



EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

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# LK Shields | Employment Legislation Update August – December 2018

by **Aoife Bradley, Roisin Lawler**

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18th January 2019 | by Aoife Bradley, Roisin Lawler

This issue of our employment legislation update covers developments between August and December 2018. In it we outline the main provisions of the Employment (Miscellaneous Provisions) Act 2018, which will come into force by March 2019, if not before.

We also review a number of other Acts, Bills and Statutory Instruments, including:

- The Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill 2017, which proposes to introduce new requirements on employers to publish information relating to the breakdown of remuneration between male and female employees.
- The Social Welfare, Pensions and Civil Registration Act 2018, which gives legislative effect to a range of Social Welfare measures announced in the Expenditure Report of 9 October 2018 including increases in weekly welfare rates of pensions, benefits and allowances and proportionate increases for qualified adult dependants.
- New statutory instruments that amend the national minimum wage and provide for a new PAYE system of taxation for income tax.

We look forward to hearing any comments or questions you may have in relation to the contents of this update.

Key Contacts	
	
<p><b>Aoife Bradley</b> - Partner and Head of Employment, Pensions &amp; Employee Benefits</p> <p>T: +353 1 6371583 E: <a href="mailto:abradley@lkshields.ie">abradley@lkshields.ie</a></p>	<p><b>Roisin Lawler</b> - Associate Solicitor</p> <p>T: +353 1 6371574 E: <a href="mailto:rlawler@lkshields.ie">rlawler@lkshields.ie</a></p>

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## **ACTS**

### **Employment (Miscellaneous Provisions) Act 2018**

This Act will come into force by March 2019, if not before.

The Act will introduce the following additional protections for employees:

- A requirement that employers provide employees with a statement of core terms of employment within 5 days of commencing employment
- Minimum payments for certain 'if and when' workers
- The prohibition of zero hours contracts

- The introduction of banded hours contracts
- The protection of employees from penalisation

### **Statement of terms of employment**

Currently, the Terms of Employment (Information) Act 1994 (1994 Act) requires employers to provide an employee with a written statement setting out fifteen terms of employment no later than two months after the commencement of employment.

Under the incoming Act, an employer will be required to provide an employee with a written statement of five core terms of their employment within five days of commencing employment, with the remaining terms of employment to be provided within two months.

The five core terms are:

1. The full names of the employer and the employee.
2. The address of the employer in the State, or where relevant the principal place of business or the registered office of the employer.
3. In the case of a temporary contract of employment, the expected duration of that contract, or in the case of a fixed-term contract, the date on which the contract expires.
4. The rate or method of calculation of the employee's remuneration together with the pay reference period for the purposes of the National Minimum Wage Act 2000.
5. The number of hours which the employer reasonably expects the employee to work per normal working day, and per normal working week.

An employee must have at least one month's continuous service with the employer before referring a complaint to the Workplace Relations Commission in respect of a failure to provide a written statement of the five core terms.

An employer who fails, without reasonable cause, to provide an employee with the required written statement within one month of the date of commencement of employment, or who deliberately provides a false or misleading statement to the employee, will be guilty of an offence. If convicted, an employer will be liable to a fine of up to €5,000 or a term of imprisonment not exceeding twelve months.

Where an offence is committed by a company with the consent or connivance of an officer of that company, both the individual and the company will be guilty of an offence.

Proceedings for such an offence may be brought in the District Court by the Workplace Relations Commission. In any such proceedings, it is a defence for an employer to show that due diligence was exercised and reasonable precautions taken to ensure that the above requirements were complied with.

### **Zero hours contracts and minimum payments for 'if and when' workers**

The Act will provide new protections for employees who are required to make themselves available for work for in a given week in the following circumstances:

- for a certain number of hours (the contract hours),

- as and when the employer requires him or her to do so, or
- for both a certain number of hours and otherwise as and when the employer requires him or her to do so.

The Act will provide for the prohibition of zero hours working practices in most circumstances.

Where a contract of employment provides that an employee must make himself or herself available for work in a given week for a certain number of hours, or for both a certain number of hours and otherwise as and when required, the minimum number of hours in the contract must be greater than zero.

