Labour & Employment 2021

Contributing editors
Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal

LEXOLOGY®
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.

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Getting The Deal Through

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For further information please contact editorial@gettingthedealthrough.com

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Ireland

Louise O'Byrne and Sarah Faulkner
Arthur Cox LLP

LEGISLATION AND AGENCIES

Primary and secondary legislation

1 What are the main statutes and regulations relating to employment?

The main statutes relating to employment are:

- the Unfair Dismissals Acts 1977 to 2015;
- the Employment Equality Acts 1998 to 2015;
- the Redundancy Payments Acts 1967 to 2014;
- the Protection of Employees (Fixed-Term Work) Act 2003;
- the Protection of Employees (Part-Time Work) Act 2001;
- the Protected Disclosures Act 2014;
- the Safety, Health and Welfare at Work Acts 2005 to 2014;
- the Organisation of Working Time Act 1997; and
- the Terms of Employment (Information) Acts 1994 to 2014.

Protected employee categories

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

In Ireland, discrimination is prohibited in employment under the Employment Equality Acts 1998 to 2015, which prohibit discrimination across nine discriminatory grounds: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community (the 'discriminatory grounds').

Discrimination may be direct or indirect. Direct discrimination arises in circumstances where one person is treated less favourably than another on one of the nine discriminatory grounds. Direct discrimination is specifically prohibited under the Employment Equality Acts concerning:

- collective agreements, employment regulation orders and registered employment agreements;
- advertising;
- vocational training; and
- discrimination by employers, employment agencies, trade associations or trade unions.

Indirect discrimination arises where an employer applies a particular condition to all employees that puts certain employees at a disadvantage because of one of the discriminatory grounds. Indirect discrimination may be objectively justified by showing that it is a proportionate way of achieving a legitimate aim.

The burden of proof in employment equality cases is on the complainant. Once the complainant establishes a prima facie case of discrimination (ie, facts from which it may be presumed that there has been discrimination), the burden then shifts to the respondent to prove the contrary.

Harassment and sexual harassment are prohibited under section 14A of the Employment Equality Acts. Harassment is defined as any form of unwanted conduct related to any of the discriminatory grounds, and sexual harassment is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature. In both cases, the conduct must have the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

Individuals are also protected from harassment by the Non-Fatal Offences Against the Person Act 1997, provided that the action complained of is persistent, and a reasonable person would realise that the acts would seriously interfere with the other's peace or privacy, or cause alarm, distress or harm.

Enforcement agencies

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary government departments responsible for employment statutes and regulations are the Department of Employment Affairs and Social Protection and the Department of Enterprise, Trade and Employment.

The Workplace Relations Commission (WRC) was established on 1 October 2015. The WRC offers mediation, conciliation and adjudication services. Appeals from an adjudication officer of the WRC (ie, the first stage of the adjudication process) are to the Labour Court for employment cases and to the Circuit Court for equal status cases. The WRC also has powers of inspection and enforcement and may visit employment premises to ensure compliance with equality and employment-related legislation.

If an employee claims to have been discriminated against on the ground of gender, he or she may choose to take the complaint directly to the Circuit Court.

WORKER REPRESENTATION

Legal basis

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Transnational Information and Consultation of Employees Act 1996 (as amended) applies concerning European works councils, and the Employees (Provision of Information and Consultation) Act 2006 applies concerning responsibilities to establish a general framework setting out minimum requirements for the right to information and consultation of employees.

Works councils are not mandatory and require an 'employee request' or employer initiative for establishment. The Regulations and

the Act set out thresholds for the size and geographical spread of the relevant workforce for the provisions to apply.

Works councils in Ireland are rare and have limited power. Employees in Ireland are usually either represented by a trade union (approximately one-third of the workforce) or not at all. All employees have a constitutional right to join a union; however, all employers also have a constitutional right to decide whether or not to recognise the union as representing the workforce.

Powers of representatives

5 | What are their powers?

