



Relate

The journal of developments in social services,
policy and legislation in Ireland

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Employment law update

This issue describes current employment legislation and some of the provisions proposed in the Employment (Miscellaneous Provisions) Bill 2017.

The Employment Equality Acts 1998 to 2015 outlaw discrimination in a wide range of employment and employment-related areas. These include: recruitment and promotion; equal pay; working conditions; training or experience; dismissal; and harassment (which includes sexual harassment). The legislation defines discrimination as treating one person in a less favourable way than another person based on any of the following grounds: gender, civil status, family status, age, disability, religious belief, race, sexual orientation or membership of the Traveller community. The Employment Equality Acts 1998 to 2015 cover employees in both the public and private sectors, as well as applicants for employment and training.

Pre-employment

Recruitment

To comply with their obligations, employers should adhere to fair, transparent and equal recruitment procedures (for example, in job advertisements and descriptions, interview questions, and job application forms).

If a job advertisement is discriminatory or indicates an intention to discriminate, the Human Rights and Equality Commission may refer the matter to the courts, who may order that no-one can be hired for that job until further investigations take place.

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Data protection

Employers and prospective employers must comply with their data protection obligations when collecting CVs, and related information about individuals. The General Data Protection Regulation (GDPR) came into force on 25 May 2018 and is discussed in more detail in the August 2017 issue of *Relate*. Legal obligations set out in employment law have not been affected by GDPR. For example, employers must continue to keep certain data, such as records of employees' working hours and rates of pay.

Different types of employment

Employee or self-employed

The tax and social insurance systems treat employed and self-employed people differently. The majority of employment protection legislation applies to employees only.

Working for a business as a self-employed person may be considered false self-employment if you are actually a direct employee of the business. A number of tests are used to determine employment status including:

- Whether you control the work
- Who supplies the materials
- Whether you get holiday pay

The *Code of Practice for Determining Employment or Self-employment Status of Individuals* is available at revenue.ie. It contains assessment criteria which can be used to clarify whether a person is employed or self-employed.

If you think you might be falsely self-employed, contact the Scope section of the Department of Employment Affairs and Social Protection. They will make a determination on your employment status. More information is available at welfare.ie.

Part-time employees

The Protection of Employees (Part-Time Work) Act 2001 prohibits less favourable treatment of a part-time employee than a comparable full-time employee, unless the less favourable treatment is justified on objective grounds, such as pension entitlements.

More information is available in the *Code of Practice on Access to Part-Time Work* at workplacerelations.ie.

Fixed-time employees

You may be employed on a fixed-term or a specified-purpose contract. Specified-purpose contracts are contracts for a special project or purpose, such as temporarily replacing a permanent employee who is on sick leave. Employees can only work on two or more fixed-term contracts (or specified-purpose contracts) for a continuous period of four years unless there are objective grounds justifying successive fixed-term contracts. Where a fixed-term or specified-purpose contract expires and the individual is re-employed within three months, the individual is deemed to have continuous service.

After this four years, if the employer wishes to renew the employee's contract it must be a contract of indefinite duration. Any term in the contract that limits the period of employment is deemed not to have effect. Fixed-term workers cannot be treated less favourably than comparable permanent workers.

Agency workers

An agency worker has an agreement with an agency to work for another business. For example, an IT consultant may have an agreement with an employment agency to work for an external business while an employee of that business is on leave.

Agency workers do not have all the same employment rights as regular workers. However, under the Protection of Employees (Temporary Agency Work) Act 2012, temporary agency workers have the right to equal treatment in basic working and employment conditions, such as pay, working time, rest periods, night work, annual leave and public holidays.

Temporary agency workers must be informed of permanent employment opportunities, and generally treated equally – as if they had been directly recruited by the hirer business.

For the purposes of most employment legislation, whoever is paying the wages of the agency worker is normally considered to be the employer.

However under unfair dismissals legislation and also health and safety legislation, the employer is considered to be the hirer business for whom the agency worker actually works (and not the agency).

Contracts of employment

Under the Terms of Employment (Information) Acts 1994 to 2014, an employer is obliged to provide an employee with a written statement of terms and conditions of employment within two months of the employee starting work.

