

Employment Law: Legislative Updater - September 2017

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- New Legislative Proposals for Precarious Work and Zero Hour Contracts
- Low Pay Commission recommends increase in Minimum Wage

Welcome to the ByrneWallace Employment Law Legislative Updater September 2017.

Summary of Legislative Developments

The Updater covers legislative updates from April 2017 to August 2017 (inclusive). There have been some important developments during this period, mainly in the area of proposed new legislation (bills) and the key highlights include;

- The enactment of the Competition (Amendment) Act 2017 which establishes rights for certain categories of self-employed workers to be represented by a trade union for the purposes of collective bargaining.
- The Financial Services and Pensions Ombudsman Act 2017 sees the merger of the Financial Services Ombudsman Bureau and the Office of Pensions Ombudsman into one body the Financial Services and Pensions Ombudsman, dealing with complaints relating to financial services and pensions.
- The Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill seeks to compel employers of a certain size to publish information relating to employee pay, for the purpose of showing whether there are differences in the pay of male and female workers and, if so, the nature and scale of such differences.
- The National Minimum Wage (Removal of Sub-minimum Rates of Pay) Bill looks to remove the provision in existing legislation which allows those under 18, and those in the first two years of their working lives, to be paid less than the Minimum Wage.
- The Equality (Miscellaneous Provisions) Bill proposes to introduce a new ground of discrimination in relation to employment equality and the equal provision of goods and services, that of discrimination based on socio-economic background.
- The Social Welfare, Pensions and Civil Registration Bill has been introduced to the Dáil by the Minister. However, anticipated provisions relating to defined benefit pension schemes are not included – work continues on drafting these, which will be included in the Committee Stage of the Bill.
- Other notable developments include the proposals for priority drafting of legislation aimed at improving protections afforded to workers on zero-hour contracts and strengthening the regulation of precarious work.

Notable Acts

Competition (Amendment) Act 2017

The Competition (Amendment) Act 2017 is intended to establish rights for certain categories of self-employed workers to be represented by a trade union for the purposes of collective bargaining. The initial provisions relate to voice over actors, session musicians and freelance journalists, but the Act also provides a mechanism to enable other groups of workers to bargain collectively in the future.

The 2017 Act introduces new categories of a “false self-employed worker” and a “fully dependent self-employed worker”.

A “false self-employed worker” is defined as an individual who (a) performs for another person under a contract (whether express or implied) the same activity or service as an employee, (b) is subordinate to the other person, (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work, (d) does not share in the other person’s commercial risk, (e) has no independence as regards the determination of the time schedule, place and manner of performing tasks, and (f) forms an integral part of the other person’s undertaking.

A “fully dependent self-employed worker” means an individual (a) who performs services for another person under a contract (whether express or implied), and (b) whose main income in respect of the performance of such services under contract is derived from not more than two persons.

The 2017 Act provides that trade unions may apply to the Minister for Jobs, Enterprise and Innovation to permit specific classes of false and fully dependent self-employed workers to avail of collective bargaining and agreements. Relevant classes of self-employed workers will be identified by Ministerial Order. The Minister will make his/her decision, after consultation with other Government Ministers, and any other relevant persons. It is not clear yet what role employers will play, if any, in this consultation process.

This Act introduces the first statutory definition of “false” and “fully dependent” self-employment in Irish law, and is likely to be used by workers who are attempting to demonstrate that they are employees

rather than independent contractors for the purposes of employment protection legislation.

(Not commenced as of 25 August 2017)

[Click here for full text \(in PDF format\)](#)

Financial Services and Pensions Ombudsman Act 2017

This Act provides for the merger of the Financial Services Ombudsman Bureau and the Office of Pensions Ombudsman into a single body, the Office of the Financial Services and Pensions Ombudsman (the “FSPO”).

Complaints in relation to pensions previously made to the Pensions Ombudsman may now be made to the FSPO. The Act introduces new time limits for different types of financial products. For pensions and long term financial services, complaints can be made within whichever is the last to expire:

1. six years from the date of the conduct giving rise to the complaint;
2. three years from the earlier of the date on which the person making the complaint became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint;
3. such longer period as the Ombudsman may allow where it appears to him or her that there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period.

These new time periods apply to complaints relating to conduct occurring during or after 2002. The FSPO can also continue a case following the death of a complainant and will also now be required to publish anonymised determinations in order to improve the understanding by the public and industry of determinations.