The Act will retain the same compensation mechanism as is currently included in Section 18 of the Organisation of Working Time Act 1997, i.e. the lesser of 25% of the contract/available hours or fifteen hours. In essence, what this means is that in circumstances where an employee works less than 25% of their contracted hours in a given week or in a scenario where the employee is engaged on an "if and when" basis and he/she has worked less than 25% of the hours that he/she was required to be available that week, he/she shall be entitled to receive by way of compensation from the WRC the lesser of 25% of the contract/available hours or 15 hours.

However, a significant change which has been introduced to Section 18 of the 1997 Act is that the minimum payment will now be calculated as three times the national minimum hourly rate of pay, or three times the minimum hourly rate of remuneration provided for by an applicable employment regulation order. At present if an employee is entitled to compensation this is calculated at their normal rate of pay.

The protections introduced do not apply in cases of lay-off or short-time, in exceptional circumstances or an emergency, or where the employee would not have been available for work for the minimum period (whether due to illness or otherwise).

Also, these new protections do not however apply to 'on call' workers, who are required to make themselves available to deal with emergencies or other events that may or may not occur.

Furthermore, the protections do not apply in circumstances where an employee is required to make himself or herself available for work in a given week by virtue only of the fact that the employer has engaged the employee to do work of a casual nature on occasions prior to the relevant week.

### **Banded hours**

The Act will introduce a new concept of 'banded hours' into the Organisation of Working Time Act 1997.

Where an employee's contract of employment or statement of employment does not reflect the number of hours worked per week by an employee, the employee is entitled to be placed in the appropriate band of weekly working hours. The appropriate band is determined by the employer having regard to the average number of hours worked by the employee in the relevant twelve month reference period.

The relevant bands are as follows:

<b>Band</b>	<b>From</b>	<b>To</b>
A	3 Hours	6 Hours

<b>Band</b>	<b>From</b>	<b>To</b>
B	6 Hours	11 Hours
C	11 Hours	16 Hours
D	16 Hours	21 Hours
E	21 Hours	26 Hours
F	26 Hours	31 Hours
G	31 Hours	36 Hours
H	36 Hours and over	

An employee who believes that they should be placed in a band of weekly working hours must make a request in writing to the employer. An employer may refuse the request on the grounds that:

- there is no evidence to support the employee's claims;
- there have been significant adverse changes to the business during or after the reference period;
- it would not be practicable for the employer to comply with the request due to exceptional circumstances or an emergency;
- the average hours worked by the employee during the reference period were affected by a temporary situation that no longer exists.

Where an employee's request is granted, they must be placed in the appropriate band within 4 weeks of the date of the request. An employee who is placed in a band of weekly working hours must work the average hours for that band for a period of at least twelve months.

The above provisions do not apply to banded hour arrangements entered into on foot of collective bargaining.

An employee may refer a complaint to the Workplace Relations Commission in relation to a failure to comply with the banded hours provisions. Where the complaint is well founded, an adjudication officer (or the Labour Court, on appeal), may require the employer to place the employee on the appropriate band of hours.

### **Anti-penalisation**

The Act will provide that an employer must not penalise or threaten to penalise an employee for invoking their rights under the 1994 Act (as amended), opposing in good faith and by lawful means an act that is unlawful under the 1994 Act, giving proceedings in evidence under the 1994 Act, or giving notice of their intention to take any of these steps. This provision does not however apply to the making of a complaint that is a protected disclosure for the purposes of the Protected Disclosures Act 2014.

'Penalisation' is defined as any act or omission by an employer that affects an employee to his or her detriment with

respect to any term or condition of his or her employment, including the following:

- Suspension, lay-off or dismissal, or the threat of suspension, lay-off or dismissal,
- Demotion or loss of opportunity for promotion,
- Transfer of duties, change of location of place of work, reduction in wages or change in working hours,
- Imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty), and
- Coercion or intimidation.

Where the act of penalisation constitutes a dismissal, the employee must elect between bringing proceedings under the 1994 Act or under the Unfair Dismissals Acts 1977 - 2015.

The maximum award that can be made in respect of an act of penalisation is an amount equivalent to four weeks' remuneration for the employee concerned.

