

What is Trending in 2018? *Employment Law and Immigration Law Update*

Speed Read

- What's next on the **Gender Agenda** in Ireland? We review recent gender pay gap issues, developments and practices and flag the most significant change that is coming down the tracks for employers in 2018;
- Donald Trump took office aged 70, Warren Buffet is 87, Janet Yellen is 71, Angela Merkel is 61 - 18 CEOs of S&P 500 companies are aged over 70 and a further 47 CEOs are aged over 65. We know that older employees are still contributing to their organisations long after the conventional retirement age. We look at the developments in relation to **mandatory retirement ages** below.
- Flexibility is King – or is it? Will Irish law keep pace with the changes to the way we work or will the **gig economy** drive on, pushing the boundaries of our existing employment law framework?
- **And in brief** – GDPR, Minimum Wage and Immigration Law developments

The Gender Agenda – Coming Soon to a Workplace Near You

In the year that marks the centenary since Irish women first secured the right to vote, 2018 is shaping up to be the year of the Gender Agenda. Since we last reported on the Gender Pay Gap (click [here](#) for our alerter) we have seen a series of high profile departures and rows as well as some developments at the policy making level.

- The most recent high profile example of a gender pay gap comes from Hollywood. Actress Michelle Williams is reported to have earned 1% of what co-star Mark Wahlberg received for re-shooting the movie 'All The Money' without Kevin Spacey. In response to the furore unleashed by this revelation, it has been reported that Williams was already obliged under her contract to perform re-shoots for limited additional remuneration. Meanwhile Wahlberg (apparently represented by the same agency) had negotiated substantial compensation for any re-shoots or changes to

the cast. The gender pay gap in this episode turned out to be substantially in excess of the estimated 16.5% average gender pay gap across Europe. It also misses the point somewhat to highlight that Wahlberg's stronger contract explains the spectacular gender pay gap.

- Closer to home, late last year the BBC published the range of remuneration for its highest earners. The list showed that two-thirds of the highest earners were men, with the highest-paid woman earning less than a quarter of the highest-earning male employee. The data revealed that many men working at the BBC were receiving higher salaries than women in comparable jobs. In Ireland, TV3 presenter Sinead Desmond reportedly resigned from TV3 late last year due to a row over a gender pay gap compared to her male co-hosts on a flagship morning show, Ireland AM.



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But, this is not an issue that is confined to the world of showbiz and media. It is a real issue, receiving substantial attention and it has the power to influence both consumers' and employees' opinion of companies. In short, larger businesses need to get ready for the change that is surely coming.

- The gender pay gap is showing no signs of closing in Ireland. The most recent CSO data shows the trend is moving in the wrong direction. The GPG has increased by 2% compared to 2012 and the data discloses that on average, women are paid 14% less than men. The CSO data, gathered in 2014, is based on gross hourly earnings. Strikingly, the gender pension gap is significantly wider, reported to be 37%. Closing this gap is a matter which the government has committed to in its current Programme for Government. The consensus is also now forming at the senior policy making level that regulation or legislation is needed to tackle this issue.
- Ireland is playing catch up with some of its European neighbours in this regard. Legislation was introduced in Germany last year obliging employers to be more transparent about salaries paid to male and female employees. Austria, France and Belgium already require equal pay reports and annual gender pay action plans to be published. In the UK, legislation enacted last year requires companies with over 250 employees to publish their gender pay data by April 2018, and then on an yearly basis.
- Some businesses are taking a pro-active approach and publishing data on gender pay in advance of the deadline. Citibank recently pro-actively published gender pay data relating to its UK, US and German business. There was extensive coverage of the reports that the average gender pay gap in Citibank across those three businesses is 1%, a much narrower gap than national averages in Europe.

So What is Happening in Ireland?

A Public Consultation on the Gender Pay Gap was launched in August, 2017. Minister Charlie Flanagan, Minister Heather Humphreys, and Minister David Stanton hosted a symposium, on 10 January in Dublin, on the gender pay gap.

The purpose of the gathering was to report back to senior policy makers and stakeholders on the outcome of the consultation exercise. Minister Flanagan stated after the event

"We need to take action now to make equality truly a reality for working women. Today's symposium has offered useful perspectives on the way forward. The Government will be bringing forward a range of actions to tackle this issue, starting with legislation on wage transparency".

