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Ireland Update: Winds of Change for Whistleblowing

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Upcoming Whistleblowing Directive

Ireland already has substantial protection for whistleblowers under the Protected Disclosures Act 2014 ("Act"). Even so, the scope and applicability of employers' obligations towards whistleblowers will broaden when Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law ("Whistleblowing Directive") is implemented.

Ireland and its fellow EU members must implement the Whistleblowing Directive by 17 December 2021. From then, private employers of 50 or more employees will be required to establish reporting channels (which may be internal or provided by an external third party) within their organisation for workers who wish to report breaches of EU law.

Employers who are subject to EU Law relating to financial services, products, markets, prevention of money laundering and terrorist financing, transport safety and the protection of the environment will be required to establish reporting channels irrespective of the number of employees employed.

The definition of relevant wrongdoings will be broadened to include breaches of financial services regulations, laws relating to products, markets, prevention of money-laundering and terrorist financing, corporate tax laws, product and transport safety, animal health, protection and welfare, environmental protection, public procurement, data protection, consumer protection, radiation, nuclear safety and public health and breaches affecting the financial interests of the European Union and the single market.

The Whistleblowing Directive will also impose strict timeframes within which employers must comply with their obligations. Receipt of a protected disclosure must be acknowledged within seven days. The disclosure itself must be "diligently followed up" within three months. Feedback must be provided within three months, though it will not be necessary to communicate the outcome of an investigation within three months.

So, how does this new regime match up to the current legal position in Ireland?

Protected Disclosures Act 2014 – Already Substantial Protection for those who Speak Up

The Act provides protection for workers (which includes employees, contractors and agency workers) who report information which in the reasonable belief of the worker tends to show one or more "relevant wrongdoings".

"Relevant wrongdoings" protected under the Act are:

- that an offence has been committed;
- that a person has failed to comply with any legal obligation (other than one relating to the worker's contract of employment);

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- that a miscarriage of justice has occurred;
- that the health or safety of any individual has been endangered;
- that the environment has been damaged;
- that an unlawful or otherwise improper use of funds or resources of a public body or other public money has occurred;
- that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement; or
- that information tending to show any matter falling within any of the above has been concealed or destroyed.

Relevant wrongdoings can relate to past acts or omissions, those that are currently ongoing or those that may occur in the future.

Workers may make anonymous disclosures under the Act if they wish. Any information which identifies the disclosing worker must be kept confidential unless an exception under the Act applies e.g. the disclosure is essential to the effective investigation of the allegation.

Workers who report relevant wrongdoings to their employer are protected from penalisation under the Act. The Workplace Relations Commission ("WRC") is empowered to award an employee who has been penalised on foot of making a protected disclosure an award of up to five years' remuneration as compensation. Employees who allege that they have been dismissed due to having made a protected disclosure may also seek a Circuit Court order for interim injunctive relief, i.e. that the worker be re-instated until a case for protected disclosure related unfair dismissal is determined.

The Act also provides that a worker's motivation for making a protected disclosure is irrelevant. This means that a protected disclosure does not need to be made in good faith to be protected under the Act. However, deliberate false disclosures will not be protected under the Act. The WRC can also reduce any award ordered for a worker who has been penalised on foot of making a protected disclosure by 25% if the investigation of the relevant wrongdoing was not the worker's sole or main motivation.

Fail to Prepare – Prepare to Fail

Having a protected disclosure policy and procedure operates as an "early warning system", allowing employers to get ahead of underlying problems within their organisation. It also improves organisational compliance and employee relations. In addition to reputational damage and regulatory breaches that may occur where employers are not made aware of wrongdoings within their organisation, without a proper protected disclosure policy and procedure in place, employers are much more likely to fail to recognise a worker reporting a relevant wrongdoing and to fulfil their obligations under the Act. This would leave an employer exposed in the event that an employee issued a claim to the WRC or the Circuit Court.

Employers should be particularly conscious of workers raising concerns which could be considered "relevant wrongdoings" during the current COVID-19 climate. Health and safety complaints relating to COVID-19 could constitute a protected disclosure as it relates to the endangerment of the health or well-being of individuals other than the person making the complaint. Employees may also feel more comfortable approaching management with concerns while working remotely or in socially distanced workspaces which afford greater privacy. Conversely, if an employer's remote working practices lead to weaker supervision or engagement with employees, "relevant wrongdoings" may be more likely to occur and employees should be reminded and encouraged to speak up so that the employer can get ahead of any hidden issues.

It is also a particularly optimal time for an employer to introduce or review its protected disclosure procedure. As outlined above, the Whistleblowing Directive will broaden the scope of employers required to have a procedure in place and substantially change employers' current obligations.

