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## NEWSLETTER JUNE/JULY 2011

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### Introduction

It's been an interesting few weeks at Tom Smyth & Associates. First, Tommy and Deirdre welcomed baby Fiona to the world on 30<sup>th</sup> April. Next Fiona O'Connor started with us as a HR Consultant in May. Fiona has a HDip in Personnel Management from UCC and has worked at Citizens Information for several years. Her knowledge and experience therefore complements our business and adds value to the service we provide

Finally, during May, Tom Snr took ill and had quadruple bypass surgery. He has a long road to recovery but is fighting on. We would like to thank everyone for the well wishes. Rest assured, they are all being passed onto him and he is still enquiring as to the 'latest from the front'!

### **JLC's – what's the Story?**

- In Ireland, for many years, certain industries have had specific rates of pay and terms of employment agreed at a national level between the Labour Court, Unions and Employer Representatives under systems called Registered Employment Agreements (REA's), Employment Regulation Orders (ERO's) and Joint Labour committees (JLC's).
- Sectors covered by these agreements include Hotels, Retail Grocery, Catering, Construction, Security, Hairdressing, Electrical Contracting, to name but a few.
- Originally, they avoided smaller employers having to face individual battles with a Trade Union by complying with what 'everyone' thought to be a reasonable set of terms specific to that sector.
- Some of the agreements appear inflexible and contain outdated terminology and content. Employers have argued that since these agreements started, additional employment law has been introduced that protects employees and renders these agreements unnecessary so they should be abolished.
- Part of the EU/IMF Memorandum of Understanding contained a commitment to review the ERO/REA/JLC sectoral agreements.
- This review was carried out by a 2 person committee, Kevin Duffy of the Labour Court and UCD economist Dr.Frank Walsh who published a report recently indicating a need for some alterations but stopping short of abolishing the agreements.
- Minister Richard Bruton announced his own ideas for the reform of these systems, which went beyond the recommendations in the Duffy/Walsh report but also stopped short of abolishing them.

- On the 7th of July the High Court Issued a decision in the legal challenge taken by John Grace Fried Chicken and the Quick Service Food Alliance (QSFA) declaring that the JLC system is unconstitutional as the Oireachtas, while able to delegate certain powers, cannot delegate the power to legislate. Imposing premium wage rate requirements on certain business owners is also an infringement of their property rights.
- This ruling applies to JLC's but not to REA's
- This has effectively meant that from 8<sup>th</sup> July 2011, Employers are not obliged to meet the requirements of JLC's for new employees but must be conscious of National Minimum Wage legislation as well as other primary acts of law such as the Organisation of Working Time Act which contains requirements on appropriate rest breaks and Sunday premium payment.
- Existing employees already have a Contract of Employment protecting their current terms and conditions, whether the employer has a written one or not, and therefore they cannot be unilaterally revised without agreement.
- The Governments initial reaction indicates they will not be appealing this decision to the Supreme Court. Minister Bruton is still intent on reforming the legislation covering sectoral agreements. It will be interesting how this High Court decision revises his thoughts. Watch this space!

## Social Welfare Basics

This is an area where employees certainly appear to know their rights and entitlements much better than their employers. As employees approach their employer to discuss a social welfare entitlement, the employer must be careful not to voluntarily agree to a scenario, which allows the employee claim social welfare in circumstances where they are not entitled to it. Employers must always be wary of writing letters to the Department which do not reflect a true account of the operational needs and should be mindful of telling the Department that hours have been reduced as there is no work available, when in fact it is the employee who wishes to reduce their hours voluntarily. As an employer, you should not knowingly write a dishonest letter to the Department.

Remember, Social Welfare issues are based on the relationship between your employee and the Department only. You, as an employer, have no obligation to reduce hours or change shift patterns on request of the employee to suit any Social Welfare requirements.

We summarise certain Social Welfare schemes and jargon below to give employers a basic knowledge. Please ring Fiona in our office with any specific questions as they arise.

### **Jobseekers Benefit (JB)/ Jobseekers Allowance (JA)**

JB is the PRSI based payment given to employees who have suffered a total or substantial loss of employment and as a result are fully unemployed for at least 3 days in any period of 6 consecutive days. An employee in this scenario is considered by Social Welfare to be engaged in 'Systematic short-time working'. To qualify for partial support where hours have been reduced, at the request of the employer, the employee must be available for work on these days. Therefore if an employee chooses to work part-time, they are not considered to be unemployed for the days they do not work and cannot avail of any JB support.