European works councils are designed to facilitate employee access to management information and are made up of employee representatives from the different European countries in which a multinational company has operations. European works councils hold meetings during which the employee representatives are informed and consulted by central management on issues that could possibly affect employee interests. These issues are limited to transnational questions (ie, issues that concern all the operations of the business in Europe, or those that concern undertakings or establishments in at least two different qualifying countries). Management does not have to disclose information that it claims is commercially sensitive.

Under the Employees (Provision of Information and Consultation) Act 2006, employers and employees may also negotiate an 'information and consultation arrangement'. This act applies to organisations with at least 50 employees. An employer may at its own initiative, or must at the request of 10 per cent or more of the employees or at the direction of the Labour Court, enter into negotiations to establish such an arrangement. The employer must permit the employees to elect representatives and must negotiate an agreement with those representatives concerning information and consultations processes within the organisation.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Under the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, an adult will not have to disclose his or her conviction in respect of a range of minor offences after seven years.

Data obtained by employers must be processed and held in compliance with data protection legislation. Any information in the public domain can generally be accessed within the context of data protection requirements.

In instructing a third party to conduct criminal background checks, the employer remains a data controller under the EU General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (as amended), and the third party acts as a processor as it would be processing the personal data of candidates on behalf of the employer.

The employer must ensure that the third party conducts all processing in compliance with the GDPR. Additionally, the employer would be required to enter a data processing contract with the third party, with that contract to contain each of the clauses required by article 28 GDPR. If an investigator is engaged, then the investigator must be registered with the Private Security Authority.

Medical examinations

7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Individual offers of employment can be made conditional upon satisfactory health checks, but a prospective employer may be liable under a discrimination claim if the offer is not confirmed based on the information disclosed by the health checks. The compensation available for pre-employment equality claims is €13,000.

Medical reports given by a medical practitioner responsible for an individual's care are subject to data protection legislation and there must be a legal basis for processing such information.

Medical information about an individual also constitutes 'sensitive personal data' under the Data Protection Acts 1988 to 2018.

Drug and alcohol testing

8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Employers are required (under section 8 of the Safety, Health and Welfare at Work Act 2005) to ensure the safety, health and welfare at work of all employees. This includes ensuring the prevention of improper conduct or behaviour that is likely to put employees at risk. An employer may require an applicant to submit to a drug or alcohol test to the extent that this is required to ensure that the applicant may safely carry out the proposed role. These tests must be necessary and proportionate.

HIRING OF EMPLOYEES

Preference and discrimination

9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

No. There are no requirements to give preference to particular groups of people. Employers are obliged under the Employment Equality Acts not to discriminate on any of the discriminatory grounds listed under the Acts (gender, marital status, family status, sexual orientation, religion, age, disability, race or membership of the Traveller community) concerning access to employment.

10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes. Under the Terms of Employment (Information) Acts 1994 to 2014, an employer must give an employee a written statement of his or her terms of employment within two months of the commencement of employment. If an employer does not comply with this requirement, employees are entitled to up to four weeks' compensation. This written statement of terms must contain:

- the full names of the employer and the employee;
- the address of the employer;
- the place of work;
- the job title;
- the commencement date, expected duration of the contract (if temporary) and the expiry date (if fixed-term);
- reference to any registered employment agreement or employment regulation order that applies to the employee;
- the rate of calculation of the employee's remuneration;
- details stating that the employee may request a written statement of the employee's average hourly rate of pay for any pay reference period as provided in that section;

- the length of the intervals between the times at which remuneration is paid, whether a week, a month or any other interval;
- any terms or conditions relating to:
  - the hours of work (including overtime);
  - paid leave (other than paid sick leave);
  - incapacity for work owing to sickness or injury and paid sick leave; and
  - pensions and pension schemes;
- the period of notice the employee is required to give and entitled to receive to determine the employee's contract of employment or the method for determining such periods of notice; and
- a reference to any collective agreements that directly affect the terms and conditions of the employee's employment.

Since March 2019, employers are also required to provide employees with key terms and conditions of employment within five days of commencing employment. These include:

- the full name of the employer and the employee;
- the address of the employer;
- the expected duration of the contract (where the contract is temporary or fixed-term);
- the rate or method of calculating pay; and
- what the employer reasonably expects the normal length of the employee's working day and week will be.

