



### WELCOME

To the latest edition of the employment law bulletin which will highlight some recent developments in employment law. We hope you find this bulletin of interest and, as always, if you have any queries on this or any other employment matter please do not hesitate to contact a member of our employment team.

### EMPLOYMENT LAW – ARE YOU COMPLIANT?

The long awaited Employment Law Compliance Bill, 2008 (“the Bill”) was finally published on 18 March 2008 and has introduced some noteworthy measures including the placing of the National Employment Rights Authority (“NERA”) on a statutory footing.

The object of the legislation is to improve compliance with employment legislation by increasing penalties for certain offences under employment legislation and to appoint more Labour inspectors; their purpose to compel compliance.

Employers will be obliged to display a notice containing certain information in a prominent position in the workplace. The notice must be in a form easily understood by their employees; therefore, it may need to be translated into other languages. The notice must contain the following information:

- (a) employees’ entitlements under employment legislation;
- (b) complaints procedures concerning entitlements under employment legislation;
- (c) the contact details of the Director of NERA to assist employees if they wish to make general enquiries regarding their entitlements under employment legislation and to assist employees who wish to communicate information in relation to breaches of employment legislation to the Director of NERA.

The Bill provides that employers must keep the following records:-

- (a) a copy of each employee’s contract of employment;

- (b) records to demonstrate compliance with any relevant Employment Regulation Order or Registered Employment Agreement;
- (c) particulars of wages and deductions from wages of employees;
- (d) records to show the provisions of the Protection of Young Persons (Employment) Act 1996 are being complied with;
- (e) records to show that the provisions of the Organisation of Working Time Act, 1997 are being complied with;
- (f) Records to show compliance with the National Minimum Wage Act, 2000;
- (g) Records of the amount of Carer’s leave taken by each employee under the Carer’s Leave Act, 2001;
- (h) Records required under the Redundancy Payments Act, 1967, the Protection of Employment Act, 1977 and the Protection of Employees (Employers’ Insolvency) Act, 1984.

To assist employers in this regard, Ronan Daly Jermyn, in conjunction with Morley & Associates, will run a half day compliance conference on **Friday, 18th April 2008, in the Clarion Hotel, Cork**, which will give practical legal and HR advice on meeting your obligations in this new age of employment compliance.

For further information and a booking form [click here](#).

Or email [marketing@rdj.ie](mailto:marketing@rdj.ie) or phone Susie Horgan, Ronan Daly Jermyn on 021 4802700.

### THE PRACTICAL IMPLICATIONS OF THE EMPLOYMENT LAW COMPLIANCE BILL FOR EMPLOYERS

In this new era of employment compliance, and in the wake of the publication of the Employment Law Compliance Bill, 2008, what are the practical implications for employers and how will this new compliance regime impact on a day to day basis on employers’ businesses?

First and foremost, the compliance obligations mean that employers are at increased risk of spot checks from Labour Inspectors who will seek access to all documentation and records required under the legislation. Therefore, employers must ensure they have in place all of the necessary documentation, such as contracts and policies and procedures together with all records. Therefore, all employers should conduct a HR audit of their organisation to ensure that they are in compliance with their obligations. If employers are not fully compliant, then they should take all steps necessary to make themselves fully compliant.

For organisations without employment contracts already in place, these should be put in place immediately. If your employees refuse to sign a written contract of employment where none existed previously, then at the very least you must issue them with a written statement of the main terms and conditions of their employment (which they are not required to sign but which must accurately reflect their actual terms and conditions and must include at least all of the information specified in the legislation) together with all appropriate policies and procedures.

Employers must also ensure that they are paying their employees correctly – consideration in this regard must be given to the National Minimum Wage legislation and the Organisation of Working Time legislation.

The publication of the Bill is a good opportunity for all employers to audit their employment practices and procedures and ensure they are fully compliant.

## THE BASICS OF JUGGLING BY HUGH MORLEY CHARTERED FCIPD

Employers and managers are busy, operational people who know how to juggle. They are not lawyers because their skills are very different. And yet more and more, they are challenged to operate within a complex legal environment, which can carry large negative financial and public relations impacts for dropping the ball. Here are a few practical management tips to keep things in the air!