JB is not payable to anyone who voluntarily enters a job sharing arrangement. However, if an employee is employed to job share and is available for full time work they may qualify for the days on which they are unemployed.

JA is a very similar payment and is available for those who may not have enough PRSI to qualify or where entitlement to JB has been exhausted. The main difference between these payments is that JA is means tested on the income and savings available to the employee and their spouse or partner.

### **Illness Benefit (IB)**

IB is the PRSI based payment given to people who are restricted from work due to an illness/injury. An employee must apply for Illness Benefit within 7 days of becoming ill and application forms are available from a local GP. No payment is made for the first three days of illness.

When dealing with any long term illness many health professionals stress the importance of the patient returning to work on reduced hours to facilitate a faster recovery. Employers should note that the Department can facilitate this as employees can do part time rehabilitative work (up to a maximum of 20 hours a week) and keep their payment once they are in receipt of IB for at least 6 months. Employees must get written approval from the Department prior to starting any rehabilitative work, should you decide this is a viable option for your company.

### **Disability Allowance (DA)**

DA is very similar to illness benefit however it is only available where the illness/injury is expected to last at least 12 months. This is a means tested payment so again income and savings are assessed.

### **Injury Benefit & Medical Care Scheme**

This is a weekly payment for an employee who is unfit for work due to an accident at work. Following an accident at work an employee may request that you fill in the Injury benefit form. This in no way accepts liability on behalf of the employer but is a requirement so the employee can receive Injury benefit and can avail of the Medical care scheme under the occupational injuries scheme. This scheme covers reasonable medical care costs for the employee stemming from the accident at work.

### **Family Income Supplement (FIS)**

FIS is a payment for low income working families. If incomes are reduced as one of a couple becomes unemployed or hours are reduced, the family may qualify, so long as the claimant is working 19 hours or more. To qualify the employee must have at least one qualifying child and the family income must be below a certain amount which is related to the family size. The employer must sign & stamp part of the FIS form on behalf of the employee. Once an employee qualifies, FIS is payable for one year even if hours or incomes increase.

### **One Parent Family (OPF)**

This is a means tested payment for men and women who are rearing children and are not living with a spouse or partner. If an employee has an income under €425 a week they may qualify for some support under this payment. Any maintenance payments received are also assessed.

### **Maternity Benefit**

As most employers know Maternity Benefit is paid for 26 weeks and a further 16 weeks unpaid maternity leave is available. This latter period is not covered by a Maternity Benefit payment but employees are entitled to a credited social insurance contribution for each week of unpaid leave. Forms to avail of credits for any returning employees can be downloaded on [www.welfare.ie](http://www.welfare.ie)

If an employee intends availing of any period of additional maternity leave remember no annual leave can be granted between the end of the initial 26 week period and the beginning of the additional leave. Employees must start maternity leave 2 weeks before their due date but should apply for the payment 6 weeks before they intend going on maternity leave.

It is a rarity these days, but if your company does have a policy whereby you continue to pay an employee in full, while on maternity leave, this Maternity Benefit should be paid directly to the company, so don't forget to give the employee your payment details. If your company continues to pay the employees normal weekly wage then the employee may be entitled to a tax and PRSI refund. If this is the case, when Maternity Benefit ceases, the employee should fill in an MB21 Statement, and forward it to the local tax office to get a tax refund. To get a PRSI refund, the employee should contact the PRSI Refunds Section of Social Welfare.

### **Carers Allowance/ Carers Benefit**

This is a payment for an employee who leaves the workforce to care for a person who is in need of full time care. It is the Department who approves whether the person requires full time care and attention. Local GPs, the employee, the employer or the carer do not make this decision. If this approval is not received then the employee is not on carers leave under the Carers Act. Therefore if they still wish to take time off they would have to hand in their notice or, at your discretion, you may grant unpaid leave!

All application forms are available online at [www.welfare.ie](http://www.welfare.ie)

## Are you Permitted? – Latest on Employee Permits!

Some individuals do not require any employment permit to work in Ireland. These include citizens of a Member State of the European Economic Area (EEA), a person who has been granted 'refugee status' by the Minister for Justice, postgraduate students, individuals whose work as an integral part of their course of study, any person granted permission to remain as the spouse of an Irish national, a person with permission to remain as the parent of an Irish citizen or a person who has been given temporary leave to remain in the State on humanitarian grounds, having been in the asylum process.

