

Employment, Pensions and Incentives Group

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# Returning to Work

## Issues for Employers to Consider

MCCANN FITZGERALD





## Introduction

Now that the lifting of lockdown restrictions has commenced many business are faced with the difficult task of planning for re-opening.

Developing those plans can be an overwhelming task, given the breadth of issues to consider, the degree of uncertainty which remains, and the fact that restrictions may be maintained or indeed re-introduced if an upsurge in the spread of the virus occurs.

With this in mind, our briefing sets out some key considerations for employers to keep in mind when developing their Return to Work Strategy.



## Reopening Society and Business

### When can my business reopen?

The Government's Roadmap for Reopening Society and Business sets out the likely timeline for the reopening of the various sectors of the Irish economy. The Roadmap is intended to be applied flexibly and restrictions may be maintained or indeed re-introduced if an upsurge in the spread of the virus occurs. While the Roadmap originally provided for five phases, the acceleration of the Roadmap announced by Government on 5 June, now envisages four phases of easing restrictions and means certain sectors and public amenities can open earlier than previously planned. As of 5 June, the Roadmap provides for the following four phases with further guidance expected on the steps to be taken in Phases 3 and 4 in the coming weeks:

#### Roadmap Phases

##### Phase 1

18 May



Outdoor workers (e.g. construction workers and gardeners), with social distancing requirements continuing to apply.

##### Phase 2

8 June



Phased return of workers, such as solitary and other workers that, due to the nature of their work, can maintain 2-metre distance constantly, with social distancing requirements continuing to apply. Retail outlets may re-open if appropriate safety measures are in place, including staggered opening hours and methods of operation including, for example, priority times for the vulnerable.

##### Phase 3

29 June



Organisations where employees have low levels of daily interaction with people and where social distancing can be maintained. The recent acceleration plans envisage a return of domestic tourism, and the re-opening of hotels, restaurants, hostels, caravan parks, galleries and museums again with appropriate safety measures.

##### Phase 4

20 July



The original Roadmap provided that organisations whose employees cannot work remotely should begin their onsite return in Phase 4 with appropriate safety measures. Phase 5 provided for returns to onsite working for all employees while higher risk organisations were advised to implement plans at this stage for an eventual onsite return of all staff. Although further detail on the precise measures which will occur in Phase 4 is expected in the coming weeks, the removal of Phase 5 is likely to mean an acceleration of the return to onsite working for all employees.

