quarter 1 showed that employment (until the pandemic) had increased by about 2.2.%. The data for April 2020 indicated phenomenal increases in both unemployment payments (602,107).³⁸ Unemployment reached 26.1% for May 2020.³⁹ May saw a reduction in the number of individuals receiving the unemployment payment (543,164).⁴⁰ Though the gap has narrowed, unemployment payments remain significantly ahead of the wage subsidy as a source of income.

c) Sick Pay

The National Scheme of 24 March 2020 also increased the Covid-19 illness payment to EUR 350 per week. The usual six-day wait period has been waived for those with Covid-19 or those required to self-isolate.⁴¹ The illness payment require a medical diagnosis and qualifying documentation to be sent directly from a family doctor to the relevant Government department.

III. Health & safety at work

The National Standards Authority of Ireland (NSAI) published, on 27 March 2020, a COVID-19 Guide which 'specifies requirements to implement, maintain and improve an organisation's ability to protect against, prepare for, respond to and recover from COVID-19 related disruptions when

- Department of Business, Innovation and Enterprise, 'Minister Humphreys again urges employers to avail of the Wage Subsidy Scheme' (27 March 2020), https://dbei.gov.ie/en/News-And-Events/Department-News/2020/March/ 27032020bc.html
- 35. See the CSO's note of 1 April 2020 outlining the figures: Central Statistics Office, 'Information Note on Implications of COVID-19 on the Live Register and the Monthly Unemployment Estimates', www.cso.ie/en/releases and publica tions/in/mue/inlrmue
- 36. The Central Statistics Office, 'Press Statement Monthly Unemployment March 2020' (9 April 2020), www.cso.ie/en/ csolatestnews/pressreleases/2020pressreleases/pressstatementmonthlyunemploymentmarch2020 The CSO explains that those who receive the unemployment payments do not fit the definition of unemployed that traditionally is used (by the EU and the ILO): CSO, 'Monthly Unemployment and COVID-19 Adjusted Estimates March 2020 Technical Note' (9 April 2020), www.cso.ie/en/methods/labourmarket/monthlyunemployment/monthlyunemploymentandcovid-19adjustedestimatesmarch2020technicalnote
- Central Statistics Office, 'Labour Force Survey Quarter 1 2020' (21 May 2020), https://www.cso.ie/en/release sandpublications/er/lfs/labourforcesurveylfsquarter12020/
- 38. Central Statistics Office, 'Live Register April 2020', https://www.cso.ie/en/statistics/labourmarket/liveregister/
- Central Statistics Office, 'Monthly Unemployment May 2020' (3 June 2020) https://www.cso.ie/en/releasesandpu blications/er/mue/monthlyunemploymentmay2020/.
- 40. Central Statistics Office, 'Live Register May 2020'.
- Department of Business, Innovation and Enterprise, 'Illness Benefit for COVID-19 absences', www.gov.ie/en/service/ df55ae-how-to-apply-for-illness-benefit-for-covid-19-absences

they arise.⁴² EUR 2,500 consultancy vouchers are also available for workplace improvement measures.⁴³ The combination is intended to assist employers in identifying and implementing the measures 'needed to ensure they can continue to operate safely to provide necessary and essential goods and services for all.'

IV. A staggered reopening

On 3 May 2020, the Irish Government produced its 'Roadmap for Reopening Society & Business'.⁴⁴ The Government identified several guiding principles in the document as shaping its response. These involve an approach to reopening society and business in a manner that is: safe, rational, evidence-informed, fair, open and transparent, and is premised upon a benefit for the whole of society.⁴⁵ There were five phases, commencing with Phrase One on 18 May, separated by three weeks, with the final phase starting on 10 August. Though conspicuous, a qualification to this plan remains: 'No assurance that it is safe to reduce social distancing measures and stricter measures will have to be reintroduced if there is strong upsurge of infection'.⁴⁶ During Phase Two (commencing 8 June 2020), the government revised this initial plan on 12 June 2020 by excluding the fifth phase; though the dates for the remaining four phases remain as initially stated.⁴⁷

