LEXOLOGY®
Getting The Deal Through

Employment: International

in Ireland

The information contained in this report is indicative only. Globe BMG is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2019 Globe Business Publishing Limited

Table of contents

COUNTRY SNAPSHOT
Key considerations
Emerging issues/hot topics/proposals for reform

THE EMPLOYMENT RELATIONSHIP
Country specific laws
Misclassification
Contracts
Foreign workers

RECRUITMENT
Advertising
Background checks

WAGES AND WORKING TIME
Pay
Hours and overtime
Record keeping

DISCRIMINATION, HARASSMENT & FAMILY LEAVE
What is the position in relation to:
Family and medical leave
Harassment
Whistleblowing

PRIVACY IN THE WORKPLACE
Privacy and monitoring

TRADE SECRETS AND RESTRICTIVE COVENANTS
Intellectual Property
Restrictive covenants
Non-compete

DISCIPLINE AND GRIEVANCE PROCEDURES
Procedures

© Copyright 2006 - 2019 Globe Business Publishing Limited

INDUSTRIAL RELATIONS

Unions and layoffs

TERMINATION

Notice

Redundancies

Protections

COURTS/TRIBUNALS

Jurisdiction and procedure

Appeals

© Copyright 2006 - 2019 Globe Business Publishing Limited

Contributors

Ireland

Niall Pelly
niall.pelly@matheson.com
Matheson

Alice Duffy
alice.duffy@matheson.com
Matheson

Rachel Kelly
Matheson

© Copyright 2006 - 2019 Globe Business Publishing Limited

COUNTRY SNAPSHOT

Key considerations

Which issues would you most highlight to someone new to your country?

Fair procedures
Irish law places a significant emphasis on fair procedures and the principles of natural justice in terminating employment. Where an employee has one year's continuous service, his or her dismissal is deemed to be unfair under the Unfair Dismissals Acts 1977-2015, unless the employer can demonstrate that:

- the dismissal was for a potentially fair reason (eg, capability, conduct, redundancy, illegality or some other substantial ground); and
- a fair process was applied in effecting the dismissal.

As such, termination at will is not permitted in Ireland.

Employment injunction
While employees can seek redress for unfair dismissal before the Workplace Relations Commission (WRC) under the Unfair Dismissals Acts, an employee may also apply to the High Court for an injunction restraining dismissal or to prevent the application of unfair procedures during a disciplinary process. Typically, injunctions are restricted to three main areas:

- a challenge on corporate governance grounds;
- where the contract has not been validly terminated (eg, the appropriate notice set out in the contract has not been provided to the employee); or
- a challenge as to the fairness of the procedures adopted in circumstances where the employee's reputation may be at stake.

Industrial relations
The Irish industrial relations system is regarded as voluntary and does not require:

- employers to engage in collective bargaining; or
- formal recognition of trade unions.

However, recent legislative amendments have improved the framework for workers seeking to improve their terms and conditions in circumstances where collective bargaining is not recognised by their employer. There is now a mechanism for trade unions, on behalf of their members, to have disputes regarding remuneration or other terms and conditions assessed against relevant comparators and determined by the Labour Court.

What do you consider unique to those doing business in your country?

Tax rate
Irish registered companies benefit from a favourable corporate tax regime, which includes:

- a rate of 12.5% for active business;

© Copyright 2006 - 2019 Globe Business Publishing Limited

- a number of additional tax incentives, including refundable tax credit for research and development; and
- access to an extensive double tax treaty network.

Works councils
Works councils are not a significant feature of Irish industrial relations, unlike in other EU countries. Irish law does include specific provision for the establishment of both European and local-level works councils; but, in practice, these are extremely rare.

Is there any general advice you would give in the employment area?

The importance of applying fair procedures when taking any action against an employee in Ireland – particularly in effecting dismissal – cannot be understated. In determining whether a dismissal is unfair, regard is had to the reasonableness of the employer's conduct and the extent to which it complied with any agreed procedures in relation to the dismissal. The constitutional right to fair procedures is generally implied into employment contracts, particularly in circumstances where the employee may be dismissed for misconduct and the dismissal may have a negative bearing on his or her reputation and prospects for future employment. 'Fair procedures' in this context generally means that:

- procedures are rational and fair;
- the basis for disciplinary action is clear;
- the range of penalties is well defined; and
- an internal appeal mechanism is available.

Employers are also recommended to carry out an audit of their personnel files in order to ensure compliance with their employment obligations in the event of a workplace inspection. Employers must keep their employment records at the place of employment. The WRC Inspection and Enforcement Division carries out approximately 5,000 workplace inspections each year – approximately half of which are unannounced. Compliance notices or on-the-spot fines can be issued to employers for failure to comply with certain legislative requirements.

Emerging issues/hot topics/proposals for reform

Are there any noteworthy proposals for reform in your jurisdiction?

The Workplace Relations Act 2015 reformed the enforcement of employment law rights in Ireland. The WRC recently published its work programme for 2017 and there is an expectation that levels of activity will increase in the Mediation Division and the Inspection and Enforcement Division.

