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Group Briefing
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The Employment (Miscellaneous Provisions) Bill 2017 (the "Bill") has been passed by the Houses of the Oireachtas

The Bill will now go before the President to be signed into law.

In summary, the Bill:

- prohibits the use of zero hour contracts, save in limited circumstances;
- provides for the provision of minimum payments in relation to low-paid employees who are required to be available to work but are not called into work;
- creates a new entitlement to banded hour contracts;
- obliges employers to notify employees in writing of 5 core terms of employment within 5 days of starting employment.

The Minister for Employment Affairs and Social Protection, Regina Doherty, TD, has confirmed that the Bill will come into force from the first week of March 2019. The Minister also announced she is arranging for a short public awareness campaign, to be conducted by the Workplace Relations Commission (the "WRC"), ahead of commencement.

The stated objective of the Bill is "*to improve the security and predictability of working hours for employees on insecure contracts and those working variable hours*". The Bill is aimed at addressing the position of those in traditionally less secure working arrangements by granting relevant employees additional rights and protections and prohibiting the use by employers of zero hour contracts, save in certain limited circumstances.

During the summer of 2018, a particularly controversial aspect of the draft Bill, was introduced by way of amendment at committee stage. The so-called 'designation' amendment proposed to make it an offence to wrongly designate the employment status of a worker, attracting a "summary conviction to a Class A fine or imprisonment for a term not exceeding 12 months or both". However, the designation amendment was removed from the final text of the Bill earlier this month.

The Bill contains amendments to the two pieces of employment legislation:

a. Organisation of Working Time Act 1997; and

b. Terms of Employment (Information) Acts 1994 – 2014.

The amendments to each piece of legislation are dealt with in turn below.

AMENDMENTS TO THE ORGANISATION OF WORKING TIME ACT 1997

Zero hour contracts refer to arrangements where an employee is either asked to be available for work, without the guarantee of work, or where an employee is informed that there will be work available on a specified day or days.

Section 18 of the Organisation of Working Time Act 1997 (the "1997 Act"), entitled "*Provision in Relation to Zero Hours Working Practices*", governs the current legal position regarding zero hour contracts. Section 18 provides that, in the event of an employer failing to require an employee to work at least 25% of the time the employee is required by his/her contract of employment to be available to work for the employer, the employee is entitled to payment for the lesser of:

a. 25% of the contract hours; or

b. 15 hours.

Zero hour contracts under section 18 can be distinguished from what are sometimes colloquially referred to as '*casual*' work arrangements for which there is no mutuality of obligation, i.e. where the employee is under no obligation to accept a work assignment. These are sometimes referred to as '*if and when*' arrangements. There is no entitlement to payment under section 18 if an employee only has an "*expectation*" of, rather than an obligation to, work.

There are essentially two situations giving rise to the application of section 18:

a. where the employee's contract provides for a specified number of hours e.g. 40 per week, an employee will be entitled to a minimum payment of 10 hours, even if not required, by the employer to work in a week;

b. if an employee is asked to be available over, for example, a four-week period and is not called into work, the employee is entitled to a minimum payment of the lesser of 15 hours or 25% of the number of hours worked by another employee doing such work and for such number of hours as the employee would or could have done had he/she been called into work. Where work is done in the week concerned by more than one other employee, the employer must have regard to the work done by the employee who works the greatest number of hours.

The Bill amends section 18 of the 1997 Act in four material respects:

a. by prohibiting zero hour contracts save in limited circumstances;

b. by providing minimum payments to low-paid employees who are called into work but sent home without any work;

c. by creating a new right for an employee to be placed in a band of hours which better reflects actual hours worked by an employee over a period of twelve months; and

d. by preventing penalisation of employees, e.g. for exercising their rights under the 1997 Act.

Each of these amendments is dealt with below.

1. A prohibition on zero hour contracts save in limited circumstances

The Bill replaces section 18 of the 1997 Act with a new section 18.

The Bill retains the current definition of zero hour contracts. However, the title of section 18 has now changed to "*Prohibition of Zero Hours Working Practices in Certain Circumstances and Minimum Payment in Certain Circumstances*".

The new Section 18 prohibits zero hour contracts by stating "*the number of hours concerned shall be greater than zero*". There are exceptions to the absolute prohibition which are in respect of the following:

a. work done in emergency circumstances; or

b. short-term relief work to cover routine absences for the employer.

2. The provision of minimum payments in relation to low-paid employees who are required to be available to work but are not called into work

The new section 18 retains the same payment mechanism as per zero hour contracts, i.e. the lesser of 25% of the contract hours or 15 hours. However, it introduces a minimum payment of three times the national minimum hourly rate of pay (as distinct from the employee's normal rate of pay) or three times the minimum hourly rate of remuneration established by an employment regulation order. It is important to note that the minimum payment obligation applies "on each occasion" that the situation arises, e.g. on each occasion during a week when work is not provided.

3. The creation of a new right for an employee to be placed in a band of hours which better reflects actual hours worked by an employee over a period of twelve months

The Bill introduces a new section which applies where the stated hours in an employee's contract of employment do not reflect the number of hours worked by the employee over a reference period of 12 months between the date of commencement of employment and the date he/she requests to be put in a band of hours. The Bill also states that a continuous period of employment with the employer occurring immediately before the legislation is enacted will be reckonable towards the 12 month reference period.