Similar protection against penalisation will be introduced for employees who wish to invoke their rights under the Organisation of Working Time Act 1997. The maximum award which can be made in respect of an act of penalisation under Section 26 of the Organisation of Working Time Act 1997 is two years' remuneration.

### **Minimum Wage**

The Act will amend the National Minimum Wage Act 2000 in relation to employees who are under the age of twenty and also repeal the section in respect of trainee rates.

Under the Act, the Minister will prescribe a percentage of the national minimum hourly rate of pay for employees:

1. Who have not attained the age of 18 years.
2. Who are 18 years of age.
3. Who are 19 years of age.

These employees will be paid for their working hours in a pay reference period at an hourly rate that is, on average, no less than the percentage of the national minimum hourly rate of pay prescribed by the Minister. The Minister must have regard to the condition of the labour market, the costs of employment, and the levels of youth employment and unemployment.

In prescribing the percentages, the Minister shall not prescribe a percentage of the national minimum hourly rate of pay that is:

1. less than 70 per cent for employees who have not attained the age of 18 years.
2. less than 80 per cent for employees who are 18 years of age.
3. less than 90 per cent for employees who are 19 years of age.

### **Social Welfare, Pensions and Civil Registration Act 2018**

This Act is designed primarily to give legislative effect to a range of Social Welfare measures announced in the Expenditure Report of 9 October 2018 including increases in weekly welfare rates of pensions, benefits and allowances and proportionate increases for qualified adult dependants.

The Act provides for an increase in the reckonable earnings threshold for employees, whereby employer PRSI contributions are paid at the lower rate of 7.8%, in order to take account of the increase in the minimum wage from 1 January 2019. This will result in the same proportion of employers' contributions being paid at the lower rate.

The Act also introduces a new weekly rate of Maternity Benefit, Adoptive Benefit and Paternity Benefit (€245 in respect of each of these benefits) with effect from 25 March 2019, and also proportionate increases in the rates of Jobseeker's Benefit, which are payable where the average reckonable weekly earnings are less than a prescribed amount, with effect from 21 March 2019.

It amends existing provisions in respect of Supplementary Welfare Allowance and Jobseeker's Allowance to ensure a person who was in the care of the State on attaining the age of 18 is not subject to age-related reduced-rate payments.

The Act provides for an alternative method – the Aggregated Contributions Method – for determining entitlement to the State Pension (Contributory) for persons who attained pensionable age on or after 1 September 2012 and who, under the existing 'yearly average' method, are not entitled to a State Pension (Contributory) at the full rate. It also provides for new rates in relation to social insurance benefits and social assistance payments.

The Act also provides a right of entitlement, in certain circumstances, to spousal pension benefits for same-sex spouses and civil partners who are members of occupational pension schemes.

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## **BILLS**

### **Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill 2017**

This Bill proposes to amend the Irish Human Rights and Equality Commission Act 2014 by introducing measures that would require certain employers to publish information relating to the pay of their employees. The purpose of such would be to show whether there is any disparity between the pay granted to male employees and the pay granted to female employees, and if so, the nature and scale of the disparity.

This Bill is proposed to apply to employers who employ a minimum of fifty employees. This Bill also empowers the Irish Human Rights and Equality Commission to prescribe classes of employers and classes of employees to which the proposed measures will apply and to prescribe the manner, form and frequency of the publishing obligations. Employers who are required to publish such information will be required to publish details relating to:



- the differences between the mean hourly rate of pay, median hourly rate of pay, the mean bonus pay and median bonus pay of male and female employees respectively as well as
- the proportion of male and female employees who are paid bonuses; and
- the proportions of male and female employees in the lower, lower middle, upper middle and upper quartile pay bands.

Information shall be published by reference to the part-time or full-time status of employees and their ages. An employer who fails to publish such information when so required will be guilty of an offence punishable by a maximum fine of €5,000 and employers who employ a minimum of 100 employees who fail to publish such information shall have their company title published by the Irish Human Rights and Equality Commission. This Bill is a private members' bill and is currently waiting to be scheduled for Committee Stage in Dáil Éireann.

