



EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

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# LK Shields | Employment Law Legislative Update 20 April 2018 – 31 July 2018

by **Aoife Bradley**

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17th August 2018 | by Aoife Bradley

## Summary of legislative developments

One of the key developments in this issue of our employment law legislative update is the Data Protection Act 2018 (DPA), which gives further effect in Ireland to the General Data Protection Regulation (EU) 2016/679, the GDPR. The DPA also transposes the Law Enforcement Directive, (EU) 2016/680, into Irish law and establishes the Data Protection Commission, replacing the Data Protection Commissioner, as the national supervisory authority for data protection.

We also review a number of new or updated bills and statutory instruments with implications for employment law, including:

- Recent developments in relation to the Employment (Miscellaneous Provisions) Bill 2017.
- The Parental Leave (Amendment) Bill 2017 and the Shared Maternity Leave and Benefit Bill 2018, which respectively propose amendments to the period of parental leave and a new entitlement to shared maternity leave and benefit.
- New regulations dealing with personal protective equipment requirements and also the Irish implementation of certain provisions of the Trade Secrets Directive.

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

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2. **Health (General Practitioner Service) Act 2018:** to provide for free general practitioner medical and surgical services for individuals in receipt of carer's benefit and carer's allowance.

## Bills

1. **Employment (Miscellaneous Provisions) Bill 2017:** to require that employers provide employees with specific terms of employment within a certain period after commencing employment; to impose sanctions for certain offences; to further provide for a minimum payment due to employees in specific circumstances; to prohibit zero hours contracts in certain circumstances; to provide for the introduction of banded contract hours and to further provide for prohibition of penalisation.
2. **Parental Leave (Amendment) Bill 2017:** to extend the current entitlement to parental leave from a period of 18 weeks to 26 weeks.
3. **Gambling Control Bill 2018:** to establish a framework for the regulation, including licensing, of gambling in Ireland and to provide for related matters including the prohibition of young people as employees in the delivery of such licensed services.
4. **Industrial Relations (Amendment) Bill 2018:** to amend the Industrial Relations Act 1990 to provide for specific provisions of the Industrial Relations Acts 1946 to 2015 to apply to certain members of An Garda Síochána.
5. **Shared Maternity Leave and Benefit Bill 2018:** proposes amendments to the Maternity Protection Acts 1994 and 2004 to allow parents of a child to share the entitlement to maternity leave.
6. **Public Service Superannuation (Age of Retirement) Bill 2018:** to raise the mandatory retirement age of public servants.
7. **Industrial Relations (Collective Action) Bill 2018:** to amend the Industrial Relations Act 1990 to remove the necessity for all agreed procedures to be resorted to and exhausted prior to collective industrial action.

## Statutory Instruments

1. **Technological Universities Act 2018 (Commencement) Order 2018.** SI No 124 of 2018. Brings certain provisions of the Technological Universities Act 2018 into force.
2. **Employment Permits (Amendment) (No 2) Regulations 2018.** SI No 163 of 2018. Amends the Employment Permits Regulations 2017 to remove certain employment categories from the ineligible list of employment categories.
3. **Data Protection Act 2018 (Commencement) Order 2018.** SI No 174 of 2018. Brings the Data Protection Act 2018 into force.
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5. **Industrial Training (Property Services Industry) Order 2018.** SI No 199 of 2018. Provides for the creation of statutory apprenticeships in respect of various functions undertaken in the property services industry.
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9. **Medical Council (Evidence of Indemnity) Rules 2018.** SI No 222 of 2018. Medical practitioners must submit evidence of professional indemnity to the Medical Council and display same in their principal place of practice.

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## ACTS

### Data Protection Act 2018

The GDPR allows EU Member States, by national law or by collective agreements, to provide more specific rules in respect of employers' processing of employee personal data, in particular for the purposes of: (i) recruitment; (ii) performance of the contract of employment; (iii) management, planning and organisation of work; (iv) equality and diversity in the workplace; (v) health and safety at work; (vi) protection of employers' or customers' property; (vii) the exercise and enjoyment of rights and benefits related to employment; and (viii) termination of the employment relationship.