This statement must include:

- Full name of employer and employee
- Address of the employer
- Place of work
- Title of job or nature of work
- Date the employment started
- Expected duration of the contract, if it is temporary
- Details of the contract of employment, if it is for a fixed term
- Details of rest periods and breaks
- * The rate or method of calculation of pay
- * Pay reference period for the purposes of the National Minimum Wage Act 2000
- * Pay intervals
- * Hours of work
- * Notice that the employee has the right to ask the employer for a written statement of their average hourly rate of pay, as provided for in the National Minimum Wage Act 2000
- * Details of paid leave
- * Details of sick pay and pension (if any)
- * Period of notice to be given by employer or employee
- * Details of any relevant collective agreements

* For these items, the employer is permitted to refer an employee to other documents (such as a pension scheme booklet or a collective agreement) provided that the employee has easy access to them.

The statement must be signed and dated by the employer but there is no requirement for the employee to sign it. If your employer fails to give you written details of the terms of your employment within two months of your starting work, you can make a complaint to the Workplace Relations Commission. The maximum compensation payable is four weeks' wages.

Certain terms of employment automatically apply to every employee, whether these terms are written in the statement of terms or not. These include:

- Terms that are required by law (for example, the right to maternity leave)
- Relevant constitutional rights (for example, the right to join a trade union)
- Collective agreements
- Joint Labour Committee Regulations
- EU laws

The custom and practice of a workplace may also form part of a contract (for example, a particular rate of overtime pay).

Probationary period

An employment contract can include a probationary period, which is usually six months with a provision to extend it for up to 12 months. During a probationary period, the employment can usually be terminated on a shorter notice period.

The Unfair Dismissals Acts 1997 to 2015 will generally not apply to the dismissal of an employee during the period at the beginning of employment when they are on probation or undergoing training.

However, this exclusion from the Acts will not apply if the dismissal results from trade union membership or activity; pregnancy-related matters; or entitlements under legislation that covers maternity protection, paternity leave, parental leave, adoptive leave and carer's leave.

Changes to your contract of employment

Your contract of employment can change if the law changes (for example, extending the statutory period of maternity leave). Both you and your employer must comply with any new legislative provisions. Otherwise, any changes must be agreed between you and your employer.

Employment (Miscellaneous Provisions) Bill 2017

The Employment (Miscellaneous Provisions) Bill 2017, once enacted, will strengthen the rights of employees to be informed about their terms and conditions of employment.

It states that an employer must, within five days of an employee starting work, provide the following core terms of employment in writing to the employee:

- The full names of the employer and employee
- The address of the employer or the address of the principal place of business
- The expected duration of the contract if it is temporary, or the end date if it is fixed term
- The rate or method of calculation of pay
- The number of expected hours work per day and per week

These core terms will not need to be re-stated in the longer form statement of terms and conditions.

These core terms must be given to the employee regardless of the length of the employment. For example, if an employee was employed for only three days, they must still receive both statements.

If an employer fails to provide an employee with the statement of core terms within one month, the employer will be guilty of an offence. An employer will also be guilty of an offence if they deliberately or recklessly provide false or misleading information in a statement of core terms. The offence will carry a class A fine or 12 months' imprisonment, or both.

Rights during employment

Working hours

The Organisation of Working Time Act 1997 sets out the minimum entitlement for employees as regards working hours, annual leave, night work, breaks and rest periods.

The average working week for most employees cannot exceed 48 hours. The provisions of the Act do not apply to transport drivers, workers at sea, Gardaí, Defence Forces, trainee doctors and certain categories of civil protection services, employees who control their own working hours, and family employees on farms or in private homes.

Provision of information about working hours

For many employees, the hours of work are specified in their contract of employment. For others, they are specified in an Employment Regulation Order or a Registered Employment Agreement.

If the hours of work are not specified, the employer must notify the employee of the starting and finishing times at least 24 hours before the first day of work or at least 24 hours before the day of each week that the employee is required to work.

Sunday working

If there is no agreement about Sunday pay entitlements, your employer must give you one or more of the following for Sunday working:

- A reasonable allowance
- A reasonable pay increase
- Reasonable paid time off work

What is reasonable depends on all the circumstances. Guidance may be obtained by referring to an agreement applying to comparable employees in a similar business.

Night workers

A night worker is an employee who normally works at least three hours between midnight and 7am and who works at night for at least half of their working hours in a year.

Normally, a night worker should not work more than 48 hours per week, with an average of eight hours in a 24-hour period. The average is usually calculated over a two-month period.

If the night work involves special hazards, or physical or mental strain, working hours cannot exceed eight hours in a 24-hour period. Pay rates and annual leave for night workers will depend on the terms of their contract of employment.

Employers must take steps to ensure the health and safety of night workers by carrying out a risk assessment and regularly assessing the effect of night work on the health of the employee.