- The enactment of the gender pay gap reporting obligations set out in draft form in the Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill 2017 would be a significant development for employers in this regard.
- The Bill was published in May 2017 and on 25 October 2017 the Bill passed the Committee Stage of the Seanad. As currently drafted, the Commission can put in place a "scheme" to require employers with 50+ employees to report on a bi-annual basis on the gender pay gap across average hourly pay and average bonuses.
- As drafted, the Bill makes provision for any contravention to constitute an offence attracting a Class A fine, the maximum fine for a summary convictions, currently €5,000. The Bill is due to move to the Report stage early this year and it remains to be whether the scheme will be conferred with sharper teeth. Early indications suggest that the approach to tackling the gender pay gap in Ireland will be to require employers at the very least to diagnose the issue of a gender pay gap. It is expected that this will come about using moderate regulation to encourage pay parity by requiring medium and larger sized businesses to publish the results of their data analysis. Interesting times.

Age – Mandatory Retirement - What is New?

Since we last reported on this area (click [here](#) for our earlier alerter), the WRC has published **SI No 600 of 2017 Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017** (click [here](#) for link to Code). The Code acknowledges and attempts to provide guidance for the new reality which is an increasing number of older and experienced employees who wish to continue working beyond the traditional mandatory retirement age. This is driven by a number of factors, not least the gender pension pay gap and the gap between eligibility for a State pension and the employee's contractual retirement date. As such, requests to work past a retirement date are common place, and the guidance, prepared with the input of several stakeholder bodies, is welcome

- The Code sets out industrial relations best practice on engagement between employers and employees in preparation for retirement.
- The Code does not provide for penalties for failure to comply with its provisions but as with many statutory codes of practice, an employer's conduct is likely to be measured as against the standards set out in this Code where a dispute arises.
- Principally the Code is a guide for employers and employees on preparing for retirement and providing a toolkit for dealing with requests to remain in employment after the mandatory retirement age. The Code provides a user friendly summary of the key legal issues to consider when looking at mandatory retirement ages. The Code addresses four issues:
 - » Guiding employers on accommodating older workers and utilising the skills of older workers
 - » A reminder to employers regarding the legal test of "objective justification" for mandatory retirement ages
 - » Helping to prepare for retirement using standard retirement arrangements
 - » Support for employers and employees for dealing with requests to work beyond the mandatory retirement age

Mandatory retirement ages remain lawful in Ireland provided that the mandatory retirement age is an express or implied term of the contract and provided there is objective justification for the mandatory retirement age meaning that it is **"capable of objective justification both by the existence of a legitimate aim and evidence that the means of achieving that aim is appropriate and necessary"**. The Code explains the meaning of a "legitimate aim":

- Intergenerational fairness (allowing younger workers to progress);
- Motivation and dynamism through the increased prospect of promotion;
- Health and Safety (generally in more safety critical occupations);

- Creation of a balanced age structure in the workforce;
- Personal and professional dignity (avoiding capability issues with older employees); or
- Succession planning.

The Code recognises that it is reasonable in the context of workforce planning for an employer to raise the issue of retirement with a prospective retiree even where the contract does not provide for it. It further recommends that the dialogue between employer and employee starts 6-12 months before the retirement date and further recommends a series of communications in writing and face to face. The Code sets out a roadmap for the areas to focus on in those discussions:

- Getting a clear understanding of the retirement date and any possible issues arising;
- Considering flexible working and flexible duties; and
- Transitional arrangements and support; and
- Assistance around guidance and information

The Code explains how parties should deal with a request by an employee who wishes to work beyond the mandatory retirement age including:

- Ask - are there good grounds on which to accept or refuse the request e.g. can the retirement be objectively justified?
- Is the employer taking an equal and consistent approach to addressing this request?
- Will a fixed term contract be used post retirement for a defined period?
- Would a more flexible or part time arrangement work post retirement?

The Code advises that it *"is important that the employee is listened to and that any decision made is on fair and objective grounds"*. The Code recommends that an employee be offered the right to be accompanied to any meetings on this issue by a colleague or a trade union representative. It also advocates prompt and transparent decision making by the employer on any requests for flexible or continued working arrangements.