If an employee of yours is not one of the above, in general, they will need an employment permit to work in Ireland. This has become a complicated procedure, as policy and practice in this area is complex, and is undergoing further changes. **It should, however, always be remembered that it is an offence for both the employer and the employee to be engaged in employment without a valid employment permit.**

For the purpose of this newsletter we are concentrating on the main areas of concern/interest for our clients; Work Permits and Spousal Permits. We define briefly other areas of interest but for a more detailed discussion please call us at any stage.

### A. Work Permits

Work permits may be issued to foreign nationals who need employment permits for those occupations where the salary is €30,000 or more. For certain occupations, work permits are not considered such as all clerical and retail staff. A full list of these 'excluded' occupations is available from the Dept of Enterprise, Trade & Employment website ([www.deti.ie](http://www.deti.ie))

If you have an employee working on an existing work permit issued before 1 June 2009 they can continue to work until it expires. A 'labour market needs test' is not required for a renewal and the list of ineligible categories does not apply.

The main features are as follows:

- Work permits are available for occupations with an annual salary of €30,000 or more.
- New applications will not be considered for occupations listed as ineligible for work permits
- The work permit is granted for 2 years initially, and then for a further 3 years. After 5 years the employee may no longer need a work permit.
- A labour market needs test is required with all new work permit applications
- Either the employer or employee can apply for the employment permit, based on an offer of employment

A work permit is issued initially for 2 years and subsequently may be renewed for a further 3 years. From 28 August 2009 if an employee has worked for 5 consecutive years on a work permit they no longer need a permit to work in Ireland. If an employee has been legally living and working in Ireland for 5 years on a work permit they can apply for long-term residence to the Irish Naturalisation and Immigration Service (INIS). If the application is successful an employee will be granted extended residence permission for a further 5 years and they will not need a work permit to work in Ireland.

An employee currently on a permit given after 1 June 2009, and whose permit is about to expire, may find it difficult to get their permit renewed. This would likely lead to a dismissal scenario, so please be diligent in tracking permits and being open and transparent with all employees.

## **B. Spousal and dependant permits**

Since 2007, spouses and dependant unmarried children under the age of 18, who have been admitted to the State as family members of employment permit holders, have been able to apply for work permits without a labour market needs test being undertaken. Since 1 June 2009, Spouses and dependants of new entrant work permit holders will be required to apply for work permits in their own right according to standard work permit eligibility criteria, including a labour market needs test and eligible job categories.

## **C. Green Card permits**

The Green Card permit is an employment permit for highly skilled migrant workers with annual salaries of over €60,000 or certain occupations where there are skill shortages. The Green Card permit replaces the working visa and work authorisation which are no longer available. There is no requirement for a labour market needs test; that is the employer does not need to advertise the job with FÁS/EURES or in newspapers. The Green Card permit is issued for 2 years and a renewal permit is not required.

## **D. Intra-company transfer permit**

Since 1 February 2007 a new intra-company transfer scheme has been introduced. This scheme allows senior management, key personnel and trainees who are foreign nationals working in an overseas branch of a multi-national company to transfer to the Irish branch. The employee must be earning at least €40,000 a year and have been working for the company for a minimum of 12 months. An intra-company transfer permit may be granted for a maximum of 2 years initially and may be extended to a maximum of 5 years.

## **E. De Facto Relationship Visa**

Non – EEA nationals, who are in a de facto relationship with an Irish national for at least 2 years, or a relationship with a non – EEA national for at least 4 years can apply for a De Facto Relationship visa. The applicant in this case must give evidence of a 'durable attested relationship' such as tenancy agreements, utility bills, joint bank account, emails and photographs etc. The applicant must also show sufficient resources and have private medical insurance. Under this visa, a person will generally receive a Stamp 4 which entitles the bearer to work in Ireland. However if there are concerns regarding the genuine nature of the relationship, a Stamp 3 is granted for the 1st year. After 12 months, the applicant can reapply for a Stamp 4 and if granted can commence employment.

## **F. Graduate Scheme**

Non-EEA students who have graduated on or after 1 January 2007, with a level 7 degree may be permitted to remain in Ireland for 6 months and those with a level 8 or higher degree may be permitted to remain for 12 months. The Third Level Graduate Scheme will allow them to find employment and apply for a Work Permit or Green Card permit. During this month period they may work full time. They must be legally resident in Ireland and should apply for this extension of their student permission (stamp 2) to their local immigration registration office.

### **Current working visa/ work authorisation holders**

**Current working visa / work authorisation holders are not affected by the new employment permit arrangements and can continue to work on their current visas or authorisations until they expire. Once they expire any renewals will continue to be processed by the Department of Justice and Law Reform.**

PLEASE REVIEW YOUR NON-EEA WORKFORCE AND ENSURE THAT ALL WORK PERMITS ARE UP TO DATE. CALL US FOR ANY ASSISTANCE.

