Changes in Employment Law

Claire Callanan outlines the most significant recent and forthcoming changes in the area of employment law

There has been a huge growth in legislative changes that affect Employment Law in the last 18 months. There are now new laws applicable in diverse areas such as fixed term contracts and the electronic monitoring of workstations. Rapidly coming down the line are changes in information and negotiation within the workplace which will be introduced by the Information and Consultation Directive by March 2005, together with extensive changes to existing safety, health and welfare legislation.

Data Protection (Amendment) Act 2003

The Data Protection (Amendment) Act 2003 came into effect on 1 July 2003 and gives effect to the provisions of EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It gives the right to an employee to have access to electronic and non-electronic data held by the employer, which may include staff appraisals or references.

The provision relating to enforced subject access will not take effect until the Vetting Unit of An Garda Síochána is in a position to properly handle requests for vetting.

The Data Protection Commissioner has now issued a set of data protection guidelines which sets out, from a data protection perspective, what information can be gathered in respect of employees. It deals with many issues including the issue of monitoring and surveillance, and sets out clear guidelines as to the limits under data protection law of monitoring and surveillance.

Under the guidelines, monitoring of employees’ email and internet usage and surveillance by CCTV must comply with the transparency requirements of data protection law. Staff must be informed of the existence of the surveillance, and also the purposes for which personal data are to be processed. If CCTV cameras are in operation and public access is allowed, a notice to that effect should be displayed. Only in exceptional circumstances, associated with a criminal investigation, should resort be made to covert surveillance.

Equality Act 2004

The Equality Act 2004 came into force in July 2004 and it amends both the Employment Equality Act 1998 and the Equal Status Act 2000. Its main provisions are:

* It extends the definition of “sexual harassment” in both Acts. Currently, the unwelcome conduct has to be reasonably regarded to be offensive, humiliating or intimidating. The Act says that sexual harassment is “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person”.

* The word “reasonable” is no longer used and this will widen its interpretation.

* The Act extends the definition of indirect discrimination and extends the definition of victimisation.
* The Act outlaws upper age discrimination and will prevent employers relying on the upper age limit provided for in the Unfair Dismissals Act to dismiss employees once they have reached age 65. All employees, whether

under or over 65, are entitled to the benefit of the Unfair Dismissals Acts. However, an employer may legally have a contractual upper age limit in their terms and conditions of employment. It is important, therefore, that employers check to ensure that they have such an upper age limit and, if not, that one is introduced. The existence of such a contractual age limit will also prevent employers being on the receiving end of age discrimination claims in relation to recruitment and promotion, and also in relation to sick pay schemes.

**Employment Permits Act 2003**

The purpose of this Act is primarily to facilitate the granting of access to the Irish labour market by nationals of EU Accession States with effect from May 2004. It includes a requirement for employment permits in respect of non-nationals working in Ireland together with penalties for non-compliance by employers and employees.

**Finance Act 2004**

Section 7 of the Finance Act 2004 provides an exemption from income tax for payments made under the employment acts. This section applies to statutory awards or payments made on or after 4 February 2004 arising out of statutory employment law claims, and to agreements that comply with particular requirements. Any part of an award that relates to loss of earnings is excluded from this provision, and is generally still subject to income tax.

**Information and Consultation Directive 2002/14/EC**

The Information and Consultation Directive will come into force in Ireland on 23 March 2005.

This is arguably the most significant piece of employment legislation ever to be introduced in Ireland. In essence, it will eventually give all employees, in organisations employing more than 50 staff, a right to be systematically informed and consulted, through their elected representatives, on any substantial changes in work organisation or contractual relations.

They also have a right to be informed and consulted on matters affecting their jobs and their future employment prospects, as well as on the economic situation of the undertaking. The Directive, therefore, has major implications for transactions involving the transfer of undertakings, collective redundancies, and health and safety law.

The Bill transposing the Directive into Irish Law is awaited. It is likely that in phase one it will apply to employers who have at least 150 employees.