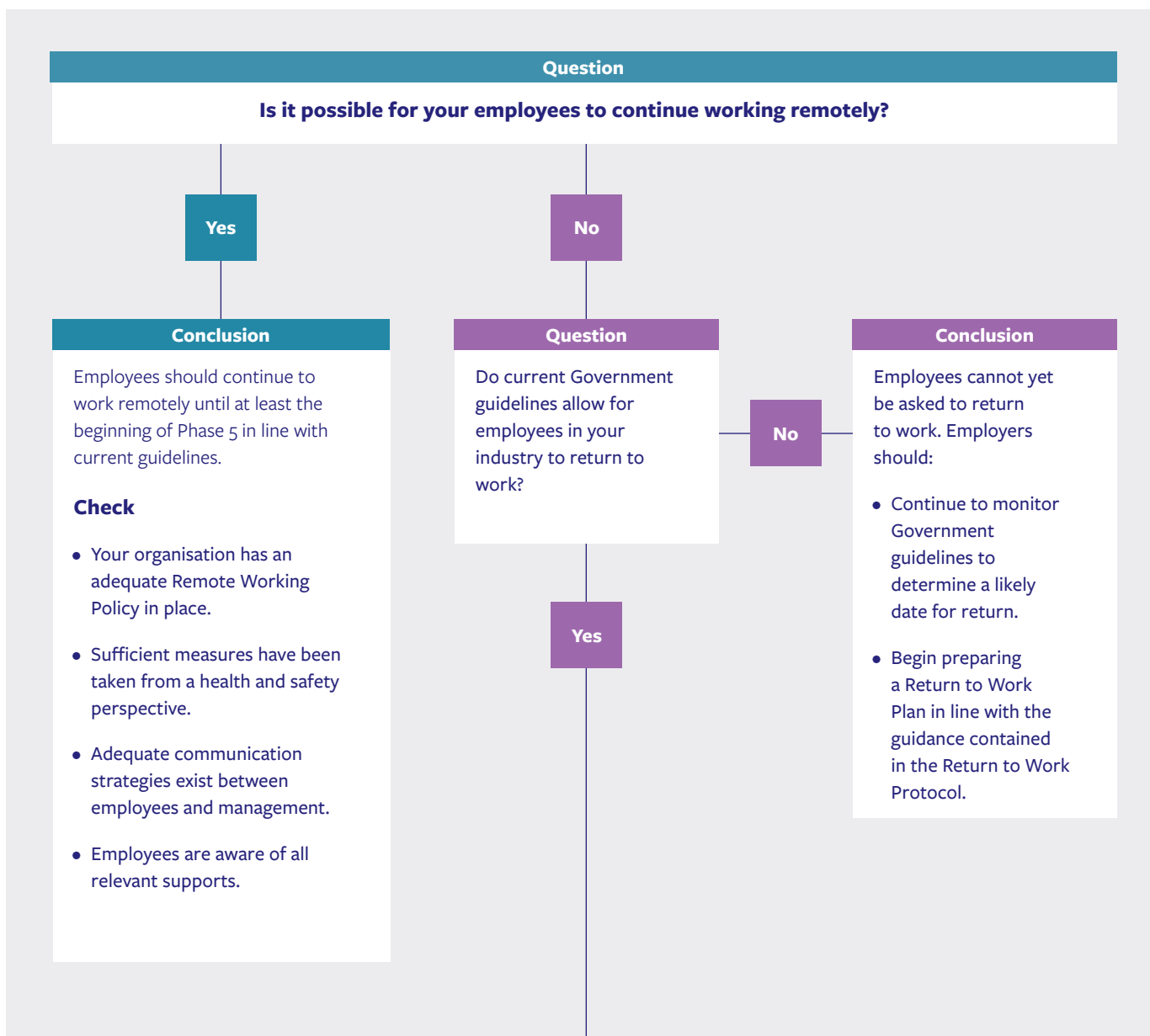
It is also important to emphasise that both the Roadmap and Protocol make it clear that all workers who can work remotely should continue to do so. Remote working is therefore likely to remain the norm for many workers and businesses.

