

**EMPLOYMENT LAW COMPLIANCE BILL 2007**

**SCREENING REGULATORY IMPACT ANALYSIS**

**DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT**

**OCTOBER 2007**

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## **SCREENING REGULATORY IMPACT ANALYSIS**

### **1. Description of Policy Context, Objectives and Options**

#### **POLICY CONTEXT**

This purpose of this Bill is to secure better compliance with employment law in accordance with the provisions of PART 2, Sections 11 to 16, of **“TOWARDS 2016”** (the 10-year Framework Social Partnership Agreement 2006 – 2015) – see Appendix.

In recent years the social partnership process has been reflected in the ongoing practice of Government and the Social Partners as well as in the development of legislative and regulatory frameworks. Insofar as the economy and employment are concerned, a particular focus has been on improving the employability and adaptability of employees, both before and during their working life. The changes in the Irish labour market arising through increased access by workers from new EU Member States are also being addressed via social partnership.

While **“TOWARDS 2016”** recognises the broad level of compliance with employment rights across the economy generally, it nevertheless sets out a significant shared commitment between the parties towards securing better compliance with legal requirements underpinned by adequate enforcement.

## OBJECTIVES

The principal objectives of the Bill\* are –

- to establish a new statutory office of the Director of the National Employment Rights Authority (within the Department of Enterprise, Trade and Employment), dedicated to employment rights compliance, and with a tripartite Advisory Board;
- to strengthen inspection and enforcement powers and make other necessary provisions to secure compliance with employment law\* (including compensation for up to 2 years' pay and protection of *bona fide* complainants against victimisation), in line with “state-of-the-art” provisions in Revenue, Social Welfare, Consumer Protection, etc., legislation;
- to specify the statutory employment records to be kept by employers for all employees and the high penalties for failure to do so or for other breaches of employment law;
- to foster increased cooperation at workplace level so as to safeguard employment rights;
- to support and enhance monitoring and inspection activity in relation to compliance with the Registered Employment Agreement in the electrical contracting sector;
- to provide for exchanges of information between statutory enforcement authorities so as to facilitate Joint Investigations of employments suspected of contravening the law<sup>¶</sup>;
- to strengthen the powers of the Minister for Enterprise, Trade and Employment to initiate investigations and publish the outcomes in cases of public interest.

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\* Editorial Note: The Government, in approving the drafting of the Bill (31 October 2007), decided that the Bill should provide also for involvement of labour inspectors, for the first time, in the enforcement of provisions of the Employment Permits Acts 2003 and 2006 and for strengthening of those Acts as regards records and other obligations of employers.

<sup>¶</sup> Editorial Note – Sections 31 and 38 of the Social Welfare and Pensions Act 2007 (No. 8), operative from 30 March 2007, provides for exchanges of employment information between the Minister for Enterprise, Trade and Employment and the Director of the National Employment Rights Authority and the Minister for Social Welfare and Family Affairs and the Revenue Commissioners, so far as to facilitate Joint Investigations of employments suspected of contravening the law.

In parallel, and as also provided for in “**TOWARDS 2016**” –

- 59 additional Inspectors are to be assigned to the Director of the National Employment Rights Authority, totalling 90 at end-2007, together with 23 legal, accounting, and other administrative and support staff;
- 20 additional support staff are being provided to the Employment Appeals Tribunal, the Labour Relations Commission and the Labour Court, and
- 5 additional Rights Commissioners are being provided, and more will be provided if caseload increases further.

## **OPTIONS/CHOICES**

The two policy options considered were -

- **Option 1 – “No change” or “do nothing”, and**
- **Option 2 – Legislate to establish a new National Employment Rights Authority with necessary functions to promote and enforce employment rights, and to strengthen deterrence (including penalties for offences) against non-compliance.**

### **Option 1 – No Change/Do Nothing**

This is not a realistic option in the light of the substantial agreement reached with the Social Partners in “**TOWARDS 2016**” on a wide range of legislative provisions to protect employment rights, designed to underpin Ireland’s continued economic and social progress over the next 10 years.