Guidance on night work and shift work is available from the Health and Safety Authority website at hsa.ie.

Zero-hours working practices

A zero-hours contract of employment requires an employee to be available for work for a certain number of hours each week. However, there is no obligation on the employer to provide working hours to the employee.

Under Section 18 of the Organisation of Working Time Act 1997, an employee with a zero-hours contract who works less than 25% of their hours in any week must be compensated. The Employment (Miscellaneous Provisions) Bill 2017, once enacted, will prohibit zero-hour working practices in all cases apart from genuine casual work, emergency situations or short-term relief work.

Under the Bill, a contract requiring a worker to make themselves available must offer more than zero hours per week.

In situations where employees are called into work but sent home without work, there will be a new minimum payment of three times the National Minimum Wage or three times the minimum rate set out in an Employment Regulation Order. It must be provided on each occasion that this occurs.

Employers will not be required to pay if the lack of work was due to unavoidable, exceptional or emergency circumstances.

Under the Employment (Miscellaneous Provisions) Bill 2017, where an employee's contract does not state the number

of hours actually worked, that employee will be able to ask their employer to review their average working hours over a period of the 12 months immediately prior to the request. The employer should then place the employee in a “band” of hours as follows:

Band	From	To
A	3 hours or more	less than 6 hours
B	6 hours or more	less than 11 hours
C	11 hours or more	less than 16 hours
D	16 hours or more	less than 21 hours
E	21 hours or more	less than 26 hours
F	26 hours or more	less than 31 hours
G	31 hours or more	less than 36 hours
H	36 hours or more	

Once an employee is placed in a band, they must work an average of the hours per week within their band for the following 12 months. If an employee is unhappy with the allocated band, they will be able to make a complaint to the Workplace Relations Commission.

Breaks and rest periods

Generally, you are entitled to a break of 15 minutes after working 4.5 hours. If you work more than six hours, you are entitled to a break of 30 minutes, which can include the first 15-minute break. There is no entitlement to be paid for breaks.

A rest period is any time that is not working time. The Organisation of Working Time Act 1997 states:

- You are entitled to 11 consecutive hours rest in any period of 24 hours. In addition, you should get 24 consecutive hours rest in any period of seven days and this should normally follow on from one of the 11-hour rest periods already mentioned.
- As an alternative, your employer can give you two 24-hour rest periods in the week that follows one in which you did not get the entitlement described above

An employer is exempt from providing these rest periods if it is not possible due to exceptional circumstances or an emergency; or where there is a collective agreement, an Employment Regulation Order, or a Registered Employment Agreement.

When shift workers are changing shift or are working split shifts, there is an exemption from the requirement to have the rest periods as specified in the Act.

If a rest period is postponed, the employee must be allowed to take it within a reasonable period of time.

Records

All employers are required to keep detailed records of employees’ start and finishing times, hours worked each day and each week, and leave granted.

Where there is no method of electronically recording hours worked by employees, the employer must record the days and hours worked each week using form OWT1 or a similar method.

Under Section 8 of the 1997 Act, an inspector from the Workplace Relations Commission may access these records. Employers who fail to keep such records are guilty of an offence.

Annual leave and holidays

Under the Act, you have a basic entitlement to four weeks’ annual paid leave, although your contract could give greater rights.

Your employer is entitled to decide when you may take annual leave, but this is subject to a number of conditions. Your employer must take into account your family responsibilities and the opportunities for rest and recreation that are available to you. They must also consult with you at least one month before the leave is to be taken.

Annual leave should be taken within the appropriate leave year or, with your consent, within six months of the relevant leave year. Further holding over (also known as carrying over) of annual leave at your request is a matter for agreement between you and your employer.

Pay in respect of annual leave is paid at the normal weekly rate. If your pay varies, because of commission or bonus payments for example, your pay for holidays is the average of your pay over the 13 weeks before you take holidays.

Annual leave and sick leave

If you are ill while on annual leave, you should get a medical certificate to cover the days that you were sick and give this to your employer on returning to work. Sick days will not count as annual leave and those days will be available to you as leave, at a later date. An employer cannot require you to take annual leave for a certified period of illness. Your annual leave entitlement continues to build up during a period of certified sick leave.

Annual leave and other leave

Time spent on maternity leave, paternity leave, adoptive leave, parental leave, *force majeure* leave and the first 13

weeks of carer's leave is treated as working time for the accumulation of annual leave entitlements.

If you are leaving a job, you are entitled to receive payment for any outstanding annual leave and public holidays due to you.

