

Health and safety – the future for employers

Anne Marie Kiernan,
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This June saw the publication of a new Bill to repeal the Safety, Health and Welfare at Work Act, 1989 and introduce a new legal code on health and safety. The Safety, Health and Welfare at Work Bill, 2004 ("the Bill") expands the legal obligations of both employers and employees in some areas and introduces novel concepts in others. This article focuses on those provisions of the Bill which will have the greatest impact on employers' health and safety regimes.

Safety statement and risk assessment

The Bill provides that employers are still obliged to carry out a risk assessment of work-place hazards and produce a written safety statement but also requires that each must be reviewed at least annually and brought to the attention of employees. Employees must be notified if the safety statement is amended or becomes invalid. In cases where a specific job poses serious risks, the employer must give the relevant extract of the safety statement to the employees affected. Employers must ensure that any contractors they retain have an up-to-date safety statement in place.

Given these proposed changes, employers will have to undertake reviews of their work systems and procedures on a constant basis in order to comply with the new legislation. A once-off safety statement or risk assessment will no longer be sufficient to comply with health and safety obligations.

Liability of directors and officers of undertakings

While the Bill does not introduce an offence of corporate killing (as recommended by the Law Reform Commission) it does provide that directors, managers or other similar officers of an undertaking will be found liable for an offence where it was authorised, consented to or attributable to the connivance or neglect of such a person. Ultimately, the courts will decide who is a 'similar officer', but any person within a company who is involved in health and safety should be aware of their potential liability in both criminal and civil proceedings, as they may find themselves being named as parties in personal injury actions.

In light of this increased exposure we would recommend that undertakings conduct a thorough review of their employer liability insurance policies to ascertain whether members of the company exposed to personal liability are

covered in respect of breaches of the legislation. Employment contracts between the company and its managers/similar officers should also be reviewed to ensure that the duties imposed upon them are reflected in their contracts.

Penalties

The Bill proposes that penalties for an offence be increased to a fine not exceeding €3,000 on summary conviction or imprisonment for 6 months or both. On conviction on indictment, a fine not exceeding €3,000,000 or imprisonment for a term not exceeding 2 years or both may be imposed.

An 'on the spot' fine not exceeding €1,000 may be imposed on an employer or employee where an inspector believes that an offence (to be set out in Regulations) has been committed. The Health and Safety Authority may also from time to time publish a list of names, addresses and business activities of persons on whom fines and penalties are imposed. From a commercial standpoint, it seems likely that this 'name and shame' provision may act as a stronger deterrent than the imposition of fines. The names of those upon whom prohibition notices are served and interim or interlocutory orders are made on foot of a breach may also be published. The list will include specific details of the matter involved and penalty imposed.

Employees' responsibilities

Many employers will welcome the expansion of employees' obligations to have regard for their own safety and that of others. Employees will be obliged not to engage in improper conduct or other behaviour and to attend health and safety training, correctly use any article or substance, protective clothing and equipment used at work.

Employees must not be under the influence of an intoxicant to the extent that they are likely to be a danger to themselves or others and they must submit to tests (to be set by Regulations) if reasonably required to do so by the employer.

Employees must immediately notify their employer if they become aware that they are suffering from a disease or physical or mental impairment which is likely to expose them or others to danger in the course of carrying out specific activities. These specific activities are not set out in the Bill but the provision will go some way towards assisting employers to prevent accidents and may even allow for more findings of contributory negligence on the part of

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NEWSLETTER

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Auctioneering industry

The Minister for Justice, Equality and Law Reform has set up a working group to review the regulatory framework for the auctioneering industry. The working group will look at the operation of the industry in comparable jurisdictions and will make recommendations for any changes necessary in terms of structure or legislation to ensure a proper auctioneering and letting service to the public in terms of house and property letting, purchase and sale.

Private security services

The Private Security Services Act, 2004 introduces a new regime for the regulation of individuals and companies who operate in the sector. While provisions of the Act have yet to come into force, it establishes a body to license and oversee private security providers and to adjudicate upon complaints made against them.

Civil Liability and Courts Act, 2004

The President signed the Civil Liability and Courts Bill into law on 21 July 2004. The Minister of Justice has yet to sign commencement orders to bring the Act into force. We will review the implications of this Act in the next issue of the newsletter.

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Commercial property investment: the impact of tenants' rights

Jim Gollogley, Partner,
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Investors in commercial property should exercise caution when acquiring rental properties which are subject to sitting tenants. Whether tenants have 'statutory rights' or 'rights to acquire a new tenancy' will have a significant impact on the value of the property.

The issue

Investment properties with tenants who do not represent a strong financial covenant or that have leases which are not particularly favourable to a landlord may impact negatively on the value of property. This problem can be exacerbated if the tenant can claim that he is entitled to a new lease upon the expiry of his existing one.