An employer that does not comply with this requirement will be guilty of an offence and liable for a fine of up to €5,000 or a term of imprisonment of up to 12 months, or both. Employees with one month's service may claim up to four weeks' compensation for this breach.

11 | To what extent are fixed-term employment contracts permissible?

Fixed-term contracts are permissible; however, certain rights and protections are given by the Protection of Employees (Fixed-Term Work) Act 2003. There is no maximum duration of contracts, but successive fixed-term contracts of four or more years will be deemed to be contracts of indefinite duration unless objectively justified by the employer.

Probationary period

12 | What is the maximum probationary period permitted by law?

There is no statutory maximum probationary period. Typically, employers provide for a probationary period of six months subject to extension at the employer's discretion. In practice, probationary periods should not exceed 11 months (with a two-week notice period applicable during probation) to ensure that an employee does not accrue service to maintain a claim under the Unfair Dismissals Acts.

Classification as contractor or employee

13 | What are the primary factors that distinguish an independent contractor from an employee?

An employee is employed under a contract of service and works under the control of the employer. An independent contractor provides services under a contract for services and does not operate under the control of the party to whom he or she is providing services.

The factors that a court will take into consideration in distinguishing an independent contractor from an employee will include:

- the bargaining power of the parties and whether the written contractual terms accurately reflect the reality of the relationship;
- the mutuality of obligation (ie, the employer must provide work and the employee must perform duties);
- the integration of the 'employee' into the business; and
- the ability or inability to use substitutes.

Temporary agency staffing

14 | Is there any legislation governing temporary staffing through recruitment agencies?

Yes. Employers must comply with the Protection of Employees (Temporary Agency Work) Act 2012. This implements EU law to guarantee that basic employment conditions are no less favourable for temporary agency workers and that they have the same access to facilities and opportunities as permanent staff in respect of:

- the duration of working time, rest periods, night work, annual leave and public holidays;
- pay;
- work done by pregnant women and nursing mothers, children and young people; and
- action taken to combat discrimination on the grounds of sex, race or ethnic origin, religion or beliefs, disabilities, age or sexual orientation.

Temporary agency workers must also have equal access to facilities such as childcare and must be informed of permanent employment opportunities.

FOREIGN WORKERS

Visas

15 | Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There is no set number of short-term visas that the Irish government will issue. The applicant must show they have sufficiently strong family, social or economic ties to a place of residence in a country other than Ireland. The granting of the visa is ultimately at the discretion of the immigration officer. There is no right to a visa nor is there one set of documents or circumstances of application that will guarantee the approval of an application.

An employee wishing to transfer from one corporate entity in another jurisdiction to an Irish-related entity must obtain an employment permit (and may also require a visa). The relevant employment permit is an Intra-Company Transfer Employment Permit, which is designed to facilitate the transfer of senior management, key personnel or trainees who are non-EEA nationals from an overseas branch of a multinational corporation to its Irish branch. Once this employment permit is obtained, the employee can apply for a long stay employment visa (if applicable).

Alternatively, employees may apply for a critical skills employment permit if the role falls within specific criteria (ie, occupations that are critically important to growing Ireland's economy, are highly demanded and highly skilled and are in a significant shortage of supply in Ireland's labour market). The employee must also receive a minimum level of remuneration to qualify for this type of permit.

Spouses

16 | Are spouses of authorised workers entitled to work?

Since March 2019, spouses and partners of critical skills employment permit holders may access the Irish labour market without the need to obtain an employment permit. Spouses of intra-company transfer employment permit holders must apply for an employment permit (eg, critical skills or general employment permit) in their own right. The spouse of the permit holder must be legally resident in Ireland.

General rules

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

An employer may not employ a foreign national without the requisite permission to work.

An employer found guilty of employing a foreign worker without the right to work in the jurisdiction is guilty of an offence under the Employment Permits Act 2003 and may be liable to a fine of up to €250,000 or 10 years' imprisonment, or both.