(Not commenced as of 25 August 2017)

[Click here for full text \(in PDF format\)](#)

Statutory Instruments

Employment Regulation Order (Security Industry Joint Labour Committee) 2017 [S.I. No. 231/2017]

This Order provides for an increase in the rate of remuneration for security operatives, being individuals employed by a security firm, to provide a security service for contract clients of that firm. The hourly rate will increase to €11.05 per hour from 1 June 2017. This will increase to €11.35 from 1 June 2018, and finally to €11.65 from 1 June 2019.

The Order provides for a sick pay scheme for workers, and a death in service benefit. It also requires an employer to provide employees with rosters setting out all hours of work for a minimum period of one week, at least three days prior to commencement. The Order provides that annual leave and public holiday entitlements will be in accordance with the Organisation of Working Time Act 1997.

The Order provides for minimum payments for short shifts and requires employers to provide facilities including protective clothing, shelter, toilet, heat, light and access to canteens or means to heat/cook food, communication equipment and first aid.

The Order also requires employers to provide for Personal Attack Benefit where an employee is attacked and injured in the course of their employment.

[Click here for full text \(in PDF format\)](#)

Additional Note: It has been reported that the Security Employers Association ("SEA"), a new body set up to fight the pay rise provided under the ERO, has confirmed that five security firms have taken a constitutional challenge against the power of joint labour committees to set wage rates for certain employment sectors. The action will also challenge the ERO itself. The action is due to commence in the High Court in November.

Notable Bills

Parental Leave (Amendment) Bill 2017 [No. 46 of 2017]

The Bill aims to amend the Parental Leave Act 1998 to extend unpaid parental leave from 18 weeks to 26 weeks, and to provide for related matters.

This Bill was introduced in the Seanad on 4 April 2017.

[Click here for full text \(in PDF format\)](#)

Trade Union (Garda Síochána and the Defence Forces) Bill 2017 [No. 57 of 2017]

This Bill removes the bar on An Garda Síochána or Defence Forces association from affiliating to any trade union, and removes the bar on a member of the Defence Forces from becoming a member of a Defence Forces association that may wish to reconstitute itself as a trade union.

Furthermore the Bill prohibits the use of strike action by An Garda Síochána or Defence Forces associations and trade unions where such action would be contrary to the maintenance of public order.

The Bill was introduced on 13 April 2017 as a Private Members Bill.

[Click here for full text \(in PDF format\)](#)

Industrial Relations (Defence Forces) (Amendment) Bill 2017 [No. 79 of 2017]

This is a similar Bill to the above, allowing Defence Forces representative organisations to affiliate to a trade union. It also allows access to the Workplace Relations Commission and the Labour Court for Defence Forces members.

[Click here for full text \(in PDF format\)](#)

Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill 2017 [No. 64 of 2017]

The Bill's purpose is to require large employers to publish information relating to employee pay, for the purpose of showing whether there are differences in the pay of male and female workers and, if so, the nature and scale of such differences.

Under this Bill, the Irish Human Rights and Equality Commission can put in place a scheme to require employers with 50 or more employees to regularly report on their gender pay gap. While the ultimate shape and form of what such a scheme could look like remains to be seen, the Bill makes provision for any contravention of such scheme to constitute an offence attracting a Class A fine, i.e. a maximum fine of €5,000.

A lot of the detail is left to the drafting of the scheme. The scheme must prescribe the classes of employer and employee to which it relates, how to calculate the number of employees in a firm and the pay of those employees, the details to be published, the form in which such information is to be published, and the frequency with which it is to be published.

The Bill does not provide for penalties for employers who demonstrate that a gender pay gap exists in their organisation; rather it requires that large employers make information relating to employee pay publicly available.

The Bill completed the Second Stage in the Seanad on 24 May 2017.

[Click here for full text \(in PDF format\)](#)

Public Services and Procurement (Workers' Rights) Bill 2017 [No. 83 of 2017]

The purpose of the Bill is to protect the employees of economic entities who bid for public contracts, and to remove wages and working conditions from being used as elements of competition among bidders for public contracts.