Landlord and tenant legislation sets out the conditions to be fulfilled by a tenant in order to claim a new lease, which include the following:

- That the tenant has occupied the premises for business purposes.
- That the tenant or its predecessors in title have been in continuous possession of the premises for at least five years before the expiration of the lease.
- That the premises in question forms "a tenement" (in essence, a building).

If the tenant satisfies these conditions the landlord will either have to negotiate a new lease or, if terms cannot be agreed between the parties, the matter can be referred to the courts. However, a court determination may not result in a lease which will necessarily add value to an investment property for the landlord.

Landlord's alternative

Investors who acquire properties with a sitting tenant cannot retrospectively amend the terms of the lease but they should ensure that they obtain proper advices on whether the tenant may have the right to claim a renewal of the lease. It is possible for a landlord to obtain flexibility when the lease with the tenant terminates, and the following options should be considered before finalising terms:

- **Short Lease:** a lease for a term of less than five years will not vest renewal rights in a tenant upon its expiry.
- **Deed of Renunciation:** a tenant may renounce any rights he has to a new lease provided he waives them before the grant of a lease. This only applies where the premises are to be used wholly and exclusively as an office. The renunciation must be by way of formal Deed.

- **Temporary convenience letting:** a lease which is expressed to be for a temporary convenience does not vest any statutory rights of renewal in a tenant. But, it is difficult to see how leases for a long term could genuinely be held to be for temporary convenience purposes.
- **Scheme of Development:** if a landlord is going to redevelop his property on foot of planning permission then that may defeat a tenant's claim for a new tenancy. In those circumstances, however, the tenant may have a claim for compensation.

Potential traps in negotiations

Property investors should beware of the potential hazards when negotiating a new lease with a tenant. The following are key areas of concern for landlords:

- **Break Options:** Many tenants now insist on break options to allow them, subject to certain conditions, terminate their tenancy before the term of years reserved by the lease expires. Legal opinion is divided as to whether such an option in favour of a landlord is enforceable, particularly if the option only becomes enforceable at least five years after the term has commenced. The current general view is that it would be unwise to rely on these types of clauses.
- **Licences:** The statutory right to renew a tenancy does not, by definition, vest in persons who have the use of premises on foot of a licence (which does not vest any property interest). But, a licence can be construed as a lease as the courts will look to the substance of the agreement rather than its form. Key indicators that the document creates a lease and not a licence include:
 - a. That the interest described is not personal to the occupant, ie the occupant of the property can assign the benefit of the agreement (whether by consent or otherwise).
 - b. The occupant enjoys exclusive possession of the premises.
 - c. The occupant exercise a high level of control over the premises.
- **Renewing Short Term Leases:** It is unwise to grant a further short term lease to an existing tenant which, when put with previous periods of occupation by the tenant, results in the tenant having been in occupation of the premises for



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employees in personal injury actions.

Complaints to the Rights Commissioner

A new provision in the Bill gives employees the right to seek redress through the Rights Commissioner in instances where they are penalised by their employer for carrying out their duty or asserting their rights under the legislation. The Rights Commissioner must make a recommendation and, in cases where they find in favour of the employee, will require the employer to take specific action or pay compensation to the employee. Essentially, this provision constitutes another right of action for aggrieved employees in addition to their options under existing employment legislation. Employers should be mindful of

the possibility of action being taken against them on foot of this measure when taking disciplinary action against employees.

Conclusion

The aim of this Bill is to encourage better consultation and improve measures to prevent accidents at work. While the Bill has yet to go through the Dáil, it does seem to propose a more equitable balance between the obligations and responsibilities of employers and those of employees than that which currently exists. Whether this will be reflected in judgments handed down by the courts when the Bill is enacted in its final form remains to be seen.

Data protection: FAQs

Killian O'Reilly, Partner,
Litigation Department

Provisions of the Data Protection Act, 2003 came into force on 1 July of last year. It is possible that you may have obligations under this legislation if you hold certain types of information relating to individuals in your organisation. The following frequently asked questions will illustrate your responsibilities under data protection legislation.

What is data protection about?

Individuals have certain rights of privacy in relation to the processing of their personal data. The Data Protection Acts, 1988 to 2003 give rights to individuals in respect of personal data and place responsibility on persons who process that data.

What type of information is covered?

The legislation covers information such as an individual's name, address, telephone number, e-mail

address, mobile telephone number, PPS number, employment, health and financial records, credit history and family details.

The Act refers to 'data', 'data controllers' and other definitions. What exactly do they mean?