The recently published private members' bill proposes to abolish compulsory retirement ages in Ireland. However, the bill is still in draft form and it remains to be seen which amendments will be made to it and whether it will be passed by the government.

Following a recent case involving Cleary's department store in Dublin – where 460 employees lost their jobs following the store's overnight closure without opportunity to consult with their employer – the interplay between employment law and insolvency law is under scrutiny, with the aim of securing greater protection for employees in circumstances where employers are in bankruptcy and insolvency situations.

Under current law, insolvent companies need not wait 30 days following notification to the minister for jobs, enterprise and innovation of proposed collective redundancies before implementing the redundancies. The "Cahill Duffy Report" was published following the closure of the store and a number of recommendations for reform were included in the

LEXOLOGY Getting The Deal Through
© Copyright 2006 - 2019 Globe Business Publishing Limited

report which, if implemented, could ensure better protection for employees of an insolvent employer in a collective redundancy situation. The primary recommendation is to remove the insolvency exception from the prohibition on implementing collective redundancies during the 30-day consultation period, thereby entitling employees to:

- consultation with their employer during the 30-day period; and
- payment of their normal wages during this time.

It is also recommended that the compensation limit for failure to inform and consult with employees for a 30-day period be increased from four weeks' pay per employee to a maximum of two years' remuneration per employee – whether or not the employer is insolvent. It remains to be seen whether such proposals will be implemented.

What are the emerging trends in employment law in your jurisdiction?

Protected disclosures and whistleblowing

It has been over two years since the introduction of the Protected Disclosure Act 2014 and the real effects of the legislation are becoming evident. An increase in cases relating to protected disclosures in the past year and the recently published code of practice on the Protected Disclosures Act 2014 – which was introduced by statutory instrument – highlight the importance for organisations to have an agreed whistleblowing policy in place to deal with any such disclosures. The code of practice also provides guidance on what the whistleblowing policy should include.

The first statutory injunction under the Protected Disclosure Act 2014 was granted in 2016 and, in practice, the number of whistleblowing-related claims is increasing.

Workplace inspections

As a result of increased resources in the WRC's inspection service, an increased number of workplace inspections was carried out over the past year and this trend is expected to continue. Recently released statistics confirm that the WRC now carries out approximately 5,000 workplace inspections every year, of which approximately 2% result in criminal prosecutions against employers. Almost half of the inspections carried out by the WRC are unannounced and it appears that the key areas in which employers are at fault relate to:

- inadequate record keeping;
- employment permits; and
- national minimum wage issues.

Increased trade union activity and recognition campaigns

The Industrial Relations (Amendment) Act 2015 introduced an indirect means by which employees whose employer refuses to engage with their trade union can go to the Labour Court and – if they can show that their terms and conditions provide a lesser benefit than those enjoyed by comparable employees in similar employment – the Labour Court will issue a binding order requiring the employer to improve the terms and conditions. The first case under this legislation (Freshways Food Company v SIPTU , LCR 21242) was decided by the Labour Court in June 2016. The trade union involved successfully contended that the remuneration and employment conditions of the employees who were party to the dispute were less favourable than those that applied to comparable employees. This has given trade unions a much stronger position to attract employees back into their membership, and more cases of this nature are expected this year.

Employment injunctions

Applications for employment injunctions in order to restrain an unlawful breach of an employee's contractual entitlements or constitutional right to fair procedures remain a predominant feature of employment litigation.

© Copyright 2006 - 2019 Globe Business Publishing Limited

In the case of dismissal, careful consideration should be given to whether the dismissal could result in an injunction and, if so, the appropriate steps should be taken to minimise that risk. The Irish courts now appear more willing to intervene and grant injunctions in favour of employees where it is in the interests of justice to do so and particularly where the employee's reputation is at stake.

THE EMPLOYMENT RELATIONSHIP

Country specific laws

What laws and regulations govern the employment relationship?

The employment relationship is governed by:

- the written terms and conditions contained in the employment contract, handbook and policies;
- legislative sources, including Irish and EU law;
- constitutional law; and
- common law (case law and implied).

Who do these cover, including categories of worker?

Permanent employees
Employees are typically engaged on a permanent part-time or full-time basis (usually subject to satisfactory completion of a probationary period), such that their employment continues indefinitely until:

- termination by either party giving notice to the other; or
- a fundamental breach by either party results in immediate termination.

Fixed-term employees
Fixed-term contracts, although atypical in nature, fall within the scope of the direct employment model. Irish law prohibits less favourable treatment of fixed-term employees relative to comparable permanent employees, unless such treatment can be objectively justified. These obligations are set out under the Protection of Employees (Fixed-Term Work) Act 2003.

Zero-hours employees
The Organisation of Working Time Act 1997 sets out particular protections for employees in relation to zero-hours employment practices. The 1997 act defines a 'zero-hours contract' as arising where an employment contract expressly requires the employee to be available to work for a certain number of hours each week or as-and-when required by the employer (or both).