Resident labour market test

18 Is a labour market test required as a precursor to a short or long-term visa?

There is no requirement to conduct a labour market test before applying for a short or long-term visa. Visas set out an individual's immigration permission, which is usually separate from his or her permission to work.

Generally, a labour market test is required before a general employment permit will be granted. Certain exceptions exist, for example:

- for a job on the Critical Skills Occupations List;
- where a recommendation has been made from Enterprise Ireland or IDA Ireland (the inward direct-investment agency) concerning the job offer (applies to client companies of Enterprise Ireland or IDA Ireland only); or
- where the job offer is for the carer of a person with exceptional medical needs and that person has developed a high level of dependence on their non-EEA national carer.

TERMS OF EMPLOYMENT

Working hours

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The Organisation of Working Time Act 1997 provides that the maximum average working week for employees may not exceed 48 hours. The average is calculated over four, six or 12 months depending on the category of employee.

An employee may not opt out of the statutory requirements of the Act. However, if an employee's role is one in which the employee determines his or her own working time (generally established by reference to contract, seniority and reality of the situation), then Part II of the Organisation of Working Time Act may not apply. Part II relates to the calculation of rest breaks, weekly working hours, minimum rest periods and Sunday work.

Overtime pay

20 What categories of workers are entitled to overtime pay and how is it calculated?

Employees do not have a statutory entitlement to overtime pay.

Employees who work on Sundays are entitled to a reasonable allowance, a reasonable pay increase or reasonable paid time off work in respect of that period of work. Alternatively, employers may determine an employee's overall pay, taking into account the fact that he or she will be required to work on Sundays. Recent case law has found that an express statement in a contract of employment that provided that working on Sundays was taken into account in the setting of an employee's pay was sufficient to satisfy the employer's Sunday work obligation.

21 Can employees contractually waive the right to overtime pay?

There is no statutory right to overtime pay. An employer and employee may contractually agree that the employee's overall pay is inclusive of the premium based on his or her obligation to work Sundays.

Vacation and holidays

22 Is there any legislation establishing the right to annual vacation and holidays?

The Organisation of Working Time Act 1997 provides for a minimum period of four working weeks' annual leave in addition to the nine public holidays in Ireland. Annual leave may be subject to the employer's approval concerning when the leave may be taken.

Since 1 August 2015, employees on long-term sick leave accrue annual leave entitlements of up to 15 months after the end of the year in which the entitlement accrued.

Sick leave and sick pay

23 Is there any legislation establishing the right to sick leave or sick pay?

An employee does not have a statutory entitlement to be paid by the employer while on sick leave. This is a matter for the employer's discretion.

It is open to an employee to apply for illness benefit provided that he or she has sufficient social insurance contributions.

Leave of absence

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees who have made the requisite social insurance contributions may receive maternity benefit, adoptive benefit, paternity benefit or parent's benefit from the Department of Employment Affairs and Social Protection. Employers are not obliged to pay employees during maternity, adoptive, parental, paternity leave or parent's leave.

A pregnant employee has a statutory entitlement to ordinary maternity leave for a period of 26 weeks, with the option to take additional maternity leave for a period of 16 weeks. An adopting employee is entitled to an ordinary adoptive leave of 24 weeks and an additional adoptive leave of 16 weeks.

An employee may avail of unpaid parental leave (26 weeks per child) and carer's leave (13 to 104 weeks), provided they satisfy certain statutory criteria. An employee who is a new parent other than the mother of the child (eg, father, civil partner of the mother, sole male adopter) is entitled to two weeks' paternity leave.

An employee is entitled to take parent's leave for children born or placed for adoption on or after 1 November 2019, provided he or she satisfies certain statutory conditions. Leave must be taken after birth or placement for adoption. From April 2021, the leave can be taken during the first two years of a child's birth or placement in case of adoption. It must be taken in periods of not less than one week and may be taken before additional maternity or adoptive leave.

The length of parent's leave is set to increase from two weeks to five weeks from April 2021.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

There is no obligation on an employer to set up or contribute to a pension scheme. If an employer does not have a pension scheme, or an employee is excluded from joining a pension scheme, the employer must provide access to a personal retirement savings account within six months of the employee starting employment.