Below are some key points from the DPA, which Irish HR specialists should be aware of.

#### *Suitable and specific measures*

The GDPR provides that where an EU Member State provides 'more specific rules' (as described above) the rules must include 'suitable and specific measures' to safeguard the employees' human dignity, legitimate interests and fundamental rights.

Section 36 of the DPA provides a non-exhaustive list of 'suitable and specific measures' to be considered when the DPA or any Irish regulations made under the DPA, require 'suitable and specific measures' be taken in respect of a processing activity. These include: (i) obtaining data subject explicit consent for the processing; (ii) implementing data access restrictions; (iii) strict time limits for erasure of personal data and mechanisms to ensure time limits are observed; (iv) targeted staff training; and (v) technical measures such as pseudonymisation and encryption of personal data.

#### *Special categories of personal data*

The Section 36 framework for 'suitable and specific measures' is relevant to Irish employers where it is necessary to process 'special categories of personal data' concerning their employees (e.g. personal data revealing racial or ethnic origin, religious or philosophical beliefs, trade union membership, or health related personal data).

The processing of special categories of personal data is generally prohibited under the GDPR. However, there are certain exemptions and the DPA provides that, subject to Section 36 'suitable and specific measures' being taken, the processing of special categories of personal data is lawful if:

- Section 46: The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the controller (e.g. employer) or the data subject (e.g. employee) in connection with employment or social welfare law;
- Section 50(c): In respect of health related data only, the processing is necessary and proportionate for an occupational pension, retirement annuity contract or any other pension arrangement;
- Section 52(1)(b): The processing is necessary for the assessment of the working capacity of an employee, and where it is undertaken by or under the responsibility of a health practitioner, or a person who owes a duty of confidentiality to the data subject equivalent to that of a health practitioner.

#### *Personal data regarding criminal convictions and offences*

Prior to the GDPR, personal data relating to 'the commission or alleged commission of any offence by the data subject' was categorised as sensitive personal data.

This type of personal data is not categorised as a special category of personal data under the GDPR. However, Article 10 of the GDPR provides that any processing of this type of personal data can only be carried out under the control of an official authority or when the processing is authorised by EU or Member

State law providing for appropriate safeguards for the rights and freedoms of data subjects.

Further to this, Section 55(b) of the DPA provides circumstances where an Irish employer may be able to process personal data regarding an employee's criminal convictions and offences (including any alleged commission of an offence and any proceedings in relation to same). However, doing so must be: (i) without prejudice to the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016; (ii) subject to the employer having a lawful processing basis under Article 6(1) of the GDPR; and (iii) subject to Section 36 'suitable and specific measures' being taken.

#### *Limiting the Rights of Data Subjects*

Article 23 of the GDPR permits Member States to restrict the exercise of data subjects' rights, including the right of access, where the restriction respects fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard important objectives of general public interest.

Section 60 of the DPA sets out a number of circumstances where data subjects' rights and controllers' obligations are restricted, to the extent necessary and proportionate.

Legal privilege exceptions continue, and so data subjects' rights and controllers' obligations in respect of certain Articles of the GDPR (including the right of access) do not apply to personal data: (i) processed for the purpose of seeking, receiving or giving legal advice; (ii) in respect of which a claim of privilege could be made for the purpose of or in the course of legal proceedings, including personal data consisting of communications between a client and his or her legal advisers or between those advisers; or (iii) where the exercise of such rights or performance of such obligations would constitute a contempt of court.

#### *Enforced Subject Access Requests*

As under the Data Protection Acts 1988 and 2003, the DPA continues to prohibit the practice known as 'enforced subject access requests', whereby an employer requires an employee or prospective employee to make a data subject access request under Article 15 GDPR, or to provide to the employer the data related to that employee or prospective employee obtained on foot of that request.