### **Option 2 – Legislate to establish a new National Employment Rights Authority with necessary functions to promote and enforce employment rights, and to strengthen deterrence (including penalties for offences) against non-compliance.**

As it is a fundamental objective of “**TOWARDS 2016**” that the effectiveness of, and public confidence in, the law governing employment rights be enhanced, the proposed Bill provides accordingly.

The proposed Bill does not change current statutory arrangements relating to the roles, etc., of the Employment Rights Bodies (Rights Commissioners, Labour Relations Commission, Employment Appeals Tribunal and Labour Court) which have a key role in ensuring that disputes between employers and employees' concerning employees' rights are resolved as efficiently and as effectively as possible. The Minister for Enterprise, Trade and Employment and the Minister for Labour Affairs at the Department of Enterprise, Trade and Employment are currently reviewing those arrangements and, if changes are decided upon, they will be reflected in the Bill when it is initiated with Government approval in Dáil or Seanad Éireann.

## **2. Identification of costs, benefits and other impacts of option 2**

### **COSTS**

Exchequer provision has already been made for the establishment and staffing of the National Employment Rights Authority which is operating on a non-statutory basis from its Carlow headquarters.

It is not expected that the Bill will generate significant costs for employers who comply with employment law: moreover, the Bill's provision for exchange of employment information between statutory enforcement authorities will reduce the need for separate approaches to employers by those authorities.

### **BENEFITS**

The Bill is intended to benefit low-paid and other vulnerable employees in particular, by securing vindication of their employment-related rights in a quicker, more cost-effective manner: this should have clear benefits in terms of alleviating poverty and preventing exploitation and distortion of competition from non-compliance with employment law and generally improving relations in the workplace.

### **3. Consultation**

The provisions of the proposed Bill arise directly out of the process of consultation and negotiation that produced “**TOWARDS 2016**” This process involved Government, trade unions, employers, farming organisations and a wide range of commercial, community and voluntary bodies.

### **4. Review**

The proposed Bill when enacted will be subject to due-course review by the Minister for Enterprise, Trade and Employment and the Social Partners pursuant to the monitoring and review arrangements provided for in Chapter IV of Part I of “**TOWARDS 2016**”.

### **5. Reference**

“**TOWARDS 2016**, Ten-Year Framework Social Partnership Agreement 2006-2015”, Government Publications Office, Sun Alliance House, Molesworth Street, Dublin 2. and at *www.taoiseach.gov.ie*.

***DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT***

***October 2007***

**/APPENDIX**

“TOWARDS 2016” – PART 2 – CHAPTER VII [SECTIONS 11 – 16]

EMPLOYMENT RIGHTS AND COMPLIANCE

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**Section 11. Introduction**

11.1 The social partnership process has been reflected in the ongoing practice of Government and the social partners as well as in the development of legislative and regulatory frameworks. Insofar as the economy and employment are concerned, a particular focus has been on improving the employability and adaptability of employees, both before and during their working life. Similarly, the positive management of change, dealing equitably with the fallout from structural and other forms of change, provides a basis for high employment rates in a competitive global market. The altered circumstances in the Irish labour market arising from the decision to permit direct access by citizens of the new Member States can also be addressed through social partnership, through the attempt to formulate a shared understanding of the issues which arise, the options for responding to them and the combination of public policy and procedural responses which are most appropriate.

**Section 12. Employment Rights Compliance and Enforcement**

12.1 While recognising the broad level of compliance with employment rights across the economy generally, there is, nevertheless, a significant shared commitment between the parties to securing better compliance with legal requirements, underpinned by adequate enforcement. It is also agreed that an effective employment rights compliance system must cover:

- ❑ The active and responsible contribution of employers, employees and trade unions;
- ❑ The education of vulnerable workers;
- ❑ The promotion of entitlements, with a special emphasis on workers from overseas;
- ❑ Information provision to all employees and employers;
- ❑ Substantially strengthened arrangements for inspection;
- ❑ Adjudication by the Rights Commissioners, Employment Appeals Tribunal and Labour Court; and
- ❑ Enforcement of adjudication outcomes.

12.2 The overall object is to secure greatly increased public confidence in the system of compliance on the basis of an informed and empowered working population, who will have simple, independent and workable means of redress, underpinned by the need for fairness and impartiality, with adjudication and if needs be, enforcement available to them, in a reasonable length of time.

