

Transposition of Directive 2019/1152 on Transparent and Predictable Working Conditions

The European Union (Transparent and Predictable Working Conditions) Regulations 2022, S.I. 686/2002 (the “**Regulations**”) were signed into law on 16 December 2022. The Regulations give effect to Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union. The Regulations amend a number of pieces of employment legislation which introduce new obligations for employers and limit the use of certain clauses in contracts of employment. We set out the main changes affecting employers.

Terms of Employment (Information) Act 1994

The Regulations make several amendments to the Terms of Employment (Information) Act 1994 (the “**Terms of Employment Act**”), the most significant of which concern:

- the written statements of employment that employees must receive within 5 days and one month of commencing employment;
- the time limits concerning the issuing of such statements and the communication of any changes to their terms;
- probationary periods;
- mandatory training; and
- parallel employment.

These key amendments are discussed below.

Definition of contract of employment

The Regulations amend the definition of contract of employment within the Terms of Employment Act to include “where an individual agrees with another person personally to execute any work or service for that person”. This is similar to the definition used in the National Minimum Wage Act 2000 which has been found to include those who would not ordinarily be considered to be employed under a contract of service but who are required to personally perform work.

Written statement of terms of employment to be furnished within one month (previously two)

Under the Terms of Employment Act 1994 employers are obliged to issue employees with a written statement of certain terms of employment (the “Written Statement”). This previously had to be provided within two months of commencement, but the Regulations have reduced this time limit to one month and have introduced additional information which must be included in the Written Statement:

- Training, if any, the employer may provide;
- In the case of a temporary agency worker, the identity of the end-user;
- Additional information for employees whose work patterns are mostly or entirely unpredictable including details of the reference hours and days within which the employee may be required to work, the number of guaranteed paid hours, remuneration for work performed in addition to those hours, and the minimum notice period before the start of a work assignment;

- The identity of any social security institutions receiving contributions attached to the contract of employment and any protection relating to social security provided by the employer.

Where the employee is required to work outside the State, the Regulations require that the Written Statement include the country or countries in which the work outside the State is to be performed and its duration.

Where an employee is a Posted Worker within the meaning set out in the European Union (Posting of Workers) Regulations 2016, the Regulations require that certain additional information be included in the Written Statement:

- The remuneration to which the employee is entitled in accordance with the applicable law of the host Member State;
- Any allowances specific to the posting, if any, and any arrangements for reimbursing expenditure on travel, board and lodging;
- The link to the official national website developed by the host Member State concerning the posting of workers and the provision of services.

The Regulations provide that an employee who already has a contract of employment at the time that the Regulations were signed into law can request an updated statement of employment containing all of the particulars required under the Regulations.

Additional information to be provided within the Day 5 Statement

The Employment (Miscellaneous Provisions) Act 2018 amended the Terms of Employment (Information) Act 1994 and introduced a requirement that employers provide employees with a statement in writing containing five key terms within five days of commencing employment (the “Day 5 Statement”). These five terms were:

- The full names of the employer and the employee;
- the address of the employer in the State or, where appropriate, the address of the principal place of the relevant business of the employer in the State or the registered office;
- the expected duration or date of expiry in the case of a temporary or fixed-term contract;
- the rate or method of calculation of the employee's remuneration and the pay reference period;
- the number of hours that the employer reasonably expects the employee to work in a normal working day and a normal working week.

The Regulations have introduced additional information which must now also be included in the Day 5 Statement. Firstly, the existing requirement regarding remuneration has been expanded such that in addition to informing employees of the frequency and method of payment and the pay reference period, employers must now also ensure that where the remuneration consists of basic pay and other component elements, these are clearly outlined.

The Regulations also require that the following additional terms be included in the Day 5 Statement:

- the place of work or, where there is no main place of work, a statement specifying that the employee is employed at various places or is free to determine his or her place of work or to work at various places;

- the title, grade, nature, or category of work for which the employee is employed, or a brief specification or description of the work;
- the date of commencement of the employee's contract of employment;
- any terms or conditions relating to hours of work (including overtime);
- where a probationary period applies, its duration and conditions.

Notification of changes

The Regulations amend section 5 of the Terms of Employment Act 1984 such that whenever a change is made to any of the particulars of the Written Statement or the Day 5 Statement, the employee must be notified in writing of the nature and date of the change no later than on the day of the change. Previously, an employer had one month to notify employees of such changes.