Maternity leave, parental leave, paternity leave or adoptive leave are discussed in detail in the February 2017 issue of *Relate*.

Public holidays

There are nine public holidays, sometimes called bank holidays, in Ireland each year. Good Friday is not a public holiday and you have no automatic entitlement to time off work on that day.

If you qualify for public holiday benefit, you are entitled to one of the following:

- Paid day off on the public holiday
- Additional day of annual leave
- Additional day's pay
- Paid day off within a month of the public holiday

You may ask your employer at least 21 days before a public holiday which of the alternatives will apply. If your employer does not respond at least 14 days before the public holiday, you may take the actual public holiday as a paid day off.

If the public holiday falls on a day which is not a normal working day for that business, you are still entitled to benefit for that public holiday. If you do not normally work on that particular day, you should receive 20% of your weekly pay. Your employer may choose to give you paid time off instead of pay. Where a public holiday falls on a weekend, you do not have any entitlement to have the next working day off work.

If you are a full-time worker on sick leave during a public holiday, you are generally entitled to benefit for the public holiday you missed.

You are entitled to leave for any public holidays that occur while you are on maternity leave, parental leave, paternity leave or adoptive leave.

Disciplinary and grievance procedures

Employers should have written grievance and disciplinary procedures and they should give employees copies of these at the start of their employment.

A grievance is a complaint which an employee has concerning their employment circumstances, such as:

- Interpretation of conditions of employment, pay and benefits
- Changing work practices
- Alleged discrimination, bullying or harassment
- Health and safety issues

The general purpose of disciplinary procedures is to ensure that employees achieve an appropriate standard of conduct, attendance, performance and behaviour at work. If an employer's concerns in these areas persist following an informal discussion, the employer may invoke disciplinary procedures.

Disciplinary procedures include:

- Informal efforts to address the concerns
- Verbal warning
- Written warning
- Final written warning
- Dismissal or a measure short of dismissal

Generally, the steps in the disciplinary procedure will be progressive as described above. However, there may be instances where more serious action, including dismissal, is warranted at an earlier stage, for example, in cases of fraud, violence or theft.

The essential elements of any grievance or disciplinary procedure are that: it is rational and fair; the basis for disciplinary action is clear; the range of possible penalties is well defined; and an internal appeal mechanism is available.

An employee's rights to natural justice and fair procedures in these matters require the following, as a minimum:

- Employee grievances are fairly examined and processed
- Details of any allegations or complaints are put to the employee concerned
- The employee concerned is given the opportunity to respond fully to allegations or complaints
- The employee concerned is given the opportunity to avail of the right to be represented during the procedure
- The employee concerned has the right to a fair and impartial determination of the issues, taking into account any representations made by (or on behalf of) the employee and any other relevant evidence or factors

These principles generally require that the allegations are set out in writing, the source of the allegations is given, and the employee is allowed to question witnesses. An employee may be suspended on full pay pending the outcome of a disciplinary investigation. Warnings should be removed from an employee's record after a specified period.

Ending the employment relationship

Retirement

The mandatory retirement age is the age at which you must retire. It is usually set out in your contract of employment. Since 1 January 2016, an employer may set a mandatory retirement age provided it is objectively justified.

In the public sector, the minimum retirement age is:

- 65 for people who joined the public service on or after 1 April 2004
- 66 for people who joined the public service on or after 1 January 2013

The mandatory retirement age in the public sector is 70. Some occupations, such as the Gardaí, firefighters and the Defence Forces, have provisions for earlier retirement.

Redundancy

Redundancy can occur where:

- Your employer ceases to carry on business or ceases to carry on business in the place where you have been employed
- Your employer's requirements for employees in your category has ceased or reduced
- Your employer has decided to carry on the business with fewer staff or no staff
- Your employer has decided your work should be done in a different way and you are not sufficiently qualified to do the work in that way
- Your employer has decided that your work will be done by another person who can also do other work and you are not qualified to do that other work

If a number of employees are being made redundant within a 30-day period, it is known as a collective redundancy.

In some cases, when you have been in a lay-off or short-time working situation for a certain length of time, you may be entitled to claim redundancy.

The Redundancy Payments Acts 1967 to 2014 provide the minimum redundancy entitlements. You and your employer may agree a redundancy payment above this statutory minimum.

Selection for redundancy

You are entitled to bring a claim for unfair dismissal if you consider that you were unfairly selected for redundancy or consider that a genuine redundancy situation did not exist. For example, where the custom and practice in your workplace has been "last in, first out" and your selection for redundancy did not follow this practice.