Agency workers
The Protection of Employees (Temporary Agency Work) Act 2012 obliges employment agencies to ensure that their workers are employed on the same basic working and employment conditions as if they had been recruited directly by the end user to the same job, subject to certain exceptions.

Misclassification

© Copyright 2006 - 2019 Globe Business Publishing Limited

Are there specific rules regarding employee/contractor classification?

Under Irish law, a distinction is drawn between self-employed independent contractors or consultants and employees. The distinction is important because different tax treatment applies to self-employed individuals and employees. In addition, employees are entitled to certain mandatory employment rights which are unavailable to contractors, including:

- the right to statutory leave;
- redundancy entitlements; and
- the right not to be unfairly dismissed (subject to minimum service requirements).

This distinction has led to a lot of case law relating to employment status and it is clear from such case law that the courts, employment rights bodies and the revenue commissioners of Ireland will consider the totality of the relationship between the parties to determine its true nature. This will involve analysis of various factors relating to the engagement, including any contractual documentation that exists. While a well-drafted independent contractor agreement will assist in demonstrating that the relationship is one of self-employment, case law has shown that contractual documentation will be disregarded if it does not accurately reflect the practical circumstances of the engagement.

Contracts

Must an employment contract be in writing?

Under the Terms of Employment (Information) Acts 1994 to 2014, an employer is obliged to provide an employee with a statement in writing no later than two months after the commencement of employment setting out certain specified terms and conditions of employment. This requirement is typically satisfied by providing an employee with a written employment contract.

Are any terms implied into employment contracts?

Terms and conditions of employment are implied into employment contracts by various pieces of employment legislation which set out minimum employment rights, including:

- the National Minimum Wage Act 2000;
- the Protection of Young Persons (Employment) Act 1996; and
- the Protection of Employees (Part-Time Work) Act 2001.

A term may be implied by custom and practice if it is so notorious, well known and acquiesced that – in the absence of agreement in writing – it is taken as one of the terms of the contract between the parties.

A term may also be implied at common law or by the Constitution, which includes the right to earn a livelihood and the freedom to associate and dissociate.

© Copyright 2006 - 2019 Globe Business Publishing Limited

Are mandatory arbitration/dispute resolution agreements enforceable?

Historically, Irish courts have been very supportive of arbitration and this approach continues to be reinforced under the Arbitration Act 2010. The courts have displayed a strong policy of staying court proceedings in favour of agreements to arbitrate.

Under Section 39 of the Workplace Relations Act 2015, the Workplace Relations Commission (WRC) has discretion to offer mediation services in certain cases to facilitate the resolution of a complaint or dispute – where possible – at an early stage and without recourse to adjudication before the WRC. However, the complaint or dispute may be referred for mediation only with the agreement of both parties.

How can employers make changes to existing employment agreements?

The terms of an employment contract cannot be varied, except by agreement of the parties to the contract. Unilateral variation of the terms of an employment contract by the employer without the employee's consent constitutes a breach of contract and could expose the employer to a number of claims, including:

- a breach of contract claim;
- a constructive dismissal claim; or
- a claim under the Payment of Wages Act 1991, depending on the circumstances.

Employers may include an express variation clause in the employment contract that reserves the right to make reasonable changes to the employee's terms and conditions. However, even with an express variation clause, any such discretion must be exercised reasonably.

Foreign workers

Is a distinction drawn between local and foreign workers?

In terms of permission to work in Ireland, a distinction is drawn between European Economic Area (EEA) nationals and non-EEA nationals, as EEA nationals need no employment permits to work in Ireland. Different types of employment permit are available for non-EEA nationals, depending on the circumstances.

RECRUITMENT

Advertising

What are the requirements relating to advertising positions?

It is unlawful to discriminate against prospective employees in relation to access to employment, which includes job advertisements. It is also unlawful to advertise a job in such a way that the advertisement could reasonably be interpreted as indicating an intention to discriminate. In certain circumstances, employers can impose eligibility requirements which may be indirectly discriminatory, provided that these:

- pursue a legitimate objective;
- are necessary to achieve that objective; and

© Copyright 2006 - 2019 Globe Business Publishing Limited

- are proportionate, such that the difference in treatment can be objectively justified.

Background checks

What can employers do with regard to background checks and inquiries in relation to the following:

(a) Criminal records?

Criminal record checks are permitted in Ireland in very limited circumstances. All searches must be performed by the National Garda Vetting Unit (NGVU) of the national police service (An Garda Síochána). However, the NGVU will conduct such a search only where it relates to a person who will be working in certain limited areas (eg, childcare, with vulnerable adults or in private security services).

In addition, it is an offence under data protection legislation to require an individual to submit a data subject access request to the NGVU in respect of his or her criminal record – save for requests in respect of the limited roles set out above.