Recent Case Law Relating to Circuit Court Interim Injunctions

Two recent cases have provided additional guidance on the Circuit Court's power to require an employer to reinstate an employee or pay their full pay and benefits pending the hearing of a protected disclosure related unfair dismissal claim.

The first case, *Paul Cullen v Kilternan Cemetary Park Limited* (unreported) 2020 related to an application to extend the deadline to apply for interim relief. Employees must apply for an interim injunction within 21 days of their dismissal. The employee alleged that there were planning irregularities in the land owned by the employer during the course of discussions to agree an exit package. The Circuit Court identified a number of factors to be taken into account when assessing whether the 21 day deadline should be extended, including the nature of the disclosure, the nature of the dismissal, the length of the delay, the capacity and ability of the applicant to process an application to the court, the extent of legal advice afforded to an applicant, the reasons for the delay, the merits of the case, any prejudice that might be suffered by reason of the delay and whether the extension would be just and reasonable in all the circumstances. The Circuit Court held that the employee's delay of 3.5 months was excessive and that it did not accept seeking alternative employment and awaiting the result of the internal appeal process justified such a lengthy delay. It also noted that potential planning irregularity was an issue that the employee, in his role as General Manager, should have taken active steps to address while in his employment. The employee's application was therefore denied. However, employers should take note that it was clear from the Circuit Court's judgment that in certain circumstances, an employee's delay will not act as a bar to them obtaining interim relief. Employers should not consider themselves "out of the woods" once the 21 day deadline has expired.

In *John Clarke v CGI Food Services Limited and CGI Holding Limited* [2020] IEHC 368, the employee, who was the defendant's Group Financial Controller, had raised a number of concerns relating to the defendants' compliance with financial and health obligations. The employee alleged that after raising these issues, he was subjected to a campaign of penalisation and eventually dismissed from his employment, ostensibly for performance based issues. The employee lodged an unfair dismissal claim with the WRC alleging that the dismissal was a consequence of his making protected disclosures. The employee applied to the Circuit Court seeking an interim injunction requiring the employer to pay his full salary and benefits pending the hearing and outcome of his unfair dismissal claim. The unfair dismissal claim was subsequently adjourned a number of times and had not been fully heard at the time of the High Court appeal, approximately fourteen months after the dismissal. The High Court held that the issues raised by the employee fell within the definition of protected disclosures and that there were substantial grounds for contending that the dismissal resulted wholly or mainly from the employee having made a protected disclosure. The High Court also held that the exception from protection under the Act where the function of the individual making the disclosure (or the employing entity) is to detect, investigate or prosecute the subject matter of the disclosure, does not apply where the alleged misconduct is committed by the employer of the employee in a compliance role. The Circuit Court interim injunction was therefore upheld. Interestingly, the High Court also ordered that a copy of its judgment be sent to the Department of Agriculture, Food and the Marine and to the Revenue Commissioners to undertake whatever investigations considered necessary in light of the allegations made by the employee.

Key Takeaways for Employers to Reduce Risks

- Be aware that employees in compliance roles may now be protected under the Act if reporting relevant wrongdoings committed by their own employer. Consider reporting lines and job descriptions for compliance roles. Ensure that managers are trained to spot potential protected disclosures.

- Circuit Court interim injunctions, if granted, can result in extremely lengthy periods of time in which an employer is required to pay their former employee's pay and benefits. Therefore, it is vital for employers to process potential protected disclosures in accordance with the Act to minimise the risks of penalisation.

- It is crucial that employers investigate any relevant wrongdoings raised by employees and ensure no penalisation (which is broadly defined under the Act) of an employee occurs due to the making of the protected disclosure. Employers should exercise increased caution when taking any action that could constitute penalisation against the worker (such as making the employee's role redundant or transferring the employee to a new location). To succeed in a penalisation claim, an employee must be able to demonstrate that 'but for' them having made the protected disclosure, the penalisation would not have occurred.

- Any investigation by an employer into alleged relevant wrongdoings committed by employees should comply with the principles of natural justice and fair procedures.

- Having made a protected disclosure does not make a worker "untouchable". Employees who have made a protected disclosures can be dealt with as normal provided the employer can demonstrate it fairly and effectively investigated the alleged relevant wrongdoing(s) when raised, took any necessary actions arising from the investigation and that the subsequent actions towards the employee had valid legitimate bases entirely unconnected to the allegations raised.
- If you have an existing whistleblowing procedures, review and amend it, and any commitments contained in it in relation to timing, in light of the upcoming changes required under the Whistleblowing Directive. Don't be afraid to process potential protected disclosures as such once you have proper processes in place. Clear, streamlined processes can protect employers.
- Employers who do not already have a protected disclosure procedure in place, should introduce one as soon as possible, particularly if they will be required to have one in place once the Whistleblowing Directive is implemented. The protected disclosure policy should be in accordance with the Code of Practice.

Key Contacts

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