**Industrial Relations (Miscellaneous Provisions) Act 2003**

Under this Act and the pre-existing 2001 Act, an employer who does not enter into collective bargaining agreements can be forced by the Labour Court to grant such terms and conditions to its employees as the Labour Court sees fit.

The Act removes the employer’s ability to only pay rates or agree terms which it consents to. The Labour Court determinations are binding and can be enforced via the Circuit Court.

**Maternity Protection Amendment Act 2004**

The Maternity Protection (Amendment) Act 2004 was enacted on 19 July 2004 but only came into force on the 18 October 2004. Its main provisions include:

* An expectant mother may take paid leave to go to a full set of antenatal classes.
* A father may take paid leave to attend two antenatal classes.
* An adjustment of working hours or breaks for breast-feeding mothers for four months after birth.
* The suspension of maternity leave in the event of illness (which would allow for the continuation of the leave after the illness).
* Maternity leave can now commence not later than two weeks before the due date rather than not later than four weeks under the existing legislation.

**Personal Injuries Assessment Board**

The Personal Injuries Assessment Board Act 2004 came into force on 1 June 2004 in respect of employment liability claims, and in

Staff must be informed of the existence of the surveillance, and also the purposes for which personal data are to be processed.
Exchequer Software
respect of all further personal injuries claims (excluding medical negligence) on 22nd July 2004.

The purpose of the legislation is to establish the Personal Injuries Assessment Board (PIAB) and enable it to make assessments of the value of personal injuries. The aim is to reduce the cost, and speed up the process, of compensation.

* The role of the PIAB is confined to claims where liability is admitted and where it is accepted that the claim is genuine.
* All personal injury cases (excluding medical negligence) are subject to mandatory referral to PIAB before they can proceed to adversarial litigation, irrespective of whether the accident occurred before the effective date.
* PIAB will not conduct oral hearings – it is a documents-only system of assessment.
* Assessment of general damages for pain and suffering will be based primarily on medical reports from the claimant’s treating doctor. There is a provision for independent medical assessment by a practitioner appointed by PIAB.
* A Book of Quantum has been compiled and published as a guideline to General Damages for various categories of injuries. The existence of this guide should also assist parties in reaching negotiated settlements.
* The PIAB will not award legal costs for or against any party.

**Protection of Employees (Fixed-Term Work)**

The Protection of Employees (Fixed-Term Work) Act 2003 came into effect on 14 July 2003. The Act provides for the improvement of conditions for fixed-term workers by ensuring the application of the principle of non-discrimination. Fixed-term workers may now not be treated less favourably than comparable “permanent” workers. It also establishes a framework to prevent abuse arising from the use of successive fixed-term employment contracts.

The Act allows that a fixed-term employee may be treated in a less favourable manner than a comparable permanent employee only where such treatment can be justified on objective grounds.

If employers have not already examined their terms and conditions with a view to complying with the Act, they should do so, as it is now over a year since the Act was introduced. There are two categories of fixed term workers that need to be reviewed:

* The first category is where an employee is in fixed term employment at the time of the coming into force of the Act on 14 July 2003. At the end of three years of continuous employment, the employer may only give one further fixed term contract for another year. The aggregate of all the contracts cannot exceed four years, unless there are objective grounds justifying such a renewal. There is little guidance so far as to what would amount to such objective grounds.
* Where an employee’s first fixed term contract commences after 14 July 2003, there can only be one further fixed term contract and the aggregate duration of the two contracts cannot exceed four years, again unless there are objective grounds justifying such a renewal.

Where an employer is renewing a contract as permitted by the Act, the employer must inform the fixed term employee in writing of the objective grounds justifying the renewal of the fixed term contract. They must also state the reason why there is no offer of a contract of indefinite duration. This must be done at the latest by the date of renewal.

Where a fixed term contract is coming to an end and is not being renewed, the employer must also give a written notice to the employee as soon as is practicable setting out why the contract is coming to an end, i.e. that it is arriving at the specified date or completing the specified task, etc. It should also state why no permanent position is available.