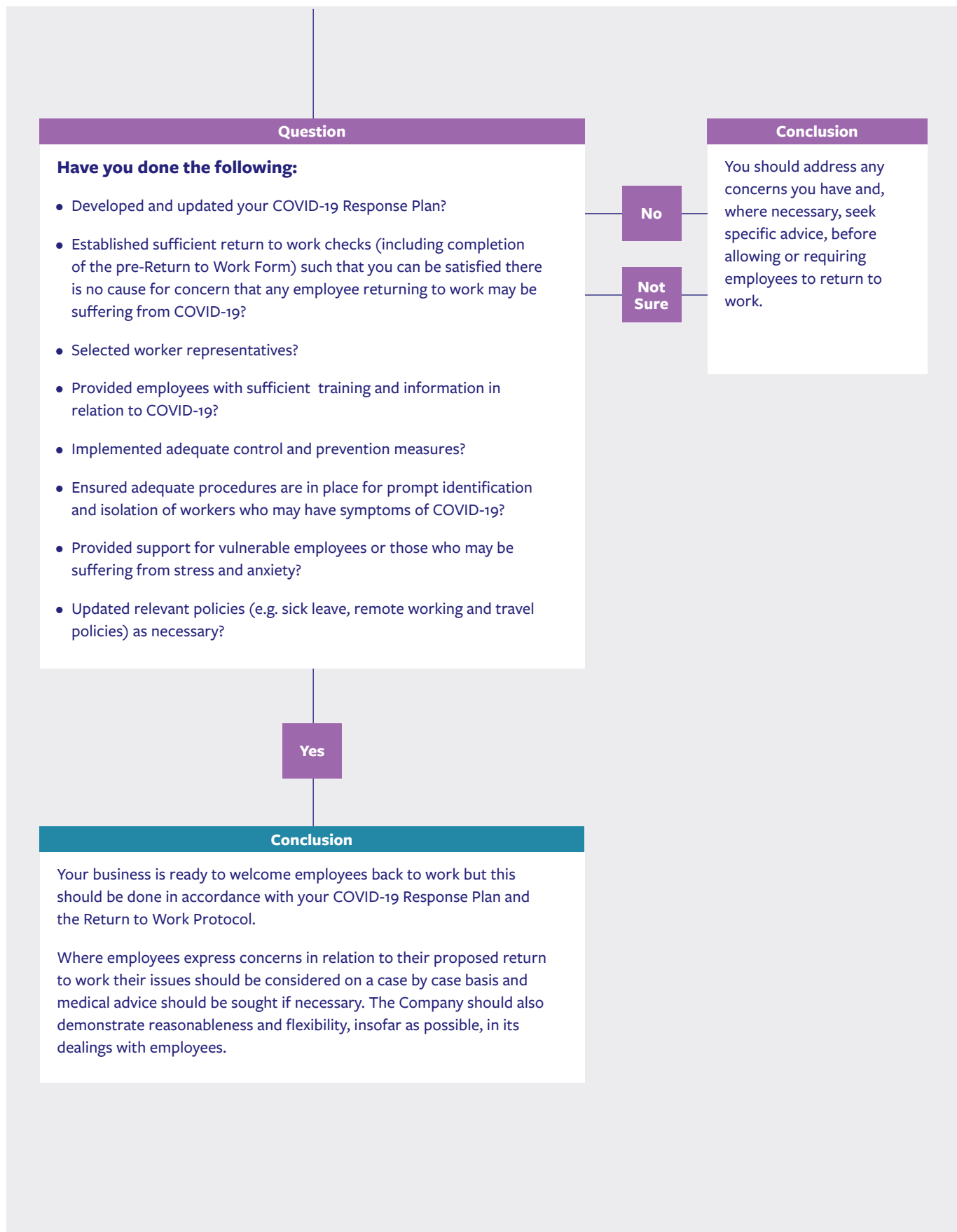


## Returning to Work

### What steps do I need to take before I allow employees to return to work?

The response to this question will, of course, depend on the precise nature of your business. However, the following provides a useful checklist of issues for all employers to consider:







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# The Return to Work Protocol

## What is the Return to Work Protocol?

The Return to Work Protocol has been prepared by the Government, in conjunction with the Health & Safety Authority (the “HSA”) and the HSE to provide guidelines to businesses across all industries as to the measures to be taken to combat the spread of COVID-19. It sets out the steps that employers and workers must take, both before a workplace reopens, and while it continues to operate.

According to the Department of Business & Innovation, “the Protocol should be used by all workplaces to adapt their workplace procedures and practices to comply fully with the COVID-19 related public health protection measures identified as necessary by the HSE”.

Strictly speaking, the Protocol itself is not legally binding but it does offer important guidance to employers as to how to fulfil existing obligations under Health and Safety law when addressing the hazards and risks presented by COVID-19. Compliance is to be monitored by the HSA using their existing powers under the Safety, Health and Welfare at Work Acts which include inspection powers and the power to issue Improvement Notices and Prohibition Notices requiring the cessation of work activities in cases of serious non-compliance. The usual penalties for breaches of health and safety obligations (which include criminal sanctions for employers and senior management as well as fines of up to €3 million) will also apply. In addition, as with any guidance published by HSA, compliance with the Protocol will give an employer a good defence to any prosecution where the employer needs to establish that it has taken all reasonably practicable steps to comply with its obligations.