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

The Protection of Employees (Fixed-Term Work) Act 2003 grants employees (unless the contrary is objectively justified):

- the right to the same terms and conditions as comparable permanent employees; and
- the right not to suffer a detriment or unfair dismissal because of their fixed-term status.

Successive fixed-term contracts of four or more years will be deemed to be contracts of indefinite duration with the employer unless objectively justified by the employer.

The rules relating to part-time workers are governed by the Protection of Employees (Part-Time Work) Act 2001, which grants such workers (unless the contrary is objectively justified):

- the right to the same terms and conditions as comparable full-time workers; and
- the right not to suffer a detriment or unfair dismissal because of their part-time status.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Employers are not currently obliged to publish information on pay, employees or the general workforce; however, there are requirements for the disclosure of directors' remuneration. The definition of directors' emoluments includes all benefits in kind, regardless of whether they are taxable. Emoluments for all services provided in connection with the management of the company must be disclosed on a combined basis.

The Gender Pay Gap Information Bill 2019 provided for increased monitoring and publication of gender pay gap information, including the differences between male and female mean hourly rates of pay, median hourly rates of pay, mean bonus pay and median bonus pay. The Bill lapsed in January 2020 and has now been restored to the Order Paper. The Bill has reached the fourth stage before the lower house of parliament in the legislative process.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The default position in Ireland is that restrictive covenants (ie, non-compete and non-solicitation clauses) are void as being restraint of trade, unless the employer demonstrates that there is a legitimate business interest, that the restriction goes no further than reasonably necessary and that it is not contrary to the public interest.

Restrictive covenants will only be enforceable to the extent to which they are protecting legitimate business needs. In this regard, they should be limited in terms of activities, geographic scope and duration. Recent case law found a restrictive covenant to be void and unenforceable, as an unjustified restraint of trade, as the covenant itself went beyond the employer's legitimate interest and was unjustifiable.

In all circumstances, the level of restriction should be balanced with the risk to the business. Post-termination non-compete clauses would ordinarily only be deemed enforceable if they are for a period of 12 months or less.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

An employer is not obliged to pay the former employee during the post-termination restrictive covenants; however, garden leave is relatively common in Ireland.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

At common law, employers are vicariously liable to third parties for the acts and omissions of their employees that occur in the course of the employees' employment.

Under the Employment Equality Acts, employers will be vicariously liable for the discriminatory acts and omissions of their employees where an employer has failed to take reasonable practicable preventive steps.

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

The deduction at source of income tax (pay as you earn), pay related social insurance and universal social charge is mandated by the Taxes Consolidation Act 1997.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

Parties' rights concerning employee inventions are covered by the Patents Act 1922 and the Copyright and Related Rights Act 2000.

The employer will usually retain any intellectual property created by the employee in the course of employment. Generally, there will be an express provision in the contract of employment stipulating that intellectual property will belong to the employer.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

There is no statutory protection concerning confidential information and trade secrets; however, it is common to insert provisions concerning both in the employee's contract.

The European Union (Protection of Trade Secrets) Regulations 2018 amended the Protected Disclosures Act 2014. Originally, the motivation for making a protected disclosure was irrelevant. Now, the maker of a protected disclosure must prove that any disclosure revealing a trade secret was a disclosure made in the public interest.

DATA PROTECTION

Rules and obligations

34 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Data Protection Acts 1988 to 2018 ensure the fair and lawful processing of personal data. The Acts provide that personal data must be:

- processed fairly and lawfully;
- collected and processed for one or more specified, explicit and legitimate purposes;
- adequate, relevant and not excessive;
- accurate and up to date;
- kept in a form that permits the identification of a data subject for no longer than is necessary;
- processed following the rights of the subject of the personal data;
- protected with appropriate security measures; and
- kept within the European Economic Area, unless the recipient ensures adequate data protection.