Candidates may be asked to declare that they have no criminal convictions on their employment application, subject to questions being asked consistently of all applicants for a particular role so as not to discriminate. In practice, however, the employer cannot reliably verify the answers given as – unlike many other countries – Ireland does not have a publicly available database to perform such checks. If it is subsequently discovered that any declaration given by the employee is false, it may be addressed under the company's disciplinary procedure. Any possible adverse action should be made clear to the candidate at the outset.

Self-declaration for previous criminal convictions is required only where it is relevant to the specific role, for a specified and legitimate purpose and not excessive in relation to that purpose. Such information must not be used for any other purpose.

(b) Medical history?

Pre-employment medical checks may be justified where health or fitness is relevant to the role. However, employers should be aware that an employee's medical history constitutes sensitive personal data under the Data Protection Acts 1988 and 2003; therefore, the employee's express written consent to obtaining this information should be sought.

(c) Drug screening?

Although there are no express or statutory restrictions against drug and alcohol screening of job applicants, there are risks associated with such tests due to the various restrictions and duties under data protection and employment equality legislation.

A drug or alcohol addiction could be considered as a disability for the purposes of disability discrimination protection. Thus, depending on the results obtained and whether these influence the employer's decision to hire, it could raise a potential disability discrimination claim.

Such information also constitutes sensitive personal data and should be processed in accordance with the requirements of data protection legislation.

© Copyright 2006 - 2019 Globe Business Publishing Limited

(d) Credit checks?

Credit checks are permissible, but only to the extent reasonably required for the nature of the role. The information should be obtained and processed in accordance with data protection legislation. For example, while checks of this nature are unusual in Ireland, where the candidate will be in a position with financial responsibility, an employer may wish to ensure that the candidate has no history of poor financial management skills.

(e) Immigration status?

Employers may request immigration status verification where this is necessary to ensure that the candidate has the right to work in Ireland.

Employers must ensure that such verification is relevant and proportionate to the legitimate aim of ensuring that the prospective candidate has the right to work in Ireland.

Any job offer should be made conditional upon the provision of immigration status verification.

An employer must retain the particulars of an employee's employment permit on file in the event of a Workplace Relations Commission workplace inspection.

(f) Social media?

Employers may use social media to screen prospective employees and this practice is becoming increasingly common in Ireland. However, employers should be cautious about how they conduct social media checks. The prudent course of action is to notify prospective employees that their social media profiles might be checked. Prospective employees should be given the opportunity to comment on the information obtained before a decision is made in relation to their recruitment. Again, employers should be mindful of their duties under data protection legislation and employment equality legislation in conducting such screening.

(g) Other?

Employer verification and references
It is common practice for prospective employers in Ireland to:

- ask candidates to provide the names and contact details of one to two previous employers for references; and
- notify candidates that i such referees may be contacted where a job offer is being made.

Education verification
It is common practice for prospective employers to request proof of a candidate's education. Therefore, most candidates are required to provide copies of qualifications (eg, degrees), following a job offer. It is uncommon for prospective employers to request such information directly from the institution; however, in the event that an employer does so, notice must be provided to the candidate explaining the specific purpose for which such information will be used. The employer must ensure that such verification is relevant and proportionate to the aim of ensuring that the prospective candidate has the relevant qualifications to perform the role and such information must be requested consistently from all candidates for a particular role so as not to discriminate.

© Copyright 2006 - 2019 Globe Business Publishing Limited

Identity verification

In relation to identity verification, an employer may request visual review of a candidate's passport. However, data protection legislation regarding the retention of such records should be considered. Guidance from the data protection commissioner states that employers need not keep a copy of an employee's passport on file; this may also apply by extension to other proof of identification documents.

Individuals in Ireland have a personal public service (PPS) number – similar to an employee's social insurance number – for taxation and payroll purposes. An employer cannot request an individual's PPS number until the individual has been offered or has commenced employment.

WAGES AND WORKING TIME

Pay

Is there a national minimum wage and, if so, what is it?

Since January 1 2017 the national minimum wage for an experienced adult employee is €9.25 per hour. There are some exceptions to those entitled to receive the national minimum wage and sub-minimum rates apply in respect of certain young people and those in the first two years of employment.

Are there restrictions on working hours?

Under Irish law, the maximum working week is 48 hours, aggregated over a reference period whose duration varies according to the employment but is typically four months, with some exceptions. For night workers, the reference period is two months.

Hours and overtime

What are the requirements for meal and rest breaks?

Employers must ensure that employees take daily rest breaks as follows:

- 15 minutes where up to four-and-a-half hours have been worked; and

• 30 minutes where up to six hours have been worked, which may include the first break – this is normally satisfied by the taking of a meal break (eg, lunch).

Additionally, employees are entitled to:

- 11 hours' daily rest per 24-hour period; and
- one period of 24 hours' rest per week preceded by a daily rest period (11 hours).

How should overtime be calculated?