### **Industrial Relations (Amendment) Bill 2018**

This Bill proposes to amend the Industrial Relations Act 1990 in order to provide for the application of certain provisions of the Industrial Relations Acts 1946 - 2015 to members of An Garda Síochána, excluding the Garda Commissioner. Members of An Garda Síochána would also have access to the Workplace Relations Commission and Labour Court. Provisions of the Industrial Relations Act which provide employees with entitlements to engage in industrial action are specifically excluded from the Bill. The Bill is currently before Dáil Éireann, Third Stage.

### **Shared Maternity Leave and Benefit Bill 2018**

This private members' bill proposes that a pregnant employee may opt to share her entitlement to 26 consecutive weeks of maternity leave with a 'relevant parent' (i.e. a person who is the father of the child, the pregnant employee's spouse, civil partner or cohabitant or the other parent of the child where the child is a donor conceived child). This will not affect the other parent's right to paternity leave. Such leave taken by the other parent will be referred to as "shared leave". The relevant parent must notify his or her employer in writing as soon as is reasonably practicable but no later than four weeks before the commencement of such leave of their intention to take shared leave. This Bill is currently before Dáil Éireann, Third Stage.

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## **STATUTORY INSTRUMENTS**

### **Employment Permits (Amendment) (No. 3) Regulations 2018 S.I. No. 318/2018**

These regulations amend the Employment Permits Regulations 2017 to contribute a supplementary 500 permits for meat processor operatives, further to the remaining number unissued out of the quota of 250 that were provided in the Employment Permits (Amendment) (No. 2) Regulations 2018.

### **Income Tax (Employments) Regulations 2018. S.I. No. 345/2018.**

These Regulations apply from 1 January 2019. The Regulations provide for the administration and operation of a Pay As You Earn system of income taxation. It is provided that the amount of tax credits and standard rate cut-off point for an employee shall be determined by an inspector having regard to the employees' entitlements to reliefs from income tax, the employees' annual emoluments, other incomes and previous underpayment or overpayment of

income tax. The inspector shall inform the employee of the inspector's determination and the employee may object within 21 days of notification and no later than 31 December of the year the determination relates to stating the employee's grounds of objection.

The Regulations provide that an employer shall send to the Revenue Commissioners the following information relating to the making of any payment of an emolument to an employee on or before the date of the making of that payment:

- The date of the payment;
- The normal pay frequency of the employee;
- The employee's personal public service number;
- In circumstances where a revenue payroll notification has been issued in respect of the employee, the number of the notification;
- The cumulative standard rate cut-off point for the pay period;
- The cumulative tax credits for the pay period;
- The basis upon which the tax was calculated;
- The employer reference number;
- The employment identifier (a unique identifier assigned to the employment of an employee by an employer);
- The gross pay of the employee;
- Details of employer contributions;
- Details of any allowable deductions; and
- The calculation of the income tax that is deductible or repayable by employers.

The Regulations oblige an employer to inform the Revenue Commissioners upon an employee's commencement and cessation of employment. An officer of the Revenue Commissioners is empowered to inspect employer records of wage sheets, revenue payroll notifications and other documents and records relating to calculation or payment of emoluments upon request.

### **Superannuation (Designation of Approved Organisations) Regulations 2018 S.I. No. 394/2018**

These Regulations provide for the relocation of pensionable service in the case of staff transfers between the Civil Service and the 'approved organisations' and also between 'approved organisations'. For the purposes of these Regulations, approved organisations are listed as Enterprise Ireland, Science Foundation Ireland and the Competition and Consumer Protection Commission.

### **National Minimum Wage Order 2018. S.I. No. 402/2018**

This order increases the national minimum hourly rate from the current rate of €9.55 to €9.80 with effect from 1 January 2019. Similarly, the minimum rate for board and lodgings is increased from €0.85 to €0.87 per hour worked and from €22.56 to €23.15 per week respectively.

### **Industrial Training (Retail Industry) Order 2018. S.I. No. 407/2018.**

This Order declares the following activities of the retail industry to be subject to the creation of statutory apprenticeships under the remit of An tScribhís Oideachas Leanúnaigh agus Scileanna (Solas):

- the making and supporting of sales to customers in a retail outlet;
- the management of security and stock display in a retail outlet;
- the control of stock for sale in a retail outlet; and
- the processing and resolution of complaints made by customers in a retail outlet.