12.3 A major package of measures has been agreed by the parties with these aims in mind, including the establishment of a new, statutory Office dedicated to employment rights compliance; a trebling in the number of Labour inspectors; greater coordination among organisations concerned with compliance; new requirements in respect of record keeping; enhanced employment rights awareness activity; the introduction of a new and more user friendly system of employment rights compliance; increased resourcing of the system; and higher penalties for non-compliance with employment law. The measures are set out in detail in Sections 13 to 16 below.

### **Section 13. New Office of Director for Employment Rights Compliance**

13.1 The parties are agreed on the need for a major enhancement and expansion of the existing Labour Inspectorate with a view to increasing its effectiveness, particularly in light of the changing labour market in Ireland. It has been agreed, accordingly, that:

- A new statutory Office of the Director for Employment Rights Compliance (ODERC) will be established under the aegis of the Department of Enterprise, Trade and Employment, led by a Director at top management level.
- A statutory Advisory Board will be established:
  - with an independent chair and three independent experts appointed by the Minister for Enterprise, Trade and Employment;
  - with three members nominated by each of the parties;
  - to provide policy advice and input and feedback to the Office on enforcement and compliance issues; and
  - with the ability to commission its own research.
- The number of Labour Inspectors under this Office will be progressively increased from 31 to 90 by end-2007, as part of an initiative to increase the staffing resources of the Employment Rights Bodies generally. Inspectors will be specially selected and trained and will be deployed on a regionalised basis.
- In addition, the new Office will be provided with legal, accounting and other administrative support to ensure its effective functioning.

- The ODERC will publish an Annual Report on its activities, which will be laid before the Houses of the Oireachtas.
- The necessary legislation to establish the new Office will be published during 2007. In the meantime, the ODERC will be established on an interim basis.

## **Section 14. Working Together for Compliance**

14.1 The parties are agreed on the need for greater co-ordination between organisations concerned with employment rights compliance, with a view to realising the considerable potential for synergy that exists in this area.

- It is intended that the ODERC will develop an ongoing structured dialogue with all the parties to this Agreement, so that, building on close co-operation, a comprehensive and responsive system of compliance and enforcement can be developed. It will be open to the parties to this agreement to provide for this dialogue in memoranda of understanding to be agreed bilaterally with the existing Inspectorate and, subsequently, the new Office.
- Complementing the work of the ODERC, the existing monitoring and inspection activity in relation to compliance with the REA in the electrical contracting sector will be strengthened by amending legislation to support new organisational arrangements, in light of the shared commitment and expertise of the parties in the sector. The necessary legislation will be published during 2007.

### *Joint Investigation Units*

- The Revenue Commissioners and the Department of Social and Family Affairs operate Joint Investigation Units (JIUs) on a regional basis under social welfare legislation, involving staff of both organisations in joint investigations of appropriate cases.
- The new legislation will enable Authorised Officers of the Department of Enterprise Trade and Employment and the ODERC to join with the Department of Social and Family Affairs and the Revenue Commissioners to work together in the Joint Investigation Units. The role of the JIUs will be to address areas where evidence suggests non-compliance exists.

### *Strengthening the RCT System*

- The employment status of workers will be a particular focus of the JIUs. The application of the existing code of practice on employee status will be reviewed, with a view to more effective implementation.
- In tandem with this review, monitoring of RCT1 declarations will be strengthened. The RCT1 declaration form will be revised to require additional specific information as to why a proposed contract is considered by the parties not to be a contract of employment. The Government will empower the Revenue Commissioners to oblige those completing RCT1s to return them to the Commissioners in certain circumstances, including taking account of where the tracking of the pattern of employment provided for under Section 17 suggests a disproportionate level of self employment. Existing fixed penalties for non-completion will be extended to failure to make such a return by amendment in the Finance Bill, 2007. The Department of Social and Family Affairs will also intensify efforts to ensure correct classification of workers for the purposes of PRSI. In this regard, legislative provision will be made for the information accruing from RCT1 returns to be shared in the context of the JIUs above with the Department of Social and Family Affairs and the ODERC.
- It has been agreed that the ODERC will join the Hidden Economy Working Group which will be relaunched immediately upon ratification and which will continue to meet on a monthly basis or as appropriate thereafter. The Group includes Revenue Commissioners, Department of Social and Family Affairs, ICTU, IBEC, SFA and CIF.