## Useful Guidance

Useful guidance in relation to the practical implementation of the Protocol can be found in the National Standard Authority of Ireland’s “COVID-19 Workplace Protection and Improvement Guide”, available at [nsai.ie](https://www.nsa.ie).

The HSA has also published a number of templates and checklists based on the Protocol which can be accessed at [hsa.ie](https://www.hsa.ie).

Both the NSAI Guide and the additional HSA guidance should be read in conjunction with the Protocol.



## Key Obligations

The Protocol imposes the following key obligations on employers:



Develop and/or update a COVID-19 Response Plan



Appoint a worker representative/worker representatives



Establish and issue pre-return to work checks including a “pre-return to work form”



Provide training and information to employees



Implement adequate prevention and control measures



Ensure adequate procedures are in place for prompt identification and isolation of workers who may have symptoms of COVID-19



Provide supports for employees suffering from anxiety or stress and specific supports for vulnerable workers



Update policies where necessary

## **Prevention and control measures**

### **Suggested measures include:**

- The provision of appropriate hygiene facilities
- Training on hand hygiene and good respiratory hygiene and etiquette
- A no hand shaking policy
- Organising workers into teams to facilitate social distancing
- Rearranging working and break areas to facilitate maintenance of physical distancing
- Staggering canteen use, implementing queuing systems and put in place card payment facilities where possible
- Closing facilities where social distancing is not possible
- Allocating specific times for collections, appointments and deliverables
- Conducting meetings as much as possible using online remote means
- Providing one way systems for access/egress routes in the workplace where practicable
- Thorough and regular cleaning
- Modifying the use of “hot desking” where necessary
- Preventing gatherings of workers in the workplace at the beginning and end of working hours (such as at time recording terminals and in changing rooms, washrooms and showers)
- Ensuring alternative measures are put in place where 2 metre worker separation cannot be ensured including physical barriers, face masks and increased hand hygiene facilities
- Providing PPE and protective clothing to workers in accordance with identified COVID-19 exposure risks and in line with Public Health Advice
- Restructuring work patterns where necessary (in consultation with employees)
- Maintaining remote working where possible.



## What other issues I should be considering at this stage?

One of the specific recommendations of the Return to Work Protocol is that employers should review their existing policies (including sick leave policies, remote working policies and travel policies) and amend them where necessary with a view to minimising the risks associated with COVID-19.

More generally, the current pandemic has resulted in changes to a variety of policies and procedures which may not yet be reflected in updated policies. What may now be a quieter than expected period for business, might serve as a good opportunity to review these policies to ensure they are up to date with best practice and current requirements. Some questions to consider include:



### Sick Leave

Are there gaps in this policy which need to be addressed to minimise the spread of COVID-19?

### Health & Safety

- Does this policy provide sufficient information to employees in relation to their responsibilities in tackling the spread of infection?
- Has your risk assessment and safety statement been updated in light of your COVID-19 Response Plan?
- Has adequate consideration been given to the health and safety of employees continuing to work remotely?

### Data Protection & Confidentiality

- Do your data protection policies and documentation need to be updated to reflect the increased processing of employee health data as required by the Protocol?
- Does your confidentiality policy adequately capture remote working arrangements?

### Remote Working & Flexible Working

- Do you need to implement or update your remote working policy? Does it cover issues such as confidentiality and data protection requirements, rest breaks and working time and mechanisms for communicating with colleagues during periods of remote working?
- Is your organisation likely to experience an increase in requests for remote working/flexible working in the future? Does the organisation have a policy for dealing with such requests? Should such a policy be implemented in line with the recommendations of the Code of Practice on Access to Part-Time Work (which deals with requests for flexible working arrangements)?