This Order explicitly excludes retail outlets/internet retail websites which principally sell food or beverages for consumption or services where the sale of goods is incidental or ancillary to the provision of services.

**Industrial Training (Logistics Industry) Order 2018. S.I. No. 408/2018.**

This Order declares the management of processes and transactions directly related to the transportation of goods including but not limited to inventory management; purchasing; warehouse management; outsourcing; quality management, information systems and transport management and planning to be subject to the creation of statutory apprenticeships under the remit of An tScribhís Oideachas Leanúnaigh agus Scileanna (Solas).

**Industrial Training (Laboratory Industry) Order 2018. S.I. No. 409/2018.**

This Order declares the following activities of the laboratory industry to be subject to the creation of statutory apprenticeships under the remit of An tScribhís Oideachas Leanúnaigh agus Scileanna (Solas):

- the collection and recording of samples for scientific analysis;
- the recording of results from scientific analysis;
- the scientific analysis and/or testing of consumables and/or solutions used in a laboratory;
- the preparation and testing of samples for scientific analysis;
- the maintenance and/or calibration of equipment ordinarily used in a laboratory; and
- all other activities which are ancillary to the activities listed above.

**Technological Universities Act 2018 (Section 36) (Appointed Day) Order 2018. S.I. No. 439/2018.**

This Order provides that 1 January 2019 is the appointed day on which Dublin Institute of Technology, Institute of Technology, Blanchardstown and Institute of Technology, Tallaght shall stand dissolved and the technological university known as Technological University Dublin will stand established.

**Health and Social Care Professionals Act 2005 (Section 95(3)) (Variation of Title: Physical Therapist) Regulations 2018. S.I. No. 479/2018.**

These regulations provide that, for the purposes of section 95(3)(a) (as amended) of the Health and Social Care Professionals Act 2005, the title of physical therapist is prescribed as a variant of the title of physiotherapist specified in section 4(1)(f) of that Act and may, in addition to the title of physiotherapist, be used by registrants of that profession.

**Counsellors and Psychotherapists Registration Board (Establishment Day) Order 2018. S.I. No. 500/2018.**

This Order appoints 30 November 2018 as the establishment day of the Counsellors and Psychotherapists Registration Board.

### **Universal Social Charge Regulations 2018. S.I. No. 510/2018.**

These Regulations provide for the administration and operation of the Pay As You Earn system of taxation, as it applies to Universal Social Charge, from 1 January 2019 and replace the existing Regulations.

The Regulations include provision for—

- the transmission of information between revenue, employees and employers;
- the determination of rate cut-off points;
- objections and appeals against determinations of rate cut-off points;
- the making available of revenue payroll notifications to employers;
- the requirement on employers to provide payroll information to Revenue no later than the date of payment of relevant emoluments to employees;
- the calculation of USC deductible or repayable by employers on the payment of relevant emoluments, including notional payments, to employees,
- the inspection of records;
- the notification of liability to employees by Revenue; and
- the recovery of underpayments from employees.

### **Employment Permits (Amendment) (No. 4) Regulations 2018. S.I. No. 550/2018.**

These Regulations amend the Employment Permits Regulations 2017 to provide for the provision of an additional 750 permits for meat processor operatives, in addition to the remaining one such permit not issued out of the quota of 573 provided in the Employment Permits (Amendment) (No. 3) Regulations 2018.

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The content of this publication does not constitute legal or other professional advice and is not intended to be relied upon as such.

## About the Authors



### **Aoife Bradley**

#### **Partner**

Aoife is Head of the Employment and Pensions Team. Aoife's practice is primarily focused on contentious employment law matters and commercial litigation.

**T:** + 353 1 637 1583 **E:** [abradley@jkshields.ie](mailto:abradley@jkshields.ie)



### **Roisin Lawler**

#### **Associate Solicitor**

Róisín is an Associate Solicitor specialising in contentious and non-contentious employment issues and commercial litigation.

**T:** +353 1 637 1574 **E:** [rlawler@jkshields.ie](mailto:rlawler@jkshields.ie)