Alternative work

An employer must have a prior consultation with you and should consider all possible alternatives before making you redundant.

You will not be entitled to a redundancy payment if:

- Your employer makes you a reasonable offer of alternative work and you refuse it
- You accept a new employment contract or re-engagement with immediate effect and the terms are the same as in your previous contract
- You accept an offer in writing from your employer for a new and different contract which will take effect within four weeks of the ending of the previous contract

Generally speaking, alternatives which involve a loss of status or worsening of the terms and conditions of your employment would not be considered reasonable. Similarly, you may be justified in refusing an offer that involves you travelling an unreasonable distance to work. You may take up an alternative on trial for up to four weeks.

Notice of redundancy

You are entitled to minimum periods of notice of redundancy depending on your length of service.

If you are being made redundant, you are entitled to reasonable paid time off to look for a new job. Between receiving your notice of redundancy and the date your employment ends, you may give your employer notice that you wish to leave before the end date of your employment. Your employer has discretion as to whether to grant your request or not. Leaving during the notice period without your employer's agreement may affect your redundancy entitlements.

Redundancy pay

The statutory redundancy payment is a lump-sum payment based on your pay. All eligible employees are entitled to:

- Two weeks' pay for every year of service over the age of 16, and
- One further week's pay

The amount of statutory redundancy is subject to a maximum earnings limit of €600 per week (€31,200 per year). The statutory redundancy payment is tax-free.

It is up to the employer to pay the statutory redundancy lump sum. Where the employer is unable to pay or refuses or fails to pay, the employee can apply for a direct payment from the Social Insurance Fund.

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities

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Where your employment has been terminated due to the insolvency of your employer, legislation provides for the payment of certain outstanding entitlements by the Department of Employment Affairs and Social Protection.

Unfair dismissal

Under the Unfair Dismissals Acts 1977 to 2015, unfair dismissal can occur where:

- Your employer terminates your contract of employment, with or without notice, or
- You terminate your contract of employment, with or without notice, due to the conduct of your employer (known as constructive dismissal)

Your employer must show that there were fair grounds for the dismissal. Apart from a case involving constructive dismissal, a dismissal is presumed to be unfair unless your employer can justify it.

You may ask your employer for a written statement of the reasons for your dismissal. Your employer must provide this within 14 days of your request.

If you are found to have been unfairly dismissed, you may be placed back in your job or, more commonly, you may receive compensation for the loss of earnings caused by the dismissal.

The Employment (Miscellaneous Provisions) Bill 2017, once enacted, will authorise an adjudication officer of the Workplace Relations Commission, when dealing with an unfair dismissal matter, to require any person to attend the hearing to give evidence or to produce documents in their possession.

A dismissal is considered to be automatically unfair if the employee is dismissed for any of the following reasons:

- Membership of a trade union or engaging in trade union activities, whether within permitted times during work or outside of working hours
- Religious or political opinions
- Legal proceedings against an employer where an employee is a party or a witness
- Race, colour, sexual orientation, age or membership of the Traveller community
- Pregnancy, giving birth or breastfeeding or any matters connected with pregnancy or birth

- Availing of rights under legislation to maternity leave, adoptive leave, paternity leave, carer's leave, parental or *force majeure* leave
- Unfair selection for redundancy
- Making a protected disclosure under the Protected Disclosures Act 2014

Normally you must have at least 12 months' continuous service with your employer to bring a claim for unfair dismissal.

Wrongful dismissal

An employer can terminate the employment contract without cause, provided it is done in accordance with the terms and implied terms of the employment contract.

Wrongful dismissal is where the employer has dismissed an employee in a way that breached the employee's contract of employment. In this situation, the employee may be entitled to damages for breach of contract. Such claims must be brought in the civil courts within six years of the alleged breach.

Enforcing employment rights

The Workplace Relations Commission (WRC) is the primary body which hears employment disputes in Ireland. A complaint or dispute should be sent to the WRC within six months of the date of the alleged contravention. This time limit may be extended by a further six months if there was a reasonable cause for the delay.

Complaints may be dealt with by mediation or adjudication, depending on the nature of the complaints and the requests made by the parties involved.

Appeals against decisions of adjudications officers may be made to the Labour Court, generally within 42 days but this can be extended if exceptional circumstances caused the delay.

Complaints to the WRC should be made using the online complaint form at workplacerelations.ie.

The information in *Relate* is intended as a general guide only and is not a legal interpretation