

New Regulations on Transparent and Predictable Working Conditions

Linda Hynes and Sinead Likely of Lewis Silkin report on the key implications of new Regulations on Transparent and Predictable Working Conditions that employers in the retail sector need to know.

THE European Union (Transparent and Predictable Working Conditions) Regulations 2022 became law on December 16, 2022, without much attention, notwithstanding that they include some significant obligations for all employers which require their immediate attention.

The Regulations transpose EU Directive 2019/1152 on Transparent and Predictable Working Conditions in the European Union. While many of the Directive's provisions were already part of the Irish employment law framework, they create new employee rights and have a number of important implications for retail employers and employees around terms and conditions of employment. We have set out the key provisions/ changes in light of the Regulations of which employers in the retail sector should be aware.

Statement of terms and conditions/ information requirements

Some important changes have been made regarding the notification dates for information to be provided to employees and the nature of the information that is provided on those dates. While it was previously the case that employees received a written statement of five core terms of employment within five days of starting a job, and a statement of the remaining terms of employment within two months, the Regulations now provide for additional information to be furnished within five days and the remainder to be furnished within one month.

The 'Day Five' statement introduced by the Employment (Miscellaneous Provisions) Act 2018 previously required employers to set out:

1. The full names of the employer and employee;
2. The address of the employer;
3. The expected duration of the contract (if the contract is temporary or fixed-term);
4. The rate or method of calculating pay, and the 'pay reference period' (i.e. weekly, fortnightly or monthly);
5. What the employer reasonably expected the normal length of an employee's working day; and week to be (for example, eight hours a day, five days a week).

This 'Day Five' statement must now also include the following:

6. Where a probationary period applies, its duration and conditions;

7. The place of work or, where there is no fixed or main place of work, confirm that the employee is employed at various places or is free to determine his or her place of work;
8. The title, grade, nature or category of work that the employee is employed for, or a brief description of the work;
9. The date of commencement of the contract of employment;
10. Any terms and conditions relating to hours of work (including overtime).

Retailers should note that the last four items on this list were previously required to be provided to employees within two months of commencement of employment. They must now be set out in the 'Day 5' statement.

Separately, all other terms of employment required to be given to the employee under the Terms of Employment (Information) Act 1994 are now required to be provided to them within one month of commencement of employment.

This 'One Month' written statement must set out the following:

1. Pay intervals (for example, weekly or monthly);
2. Details of any paid leave, including annual leave and public holiday entitlements;
3. Details of any sick pay entitlements (bear in mind that three days' SSP is now payable to employees in Ireland even if there is no scheme operated by the employer);
4. Details of any pension and pension schemes;
5. The periods of notice to be given by employer or employee;
6. Details of any collective agreements that may affect terms of employment.

Additional terms must now also be included as follows:

7. The training entitlement, if any, provided by the employer;
8. In the case of a temporary agency worker, the identity of the end-user;
9. If the working pattern of the employee is completely (or mostly) unpredictable, an acknowledgement that the work schedule is variable, the number of guaranteed paid hours and

the remuneration for work performed in addition to those guaranteed hours. It should also state the hours and days where the employee may be required to work, and the minimum notice to be given to the employee before the start of a work assignment;

10. The identity of the social security institutions receiving the social insurance contributions attached to the contract of employment and any protection relating to social security provided by the employer.

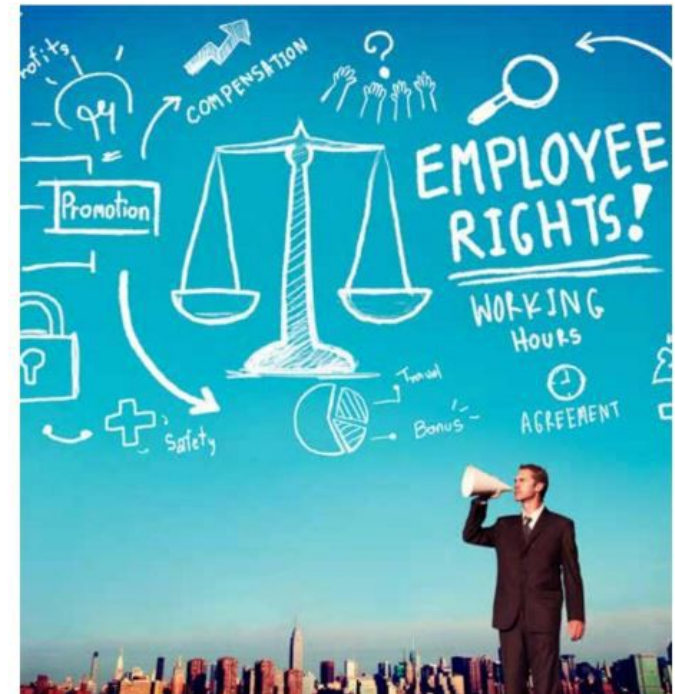
Retailers should also note that any change in terms of conditions must be notified to an employee in writing no later than the day on which the change takes effect, rather than the previous one-month time limit that applied.