## Issues

### Whistleblowing

- How will your organisation deal with concerns from employees around the adequacy of the control and prevention measures introduced?
- Is there an adequate whistleblowing procedure in place to deal with those concerns? If not, is there a risk that employees may be likely to express their concerns publicly or, indeed, to make a complaint to the HSA, before your organisation has had an opportunity to address those concerns?

### Annual Leave

Does the Company need to update its policies in relation to the carryover of leave or the taking of annual leave generally in light of the current crisis?

### Travel

- Do you need to implement or amend policies in relation to business travel or the sharing of Company vehicles to ensure compliance with the Protocol?
- What steps need to be taken in relation to communications with employees on the issue of personal travel? Have many of your employees returned to other jurisdictions while working remotely? What is the Company's policy with respect to those employees?

### Grievance & Disciplinary Issues

- Are there any outstanding grievance or disciplinary processes in your organisation which have been paused due to the pandemic?
- Are any employees on suspension pending the outcome of an investigation? Do such procedures need to be re-ignited or should they remain paused? Does the organisation need to communicate with the employees involved?



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## Longer Term Impact

What steps should I be taking if I think COVID-19 disruptions might have a longer term impact on my ability to provide work for my employees?

Employers in industries that are likely to experience more prolonged restrictions, such as those involved in organising festivals or events, or those operating in certain areas of the hospitality sector may need to continue to look at cost-cutting measures with a view to ensuring the viability of the business in the long-term. Again, specific advice may need to be sought depending on the nature of your business and the particular concerns of your organisation but the following points are worth keeping in mind:

### Possible Measures

**Are there any industry groups which might be able to provide support for your organisation?**

Many industry groups, such as the Irish Business and Employers' Confederation, the Restaurants Association of Ireland, the Vintners' Federation and the Irish Hairdressing Federation have been making overtures to the Government on behalf of their members and such organisations may be a useful resource for employers seeking to decide on next steps.

**Are you relying on Government supports such as the Temporary Wage Subsidy Scheme?**

If so, have you considered what steps may need to be put in place in the event that the restrictions outlast the availability of the Scheme.

**Are you documenting the steps being taken by your organisation to mitigate adverse effects for employees?**

The unfortunate reality is that the economic impact of the pandemic is likely to result in redundancies in some businesses. Employers should, of course, consider alternative options before implementing redundancies. In the current circumstances, those alternatives will include availing of short-term measures like lay-off or the Temporary Wage Subsidy Scheme. Nonetheless, many employers sooner or later may find themselves reasonably of the view that redundancies are the only way forward. Whether those redundancies are imminent, or a more remote possibility, organisations considering redundancies at this stage would be well advised to document their considerations as part of the decision making process giving rise to redundancies in order to minimise the risk of successful claims by employees who may be made redundant.

**In the event redundancies are necessary, are your processes compliant with legal requirements?**

As a matter of Irish law, redundancies must be genuine and be carried out in accordance with a fair and reasonable process. Fair and objective selection criteria should be introduced, where necessary, to avoid claims of unfair or discriminatory selection and any procedure leading to the implementation of redundancies should be fair and reasonable and should include appropriate consultation with those affected. Where an employer has availed of the Temporary Wage Subsidy Scheme, it should also consider whether implementing redundancies, in particular in tandem with the Scheme, may conflict with the declaration it has provided to the Revenue Commissioners in relation to its intention to retain employees.

Depending on the number of proposed redundancies, employers should also bear in mind that the collective redundancy legislation may apply. This imposes increased obligations in respect of notification and consultation and imposes significant penalties for non-compliance, including criminal sanctions.