Employees are not entitled to payment for overtime unless this is expressly provided for in their employment contract. However, employees are entitled to compensation by way of:

© Copyright 2006 - 2019 Globe Business Publishing Limited

- an allowance;
- an increase in salary; or
- paid time off in lieu for hours worked on a Sunday, unless the employee's salary already takes account of the requirement for Sunday work.

What exemptions are there from overtime?

As stated above, employers are not obliged to make payment for overtime hours worked, unless this is provided for in an employee's contract or is an implied term through custom and practice. However, an employee must not be required to work in excess of a 48-hour week, aggregated over the applicable reference period (generally four months). The exception to the 48-hour working week is narrowly defined in Ireland and there is no general opt-out provision in the applicable legislation. Thus, the exception is typically reserved for senior employees who have autonomy over their working hours.

Is there a minimum paid holiday entitlement?

Under Irish working time legislation, all time that is worked qualifies for paid annual leave. Employees are entitled to the greater of the following:

- four working weeks' statutory paid annual leave for a leave year in which the employee works 1,365 hours or more;
- one-third of a working week for each month of a leave year in which the employee works 117 hours, up to a maximum of four working weeks; or
- 8% of the hours worked by the employee, up to a maximum of four working weeks.

There are nine public holidays in Ireland each year. Employees who are entitled to public holiday benefit are – at the employer's discretion – entitled to the following:

- a paid day off;
- a paid day off within one month of the public holiday;
- a day of annual leave; or
- an additional day's pay.

What are the rules applicable to final pay and deductions from wages?

Final pay
Under Irish law, an employee is entitled to payment in respect of accrued but untaken annual leave on the date of his or her termination of employment.

Deductions from wages
Employers cannot make deductions from employees' wages unless:

- the deduction is required or authorised under statute (eg, tax and social security deductions);
- the deduction is required or authorised under contract; or

© Copyright 2006 - 2019 Globe Business Publishing Limited

- the employee has given prior written consent to the deduction.

Record keeping

What payroll and payment records must be maintained?

Employers are obliged to retain payroll details, including:

- gross to net;
- rate per hour;
- overtime;
- deductions;
- commission;
- bonuses; and
- service charges.

Employers must also be able to demonstrate that employees are provided with payslips.

DISCRIMINATION, HARASSMENT & FAMILY LEAVE

What is the position in relation to:

Protected categories

(a) Age?

Discrimination on the grounds of age is prohibited, subject to a number of specific exemptions. For example, an employer may fix a retirement age (whether voluntary or compulsory) or offer a fixed-term contract to any person or class of persons over the compulsory retirement age for that employment, provided that the reason for doing so is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

(b) Race

Discrimination on the grounds of race, colour, nationality or ethnic or national origin is prohibited. However, such discrimination may be justifiable if a difference in treatment is a genuine occupational requirement, the objective is legitimate and the requirement is proportionate. For example, the requirement that an employee be proficient in the Irish language was held to be reasonable and justifiable in circumstances where the particular employer – a university – had a statutory obligation to promote the Irish language.

(c) Disability?

It is unlawful for employers to discriminate against employees or prospective employees on the grounds of disability. Employers that employ a person with a disability may be required to take positive action to enable that person to carry out the role. Legislation provides that an employer must take appropriate measures to reasonably accommodate the needs of disabled workers, unless this would impose a “disproportionate burden” having regard to the scale and

© Copyright 2006 - 2019 Globe Business Publishing Limited

financial resources of the employer's business and the possibility of obtaining public funding or other assistance. The definition of 'disability' is wide ranging and has been held to cover almost all temporary and permanent physical and psychological conditions.

(d) Gender?

Discrimination on the grounds of gender is prohibited. To establish discrimination on gender grounds, a complainant must show both less favourable treatment and that such treatment arises from the complainant's sex. Less favourable treatment that arises from an employee's pregnancy or maternity leave constitutes direct discrimination on the grounds of gender.

(e) Sexual orientation?

It is unlawful to discriminate between any two persons on the grounds of sexual orientation. 'Sexual orientation' is defined as "heterosexual, homosexual or bisexual orientation".

(f) Religion?

Discrimination on the grounds of a person's religious belief or lack of religious belief is prohibited. Religious belief includes a person's religious background or outlook. An exception is made in Irish law which allows institutions run by religious institutions or orders to discriminate on the grounds of religion where it is reasonable to do so, in order to maintain the institution's religious ethos.

(g) Medical?

This is not one of the specified nine protected grounds in the Employment Equality Acts 1998 to 2015; however, disability discrimination is prohibited (as outlined above). The definition of 'disability' is broad and covers a wide range of illnesses.

(h) Other?

Civil status
Discrimination on the grounds of civil status is prohibited. 'Civil status' in Irish law means being:

- single;
- married;
- separated;
- divorced;
- widowed;
- a civil partner; or
- a former civil partner in a civil partnership that has ended by death or been dissolved.

© Copyright 2006 - 2019 Globe Business Publishing Limited

Family status
Discrimination on the grounds of family status is prohibited. 'Family status' means responsibility as:

- a parent or a person in loco parentis in relation to a person under the age of 18; or
- a parent or the resident primary carer in relation to a person over the age of 18 with a disability of such nature that it gives rise to the need for care or support on a continuing, regular and frequent basis.