- "Data" means automated data and manual data.
- "Personal Data" means data relating to a living individual who is or who can be identified either from the data or the data in conjunction with other information that is or is likely to come into the possession of a Data Controller.
- "Data Controller" is a person who alone or with others controls the contents and use of personal data.
- "Data Processing" is the performance of any operation or set of operations on personal data including obtaining, recording or keeping the data together with

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OFFICE NEWS

Ailbhe Kirrane has successfully completed the Irish Taxation Institute examinations. She is now an Associate of the Institute. Killian O'Reilly was recently awarded a Diploma in Employment Law from University College, Dublin. Congratulations to Ailbhe and Killian on their achievements!

Data protection: FAQs (Cont'd)

collecting, organising, storing, altering or adopting the data or retrieving consulting or using it. It also covers disclosing the data or destroying it.

In July of this year the Data Protection Commissioner published guidelines to assist organisations in identifying what is meant by 'personal data' and what constitutes a 'relevant filing system' in the context of manual data. It is important that organisations regularly update themselves with the guidance issued by the Commissioner on its website.

Now that I have identified myself as a data controller what are my obligations under the Act?

There are eight rules with which every Data Controller and Data Processor needs to comply:

- To obtain and process data fairly and lawfully.
- To keep accurate and complete data.
- To keep data for specified, explicit and legitimate purposes only.
- Not to process data for incompatible purposes.
- To ensure data is adequate, relevant and non-excessive.
- To retain data for no longer than is necessary.
- To keep data safe and secure.
- To comply with access requests from individuals on whom data is stored.

What rights does an individual have in relation to this data?

The basic thrust of an individual's rights under Irish data protection law can be summarised as follows:

- To expect fair treatment from organisations in the way they obtain, keep, use and share information.
- To demand to see a copy of all information kept by an organisation.
- To stop an organisation from using individual's details for directing marketing.
- To demand that inaccurate information be corrected.

- To demand that any information be deleted if the organisation has no valid reason to hold it.
- To complain to the Data Protection Commissioner.
- To sue an organisation if they suffered damage through the mishandling of information contrary to the Data Protection Acts.

I have read newspaper reports of organisations who have been prosecuted for non-registration. Why do I need to register?

Data Controllers and Processors are required to register with the Office of the Data Protection Commission. This is, in itself, seen as a very effective measure in raising and maintaining awareness among Data Controllers. Registration must be renewed annually and is regarded as a good way for data controllers to focus on and observe their obligations under data protection law.

The current registration system is one of self-assessment. It is important to note that the Data Protection Commissioner is empowered to initiate legal proceedings in the Civil Courts for non compliance with registration requirements. Two legal firms have already been successful prosecuted in this regard.

It is also worth noting that the registration of Data Controllers and Data Processors may now be completed online.

Who deals with complaints under the legislation?

The Office of the Data Protection Commissioner has a statutory function to ensure compliance with the Data Protection Acts, 1988 and 2003. One of the key objectives of this office is to "seek to make a difference in generating cultural change in organisations regarding respect for data protection and privacy and in generating awareness amongst the public about their rights". The Data Protection Commissioner can be contacted at www.dataprivacy.ie or by post at Block 6, Irish Life Centre, Lower

Abbey Street, Dublin 1.

What happens if I don't comply with the legislation?

The Data Protection Commissioner may launch an investigation into a possible contravention of the acts where an individual complaint is made to it or where he is "of the opinion that there may have been a contravention".

When a complaint is received the Commissioner is required to investigate and, if possible, to obtain an amicable resolution. Failing such a resolution he is required to issue a decision. Whilst he does not have the power to impose fines in respect of contraventions, a formal decision may be issued which is subject to a right of appeal by either party to the Civil Courts. It is important to note that individuals who have been the subject of contraventions may make a claim for damages in the courts under Section 7 of the Acts.

The Data Protection Commissioner is also empowered to conduct investigations where he considers it appropriate in order to ensure compliance. A complaint is not required to initiate such an investigation and the law is proactive rather than reactive. In the last year two such "privacy audits" were carried out; one in Beaumont Hospital and the other in Eircom. It is likely that these audits will increase in number and profile.

Conclusion

A huge number of companies and organisations hold personal data on individuals to some extent. Data protection compliance should be an inherent element of corporate governance which requires a cultural shift in the way in which we treat information about individuals. The pro-active nature of the legislation will ensure that further privacy audits will take place as will prosecutions for non registration and action on individual complaints.

Please do not hesitate to contact Killian O'Reilly if you require any further information.

Commercial property investment: the impact of tenants' rights (Cont'd)

over five years when the new lease expires. In those circumstances the only basis for renewing the lease (if the landlord wishes to avoid conceding rights of renewal to his tenant) is for the tenant to first undergo a complete and total break in occupation of the

property for more than a temporary period. Short periods designed simply to circumvent landlord and tenant legislation are not effective in this case.

Conclusion

Landlords should tread carefully when dealing with their tenant's rights to potential claims for a new tenancy as a poorly considered approach may have adverse effects on the long-term investment value of commercial property.