Employers should be familiar with the technical requirements necessary to create a valid fixed term contract.

Under the Unfair Dismissals Acts, employees are now entitled to redundancy when fixed term contracts end and are not renewed, subject to the usual qualification requirements (See section on Redundancy Payments Act 2003).
Public Health (Tobacco) (Amendment) Act 2004

The workplace smoking ban was introduced by the Public Health (Tobacco) (Amendment) Act 2004 and which came into effect on the 29 March 2004. A workplace is defined by the Act as “any place, land or other location at, in, upon or near which, work is carried on, whether occasionally or otherwise”.

Outdoor workplaces such as farms, buildings sites may be exempt since they may be covered by the exemption under Section 16 which permits smoking as long as there is no roof or if there is, less than 50% of the perimeter is walled. Motor vehicles (including company cars and commercial vehicles) are places of work under the Safety Health and Welfare at Work Act, 1989 and are covered by the ban.

It is worth noting the penalties for breach of the ban. On summary conviction, there is a fine of up to €3,000 and/or up to three months imprisonment and on indictment, a fine of up to €125,000 and/or up to two years imprisonment. It is likely that persons found to be in contravention of the ban will be guilty of an offence and the employer in charge of that workplace and who has facilitated the breach of the ban will also be held accountable. It will be a defence for an employer against whom proceedings are brought to show that he or she made all reasonable efforts to comply.

Employers should ensure that their smoking policy is updated and that employees are made aware of the changes and in particular the consequences of breaching the policy.

Redundancy Payments Act 2003

To qualify for statutory redundancy, the employee has to be between the ages of 16 and 66, with two years’ continuous service, be insurable for all benefits under the Social Welfare Acts (unless excepted), and work for 18 hours or more per week.

The new Redundancy Payments Act 2003 applies to all redundancies on or after 25 May 2003. It does not have retrospective effect. The main provisions include:

* An employee who worked in a company abroad and who returns to Ireland to that company and is subsequently made redundant is entitled to statutory redundancy for the entire service in the company as long as s/he has worked for two years in Ireland prior to termination.

* The 2003 Act introduces the concept of redundancy on termination of fixed purpose contracts for the first time. If an employee is employed for a fixed term or for a specified purpose and that term expires or that purpose ceases without the contract being renewed, then the employee becomes entitled to redundancy.

* Agency employees may now be entitled to redundancy – a contract of employment is defined using the same definition as in the Employment Equality Act 1998. This definition includes a contract between an agency and a worker. If the contract is to provide services to a third party and that third party is liable to pay the wages of the worker, then it deems the third party to be the employer.

* Employees of insolvent companies can now make claims for minimum notice entitlements under the Insolvency Payments Scheme without having to obtain an award from the Employment Appeals Tribunal.

* Continuity of employment will not be broken by any period of illness, lay-off, holidays, lock-out or strike.

* In calculating reckonable service, an employer may now exclude (only from the three year period ending with the date of termination of employment) ordinary sick-leave over and above 26 weeks, occupational injury over and above 52 weeks, maternity leave over 18 weeks and career breaks over 13 weeks in a 52 week period. Reckonable service also excludes absence from work because of lay-offs or strikes. Short-time work is reckonable.

Safety, Health and Welfare at Work Bill 2004

This Bill was published on the 24 June 2004. The purpose of the Bill is to consolidate and update the Safety, Health & Welfare at Work Act 1989 (“the Act”) along with the general provisions of the Safety, Health & Welfare at Work (General Application) Regulations 1993 (the "Regulations").

The main features of the Bill include:

* Increased duties on employers and employees
* On-the-spot fines
* The provision of risk assessment
* Publication of the names of offending employers
* Testing of employees for intoxicants
* Increase of penalties for offending employers

Claire Callanan is a Partner in Beauchamps, and chairs the Employment Law Team. For full contact details telephone Beauchamps at (01) 4180 600 or c.callanan@beauchamps.ie.