Membership of the traveller community
It is unlawful to discriminate between any two persons on the grounds that one is a member of the traveller community and the other is not. The 'traveller community' means the community of people commonly so-called which is identified both by the community and others as people with a shared history, culture and tradition, including (historically) a nomadic way of life on the island of Ireland.

Family and medical leave

What is the position in relation to family and medical leave?

Maternity leave
Employees have a basic entitlement to take maternity leave for a minimum of 26 consecutive weeks, regardless of their length of service. Employers are not obliged to pay employees on maternity leave. However, employees may be entitled to social welfare payments, known as maternity benefit, from the Department of Social Protection at the rate of €230 per week, provided that they have made sufficient pay-related social insurance contributions before their maternity leave. In addition to the basic leave entitlement, employees are entitled to 16 weeks of unpaid additional maternity leave. This additional leave carries no entitlement to social welfare (maternity benefit) payments. Considerable protection is afforded to employees who avail of maternity leave.

Harassment

What is the position in relation to harassment?

Employment equality law in Ireland prohibits harassment by fellow employees, the employer or a client, customer or other business contact of the employer. 'Harassment' is defined as any form of unwanted conduct relating to any of the discriminatory grounds. 'Sexual harassment' is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Such conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other materials.

The prohibition of harassment and sexual harassment extends to the employee's place of work or otherwise in the course of his or her employment. Work-related social events can fall within the scope of the prohibition. Employers can be held vicariously liable for the harassment or sexual harassment of their employees.

A defence is available to employers if they can prove that they took such steps which were reasonably practicable to prevent harassment or sexual harassment. In this regard, employers must inform, educate and instruct their employees on harassment and sexual harassment; failure to do so may make it difficult to defend any such claim.

Whistleblowing

© Copyright 2006 - 2019 Globe Business Publishing Limited

What is the position in relation to whistleblowing?

The Protected Disclosures Act 2014 protects workers in all sectors. In accordance with international best practice, the safeguards in the act are extended to a wide range of workers.

'Protected disclosure' means the disclosure of relevant information (whether before or after the date of passing of the Protected Disclosure Act 2014) by a worker in the manner specified in the act, which – in the reasonable belief of the worker – tends to show one or more relevant wrongdoings and has come to the worker's attention in connection with his or her employment.

'Worker' is broadly defined and includes:

- employees (public and private sector);
- contractors;
- trainees;
- agency staff;
- former employees;
- job seekers; and
- those undertaking work experience.

PRIVACY IN THE WORKPLACE

Privacy and monitoring

What are employees' rights with regard to privacy and monitoring?

Such rights largely depend on whether the employer has terms of employment or electronic communication policies in place which explicitly allow it to monitor the electronic communications of its employees. An employee's right to privacy is balanced against the employer's rights, but generally, a considerable degree of privacy is afforded to the employee.

While data protection legislation sets out the rights and entitlements of individuals regarding the issue of data privacy, the issue of surveillance of electronic communications in the workplace is not specifically legislated for in Ireland. However, the European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 (SI 535/2003) introduced provisions relating to the confidentiality of communications.

The Irish Constitution does not afford an explicit right to privacy. However, the Supreme Court has recognised that the right to privacy and communications exists as an un-enumerated right under Article 40.3 of the Constitution and almost certainly extends to the workplace. Further, the European Court of Human Rights has clarified that Article 8 of the European Convention on Human Rights may be invoked by employees in relation to breaches of their privacy that occur in the workplace.

Any monitoring or surveillance by an employer must be transparent. Personal data from or related to an employee's email account or internet use should be retained only in accordance with data protection principles.

To what extent can employers regulate off-duty conduct?

© Copyright 2006 - 2019 Globe Business Publishing Limited

The use of a private investigator must be balanced against the employee's general right to privacy as an individual, which is protected by the Constitution and by the European Convention on Human Rights. Under Irish legislation, it is an offence to engage or employ a private investigator who is not licensed by the Private Security Authority.

The data protection commissioner of Ireland has adopted a hard-line stance against private investigators who do not fully comply with their data protection obligations.

Evidence obtained by covert surveillance which an employer seeks to adduce for the purpose of any proceedings or investigation will be carefully considered by the data protection commissioner, should the employee choose to make a complaint. For this reason, it is not advisable for an employer to rely solely on a private investigator's report in disciplinary proceedings, as it may be excluded from later proceedings if it is determined that the surveillance was excessive.

In order to ensure that a private investigator's evidence is admissible in later proceedings, the employer should ensure that the surveillance is not a disproportionate or unwarranted invasion of privacy and that engagement with the private investigator is in compliance with the recommendations of the data protection commissioner.