35 Do employers need to provide privacy notices or similar information notices to employees and candidates?

Under the Data Protection Act 2018 and the EU General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR), employers have certain obligations to data subjects (ie, employees). Employees must, at the time the personal data is being collected, be made aware of certain information (eg, the identity and contact details of the data controller, the purposes of processing the personal data, the legal basis for the processing and the persons to whom the data may be disclosed). Employees must be informed of their rights of access, rectification, erasure, restriction of processing, objection and data portability in respect of their personal data.

Employers should provide a privacy notice to satisfy their obligations under GDPR. A privacy notice should clearly inform employees about their rights of access and rectification, the type of data that is collected about them and the lawful bases for processing that data. It should be provided at the commencement of the employee's employment and updated if there are any changes. A privacy notice should be fully compliant with articles 13 and 15 of the GDPR.

36 What data privacy rights can employees exercise against employers?

Under the Data Protection Act 2018 and GDPR, employees have a number of rights, including the right to:

- information about the collection of their personal data;
- establish the existence of their personal data;
- access their personal data;
- rectify or erase their personal data;
- object to processing that is likely to result in damage or distress; and
- restrict the data controller from processing the data if the data is inaccurate or if they consider the processing unlawful.

As with any other data subject, these rights can be limited in certain circumstances.

BUSINESS TRANSFERS

Employee protections

37 Is there any legislation to protect employees in the event of a business transfer?

Where there is no change in the identity of the employer, (eg, share sale) the employees' contracts of employment continue as before the transfer. All rights, duties and liabilities continue, and the buyer of the employer's shares inherits all those rights, duties and liabilities.

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (TUPE) give special protection for the rights of employees on the transfer of an undertaking (where there is a 'relevant transfer'), which includes a sale of assets or business activity, or on a change of service provider.

If a TUPE situation arises:

- an employee may not be dismissed solely because of the transfer; however, dismissals may take place for economic, technical or organisational reasons;
- all the rights and obligations of an employer under a contract of employment (including terms inserted by collective agreements) other than pension rights existing on the date of transfer are transferred to the new employer on the transfer of the business or part thereof; and
- if either employer envisages measures concerning their employees, the employees' representatives must be consulted, where reasonably practicable, not later than 30 days before the transfer occurs.

TERMINATION OF EMPLOYMENT

Grounds for termination

38 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer must have cause to dismiss an employee. Under the Unfair Dismissals Acts 1977 to 2015, the dismissal of an employee is deemed not to be unfair if it is for reasons of capability, conduct, capacity, redundancy, contravening the law (ie, the employee's continued employment would be illegal) or some other substantial reason.

Notice

39 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

At a minimum, employers must give employees the following statutory periods of notice.

Duration of employment	Minimum notice
13 weeks to 2 years	1 week
2 to 5 years	2 weeks
5 to 10 years	4 weeks
10 to 15 years	6 weeks
15 years or more	8 weeks

If the employee's contract of employment provides for notice in excess of the statutory period, the contractual notice must be given. Payment in lieu of notice may be given if it is provided for in the contract of employment.

40 | In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee without notice for gross misconduct (ie, summary dismissal). This is conduct that is so serious that immediate dismissal of the employee is warranted; for example, assault, stealing or serious breach of employment policies. Employment contracts may contain further examples of gross misconduct.

Severance pay

41 | Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The Redundancy Payments Acts 1967 to 2014 provide for statutory redundancy payments for employees with at least two years' continuous service.

Employees are entitled to two weeks' pay for each year of continuous service (capped at €600 per week) plus one additional week's pay (capped at €600 per week).

Procedure

42 | Are there any procedural requirements for dismissing an employee?

Yes. The Unfair Dismissals Act states that the adjudication officer or the Labour Court may have regard for the reasonableness of the conduct of the employer concerning a dismissal.

The Workplace Relations Commission has introduced a Code of Practice on Grievance and Disciplinary Procedures, which, although not technically legally binding, employers should follow in dismissing an employee. The Code sets out the importance of procedures and their application fairly and consistently in light of an employee's constitutional right to natural justice and fair procedures. It outlines that disciplinary action may include:

- an oral warning;
- a written warning;
- a final written warning;
- suspension without pay;
- transfer to another task, or section of the enterprise;
- demotion;
- some other appropriate disciplinary action short of dismissal; or
- dismissal.