### **Health (General Practitioner Service) Act 2018**

This Act amends the Health Act 1970 to allow for the Health Service Executive to provide without charge general practitioner medical and surgical service for individuals in receipt of carer's benefit or carer's allowance.

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## **BILLS**

### **Industrial Relations (Collective Action) Bill 2018**

The purpose of this private members' bill is to remove the requirement that all agreed procedures be resorted to and exhausted before collective industrial action can be manifested, as provided for in the Industrial Relations Act 1990.

The Industrial Relations Act 1990 provides that where in relation to the employment or non-employment, or the terms or conditions of or affecting the employment of one individual worker, there are agreed procedures availed of by custom or in practice in the employment concerned, or provided for in a collective agreement, for the resolution of individual grievances, including dismissals, then specified collective industrial action only applies where those procedures have been resorted to. The Bill proposes the deletion of these provisions.

### **Employment (Miscellaneous Provisions) Bill 2017**

We reviewed the initial version of this Bill in our December 2017 issue. The Bill has now gone through all stages in the Dail: some amendments and additional provisions were introduced during that process, which are discussed below. The Bill may also be subject to further changes in the Seanad.

## Unfair Dismissals

It is proposed that section 8 of the Unfair Dismissals Act 1977 will adopt a new subsection expanding the powers of the adjudication officer within the Workplace Relations Commission. An adjudication officer can now, by giving notice, require a person to give evidence in proceedings or to provide the adjudication officer with any documents in his or her possession, custody, or control that relate to the matters at hand. A person who is served such notice will be entitled to the same immunities and privileges as a witness in High Court proceedings. Failure or refusal to comply with such a notice, refusal to provide evidence in proceedings, or failure to produce related documents will render the party guilty of an offence and liable to a fine not exceeding €500.

## Anti-Penalisation

The proposed amendment to the Terms of Employment (Information) Act 1994 to protect against penalisation remains largely unchanged, except for the addition of a new subsection 6C(6), which provides that where in penalisation proceedings facts are established by or on behalf of a complainant from which it may be presumed that this section has been contravened, the onus is on the respondent to prove the contrary.

Further protection against penalisation is proposed in the Organisation of Working Time Act 1997 with an amended version of section 26. This section provides that penalisation will be said to have occurred should the hours of work of an employee who had made a complaint under the Workplace Relations Act 2015 (in relation to banded hours) be reduced, unless this reduction can be justified by an objective and unrelated factor. The onus will be on the employer to show that such justification exists.

## Banded Hours

The new concept of 'banded hours' to be inserted into the Organisation of Working Time Act 1997 has been slightly amended since the first version of the Bill, with the addition of a subsection which determines that in the event of hours becoming available, an employer must offer these surplus hours to existing part-time employees first.

The table setting out the bands of weekly hours has also been amended from just four bands to the following:

Minimum Wage Band	From	To
The Bill seeks to amend the National Minimum Wage Act 2000 in relation to employees who are under the age of twenty and to also repeat the section in respect of trainee rates.	3 hours or more	less than 6 hours
The Bill proposes that the Minister will now prescribe a percentage of the national minimum hourly rate of pay for employees:	6 hours or more	less than 11 hours
<b>C</b> 1. Who have not attained the age of 18 years,	11 hours or more	less than 16 hours
2. Who are 18 years of age, and		
<b>D</b> 3. Who are 19 years of age.	16 hours or more	less than 21 hours
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.	21 hours or more	less than 26 hours
In prescribing the percentages, the Minister shall not prescribe a percentage of the national minimum hourly rate of pay that is:	31 hours or more	less than 36 hours
<b>H</b>	36 hours and over	
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.		