Finally, the Code recommends that employers train managers on the benefits of age diversity. This includes raising age discrimination awareness among employees and ensuring that there is a culture in the workplace where tolerance for discrimination is eliminated with a view to properly managing an older and more diverse workforce.



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Flexibility is King or is it? – The Gig Trend is Set to Continue

The drive towards new, flexible, imaginative and less conventional ways of working is unlikely to slow down in 2018. The success of digital platforms which are driving this change is evident – look at Uber, Deliveroo, and Airbnb. A whole eco system is flourishing around the gig economy to help it to thrive. A good example of this is the phenomenal success of WeWork, a startup not so long ago and now valued at \$20bn. It offers flexible, short-term office space replete with collaboration areas, beer and prosecco on tap and yoga classes on site. WeWork is racing to meet the huge demand from both traditional business and disrupter start ups, all clamoring to work from their state of the art premises.

Flexibility is King - or is it? Giggers are in theory free to choose their working hours, free to move easily to better earning opportunities and free to take on multiple gigs at the same time. But is this maximum flexibility or exclusion from an extensive protective employment framework under another name? There are tensions with this business model and the law is struggling to keep pace.

- The tensions have been erupting in the Courts and tribunals in the UK. Uber has fought a long campaign against the erosion of its flexible worker model (click [here](#) for our alerter on this). Its campaign to date has not been successful and as matters stand, Uber drivers have been classified as workers by the English courts. The celebrated Pimlico Plumbers also failed in their attempt to assert that their plumbers were not “workers” (click [here](#) for link to case). The situation is somewhat different in Ireland. We still do not have a category of “worker” under Irish law unlike in England and there are no serious plans in the pipeline to change this. The law in Ireland has evolved slowly in this area and the test as to whether an individual is an employee or an independent contractor largely still focusses on whether the person is truly in business on their own account.
- As reported in our [alerter](#) the most significant change that we are likely to see this year in this particular area is the regulation of the use of low hours, zero hours and uncertain hours contracts. The commitment to tackling the casualisation of work at the expense of basic workers’ rights has been on the agenda since early last year.

A government spokesperson said in May last year that amendments to the Organisation of Working Time Act, 1997 will follow to outlaw the use of zero hours contracts “*unless it is genuinely casual work, emergency cover or short-term relief work for the employer. This proposal is to avoid the contagion of an increase in zero hours practices in this jurisdiction.*” The Employment (Miscellaneous Provisions) Bill 2017 was published in December 2017 to address this. The Bill is due to progress to the Second stage before the Dail in the coming weeks.

GDPR

The count down to the triggering of the new GDPR framework has begun in earnest. At the time of writing it is 128 days! Follow our regular updates to help employers get GDPR ready:

[Action plan for employers](#)

[GDPR for employers - consent](#)

[GDPR for employers - privacy notices](#)

And in Other News:

- **New Minimum Wage**
The minimum wage increased to €9.55 per hour from 1 January 2018 through S.I. No. 440 of 2017 (National Minimum Wage Order 2017). This is a 30 cent increase on the 2017 rate. The increase is on foot of the recommendations of the Low Pay Commission (a statutory body set up in 2015 to make recommendations on the rate of the minimum wage annually).
- **New Irish Residence Permit - GNIB card discontinued**
From 11 December 2017 the GNIB card has been phased out and replaced by the Irish Residence Permit (IRP). The IRP is not an identity card, it is a registration certificate. It does not give any new rights or entitlements. Non-EU/EEA and non-Swiss nationals who are aged 16+ who will stay in Ireland for over 90 days must register with the Irish immigration authorities to obtain an IRP.
- **Changes to the Stamp 1G permission**
The Irish Naturalisation and Immigration Service recently revised the conditions of the Third Level Graduate Programme (or “Stamp 1G” permission). Previously, the Programme allowed non-EEA graduates from a recognised Irish University to remain in Ireland to seek or undertake employment for a 12 month period without the need to obtain a separate employment permit. A key amendment to the Programme is that now Graduates with an award at Level 9 or above on the National Framework of Qualifications can apply for a 12 month extension to their initial 12 month permission.

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