## 'Employment Law Health Check' –A worthwhile periodic exercise

As you all know from talking to us, employers in Ireland must work within the boundaries of a substantial and complex level of employment law. We like to think that our Retainers are in a generally good position when it comes to their HR policies. We have, however, created a quickfire questionnaire below which we would hope you will answer honestly with your Organisation in mind. If there are some negative answers, please don't hesitate to call us and we can put you on the right track. If needs be, we are happy to visit you and conduct a more thorough audit. We would be happy to offer our services in a proactive manner to help you keep all the HR boxes ticked! If you are struggling with the burden of Employment Law compliance and you would like to discuss how our outsourcing assistance service could help, please call us on 021 4543506 to discuss.

In your business;

- Do all employees have a signed contract of employment on file for their current position?
- Are all employees currently on Probation being correctly coached and monitored to ensure they get feedback on their progress?
- Do all employees get legal rest breaks in accordance with the Organisation of Working Time Act 1997 (or JLC)?
- Are all working hours and rest breaks recorded fully each week, signed by the employee to confirm accuracy, and the records maintained? (Clocking machine records are also acceptable)
- Are your employees covered by a JLC document, and if so, have you fully reviewed the document to ensure you are compliant with it?
- Do all employees get a payslip for each wage period which clearly and fully indicates the gross to net breakdown for their earnings?
- Are employees under the age of 18 specifically accommodated in accordance with the Protection of Young Persons (Employment) Act 1996? (especially rest breaks and finishing time in the evening)
- Are correct and current work permits on file for all non-EEA employees? (See article in this newsletter!)
- Do you record any changes to an employee's terms and conditions in writing and issue it to the employee to confirm the new arrangement to avoid any confusion as to the exact terms of the change?
- Do you have an up to date Safety Statement (2011) with appropriate risk assessments signed by all employees?
- Has manual handling training been completed by all employees in your business?
- Have you detailed disciplinary and grievance procedures in place and can you prove that all employees are aware of these procedures and all managers know how to appropriately deal with situations in keeping with the principles of natural justice?

The dangers of non-compliance with employment legislation can be severe in terms of fines or legal awards in the event of an inspection from NERA or if issues arise with employees that leads them to seek legal or Union advice.

Employers see HR and legal compliance as an administrative nightmare and burden until they get an award against them either by a Rights Commissioner or EAT or from a NERA inspection where backpay has been awarded to employees. It then seems to be a case of once bitten, twice shy, and the importance of good HR housekeeping is firmly cemented in their minds.

If we can ever assist you in ensuring your house is in order and help you avoid these fines and costs, we are at the end of the phone!

If you want to fax this page to us, with your contact details, we can give you a call to discuss any issues raised. (Fax 021 4343115)

Business Name: \_\_\_\_\_ Contact Name: \_\_\_\_\_ Tel: \_\_\_\_\_

# Snippets....

By the end of June 2010, NERA inspectors had carried out 7,964 calls, interviews & inspections involving 2,214 individual employers and unpaid wages due to employees totalling €538,228 were recovered.

[Social Networking Sites (SNS): Public comments on the likes of facebook, bebo and twitter by employees which mention their employers or colleagues are on the rise. These are usually not uploaded on company computers or time, therefore an employer must be very vigilant in dealing with these issues. General email or internet policies do not deal comprehensively with these issues. We recommend a specific clause that alerts employees that inappropriate comments on SNS will be taken seriously and may lead to disciplinary warnings! ]

Don't forget that an employer is obliged under the Organisation of Working Time Act 1997 to maintain records of an employees working time on a daily and weekly basis for a period of 3 years and a further 2 years once the employment relationship ceases. Keep those records safe even after the employee leaves!!!!

Under the new Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 , same sex couples now have the same rights & obligations towards each other as married couples. Legislation to bring this into effect for taxation purposes has not been passed yet but is expected shortly and will apply for the complete tax year of 2011. It is advised that you amend any existing equality policies to reflect 'marital and civil partnership status'. In addition you should be mindful of any implications this may have in relation to any pension or health insurance entitlement your employees may have.

Given the above snippets are you confident that your HR documents are compliant? What if NERA calls, do you have, have you all your records up to date? If you are unsure about any of these issues or would like to return our Employment Law Health Check to us, please feel free to contact us on 021 454 3506 or fax 021 434 3115

All the Best for Summer 2011,

Tom, Tommy & Fiona.