The most recent amendment to this Bill is the insertion of section 20, which proposes to make it an offence for an employer to incorrectly designate an employee as self-employed. A person found guilty of such offence would be liable on summary conviction to a fine of up to €5,000 and/or up to 12 months' imprisonment. The Bill proposes that summary proceedings under this section may be brought and prosecuted by the Workplace Relations Commission. It shall be a defence for the accused employer to prove that they (or any person under their control) exercised due diligence and took reasonable precautions to ensure that the designation was correct. The proposed section 20 provides that an employee is a person who, in performing his or her duties, does so as a person not in business on their own account and who is not a free agent or economically independent of the person engaging his or her service. It further sets out a number of factors which would indicate that an individual is an employee. The Minister for Employment Affairs and Social Protection has expressed her disappointment with the introduction of this particular amendment at such a late stage due to the delay it will cause to the Bill completing its passage through the Oireachtas.

### **Parental Leave (Amendment) Bill 2017**

This private members' bill proposes to increase the current entitlement to parental leave from a period of 18 weeks to 26 weeks and would increase the qualifying age of the child from 8 to 12 years of age. Employees with a qualifying child who had already taken the 18 weeks' leave would be entitled to the additional 8 weeks' leave also.

### **Gambling Control Bill 2018**

This private members' bill includes safeguards preventing licence holders from employing a young person (i.e. individuals who are less than 18 years old) in connection with the delivery of licensed services. Employment in this case includes paid and unpaid placements and both part-time and occasional employment. It refers to any position at a place used to provide or support the delivery of the gambling service, where the position involves any level of involvement in the delivery of the service. A licence holder who employs a person in a premises where a gambling service is available, is being provided from or is accessible will be guilty of an offence and liable on summary conviction to a fine of up to €5,000 and/or 6 months' imprisonment.

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

This Bill amends the Industrial Relations Act 1990 to provide that certain provisions of the 1990 Act will now apply to certain members of An Garda Síochána, namely all members of An Garda Síochána excluding the Garda Commissioner and members of the reserve forces. If enacted, the Industrial Relations (Amendment) Act 2018 would provide Garda Representative Associations and members of An Garda Síochána with access to the services of the Workplace Relations Commission and the Labour Court in the event of industrial relations disputes involving members arising.

### **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.

### **Public Service Superannuation (Age of Retirement) Bill 2018**

This Bill proposes to raise the age at which certain public servants are required to retire from their employment. The mandatory retirement age applicable to public servants will be 70 years of age. The Bill also proposes that the Minister for Public Expenditure and Reform may prescribe a higher age of 75 to apply as a mandatory retirement age, having had regard to factors including the likely effect on recruitment, promotion and retention of staff in the public service, the pensionable age applicable at the time of the order and the likely cost (if any) to the Exchequer. This Bill will apply to all public servants, with specified

exclusions.

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## **STATUTORY INSTRUMENTS**

### **Technological Universities Act 2018 (Commencement) order 2018**

#### **SI No 124/2018**

This order brings into effect certain provisions of the Technological Universities Act 2018, including establishing technological universities, empowering such bodies to appoint members of staff to the technological universities as they consider appropriate from time to time and providing that these members of staff will be paid such remuneration, fees, allowances and expenses as may be approved from time to time by the Minister for Education and Skills with the consent of the Minister for Public Expenditure and Reform. A technological university is further empowered to suspend or dismiss a member of staff, in accordance with any procedures it establishes following consultation with each trade union or staff association recognised by the technological union. Staff members so appointed shall become and be a member of the Education Sector Superannuation Scheme 2015 in accordance with its terms and conditions. Staff members of institutes of technology and Dublin Institute of Technology shall now be members of staff of technological universities and fixed-term employees of former institutes of technology and Dublin Institute of Technology shall be fixed-term employees of technological universities. Such individuals shall not be subject to less favourable terms and conditions of remuneration and service.