## Key Contacts

### Employment, Pensions and Incentives Group



**Terence McCrann**  
*Partner*  
+353 1 607 1336  
terence.mccrann@  
mccannfitzgerald.com



**Eleanor Cunningham**  
*Partner*  
+353 1 607 1723  
eleanor.cunningham@  
mccannfitzgerald.com



**Mary Brassil**  
*Partner*  
+353 1 607 1279  
mary.brassil@  
mccannfitzgerald.com



**Stephen Holst**  
*Partner*  
+353 1 511 1517  
stephen.holst@  
mccannfitzgerald.com



**Catherine Austin**  
*Consultant*  
+353 1 607 1492  
catherine.austin@  
mccannfitzgerald.com



**Donal Hamilton**  
*Senior Associate*  
+353 1 607 1782  
donal.hamilton@  
mccannfitzgerald.com



**Ruth Keehan**  
*Senior Associate*  
+353 1 607 1357  
ruth.keehan@  
mccannfitzgerald.com



**Aoife Clarke**  
*Associate*  
+353 1 607 1670  
aoife.clarke@  
mccannfitzgerald.com



**Ellen Nolan**  
*Associate*  
+353 1 511 1550  
ellen.nolan@  
mccannfitzgerald.com



**Clementine Farrell**  
*Associate*  
+353 1 611 9114  
clementine.farrell@  
mccannfitzgerald.com



**Emma Libreri**  
*Associate*  
+353 1 607 1304  
emma.libreri@  
mccannfitzgerald.com



**David McCauley**  
*Associate*  
+353 1 511 1504  
david.mccauley@  
mccannfitzgerald.com



**Zoe O'Reilly**  
*Associate*  
+353 1 611 9165  
zoe.oreilly@  
mccannfitzgerald.com



**Declan O'Rourke**  
*Associate*  
+353 1 511 1656  
declan.orourke@  
mccannfitzgerald.com

## Technology & Innovation Group



**Paul Lavery**  
*Partner, Head of  
Technology and  
Innovation*  
+353 1 607 1330  
paul.lavery@  
mccannfitzgerald.com



**Adam Finlay**  
*Partner*  
+353 1 607 1795  
adam.finlay@  
mccannfitzgerald.com



**Doug McMahon**  
*Partner*  
+353 1 607 1459  
doug.mcmahon@  
mccannfitzgerald.com



**Mark Ellis**  
*Senior Associate*  
+353 1 607 1406  
mark.ellis@  
mccannfitzgerald.com



**Ruth Hughes**  
*Associate*  
+353 1 607 1482  
ruth.huges@  
mccannfitzgerald.com



**Aoife Mac Ardle**  
*Associate*  
+353 1 611 9100  
aoife.macardle@  
mccannfitzgerald.com



**Siobhan Power**  
*Associate*  
+353 1 611 9173  
siobhan.power@  
mccannfitzgerald.com



**Catherine Walsh**  
*Associate*  
+353 1 607 1255  
catherine.walsh@  
mccannfitzgerald.com

## Health & Safety Group



**Barrett Chapman**  
*Partner*  
+353 1 607 1480  
barrett.chapman@  
mccannfitzgerald.com



**Jamie McGee**  
*Senior Associate*  
+353 1 607 1445  
jamie.mcgee@  
mccannfitzgerald.com



**Maeve McDermott  
Casement**  
*Associate*  
+353 1 607 1486  
maevemacdermott  
casement@  
mccannfitzgerald.com



**David Sheehan**  
*Associate*  
+353 1 611 9108  
david.sheehan@  
mccannfitzgerald.com

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**Principal Office**

Riverside One, Sir John Rogerson's Quay  
Dublin 2 D02 X576  
+353 1 829 0000

**London**

Tower 42, Level 38C, 25 Old Broad Street  
London EC2N 1HQ  
+44 20 7621 1000

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**New York**

Tower 45, 120 West 45th Street, 19th Floor  
New York, NY 10036  
+1 646 952 6001

**Brussels**

40 Square de Meeûs, 1000 Brussels  
+32 2 740 0370

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