

# EMPLOYMENT UPDATE

## Changes Afoot for Agency Workers

European Directive 2008/104/EC on Temporary Agency Work has been the subject of press attention in recent weeks and months. What legal changes are envisaged by the Directive?

### 1. What does the Directive envisage?

The following are the main points to note in relation to the Directive:-

- i) The essence of the Directive is to ensure that workers employed via an employment agency have exactly the same terms and conditions as **comparable permanent employees** doing **the same or similar work** in the end-user company (ie, the body making use of the workers' services day-to-day).
- ii) To ensure parity of terms and conditions, the Directive provides for mandatory equal treatment for agency workers from commencement of employment. Specifically, agency workers must be given the same "...**basic working and employment conditions...**" as comparable, permanent workers
- iii) The Directive defines<sup>1</sup> "...**basic working and employment conditions...**" as follows:-

**'basic working and employment conditions' means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:**

**(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;**

**(ii) pay.**

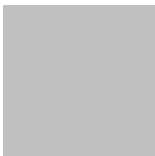
In other words, several key aspects of the employer-employee relationship come within the scope of the Directive. On this, it is worth noting that "pay" is not defined in the Directive, which obviously means that it could be given the widest possible interpretation and could encompass bonuses and benefits-in-kind that are available to comparable permanent employees.

### 2. What is the current status of the Directive in Ireland?

Unlike European Regulations, Directives do not automatically come into force once they are passed by the European Parliament. Instead, member states are allotted an implementation period during which directives must be given force in local law.

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<sup>1</sup> Article 3 (1) (f)



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The Directive was due to be implemented in Ireland by 5 December 2011. The usual form of implementation of directives is by way of statutory instrument. However, it is possible (particularly where variations to a directive are contemplated) for implementation to be by way of Act of the Oireachtas<sup>2</sup>.

The Directive has not yet been implemented. The previous Minister for Enterprise, Trade and Employment<sup>3</sup> commenced a consultation period late last year and invited submissions from interested parties. The Department has been working, throughout 2011, on the heads of the implementing legislation and are hoping to publish these shortly.

An individual employee can, in theory, rely upon the terms of the Directive with effect from 5 December despite the fact that it has not been transposed into Irish law.

However, it is important to note that the European courts have ruled that Directives which have not been transposed can only be relied upon in this way if they are clear, unambiguous and sufficiently precise. In these circumstances, an individual may really only rely upon them against a State entity – it is much more difficult to rely upon them against private companies. If no implementing legislation comes into effect by the time an individual takes a test case, it will be for the courts to decide whether the provisions are sufficiently clear, unambiguous and precise.

### **3. Will the Irish legislation be identical to the terms of the Directive?**

Derogation from the terms of the Directive is possible and the strict terms can be departed from following agreement with the social partners (employer representative organisations and unions/employee representative organisations). In the United Kingdom, by way of example, an entitlement to equal pay only arises after 12 weeks of service.

During the consultation process referred to in the preceding section, a large number of submissions were received from interested parties, including unions and employer representative organisations. Those submissions (and any findings arising from them) are not currently available, although the official position is that all such submissions will be taken into account when drafting the legislation.

Interestingly, it appears that the Department were hoping to incorporate a qualifying period into the legislation similar to that of the UK. In other words, it is the Department's intention that agency workers will not qualify for equal treatment on day #1 – there will be a qualifying period. However, this must be agreed with the social partners.

Negotiations surrounding a framework agreement with the social partners are apparently in train at the moment, in tandem with the drafting of the incorporating legislation. However,

<sup>2</sup> The Working Time Act, 1997 is a good example of this.

<sup>3</sup> Obviously now the Minister for Jobs, Enterprise and Innovation



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recent media coverage suggests that it will not be possible to agree derogation in terms similar to that of the UK. That may mean that the Irish legislation ultimately closely mirrors the terms of the Directive and will not follow the example of our nearest neighbours.

#### 4. What are the implications for employers?

It is not yet clear whether the government will succeed in varying the strict regime laid down in the Directive, although it seems unlikely given recent media coverage.