### **European Union (Personal Protective Equipment) Regulations 2018.**

#### **SI No 136/2018.**

These regulations transpose into national law the provisions of Regulation (EU) 2016/425 of the European Parliament and Council of 9 March 2016 on personal protective equipment. The regulations set out the obligations on economic operators in relation to these products and the required conformity assessment procedures for personal protective equipment. These regulations empower an authorised officer to enter any place of business of an economic operator (or specified other places), to make particular enquiries and to require any person in charge of, employed at or any other relevant person at such place to produce to the authorised officer any personal protective equipment, in their possession or under their control. A person in charge of, employed at or any other relevant person at a place of business of an economic activity must afford the authorised officer access to any computer records. Such person in charge must also provide the authorised officer with such information as the authorised officer may reasonably require for the purposes of any inquiry, search, examination, investigation or inspection and provide the authorised officer such assistance and facilities within the person's power or control as are reasonably necessary to enable the authorised officer to exercise any of his or her powers under the Regulations.

### **Employment Permits (Amendment) (No 2) Regulations 2018.**

#### **No 163 of 2018.**

These regulations amend the Employment Permits Regulations 2017 to provide for the removal of meat processors, horticulture workers and dairy farm assistants from the ineligible list of employment categories. A maximum number of general employment permits may be granted in respect of each category and the regulations also set minimum annual remuneration and additional information, evidence and documentation requirements for foreign nationals applying for a general employment permit in respect of these employments. When applying for a general employment permit in respect of these categories of employment, the applicant is required to submit a copy of a declaration signed by the person making the offer of employment that they will ensure that the employment permit holder has access to suitable accommodation and training, including language training, in addition to the usual requirements when applying for an employment permit.

### **Health and Social Care Professionals Act 2005 (Section 4(2)) (Designation of Professions: Counsellors and Psychotherapists and Establishment of Regulation Board) Regulations 2018.**

### **SI No 170 of 2018.**

These regulations designate the new professions of counsellor and psychotherapist under the Health and Social Care Professionals Act 2005 and establish a registration board for both professions with effect from 2 July 2018.

### **Data Protection Act 2018 (Commencement) Order 2018.**

#### **SI No 174/2018.**

This order brings the Data Protection Act 2018 (discussed above) into operation as of 25 May 2018, with the exception of specified provisions.

### **Data Protection Act 2018 (Establishment Day) Order 2018.**

#### **SI No 175/2018.**

This order provides that 25 May 2018 is the establishment date for the purposes of the Data Protection Act 2018.

### **European Union (Protection of Trade Secrets) Directive Regulations 2018.**

#### **SI No 188/2018.**

These regulations transpose into national law the provisions of Directive 2016/943 of the European Parliament and Council of 8 June 2016 on the protection of trade secrets against their unlawful acquisition, use and disclosure. Under these regulations the acquisition of a trade secret is considered lawful when the trade secret is obtained by independent discovery or creation, observation, study, disassembly or testing of a product that has already been made available to the public or is lawfully in the possession of the acquirer, by exercise of the rights of workers or workers' representatives to information and consultation, or by any other means which is in conformity with honest commercial practices. These regulations provide that the acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by European Union law or by Irish law.

The regulations provide that the acquisition of a trade secret without the consent of the trade secret holder is unlawful when carried out by unauthorised access to, appropriation of, or copying of any documents which contain the trade secret or from which the trade secret can be deduced, and by any other conduct which is considered contrary to honest commercial practices. The use or disclosure of a trade secret will be considered unlawful when carried out without the consent of the trade secret holder, where the person has acquired the trade secret unlawfully, is in breach of a confidentiality agreement or any other duty not to disclose the trade secret or is in breach of any contractual or other duty to limit the use of the trade secret. The acquisition, use or disclosure of a trade secret shall be considered unlawful whenever a person knew or ought, under the circumstances, to have known that the trade secret had been obtained from another person who was using or disclosing the trade secret unlawfully.

The acquisition, use or disclosure of a trade secret by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with EU and Irish law shall not be considered unlawful provided that such disclosure was necessary for that exercise. The acquisition, use or disclosure of a trade secret for exercising the right to freedom of expression and information, for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest, and for the purpose of protecting a legitimate interest recognised by EU law or Irish law will not be considered to be unlawful.