Probationary periods

Some significant changes have been made with respect to probationary periods. The Regulations provide that probationary periods cannot exceed six months. They

can be longer on an exceptional basis, where it would be in the interest of the employee, but no longer than 12 months. While probationary periods longer than six months probably tend to be less common in the retail sector, retailers should nonetheless look at their existing contracts to ensure compliance with this change. With the new maximum statutory probation period of six months, retailers may also want to consider whether to apply a six-month probation period or a shorter period with the right to extend up to the six-month maximum. Retailers should also examine their current performance management processes to ensure they fit within the new probationary periods.

Another important implication of the Regulations for retailers to be aware of is that any employee who commenced employment prior to December 16, 2022, who is subject to probation of longer than six months, and the employee has completed at least six months of the probationary period, that probationary



The European Union (Transparent and Predictable Working Conditions) Regulations 2022 became law on December 16, 2022, and have some significant implications for retail employers and their staff.

Employment Law

“We recommend that employers in the retail sector carefully review their contracts of employment in light of the new provisions to ensure that they are amended to comply with the provisions of the Regulations.”

period expired on February 1, 2023, or the date on which the probationary period was due to expire (if earlier). Retailers should therefore try to identify any employees who might be caught by this provision so that any necessary actions, such as appraisals or reviews that might be anticipated to form part of the probationary process, are completed before the probation period automatically expires.

Where retailers use fixed term contracts, the length of any probationary period for fixed term employees must be proportionate to the expected duration of the contract and the nature of the work and cannot be included in any renewal of a fixed term contract (for the same function).

Exclusivity of service

Another significant implication of the Regulations that retailers should be aware of relates to exclusivity of service. An employer can no longer prevent an employee from working for another employer, outside their work schedule, or treat an employee adversely for working for another employer. A restriction on the right to work for another employer is only permitted where it's proportionate and based on objective grounds. This is referred to as an 'incompatibility restriction' and where it is imposed, details of the restriction, along with the objective grounds on which it's based, must be included in the contract of employment or the written statement provided to the employee.

The Regulations contain a non-exhaustive list of what is meant by 'objective grounds' which includes the following:

- a. Health and safety;
- b. The protection of business confidentiality;
- c. The integrity of the public service;
- d. The avoidance of conflicts of interests;
- e. Safeguarding productive and safe working conditions;
- f. The protection of national security;
- g. The protection of critical national infrastructure;
- h. The protection of energy security;
- i. The administration of vital public service functions;
- j. Compliance by the employer and the employee with any applicable statutory or regulatory obligations;
- k. Compliance by the employee with any professional standards for the time being in force.

While exclusivity of service provisions have been commonplace in contracts of employment, retailers will now need to consider their contracts of employment where such clauses are included. If exclusivity is required for specific roles, retailers should update those contracts to include the objective justification by reference to the Regulations.

Mandatory training

Where retailers are required by law or by a collective agreement to provide training to an employee so that they can carry out their role, such training must:

- Be provided to the employee free of cost;
- Count as working time;
- Where possible, take place during working hours.

Collective agreements

There is a carve-out in employments where there is a collective agreement already dealing with any of the matters covered by the Regulations (but only for the employees covered by that agreement).

Changes to the Organisation of Working Time Act 1997

Another important development for



retailers to be aware of affects employees in the sector who may have unpredictable hours. To further strengthen the minimum predictability of employees' working hours, the provision the Organisation of Working Time Act 1997 that requires employers to notify employees at least 24 hours in advance of their working hours, subject to unforeseen circumstances, has been amended. Now, any work assignment notified to an employee must take place within the reference hours and days notified to the employee as part of their written terms; otherwise, the employee is entitled to refuse the work assignment without adverse consequences.

Conclusion

Some of the provisions which are now legally operational may take some retailers by surprise, in particular regarding the operation of probationary periods since December 16 last and the rules around exclusivity of service. We recommend that employers in the retail sector carefully review their contracts of employment in light of the above provisions to ensure that they are amended to comply with the provisions of the Regulations, and that the expiry of any probation period on February 1, 2023, has been caught.

About the authors

FOR further information on this topic please contact Linda Hynes (Linda.Hynes@lewisilkin.com), or Sinead Likely (Sinead.Likely@lewisilkin.com), from Lewis Silkin. This article is for general guidance and does not constitute legal advice. Legal advice should be sought in any given set of circumstances.