### *Better Records*

- 14.2 The parties are agreed on the need for improved record keeping in order to protect workers' employment rights.
- New legislation will be published as necessary, consistent with the EU Treaties, during 2007 to provide that every employee must have an identifiable employer within the State who has legal responsibility for compliance with all aspects of the applicable Employment Rights legislation.
  - To support more effective inspections, it is proposed to prescribe the form in which payroll and working time records must be kept by employers. Legislative powers will be introduced in 2007 to provide for these statutory employment records, so as to be consistent with the existing record keeping requirements for employers in relation to, for example, taxation and social welfare.

- It has been agreed that the social partners will participate with the Revenue Commissioners, the Department of Social and Family Affairs and the Department of Enterprise, Trade and Employment in setting out the legal requirements for statutory employment records covering time records and Statements of Pay (Payslips).
- The onus will be on employers to maintain and produce up-to-date Statutory Records in accordance with legislation to be enacted. Failure to do so will be a criminal offence subject to summary or indictable proceedings. Where redress proceedings in relation to non-payment of statutory entitlements are being taken to the Rights Commissioners, Employment Appeals Tribunal, Labour Court or Court of Law, the onus of producing evidence of payments made or deductions from pay and hours worked will rest with the employer.
- The penalty for non-maintenance of statutory employment records will be up to €250,000 on indictment.

#### *Investigations*

- 14.3 The parties are agreed on the need for legislation to strengthen the powers of the Minister for Enterprise, Trade and Employment in relation to the investigation by Labour Inspectors or authorised persons of particular employments in relation to employment rights and compliance. The Minister will be empowered to publish the outcome of such an investigation in cases of public interest. New legislation will be published in 2007 to provide for these powers.

#### *Improved Communications*

- 14.4 The parties are agreed on the need for more intensive promotion of employment rights, obligations and entitlements to employers and employees and to workers from overseas in particular.
- Social partners and other organisations will be invited to bring their knowledge and networks to bear on the design and delivery of this education and awareness programme.
  - The ODERC will initiate a publicity campaign, with an emphasis on workers from overseas and on the sectors in which they are employed in significant numbers, setting out their rights in a range of languages and including, in relation to the construction sector, information on the pension provisions of the relevant REA.
  - A specific budget of €750,000 will be provided for education and promotion of the new compliance model, in which the social partners will participate. This will complement other similar activities by Civil Society organisations.

## **Section 15. An Agreed New Approach to Attaining Compliance**

15.1 To maximise the effectiveness of the substantially increased compliance effort, the parties to the Agreement are agreed that a new approach be used to both effect compliance by all parties and simplify the adjudication and redress mechanisms available in the employment rights area. This, when coupled with the education and awareness programmes, increased penalties and improved access to redress, will constitute the New Compliance Model.

15.2 The Parties are agreed on the adoption of a new compliance model based on the following criteria:

- Effectiveness in promoting compliance;
- Fairness and impartiality; and
- Ease of understanding and use.

### *General Principles*

15.3 The general principles of the new compliance model will be:

- that matters be resolved at the level of the workplace where possible;
- that interactions between employers and employees and trade union representatives, as appropriate, be supported by the enhanced employment rights promotional and educational efforts directed at them; and
- that initiation and ownership of cases will rest with the complainant, insofar as possible.

### *Procedural Approach*

15.4 The new model will provide that individuals will be aware that they may take their case, either directly or with the assistance of their trade union or other representative, to a Rights Commissioner as the primary point of contact with the adjudication process. Those who do not wish to pursue a case in the above manner may refer the matter to the ODERC for investigation.

15.5 The new model will also provide that:

- The Minister may also request the ODERC to carry out an investigation.
- The ODERC will undertake investigations on its own initiative.
- The ODERC will seek resolution in a timely manner by direct engagement with the employer.

### *Resolution of Cases*

15.6 If a breach is not addressed within a specified period of time, the ODERC will have the option to commence prosecution and/or inform both the employer and the affected employees, by means of a notification, of the breaches detected and of their redress options. In so doing the employees and employers will be advised that they may consult with a trade union, employer representative body or others, as appropriate, for advice and assistance to:

- address the matter in the workplace, and/or
- seek a hearing by the Rights Commissioner Service.