- Seek always to pre-empt issues with positively stated, well communicated, up to date policies and procedures. This means, for example, that they advocate attendance rather than denouncing absence, that they promote dignity rather than decry bullying. The words we use tend to influence the environment we operate in. They are communicated to managers and staff at the outset, rather than in a reactive situation. At least once a year, they are revisited to include the latest amendments and to refresh staff awareness.
- To avoid unnecessary escalation, it is advisable that managers have an open-door policy and

address grievances early. Good listening and questioning skills have never landed anybody in court. An empathic response costs nothing and never surrenders the right to manage. Well written policies allow you to treat staff consistently and transparently, avoiding dangerous precedence or bias. Avoid or explain delays as appropriate, but do not create a time vacuum for staff who raise an issue or query.

- Even disciplinary actions can be less contentious if your approach is one of enquiry, where you separate the behaviour from the person, and avoid accusations and character references. Always seek to resolve matters privately and informally rather than publicly or formally. Never reprimand one staff member in front of other staff in order to make an example of them. In private, simply describe observed negative behaviour and its impact, ask about it, and request a specific change where appropriate. It is less confrontational to sit beside somebody than opposite them when doing this.
- An escalation from informal to formal in grievance handling is flagged by the manager asking the complainant to put things in writing. An escalation from informal to formal in disciplinary actions is flagged by the manager writing to the staff member. Even in the event of escalation, the primary relationship between employee and manager should remain open. Always seek to exhaust procedures before escalating to the next level as each escalation has a corresponding cost in time and effort. Keep senior management informed as appropriate, so that the manager is not “on a solo run”. The involvement of senior management however is rarely helpful at an early stage.
- In disciplinary actions, you must be aware that the accused has rights under “natural justice”. These include:
  - The right to know the rules and the consequences,
  - The right to know case against them,
  - The right to representation (should be qualified in policy),
  - The right to time for preparation and delivery of a reply,
  - The right to fair hearing and impartial and objective consideration of all evidence,
  - The right to have decisions explained and expectations/consequences clarified,
  - The right to appeal as appropriate.

Always seek advice from HR or legal professionals in handling formal procedures. Where you are caught unawares and uncertainty arises, adjourning a meeting is a good idea. Thereafter decide and communicate and act in

reasonable timeframes, stick to commitments and work to timeframes.

In general, staff relationships are healthier when you are acknowledging and negotiating competing needs and interests. Once formal positions and rights are claimed, the stakes get higher, and matters escalate out of the manager's immediate control. Good employee relations require the mindset of an investor. An ounce of preventative advice is worth a ton of the curative type. After all, it's not much fun as a juggler to drop the balls and have your audience pick them up.

**Hugh Morley Chartered FCIPD is a HR Consultant with Morley and Associates and will present with Jennifer Cashman and Alice Crowley of RDJ at the conference "Employment Law – Are You Compliant?" on April 18th 2008 in the Clarion Hotel.**

## INFORMATION AND CONSULTATION ACT EXTENDED

It is important for employers to note that as and from Sunday, the 23<sup>rd</sup> March 2008, the Employees (Provision of Information and Consultation) Act, 2006, applies to undertakings with at least 50 employees. Prior to this date, the Act only applied to undertakings of at least 100 employees. This Act has potential significance for employers although, in practice, it does not appear to be a huge issue for employers.

The purpose of the Act, which implements EU Directive 2002/14/EC, is to provide for the establishment of a general framework setting out the minimum requirements for the right to information and consultation of employees in undertakings with at least 50 employees.

Effectively, the Act sets out minimum requirements for employees to be informed and, in some instances, consulted by their employer about developments in the business. Developments will include, for example substantial changes in work organisation such as a major change to shift patterns/rotas or major changes to terms and conditions of employment.

The information and consultation obligations are not automatically effective. An employer may initiate the process to negotiate an information and consultation arrangement or the employees may request the employer enter into negotiations. A minimum of 10% of the workforce (subject to a minimum of 15 employees and a maximum of 100 employees) must make such request. If neither party triggers the process, the obligations do not arise. It is for this reason that the legislation appears to have had little practical impact on employers. Having said that, employers should ensure that they have

meaningful information and consultation procedures in place in their organisation to prevent a situation arising whereby they receive a trigger from the workforce to enter into negotiations with a view to agreeing information and consultation framework under the legislation.