In procurements which have a value less than the applicable EU threshold, a contracting authority (i.e. a State, regional or local authority, a public body, or an association formed by one or more such authorities or public bodies) is prohibited from selecting any economic operator who has during the previous three years:

1. breached any aspect of employment law;
2. failed to adhere to the terms of any decisions or determinations or either the Workplace Relations Commission or the Labour Court, or;
3. failed to comply with the terms of non-binding and local collective agreements in respect of its employees;
4. failed to recognise a trade union which represents a number of its employees;
5. failed to honour a condition of employment applicable to the relevant sector or industry as set by a Registered Employment Agreement or a Sectorial Employment Order;
6. employed one or more persons on a zero or precarious hours contract; or
7. sub-contracted work or services to any other firm in respect of which there is evidence the other firm has committed a failure or breach referred to in

paragraphs (1) to (7).

In assessing a tender, a contracting authority shall assign additional weighting to a tenderer where the tenderer can demonstrate that it:

1. remunerates its employees at a level which is equivalent to or above the living wage, and
2. applies in respect of its employees conditions of labour which are not less favourable than the highest minimum standards established nationally by law, arbitration or collective bargaining for work or services of the same character in the trade or industry concerned.

In procurements which have a value *greater than* the applicable EU threshold, a contracting authority can choose not to select any economic operator who has during the previous three years:

1. breached a provision of employment law;
2. failed to recognise a trade union which represents a number of its employees;
3. failed to engage in meaningful negotiations with duly selected employee representatives; or
4. sub-contracted work or services to any other firm in respect of which there is evidence the other firm has;
 - (i) committed a failure or a breach of the type referred to in paragraphs (a) to (c); or
 - (ii) availed of child labour in a country where any of the goods or services produced pursuant to a tender have been produced, or has otherwise contravened the employment laws of that country.

In assessing a tender, a contracting authority shall assign additional weighting to a tenderer where the tenderer can demonstrate that it:

1. recognises one or more trade unions which represents a number of its employees;
2. remunerates its employees at a level which is equivalent to or above the living wage;
3. applies in respect of its employees conditions of labour which are not less favourable than the highest minimum standards established nationally by law, arbitration or collective bargaining for work or services of the same character in the trade or industry concerned;
4. does not employ persons on a zero or hours contract;

5. does not employ more than 10% of its workforce on fixed term contracts; and
6. is in full compliance with the terms of all non-binding and local collective agreements in respect of its employees.

The Bill amends The European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. No. 284 of 2016) by broadening the effect Section 4(a) of Regulation 18 which obliges an economic operator to comply with applicable environmental, social and labour law obligations.

This Bill was introduced to the Oireachtas on 22 June 2017 and is at the First Stage.

[Click here for full text \(in PDF format\)](#)

National Minimum Wage (Removal of Sub-minimum Rates of Pay) Bill 2017 [No. 86 of 2017]

This Bill seeks to provide that the full minimum wage must be paid to workers from aged 16 and upwards. Currently, the full minimum wage must only be paid to workers from aged 18 and upwards.

It also removes the exception allowing less than the minimum wage to be paid to those in their first two years of work after attaining the age of 18.

The Bill was introduced in the Seanad as a Private Members Bill on 27 June 2017.

[Click here for full text \(in PDF format\)](#)

Equality (Miscellaneous Provisions) Bill 2017 [No. 87 of 2017]

The purpose of this Bill is to expand the nine discriminatory grounds to include a new ground which would prohibit discrimination on the basis of disadvantaged or socio-economic background.

This Bill aims to prevent employers from discriminating against a job applicant because he or she came from a disadvantaged local authority estate, or an area that is associated with higher levels of criminality, or anti-social behaviour. Further, it would not be permissible for service providers to discriminate against people because of

where they live.

It amends both the Employment Equality Act 1998 and the Equal Status Act 2000 by the addition of further ground for discrimination: *“that one has a disadvantaged socio-economic status and the other has not (the “socio-economic ground”)*”.

The Bill was introduced as a Private Members Bill on 27 June 2017 and is currently at the Second Stage.

[Click here for full text \(in PDF format\)](#)

Social Welfare, Pensions and Civil Registration Bill 2017 [No. 94 of 2017]

When the General Scheme of this Bill was published in May 2017, it contained a number of proposals around the funding of defined benefit (“DB”) pension schemes. These included a 12 month notice period before ceasing contributions to a DB pension scheme; provisions for negotiations with the trustees in relation to funding; and additional powers for the Pensions Authority to set a schedule of contributions to be paid by sponsoring employers in certain circumstances. The amount determined by the Authority would be a debt enforceable in court by the trustees.

However, when the Bill itself was introduced into the Dáil in July, these proposals relating to pensions had been removed.