Are there rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

The considerations outlined above in relation to privacy and monitoring also apply to the monitoring of employee social media accounts and this is best addressed by having a suitable social media usage policy in place. The permitted and prohibited uses of social media in the workplace should be clear to employees, both during and outside of work hours. It should be made clear to employees that inappropriate use of social media may result in disciplinary action, including the possible termination of their employment.

As a general guide, employers should:

- clarify the distinction between employees' personal use of social media and their use of social media in a professional forum;
- communicate to employees the reason why a social media policy is required;
- clarify the types of social media that employees can engage with during working hours (if any) and the appropriate times for them to do so (ie, lunchtime and breaks); and
- outline prohibited uses of social media at any time (eg, conduct which may constitute unlawful discrimination, defamation, bullying or harassment).

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual Property

Who owns IP rights created by employees during the course of their employment?

As a general rule, employers own the IP rights created by employees in the course of their employment unless otherwise agreed between the employer and employee. Disputes often arise as to whether a person is an employee and whether the IP rights were created in the course of employment. Thus, it is important that the IP clause is carefully drafted in the employment contract.

© Copyright 2006 - 2019 Globe Business Publishing Limited

Restrictive covenants

What types of restrictive covenants are recognised and enforceable?

The general position under Irish law is that restrictive covenants are void and unenforceable as restraints of trade. The courts will permit limited exceptions to that general position, but only in circumstances where the employer can demonstrate that:

- it has a legitimate business interest to protect; and
- the relevant restriction goes no further than is reasonably necessary to protect that interest.

The protection of confidential information, customer and supplier connections, and maintaining the stability of a workforce have been recognised as potentially protectable interests.

Restrictive covenants should be tailored in terms of:

- the conduct that is sought to be restricted;
- the geographical scope of the restriction; and
- the duration of the restriction.

The enforceability of a restrictive covenant depends on the individual circumstances of each case and, in particular, the legitimate business interest that the employer is trying to protect as a direct consequence of the departure of that particular employee.

As both the circumstances of the employee and the case law relating to this area of law will change during the course of the employment relationship, restrictive covenants should be continually updated to reflect these changes.

Non-compete

Are there any special rules on non-competes for particular classes of employee?

In general terms, non-compete provisions are viewed as being more draconian than non-deal provisions, which are in turn viewed as more restrictive than non-solicit provisions. Assuming that there is sufficient evidence to justify the relevant restriction, the general rule is that a non-compete provision with a duration of greater than six months is unlikely to be enforced; whereas a non-solicit provision of up to 12 months' duration may be enforceable (particularly in circumstances where customer contracts are renewed on an annual basis). However, this greatly depends on the relevant circumstances and the role of the particular employee.

The scope of such clauses must be relative to the employee's position in the business. As more senior employees will have access to more sensitive information and will be in contact with clients, restrictions placed upon them may be justified where otherwise they would be held to be unreasonable.

DISCIPLINE AND GRIEVANCE PROCEDURES

Procedures

Are there specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

© Copyright 2006 - 2019 Globe Business Publishing Limited

The Code of Practice on Grievance and Disciplinary Procedures implies a standard that employers should adhere to regarding disciplinary and grievance procedures. When conducting such procedures, employers must ensure that they adhere to the fundamental principles of fair procedures.

Under Irish law, employers must notify their employees of the dismissal procedure (ie, a disciplinary procedure) within 28 days of commencement of employment. Failure to put in a place a suitable grievance procedure can make defending disciplinary and other related claims very difficult.

INDUSTRIAL RELATIONS

Unions and layoffs

Is your country (or a particular area) known to be heavily unionised?

No. The Irish industrial relations system is regarded as voluntary in nature and does not require:

- employers to engage in collective bargaining; or
- formal recognition of trade unions.

What are the rules on trade union recognition?

Under the Irish Constitution, employers need not recognise the associations or trade unions which seeks to represent employees' interests.

What are the rules on collective bargaining?

If a trade union wishes to engage in collective bargaining, it must be either an excepted body or an authorised trade union which holds a negotiation licence. If collective bargaining is successful, it will result in a collective agreement.

Recent legislative amendments have improved the framework for workers seeking to improve their terms and conditions in circumstances where collective bargaining is not recognised by their employer. There is now a mechanism for trade unions, on behalf of their members, to have disputes regarding remuneration, terms and conditions assessed against relevant comparators and determined by the Labour Court.

Effectively, employers must now actively engage in collective bargaining with trade unions or independent statutory associations if they are to avoid the application of this legislation.

TERMINATION

Notice

Are employers required to give notice of termination?

Statutory minimum periods of notice apply by virtue of the Minimum Notice and Terms of Employment Acts 1973 to 2005. In addition, in certain circumstances, absent any agreed notice period, the courts may imply a term into an employment contract to determine that the contract can be terminated on reasonable notice. What constitutes 'reasonable' depends on the circumstances and can range from one month for junior employees to 12 months for senior executives.

© Copyright 2006 - 2019 Globe Business Publishing Limited

Redundancies

What are the rules that govern redundancy procedures?

