What's New

The McCann FitzGerald **Employment, Pensions & Incentives Group** Update

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Welcome to the McCann FitzGerald Employment, Pensions & Incentives update. Below is an update on some of the latest developments.

Update to the Work Safely Protocol

The Work Safely Protocol was updated on 21 October 2021. The updated Work Safely Protocol has been accompanied by an updated guidance note from the LEEF Consultative Group, which provides that important and necessary public health guidance currently in effect will remain in place after the 22 October and that the Work Safely Protocol will continue to apply in full. However, "*a phased and staggered*" return to the workplace can continue for "*specific business requirements*". The updated guidance note from the LEEF Consultative Group provides that, "a *cautious and careful return to workplaces should take into account*:

1. *appropriate attendance levels, cognisant of public health guidance as reflected in the Work Safely Protocol and associated checklist(s);*
2. *the use of staggered arrangements, such as non-fulltime attendance and flexible working hours; and*
3. *that attendance is for specific business requirements*".

The guidance note also states that the "*interpretation of this guidance will depend on the specific circumstances of each workplace and should be informed by consultations with workers.*" .

Payment of Wages (Amendment) (Tips and Gratuities) Bill 2021

The Government has approved the heads of bill for a new law that will prohibit the use of tips and gratuities to 'make up' employees' contractual rates of pay. An Tánaiste and Minister for Enterprise Trade and Employment, Leo Varadkar, said that the Payment of Wages (Amendment) (Tips and

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Gratuities) Bill (the "**Bill**") will, "*for the first time, give workers legal protections over tips*". The aim of the Bill is to provide clarity on the meaning of tips, gratuities and service charges; place tips and gratuities, but not service charges, outside the scope of a person's contractual wages; oblige employers to display prominently their policy on the distribution of both cash and card tips; and oblige employers to distribute fairly, equitably and in a transparent manner, tips that are received in electronic form i.e. through debit or credit cards or smart phones. The Department of Enterprise has stated the new law will make it a requirement to distributed in "*a fair, transparent and equitable manner*", which will be "*context specific*" and is likely to take into account matters such as staff hours, busy and quiet periods, a worker's role in service delivery, customs and practice etc. The record generated by electronic payments "*will support and facilitate inspections by the Workplace Relations Commission in the event of a complaint being made.*"

WRC awards €25,000 to worker in age discrimination claim

In *Anthony Kenny v Bord na Mona Plc* (ADJ-00027832), the complainant was retired from Bord na Mona in April 2020, when he turned 65. He sought an extension of employment before his retirement date which was denied first in December 2019, and then on appeal in January 2020. Bord na Mona rejected the complainant's application for the following reasons: it was a condition of employment that all employees retire on their 65th birthday; pension scheme rules; established custom and practice; and an employees' entitlement to draw down a pension. When rejecting the complainant's appeal, Bord na Mona added that the decision was also made with "*due regard to health and safety requirements given the physically demanding nature of the general operative role and tasks associated with that role.*" The complainant submitted that Bord na Mona had not taken account of the Code of Practice on Longer Working. Following a joint industrial relations council meeting, Bord na Mona decided, on April 1, 2020, that any worker who had registered a grievance with the company relating solely to being retired at age 65 years was "*to be offered a fixed term contract for 12 months, subject to satisfactorily passing a medical examination in advance*". On that basis, the complainant was offered a one-year fixed-term contract subject to a medical examination. However, the complainant did not agree to the medical assessment as proposed due to concerns he had relating to his diabetic condition.

The Workplace Relations Commission ("**WRC**") did not address the one-year fixed term contract, noting that the company's position in relation to the JIRC was not finalised at the time the discrimination claim was referred to the WRC. Instead, the decision was confined to the alleged breaches of the Employment Equality Acts when the employer rejected the complainant's employment extension application. The WRC described the added justification as part of the appeal decision as "*striking*" and noted that this was the first time Bord na Mona had sought to use objective justification for the worker's retirement, and it had followed an appeal hearing at which the complainant's union representative referred to his "*excellent physical condition*". Bord na Mona had not raised the issue of physical condition or health and safety at that meeting. The WRC awarded the complainant €25,000 in compensation for breaches of the Employment Equality Acts.

Finance Bill 2021

The Finance Bill 2021 (the "**Finance Bill**") includes some technical and administrative pensions tax amendments, implementing a number of the recommendations of the Interdepartmental Pensions Reform and Taxation Group. The Finance Bill will provide for the full removal of the requirement to have an Approved Minimum Retirement Fund ("**AMRF**") in the case of individuals availing of the Approved Retirement Fund ("**ARF**") option. For death-in-service pensions, it will provide that the ARF option will be available as an alternative to the compulsory purchase of annuities. It will also provide for tax relief on employer pension contributions to occupational pension schemes set up for employees of another company in certain circumstances. Further, the Finance Bill will remove the prohibition on transfers from an occupational pension scheme to a Personal Retirement Savings Account for members with more than 15 years' service.

Pensions Authority publishes information on outsourcing notification

The Pensions Authority has published information for trustees regarding their outsourcing notification obligations provided for under the Pensions Act 1990. From 1 December 2021, trustees must notify the Authority when they enter an outsourcing arrangement for the provision of the internal audit and risk management key functions. Trustees who have entered these arrangements since 22 April 2021 must also notify the Authority. The Authority is currently updating the Pensions Data Register to facilitate the notification of the appointment of internal audit and risk management key function holders. This new facility will be available from 1 December 2021 with accompanying instructions.

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