Instead the provisions in the Pensions Bill included a number of timing changes for defined benefit pension schemes:

- a new six month time limit for the submission of a funding proposal where a scheme does not meet the minimum funding standard (a proposal retained from the General Scheme of the Bill);
- six months (instead of nine months) for a funding standard reserve certificate to be submitted where a scheme does not meet the funding standard reserve; and
- an annual (rather than triennial) requirement for a scheme which ceases to be a regulatory own funds scheme to submit an actuarial funding certificate.

Minister for Employment and Social Protection, Regina Doherty, T.D., stated in the Dáil that the text relating to the proposals removed from the Bill was being drafted, and in order to reinstate these measures, the amendments are envisaged to be introduced during the Committee Stage in Autumn.

The Bill is currently at the Second Stage, which will take place in Autumn when the Dáil resumes.

[Click here for full text \(in PDF format\)](#)

Notable Developments

Government Approves Priority Drafting of Legislation to Affect Zero and Low Hours Contracts

The Government has proposed draft legislation that would significantly affect the operation of zero hours and low hours contracts in Ireland.

The proposals would prohibit zero hours contracts, except in cases of genuine casual work, or emergency cover, or short-term relief work for an employer. The proposals would affect any employee on low hour contracts who consistently works more hours each week than is provided for in his or her contract of employment.

Currently the law does not prohibit any contract of employment that requires an employee to be available for work for a certain number of hours each week but that does not require the employer to make a corresponding commitment to provide work to the employee during those hours. Neither does the law prohibit any contract in which an employee is obliged to be available for work as and when required to work by the employer.

The law protects such employees by requiring the employer to pay the employee for a specified number of hours' work. The employer must pay the employee for the specified number even in weeks during which the employee works less than the specified number of hours.

The specified number of hours for which the employee must be paid varies with context, but is typically 25% of the maximum contracted hours, or 25% of the typical working week, subject to a maximum of 15 hours' work per week.

Under the draft proposals, an employer will no longer be able to engage an employee on a contract in which the employee does not have an entitlement to work any hours, unless the work is genuinely casual work,

emergency cover or short-term relief work for the employer.

The proposals also provide for the creation of a new right for an employee whose contract of employment does not reflect the reality of the hours worked by him or her on a consistent basis. If an employee can establish, using a reference period of 18 months, that his or her contracted hours are not a true reflection of hours actually worked, the Government proposes that the employee will have the right to be placed in a band of hours that better reflects the actual hours worked over that reference period.

According to The Department of Jobs, Enterprise and Innovation, this proposal will *"provide greater certainty and a truer reflection of their hours of work and level of earnings, thereby addressing, in particular, difficulties employees may have accessing financial credit, including mortgages"*.

It is intended that the Workplace Relations Commission will have responsibility for enforcing this proposed right. An employee will be able to seek redress through the WRC, but redress will be limited to the placement of the employee in an appropriate band of hours.

The proposals do, however, provide some potential defences for an employer facing a claim before the WRC of this nature. For example, an employer will have a defence if it can demonstrate that significant adverse changes have affected its business (such as the loss of an important contract), and those changes justify the continuation of the hours stated in the employee's contract.

The Government also proposes to increase the obligations placed on each employer to provide information to each employee at the commencement of the employment relationship. It proposes that, within five days of commencement of employment relationship, five core terms of the employment relationship must be disclosed to the employee. These terms will include the employer's reasonable expectation of the normal length of the employee's working day and week. Where an employer breaches the proposed legislation, it will be guilty of a criminal offence, though the precise sanctions have not yet been disclosed.

The legislative proposals have been placed on the Attorney General's priority list for drafting. It is not possible at this juncture to say how long the drafting process will take. For businesses that operate zero hours or low hours employment contracts these proposals could mean a complete overhaul of some employment relationships.

Low Pay Commission Recommends 30c Increase in the Minimum Wage

On 18 July 2017, the Low Pay Commission Report recommended a 30c increase in the minimum wage, which would bring the minimum wage up to €9.55 per hour. The recommendations were welcomed by An Taoiseach, Leo Varadkar T.D., and Minister for Enterprise and Innovation, Frances Fitzgerald T.D.. The Taoiseach stated that the Government intend to formally respond to the report in the autumn, in the context of Budget 2018. Three members of the Commission with an employer background disagreed with the majority, only support a 20c per hour increase.

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