Employee protections

43 | In what circumstances are employees protected from dismissal?

Employees with 12 months' service have statutory protection from unfair dismissal.

Dismissals are automatically deemed to be unfair if they result wholly or mainly from the following:

- membership or proposed 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; and
- dismissal in the context of transfer under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

No minimum period of service applies to the automatically unfair dismissals above.

Mass terminations and collective dismissals

44 | Are there special rules for mass terminations or collective dismissals?

Yes. The Protection of Employment Act 1977 (as amended) sets down procedural requirements concerning collective redundancies.

Collective redundancies arise where during any period of 30 consecutive days, the number of employees being made redundant are:

- five employees where 21 to 49 are employed;
- 10 employees where 50 to 99 are employed;
- 10 per cent of employees where 100 to 299 are employed; and
- 30 employees where 300 or more are employed.

In such a situation, the employer must enter into consultations with employee representatives with a view to reaching an agreement. These consultations must take place at the earliest opportunity and at least 30 days before the notice of redundancy is given. The consultation aims to consider whether there are any alternatives to the redundancies.

The employer is obliged to provide the following information in writing to employee representatives:

- the reasons for the redundancy;
- the number and descriptions of the employees affected;
- the number and descriptions of employees normally employed;
- the period in which the redundancies will happen;
- the criteria for selection of employees for redundancy; and
- the method of calculating any redundancy payment.

The employer must also inform the Minister for Employment Affairs and Social Protection in writing of the proposed redundancies at least 30 days before the occurrence of the first redundancy.

Class and collective actions

45 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Irish law does not provide for class actions or collective actions; however, representative actions and test cases operate similarly to class or collective actions.

Joinder and consolidation procedures are also a form of collective action.

Mandatory retirement age

46 | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Employers may impose a mandatory retirement age; however, it must be objectively and reasonably justified by a legitimate aim and the means of achieving that aim must be appropriate and necessary. Employers commonly cite intergenerational fairness and succession planning as the grounds for imposing mandatory retirement ages.

The Code of Practice on Longer Working of the Workplace Relations Commission sets out the best industrial relations practice in managing the relationship between employers and employees when an employee is approaching retirement. This Code of Practice is now binding under SI 600/2017.

The current qualifying age for state pensions is 66. The government had announced plans to increase the state pension age to 67 in 2021 and 68 in 2028. However, the government has deferred the change that was due in 2021 and a Pensions Commission has been established to consider the change to the state pension age, among other issues such as sustainability and intergenerational fairness.

There has been recent high-profile litigation by employees against employers enforcing mandatory retirement ages in which employees have successfully claimed that the mandatory retirement age is not objectively justified. Employers should ensure that the mandatory retirement age is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

DISPUTE RESOLUTION

Arbitration

47 | May the parties agree to private arbitration of employment disputes?

Yes. Employment contracts can provide for arbitration of disputes. Under Irish arbitration law, where a valid arbitration clause exists in a contract, this will result in a stay in any legal proceedings.

Irrespective of the contractual position, an employee will still have the right to seek to enforce his or her statutory employment rights (eg, payment of wages) in front of an adjudication officer or the Labour Court.

Employee waiver of rights

48 | May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee may waive statutory and contractual rights to employment claims via a settlement agreement. The normal rules of contract law apply, and consideration is necessary for a settlement agreement to be enforceable. There is no statutory obligation for an employee to be legally advised, but it is deemed to be best practice.

The agreement must:

- be in writing;
- clearly set out the claims being waived; and
- be entered into freely and without duress.

Limitation period

49 | What are the limitation periods for bringing employment claims?

The limitation periods are as follows:

- unfair dismissal: within six months of the date of termination, with a possibility to extend by up to another six months;
- discrimination: six months from the most recent occurrence of discrimination, with a possibility to extend by up to another six months;
- unlawful deduction of wages: six months from the date of contravention, with a possibility to extend by up to another six months; and
- redundancy payment: one year from the date of termination of employment, with a possibility to extend by up to another year.