The employee must make a written request to be placed in a band of weekly working hours. The employer must then place the employee in the appropriate band not later than four weeks from the date the employee makes the request.

The appropriate band is determined by the employer on the basis of the average number of hours worked by the employee per week during the reference period. The bands are set out in a table in the Bill as follows:

BAND	FROM	TO
A	3 hours	6 hours
B	6 hours	11 hours
C	11 hours	16 hours
D	16 hours	21 hours
E	21 hours	26 hours
F	26 hours	31 hours
G	31 hours	36 hours
H	36 hours and over	-

4. The requirement that an employee who is placed in a band is entitled to work such hours the average of which falls within the band for a period of 12 months following placement in the band.

An employer may refuse to place an employee in the band in one of the following circumstances:

a. where there is no evidence to support the employee's claim;

b. where there have been significant adverse changes to the business, profession or occupation carried on by the employer during or after the reference period;

c. due to exceptional circumstances or an emergency (including an accident or the imminent risk of an accident) the consequences of which could not have been avoided despite the exercise of all due care, or otherwise due to the occurrence of unusual and unforeseeable circumstances beyond the employer's control; or

d. where the average hours worked by the employee were affected by a temporary situation that no longer exists.

The section will not apply to banded hour arrangements entered into by agreement following collective bargaining.

The section will not require an employer to offer hours of work to an employee in a week that the employee was not expected to work, nor does it require an employer to offer hours of work in a week where the employer's business is not being carried out.

An employee can bring a complaint to the WRC, which can issue a decision placing the employee in an appropriate band of hours but cannot award compensation.

5. The prevention of penalisation of employees e.g. for exercising their rights under the 1997 Act

The Bill replaces the penalisation provision in the 1997 Act with a new penalisation provision.

An employee who claims to have been penalised for invoking rights under the Act can bring a claim to the WRC and be awarded compensation of up to two years' remuneration.

AMENDMENTS TO THE TERMS OF EMPLOYMENT (INFORMATION) ACTS 1994 - 2014

The Terms of Employment (Information) Acts 1994 - 2014 (the "*1994 Act*") is amended in two material respects:

a. by requiring employers to notify employees in writing of five core terms of employment within five days of the commencement of employment; and

b. by protecting employees from penalisation, e.g. for exercising their rights under the 1994 Act.

1. The requirement to notify employees in writing of five core terms of employment within five days of commencement of employment

Currently, an employer must provide a written statement to an employee outlining 15 core terms of employment within two months of the commencement of the employee's employment. Failure to do so can result in an employee bringing a claim before the WRC. If successful, an employee can be awarded compensation of such amount as is just and equitable having regard to all of the circumstances, but not exceeding four weeks' remuneration.

The Bill requires that an employer must now notify an employee of five core terms of employment within five days (as distinct from five business days) from the commencement of employment. These core terms are as follows:

a. names of employer and employee;

b. address of employer;

c. expected duration of temporary employment or the end date of a fixed-term contract;

d. the method of calculating pay and pay reference period for the purposes of the National Minimum Wage Act 2000; and

e. the number of hours which the employer "reasonably expects" the employee to work:

   i. per normal working day; and

   ii. per normal working week.

This provision supplements, rather than replaces, an employer's existing obligations under the 1997 Act.

In relation to (e) above, the Bill does not define "reasonably expects". Where an employee's hours of work are not fixed and vary from week to week, it is likely that an employer will be in compliance if it provides such information as it is able to determine from the outset of the employment relationship. Examples of provisions in statements of employment which might be acceptable are as follows:

"You will work x hours per day, y hours per week [insert days]" or

"You will work x hours per day, y hours per week on such days as are determined by the Company from time to time" or

"You will work x hours per day on such days as will be determined by the Company from time to time" or

"You will work y days per week for such number of hours per day, as will be determined by the Company from time to time" or

"You will work such hours per day and such hours per week, as will be determined by the Company from time to time".

Similar to the current legal position, where the employer does not comply with the new obligation in the Bill, an

employee can bring a claim to the WRC and/or the Labour Court and be awarded compensation of up to four weeks' remuneration.

In order to bring a claim, an employee must have at least one month's continuous service.

Further, failure to provide the required information within one month can give rise to a criminal offence. Offences are tried summarily. Fines on conviction are to a Class A fine, i.e. a fine not exceeding €5,000, or imprisonment of up to twelve months or both. Directors, managers, secretaries or other officers of a company can be individually liable, i.e. be prosecuted individually for offences.

2. Anti-penalisation provision

The Bill also introduces an anti-penalisation provision whereby an employer may not penalise an employee for exercising rights under the 1994 Act. An employee who is penalised can be awarded compensation of such amount as the WRC considers just and equitable having regard to all of the circumstances, but not exceeding four weeks' remuneration.

CONCLUSION

The Minister has described the Bill as one of the most significant pieces of employment legislation in a generation, which she states is balanced and fair to both employers and employees. IBEC, the business and employer association for organisations based in Ireland, has expressed concern that the provisions "*will significantly damage the Irish business model and erode our competitiveness*" and that "*the administration and compliance requirements brought about by these proposals will overwhelm small and medium-sized businesses.*" Employers should use the time from now until the commencement of the legislation as an opportunity to consider, and seek advice on, the impact that these changes may have on how they engage with employees so that they are ready ahead of time for the changes coming into force in March.

KEY CONTACTS

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