15.7 The Government will examine the practicality of providing that the ODERC, where intimidation or other barriers to redress may exist, could refer specific limited cases directly to the Rights Commissioner Service for a hearing. This direct referral of cases by the ODERC to the Rights Commissioner Service will be dependent on suitable legislative underpinning being drafted in consultation with the Office of the Attorney General. In circumstances of direct referral of a case by the ODERC, the Rights Commissioner Service, when arranging a hearing, will advise the parties of the availability of advice and assistance from employer representative bodies and trade unions or others, as appropriate.

15.8 In the event of a Rights Commissioner hearing for adjudication and redress, the relevant ODERC inspector may be called by the Rights Commissioner to attend as an expert witness.

15.9 Appeals by either party in respect of a Rights Commissioner Decision will be to the Employment Appeals Tribunal or Labour Court as provided by legislation. The outcomes of all hearings in the employment rights bodies will, where there has been no appeal, be directly enforceable in the Circuit Court without having to have a further hearing.

### *Public Policy*

15.10 In relation to certain cases, and particularly in instances relating to failure to maintain statutory records, breaches of the Protection of Young Persons Act, 1996, or instances of non-cooperation with ODERC Inspectors, the ODERC may take cases to the Courts with a view to securing convictions by way of prosecutions for summary or indictable offences, notwithstanding any redress actions that may be taken.

### *Role of the Employment Rights Bodies*

15.11 The norm will be for all employment rights cases to be heard in the first instance by the Rights Commissioner Service with subsequent appeal to either the Employment Appeals Tribunal or Labour Court. An exception to this approach will be in relation to adjudication under the Unfair Dismissals Acts and associated claims arising in a particular case where a party may opt, as at present, on a case being taken to the Employment Appeals Tribunal in the first instance with appeal to the Circuit Court. A further exception will be cases under the existing provisions of the Industrial Relations Acts which allow a party to a dispute to object to a hearing at the Rights Commissioners.

### *Commitment of More Resources for Compliance enforcement, Adjudication and Redress*

15.12 The Government are committed to the resourcing of the Office of the Director of Employment Rights Compliance. In addition to increasing the number of Labour Inspectors under this Office from 31 to 90, progressively up to end-2007, the new Office will be provided with 23 legal, accounting and other administrative support staff to ensure its effective functioning.

15.13 The Government are also committed to increasing the staffing resources of the Employment Rights Bodies generally in order to accelerate the processing of cases through the adjudication and redress system. Responding to the growing caseload it has been agreed that:

- (a) 20 additional support staff will be provided for the Employment Appeals Tribunal, the Labour Relations Commission and the Labour Court; and
- (b) an additional 5 Rights Commissioners will be provided, increasing, as necessary, in line with the Commissioners' caseload.

### **Section 16. Strengthening Penalties and Redress**

16.1 Penalties for non-compliance in all areas of employment law are to be reviewed and increased as follows:

- **On summary conviction** – to €5,000 in the District Court and/or a custodial sentence in line with the jurisdiction of the Court;
- **On indictment** – Penalties could range up to €250,000 for e.g. non-maintenance of Statutory employment records and transgressions under the Protection of Young Persons Act, 1996.

- 16.2 As regards **Redress**, where the issue has been brought to the Rights Commissioners/ Employment Appeals Tribunal/ Labour Court, they will be able to award compensation of an amount that is just and equitable, of up to 2 years' remuneration taking account of financial loss, across the range of legislation (such an approach has a built-in inflator).
- 16.3 New legislation will provide for this new model of compliance with its compliance/adjudicative elements and increased penalties regime, as agreed above, across all employment rights legislation. It will be published during 2007. This legislation will contribute to the ongoing work of the Employment Rights Group, established by the Government, which will continue its remit to simplify and harmonise employment rights law.

#### *Protection of Complainants*

- 16.4 The Government will provide statutory protection to an employee who, in good faith, has made a complaint to an appropriate authority, including to ODERC, against his or her employer under any employment rights provision, ERO or REA and who is subsequently dismissed or otherwise penalised arising from the complaint.