Equally, it is unclear how long a qualifying period (assuming one is agreed) will last. That obviously means that it is difficult, until the heads of legislation are published, to give accurate legal advice on the new obligations that will be incumbent upon employers. However, it seems reasonable to assume the following:-

- i) As and from the date that the Directive takes effect in Irish law, all agency workers will be entitled to the same basic working and employment conditions as comparable permanent employees doing the same or similar work once any qualifying period has expired.
- ii) Subject to any derogation from the terms of the Directive, agency workers will be entitled to parity of treatment in the following areas:-
  - (a) Duration of working time;
  - (b) Overtime;
  - (c) Breaks;
  - (d) Rest periods;
  - (e) Night work;
  - (f) Holidays;
  - (g) Public holidays; and
  - (h) Pay.
- iii) The provisions relating to pay raise an interesting question: who pays? Usual practice is for the agency to pay the worker's wages with the agency receiving a fee from the end-user. The Directive does not explicitly state that the end-user is responsible for paying the agency worker, merely that the agency worker must be paid at a comparable rate to permanent employees. That obviously means that if an agency is forced to increase the rate of pay, that increase will be passed on to the end-user by way of increased fees.
- iv) It is worth noting that Agency workers can **already** benefit from the protection of the following pieces of legislation:-
  - (a) Redundancy Payments Acts, 1967-2007
  - (b) Payment of Wages Acts, 1991
  - (c) Terms of Employment (Information) Act, 1994
  - (d) Maternity Protection Act, 1994



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- (e) Adoptive Leave Act, 1995
- (f) Protection of Young Persons (Employment) Act, 2006
- (g) Organisation of Working Time Act, 1997
- (h) Employment Equality Acts, 1998 and 2004
- (i) Carer's Leave Act, 2001
- (j) Protection of Employees (Part-Time Work) Act, 2001

The party responsible for compliance is the party paying the agency worker's wages. Obviously, if an employer does not pay the agency worker's wages, the employment agency is obliged to comply with this legislation.

The Directive will add a substantial layer of additional protection to the protections enshrined in these pieces of legislation with pay, as referred to at (iii) above, being the most significant.

- v) It will be critically-important for employers to carefully review its contracts with agencies supplying workers. The Directive will give rise to the potential for a wide range of claims to be brought by employees, including:-

- (a) Claims for pay in lieu of holiday leave entitlements;
- (b) Claims for pay in lieu of overtime;
- (c) A myriad of additional claims under the Organisation of Working Time Act, 1997 (failure to provide rest breaks is a single example); and
- (d) As referred to previously, if "pay" is given a wide definition in the Irish legislation, claims in respect of such things as bonuses and benefits-in-kind.

Not all of these claims can be anticipated and it is essential to ensure that contingencies are dealt with. If a money claim (to take one example) under the Payment of Wages Act is brought by an agency worker, an employer will need to ensure that the agency is liable, rather than itself. Of course, an agency worker may issue a claim against his agency employer alone, but this cannot be taken for granted. An agency worker could well claim against the agency employer *and* the employer.

One way of dealing with this potential difficulty might be to include indemnities (assuming the agency is agreeable) in the employer's favour in all contracts with agencies.

If this is not possible, then employers will need to examine future budgets and either (a) make provision for increased salary (and other) demands once the Directive takes effect or (b) consider reducing the number of agency workers in 2012 (and, obviously, in future years).



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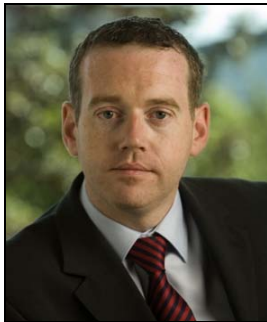
vi) One point to note, again, is that agency workers *already* benefit from the protection of the Unfair Dismissals legislation. In that regard, the Directive will make no material difference. An agency worker with at least one year's continuous employment already benefits from the protection of this legislation and would be deemed, in the present case, to be an employee.

**5. Summary**

The unavoidable conclusion is that the advent of the Directive means that the ability of the employers to employ agency workers on different terms and conditions to permanent employees will be constrained.

Of course, at the same time, employers will continue to benefit from the 1-year threshold set out in the unfair dismissals legislation: an employer can still employ agency workers for a period of up to one year and then terminate their contracts without risk of a claim of unfair dismissal (assuming the termination is in compliance with whatever termination clause is in the contract and the employer follows the usual fair procedures etc).

The difference with the old regime will be that employers will have to treat those agency workers as comparable permanent employees during that period of up to one year.

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Patrick graduated from Trinity College Dublin in 1996 and qualified as a solicitor in 2000. He specialises in commercial litigation and dispute resolution and has extensive experience in large commercial trials, including litigation in Ireland's commercial court. His practice areas include national and international contract disputes, employment, media and product liability law.

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