Within the legislation there is a specific set of Standard Rules which apply in situations when an organisation fails to reach a negotiated agreement. They operate as a fallback to ensure that information and consultation arrangements are in fact put in place where sufficient numbers of employees want them.

## ARE YOU READY TO TEST FOR DRUGS AND ALCOHOL IN YOUR WORKPLACE?

On the 6<sup>th</sup> of March last, the Health and Safety Authority ("HSA") announced that it is to commence a blitz of inspections in safety critical workplaces. The HSA will assess key hazards in the workplace. The inspections will include a review of drug and alcohol testing policies, employee training regarding the policies, risk assessment statements and safety statements. The inspection blitz comes hot on the heels of recent high profile cases regarding dismissals where employees have tested positive for drugs and/or alcohol.

On the 28<sup>th</sup> of February last, a Lieutenant in the Irish Army succeeded in obtaining an injunction against the Minister for Defence in circumstances where he was summarily dismissed following a positive drugs test. The High Court noted that while it was clear that the soldier tested positive for drugs, it was equally clear that the Department failed to discharge its responsibilities in relation to rolling out a transparent and agreed drug and alcohol policy.

The High Court emphasised that it was keen to support the principle of drug and alcohol testing in safety critical workplaces but it noted that testing must be done in a proportionate and fair manner. The Court also made great play of the fact that employers must ensure that random drug testing is genuinely random and that employees are never at risk of being singled out for unfair treatment.

In this case, Lieutenant John White claimed that his positive drug test was due to his having eaten a pizza which, unknown to him, had been spiked with cannabis resin by a friend as a prank. He also said that the employee did not have a fair opportunity to make his case prior to the sanction of summary dismissal being applied. The court held that the decision to dismiss Lieutenant White was "unfathomable" given the explanation that Lieutenant White had provided. The Judge said that the Army's disciplinary procedures were wrongly applied in relation to not recommending a discharge on the grounds

of reasonable doubt and he ruled the decision to discharge was beyond the provisions of the disciplinary procedures.

In December 2007 the issue of zero tolerance policies in relation to drug and alcohol consumption came before the Labour Court. In the case of *Alstrom Ireland -v- A Worker*, SIPTU retained the services of the European Workplace Drug Testing Society (“EWDTs”) for the purposes of providing expert evidence on behalf of the worker. Lydia Pierce, President of the Society, gave evidence that the minimum cut off point for a positive drug test according to the EWDTs is 15ng/ml. In that case, the sample from the worker measured 8.6ng/ml. Prescription drugs, over the counter drugs and even some hair products can result in a positive test up to 15ng/ml. In holding in favour of the employee, the Labour Court held it was of the view that the worker should be given the benefit of the doubt in view of the minimal content of drugs in his system. In recent cases, the Courts and Tribunals have been at pains to emphasise that drug and alcohol policies must be agreed in advance with employees. If employers engage in random testing, the testing must genuinely be random.

Key points for employers to note are:

- Avoid knee jerk decisions when dealing with addicts in the workplace – apply company policies and be seen to do so;
- Do not make assumptions about the situation – investigate before taking action;
- Be prepared to stand over any views about how the employee’s addiction impacts on the reputation of the business;
- Check your drug and alcohol policy, sick pay policy, grievance and disciplinary policy and the employee’s eligibility for permanent health insurance.

**For information in relation to training seminars on workplace drug testing, please contact Deirdre Crowley of the employment unit.**

For further information, to receive a copy of our legal updates or to discuss any aspect of employment law please contact a member of our employment law team:

Fergus Long: +353 21 4802722 or [fergus.long@rdj.ie](mailto:fergus.long@rdj.ie)

Jennifer Cashman: +353 21 4802708 or [jennifer.cashman@rdj.ie](mailto:jennifer.cashman@rdj.ie)

Gillian Ahern: +353 21 4802703 or [gillian.ahern@rdj.ie](mailto:gillian.ahern@rdj.ie)

Deirdre Crowley: +353 21 2332847 or [deirdre.crowley@rdj.ie](mailto:deirdre.crowley@rdj.ie)

Alice Crowley: +353 21 4802716 or [alice.crowley@rdj.ie](mailto:alice.crowley@rdj.ie)

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