Specific statutory redundancy rights exist for employees with at least two years' continuous service:

- Notice entitlements – employees selected for redundancy are entitled to:

o the greater of statutory minimum notice under the Minimum Notice and Terms of Employment Acts 1973 to 2005 or notice in accordance with their contracts;

o a minimum of 14 days' notice of their redundancy under the Redundancy Payments Acts 1967 to 2012, which may run concurrently with their contractual or statutory notice entitlement; or

o payment of salary in lieu of that notice period, if contractually provided for or accepted by the employee.

- Statutory redundancy payment – employees with over two years' service are entitled to a lump-sum statutory redundancy payment. The minimum statutory lump-sum payment is calculated as:

o two normal weeks' pay for each year of continuous and reckonable service with the employer over the age of 16 years; and

o one additional week's pay.

In each case, a week's pay is capped at €600.

Employers must consult appropriately with affected employees before making decisions on redundancy, informing the employees of the possibility of redundancies and the business reasons for these. Employers must consider alternatives to making employees redundant, including alternative positions. Employees should be invited to conduct a similar exercise. If no alternatives are available, employers are not required to create positions.

Are there particular rules for collective redundancies/mass layoffs?

The Protection of Employment Act, 1977, as amended by the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act, 2007, contains certain notification and consultation obligations that apply where an employer is planning to implement a collective redundancy. A collective redundancy is the dismissal for reasons unconnected to the individual employee (ie, redundancy) over any period of 30 consecutive days, of at least:

- five persons in an establishment that normally employs more than 20 and fewer than 50 employees;
- 10 persons in an establishment that normally employs at least 50 but fewer than 100 employees;
- 10% of the number of employees in an establishment that normally employs at least 100 but fewer than 300 employees; or
- 30 persons in an establishment that normally employs 300 or more employees.

'Establishment' is defined in the Protection of Employment Act, 1977 as "an employer or a company, or a subsidiary company, or a company within a group of companies which can independently effect redundancies".

When calculating the number of employees normally employed in an establishment, employers must take the average of the number employed in each of the 12 months preceding the date on which the first dismissal takes effect.

© Copyright 2006 - 2019 Globe Business Publishing Limited

In relation to the employer's information and consultation obligations under the act, the key points for consideration are as follows:

• Consultation with employee representatives should take place at the earliest opportunity and, in any event, at least 30 days before the first notice of dismissal is given; and

• Collective redundancies cannot take effect until 30 days after the date of notification to the minister for jobs, enterprise and innovation.

Protections

What protections do employees have on dismissal?

Where an employee has accrued one year's continuous service, he or she is entitled to protection under the unfair dismissal legislation. Under this legislation, the employee may be awarded up to two years' remuneration by the Workplace Relations Commission (WRC), reinstatement or re-engagement.

Employees may bring claims for discriminatory dismissal under the equality legislation where their dismissal was related to a discriminatory ground. There is no service requirement for bringing such a claim. Again, an award of compensation of up to two years' remuneration can be made by the WRC. However, where an employee brings a claim for unfair dismissal and discrimination, he or she must elect which claim to pursue before the WRC. Typically, complaints to the WRC must be presented within six months of the date of the alleged legislation breach. The timeframe for submitting a complaint to the WRC may be extended by a further six months if there is "reasonable cause for the delay".

Employees may also seek a High Court injunction to restrain an employer from implementing a dismissal. An injunction preserves the status quo pending the determination of the employee's breach of contract claim. If granted, it typically includes an order to maintain salary pending trial, which could be nine to 12 months away, with the risk of an order requiring the employer to reinstate the employee at trial.

COURTS/TRIBUNALS

Jurisdiction and procedure

Which tribunals or courts have jurisdiction to hear complaints?

Complaints in relation to contraventions of – and disputes as to entitlements under – employment, equality and equal status legislation may be presented or referred to the director general of the Workplace Relations Commission (WRC).

Any claims for breach of contract may be pursued through the Irish courts.

What is the procedure and typical timescale?

On receipt of a complaint form, the WRC will acknowledge receipt and, in the case of a complaint to be dealt with by means of adjudication, will forward details of the complaint to the employer. Typically, a complaint hearing is scheduled within three to four months of receipt of the complaint.

In certain cases, the WRC may offer a mediation service in order to facilitate attempts at a resolution of the issues at hand, without recourse to formal adjudication. Mediation may be offered only where both parties consent; otherwise, the complaint or dispute will be referred to an adjudication officer. The complaint form asks complainants to indicate

© Copyright 2006 - 2019 Globe Business Publishing Limited

whether they would be willing to avail of mediation services to facilitate the resolution of the complaint, should the WRC be in a position to offer these services in their case.

Appeals

What is the route for appeals?

The decision of a WRC adjudication officer must be appealed in writing within 42 days of the date of the decision. If no appeal is lodged by this date, the decision is legally binding and may be enforced through the district court. The Labour Court's decisions may be appealed to the High Court on a point of law only.

© Copyright 2006 - 2019 Globe Business Publishing Limited