All periods of extension are for reasonable cause only.

UPDATE AND TRENDS

Key developments of the past year

50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

Unsurprisingly, most developments over the past year have dealt with circumstances brought about by the covid-19 pandemic.

Additionally, the following developments are of note.

Protected Disclosures (Amendment) Bill

This Bill will implement changes necessitated by the Whistle-blowing Directive, and EU member states must implement the new provisions by 17 December 2021. The Protected Disclosures Act 2014 will have to undergo substantial changes to comply with the Directive, most notable of which are the extension of obligations to have a whistle-blowing policy to the private sector and the introduction of strict time frames to follow-up disclosures.

The Industrial Relations Act 1990 (Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work) Order 2020

The Code addresses the question of workplace bullying and is effective from 23 December 2020. It outlines the employer's role in effectively managing workplace bullying and identifies organisational culture as a pillar in the prevention of workplace bullying. This includes good leadership, effective communication and staff training and a mechanism to resolve complaints in a supportive and fair manner.

National Remote Work Strategy

The government's intention to ensure that remote working is a permanent feature of working in Ireland is evident through the key aspects of this strategy. It mandates remote working for 20 per cent of the public sector and proposes to review tax arrangements for remote working. Most notably, the strategy envisages the introduction of a code of practice for establishing the right to disconnect. The government also intends to introduce legislation for an employee's right to request to work remotely.

Right to disconnect

The Workplace Relations Commission launched a public consultation to inform the drafting of a new code of practice on the right of employees to disconnect. The code will establish best practices concerning the right of employees to disengage from work outside of normal working time hours. Once approved by the Minister of Enterprise, Trade and Employment, the code will be admissible in evidence in proceedings before a court.

Coronavirus

51 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The government has introduced various measures to address circumstances brought about by the pandemic, with notable measures listed below.

Employment Wage Subsidy Scheme (EWSS)

The EWSS is aimed at ensuring that employees maintain the link with their employer and to avoid redundancies so far as is possible. The EWSS has two key elements:

- it provides a flat-rate subsidy to qualifying employers based on the number of employees on their payroll; and
- it reduces the rate of pay related social insurance to 0.5 per cent on wages paid to eligible employees.

Employers must be able to demonstrate a 30 per cent reduction in turnover as a result of the covid-19 crisis to qualify for the scheme. The EWSS is currently due to terminate on 30 June 2021 but may be extended.

COVID-19 Pandemic Unemployment Payment

The COVID-19 Pandemic Unemployment Payment (PUP) is available for those who lost their job (or who were temporarily laid off) as a result of the pandemic. To be eligible, a person must not receive any income from an employer and must be genuinely seeking work. The PUP is also scheduled to run until 30 June 2021.

Immigration measures

The Department of Justice has introduced a temporary extension of immigration permissions until 20 April 2021 as well as measures to process priority or emergency visas.

Suspension of redundancy provisions

The suspension of redundancy provisions relating to temporary layoff and short-time work introduced in March 2020 will be extended until 30 June 2021. Such provisions were previously due to expire on 31 March 2021. Before March 2020, if an employee was laid off or put on short time for four or more consecutive weeks, or six or more weeks within a 13-week period of which not more than three are consecutive, the employee was entitled to notify their employer in writing of their intention to claim a statutory redundancy payment (assuming they satisfied the qualifying criteria). On giving notice, an employee would be entitled to a statutory redundancy payment if their employer could not give them counter-notice within seven days of the employee's notice.

Best practice or advice for clients

As the covid-19 crisis is continually evolving, we advise all clients to seek up-to-date advice on government guidance concerning covid-19 measures, particularly regarding international travel.

ARTHUR COX

Louise O'Byrne
louise.obyrne@arthurcox.com

Sarah Faulkner
sarah.faulkner@arthurcox.com

Ten Earlsfort Terrace
Dublin 2, D02 T380
Ireland
Tel: +353 1 920 1000
Fax: +353 1 920 1020
www.arthurcox.com

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