These regulations amend Section 5 of the Protected Disclosures Act 2014 and now provide that where a worker makes a disclosure which concerns the unlawful acquisition, use or disclosure of a trade secret, this disclosure is protected provided that the worker has acted for the purposes of protecting the general public interest.

The regulations further provide for civil redress measures and remedies in the event that a trade secret is

unlawfully acquired, used or disclosed. They also endeavour to ensure the confidentiality of the trade secret during court proceedings by limiting access to the hearing and court documents containing the trade secret.

**Health and Social Care Professionals Act 2005 (Section 95(3)) (Variation of Title: Speech Therapist) Regulations 2018.**

**SI No 192/2018.**

These regulations provide that the title of “Speech Therapist” may only be used by professionals registered with the Speech and Language Therapists Registration Board, in addition to the title “Speech and Language Therapist”.

**Health and Social Care Professionals Act 2005 (Section 95(3)) (Variation of title: Dietician) Regulations 2018.**

**SI No 196/2018.**

These regulations provide that the title of “Dietician” may only be used by professionals registered with the Dietitians Registration Board, in addition to the variant of this title “Dietitian”.

**Industrial Training (Property Services Industry) Order 2018.**

**SI No 199 of 2018.**

An order providing that An tSeirbhís Oideachas Leanúnaigh agus Scileanna shall exercise its functions in the creation of statutory apprenticeships in respect of the valuation of property, the negotiation by private treaty or auction of the sale or purchase of property, the letting of property, the provision of property management services, the marketing of property for the purpose of sale or letting and the performance of administration and support function in connection with the provision of property services.

**Trade Union Act 1941 (Revocation of Negotiation Licence) (No. 1) Order 2018.**

**SI No 210 of 2018.**

Order revoking the negotiation license granted to the Civil and Public Services Staff Association as this union has ceased to be an authorised trade union.

**Trade Union Act 1941 (Revocation of Negotiation Licence) (No. 2) Order 2018.**

**SI No 211 of 2018.**

Order revoking the negotiation license granted to the Irish Municipal, Public and Civil Trade Union as this union has ceased to be an authorised trade union.

**Trade Union Act 1941 (Revocation of Negotiation Licence) (No. 3) Order 2018.**

**SI No 212 of 2018.**

Order revoking the negotiation license granted to the Civil Service Executive Union as this union has ceased to be an authorised trade union.

**Medical Council (Evidence of Indemnity) Rules 2018.**

**SI No 222 of 2018.**

Rules which provide that medical practitioners who practice medicine must submit evidence of professional indemnity (prescribed in Schedules 1 - 3 of the Rules) to the Medical Council and must display such evidence in the principal place that they practice medicine. The rules provide for the timing of such submission and the manner of such display.

**European Communities (Reception Conditions) Regulations 2018.**

## **SI No 230 of 2018.**

These regulations obligate an employer to verify whether a prospective employee who is an asylum seeker holds a labour market access permission or is otherwise entitled to seek employment before the employer employs such a person.

Labour market access permission is granted to asylum seekers for a period of nine months from the date upon which they lodge a protection application form with the International Protection Office. Such a permission is renewable until a final decision is reached on their protection application

An employer who employs an applicant who holds a labour market access permission must inform the Minister of Justice and Employment within 21 days of the commencement of that employment and within 21 days of the cessation of the employment that the applicant has commenced or ceased to be employed by them, as the case may be.

An employer must keep records of the employment concerned, its duration, particulars of the labour market access permission and details of the remuneration paid to the applicant for a period of three years from the date of cessation of that employment.

Employers may only employ an applicant if the employer's workforce consists of more than 50 per cent nationals of the Member States of the EEA and the Swiss Confederation on the date of the applicant's employment.

An employer may be requested to provide information on all foreign nationals, employed under the employment permits system or pursuant to a labour market access permission to the Minister within 10 working days of the Minister making a request for these records.

Employers who fail to comply with their obligations under these regulations, shall be guilty of an offence and shall be liable to pay a fine of €5,000 and/or a term of imprisonment not exceeding 12 months.

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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.*

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