There are many questions that arise from this plan. One that stands out for workplaces is: 'The promotion of "micro-communities" will allow for work to be conducted and for social interaction to promote wellbeing, while still limiting the spread of infection.'⁴⁸ Micro-communities for work purposes suggests a continuation of the limitation of movement where the expansion from a lockdown phase represents an inclusion of work colleagues. It would seem as though there are two goals with micro-communities. The spread of Covid-19 has been stated in the document. The other, though, seems to be contact tracing – where if someone within a micro-communities are not unique to Ireland as the idea is traced to the European Centre for Disease Control (ECDC).⁴⁹ As applied to workplaces, the query will be how to maintain these micro-communities over the course of the different phases and over a longer period of time until (if) a vaccine is developed and made widely available.

44. Department of Taoiseach and Department of Health, 'Roadmap for Reopening Society & Business' (3 May 2020), https://www.gov.ie/en/news/58bc8b-taoiseach-announces-roadmap-for-reopening-society-and-business-and-u/

48. Ibid f43.

NSAI, COVID-19 Workplace Protection and Improvement Guide (27 March 2020), www.nsai.ie/images/uploads/ general/Covid-19_Workplace_Protection_and_Improvement_Guide.pdf

Department of Business, Innovation and Enterprise, 'New 'Workplace Protection and Improvement Guide' launched by Minister Humphreys' (27 March 2020), https://dbei.gov.ie/en/News-And-Events/Department-News/2020/March/ 27032020.html

^{45.} Ibid.

^{46.} Ibid.

Department of Taoiseach and Department of Health, 'Roadmap for Reopening Society & Business' (12 June 2020) https://www.gov.ie/en/news/58bc8b-taoiseach-announces-roadmap-for-reopening-society-and-business-and-u/

^{49.} European Centre for Disease Control, 'Rapid Risk Assessment Coronavirus disease 2019 (COVID-19) in the EU/EEA and the UK – Ninth update' (23 April 2020), 18. Another term, 'bubbles', has been used in relation to Australia and New Zealand.

V. Next steps

It may have been easily overlooked, but the Irish general election of 8 February 2020 did not produce a clear majority for any one party. For the first time in almost a century neither of the two main parties, Fianna Fáil and Fine Gael, was in a position to form a Government, without support from the other.⁵⁰ Assessment regarding why this result arose speculated that social issues, such as rising rents, a shortage of housing, and homelessness, were on voters' minds; areas in which both parties have been seen as weak.⁵¹ Fianna Fáil and Fine Gael engaged in discussions on a joint government policy document.⁵² Later, the Green Party entered into these negotiations so that a majority coalition may be reached. On 15 June 2020, the leaders of these three political parties reached an agreement on a draft 'Programme for Government'.⁵³ The election result will have a bearing on the next steps for the Irish Government as it navigates the challenges of the pandemic (itself) as well as the economic implications.

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^{50.} This result may be largely attributed to the rise in votes (and seats) for Sinn Féin (a party that has historical ties with the Irish Republican Army).

BBC News, 'Irish general election: Sinn Féin celebrate historic result' (11 February 2020), www.bbc.com/news/worldeurope-51441410

^{52.} See, Micheál Lehane, 'Government policy could be agreed this week', RTÉ (1 April 2020), www.rte.ie/news/politics/ 2020/0331/1127700-fine-gael-fianna-fail-talks; and Paul Cunningham, 'Meeting with Martin has 'cleared the air', says Varadkar', RTÉ (18 May 2020), https://www.rte.ie/news/2020/0517/1138977-Government-formation-talks-politicsc/

^{53.} RTÉ, 'Agreement reached on draft programme for government' (15 June 2020) https://www.rte.ie/news/politics/2020/ 0615/1147519-government-formation/) The role of the Taoiseach (leader of the government) will rotate.