Probationary periods

The Regulations limit the length of the probationary period to a maximum of six months for private sector employees and 12 months for public sector employees.

The Regulations provide that the probationary period for private sector employees can be extended on an exceptional basis in the interests of the employee for a maximum of 12 months.

Where an employee has been absent from work due to maternity leave, adoptive leave, parental leave, paternity leave, carer's leave, parent's leave, statutory sick leave or another form of statutory protective leave during the probationary period, the employer can suspend the probationary period for the duration of the employee's absence.

In cases where on the commencement of the Regulations, on 16 December 2022, an employee in the private sector has already entered into a contract of employment which:

1. has a probationary period that exceeds 6 months, and
2. the employee has completed at least 6 months of their probationary period;

the probation period will expire on either the date on which the probation period was due to expire or the 1 February 2023, whichever is the earlier.

Protection of Employees (Fixed Term Work) Act 2003

The Regulations amend the Protection of Employees (Fixed Term Work) Act 2003 to provide where a fixed term employee has a probationary period within their contract it shall be proportionate to the expected duration of the fixed term contract and the nature of the work, and where the contract is renewed for the same function and task, it shall not be subject to a new probationary period.

Collective agreements

If there are provisions contained within an existing collective agreement approved by the Labour Court or a Registered Employment Order in relation to any matters covered by the Regulations (including probationary periods) these provisions take precedence over the particulars set out in the Regulations.

Transition to another form of employment

Where an employee has at least six months service and has completed his or her probationary period, the Regulations provide that he or she may request once in any 12-month period to transition to another form of employment with more predictable and secure working conditions, where available. The employee is entitled to a “reasoned written reply” from the employer within one month of the request. However, where a similar request is repeated and where the employee's situation remains unchanged, an oral reply is permitted.

Mandatory training

Where an employer is required to provide mandatory training either by law or by a collective agreement, it shall be provided free of charge, count as working time and where feasible take place during working hours.

Parallel employment

The Regulations provide that employers cannot prohibit employees from taking up employment with another employer outside of their work schedule or subject the employee to adverse treatment for engaging in such parallel employment.

An employer can however restrict the employee from taking up parallel employment where the restriction (referred to as an “incompatibility restriction”) is proportionate and based on objective grounds. Where the employer imposes an incompatibility restriction on an employee, the employer must set out details of the incompatibility in writing (including details of the objective grounds on which it is based) either in the employee’s contract of employment or in a separate written statement provided to the employee.

The Regulations set out a non-exhaustive list of objective grounds as follows:

- a) health and safety,
- b) the protection of business confidentiality,
- c) the integrity of the public service,
- d) the avoidance of conflicts of interests,
- e) safeguarding productive and safe working conditions,
- f) the protection of safety of patients and people receiving care from the health service,
- g) the protection of national security,
- h) the protection of critical national infrastructure,
- i) the protection of energy security,
- j) the administration of vital public service functions,
- k) compliance by the employer and the employee with any applicable statutory or regulatory obligations,
- l) compliance by the employee with any professional standards for the time being in force,
- m) additional objective grounds for the purposes of a contract of employment entered into by the Health Service Executive or a service provider (defined in the Regulations as section 38 of the Health Act 2004 providers, Mental Health Commission, Irish Blood Transfusion Board, and the National Virus Laboratory at UCD) includes the following grounds:
 - i. the protection of patient health and safety

- ii. the State's objectives of
 - I. the promotion of public welfare by improving public health,
 - II. the removal of inefficiencies and inequalities in the delivery of healthcare services, and
 - III. assisting in the implementation of a universal healthcare service in which patients are treated on the basis of health needs.

Organisation of Working Time Act 1997

The Regulations amend section 17 of the Organisation of Working Time Act 1997 (the "OWTA") and provide that in addition to adhering to the notice requirements in s.17 of the OWTA, an employer must ensure that the work takes place within the predetermined reference hours and days in the employee's written statement of terms. In the event that the work does not take place within reference hours and days predetermined by the employer or the notice requirements are not met, the employee has the right to refuse the work assignment without suffering adverse consequences..

Excluded parties

The Regulations do not apply to seafarers or fishermen and the provisions around probationary periods, parallel employment, right to request more predictable and secure working conditions and mandatory training do not apply to certain members of the judiciary, retained firefighters, members of the defence forces or members of An Garda Síochána.

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