



# WESTBORO PARTNERS

Business & Financial Advisers

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# EMPLOYERS HAVE RIGHTS TOO



**The rights** of Employees in Ireland are firmly enshrined in law. Currently there are over 30 pieces of legislation and 10 Codes of Practice dealing with employment law, and the list of new or enhanced employment rights is growing continuously. To have a fair and just society, it is right and proper that, vulnerable people are protected in the workplace. However, it appears that in this mass of employment legislation/codes of practice, and in our enthusiasm to protect the most vulnerable employees, we have lost sight of the fact that **employers have rights too.**

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What is less well known is that each piece of legislation enacted or proposed, carries with it obligations and responsibilities on the part of the employee as well as on the part of the employer. This has resulted in a significant focus in recent years, on the rights of employees and the obligations of employers without any balancing focus on the rights of employers and the obligations of employees.

A simple search on the internet will deliver volumes on employee's rights. Even pages, that, on first reading, appear to be about employer's rights, focus on employers obligations – not their rights.

So exactly what rights do employers have and how can they go about enforcing those rights? Firstly it is important to note, that the vast majority of employers are good employers and are doing the best they can for their employees in an increasingly difficult economic environment. However, there are a minority of employers who behave recklessly and as a result there is a need for both employment legislation or enforcement bodies such as NERA (National Employment Rights Authority) or the EAT (Employment Appeals Tribunal). The second point to note is that good employers do not always have their systems in place, with the necessary documentation/paperwork such as contracts of employment and written and communicated policies and procedures. By not having the necessary documentation, employers are unnecessarily risking potentially very expensive fines and prosecutions despite the fact that they are treating their employees fairly and within the terms of the various pieces of legislation.

There are two elements to employer's rights in the employment relationship. The first is in relation to notification, documentation and time frames that employees are required to adhere to under the various pieces of employment legislation. Each piece of legislation carries with it details of employee obligations as well as their rights. However, the employee obligations are frequently ignored or overlooked. The second element relates to employees obligations in relation to their performance and behaviour at work and includes such issues as attendance, time-keeping, the ability of an employee to competently perform the job that they are employed to do, and employee behaviour.



There are many competent, high performing employees who produce excellent results but who, because of their behaviour, have a negative impact on the morale, motivation and performance of others. Some employees believe that if they produce the results, then the normal workplace rules such as punctuality, good attendance, and professional and respectful behaviour toward colleagues, subordinates and supervisors, do not apply to them. This is certainly not the case and employers have the right to tackle poor behaviour and to apply reasonable sanctions on employees who continue to behave poorly despite being given the opportunity to improve. Employers under Health & Safety legislation, also have a duty of care to other employees who may be negatively affected by the poor behaviour of others.

In order to enforce their rights, there are a few key actions that employers need to take:

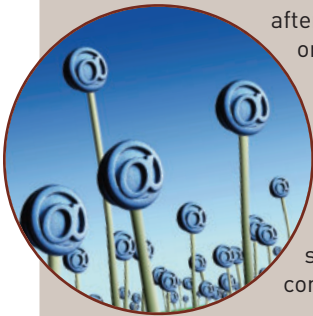
Employers must have the required documentation in order. That means it must be up to date, communicated to employees and available for inspection. It must also be acted upon. Having a disciplinary procedure document but not acting on it almost places the employer in a worse situation than if he/she had no procedure. Key pieces of documentation include (but are not limited to) contracts of employment, grievance and disciplinary policies and procedures, bullying and harassment prevention policies and procedures, equal opportunities policy, etc. Secondly employers and their representatives (managers, supervisors, etc.) must be familiar with their obligations under employment law. Not knowing is not a defence. This may mean attending training on people management activities, or simply familiarising oneself with the requirements of legislation. Finally, employers must act in a reasonable, fair and consistent manner toward all employees. This does not mean treating everyone the same. Each case must be dealt with on its own merits however employers must be consistently reasonable and fair.

If these three elements are in place, an employer is in a much stronger position to enforce their own rights both in the workplace and before any statutory third party.



## MANDATORY ELECTRONIC FILING

Revenue has announced that they are currently implementing Phase 3B of the Mandatory Electronic Filing and Payment Regulations 2011. The new filing arrangements will apply to Employers with more than 10 employees who were not previously notified by Revenue to pay and file returns electronically. Notified individuals or businesses must submit all returns/payments due on or after 1 October 2011 using the Revenue on-line system (ROS).



Revenue will now commence a process of writing to individuals or businesses concerned advising them of the obligations that will apply from 1 October 2011 and of the steps that need to be taken to ensure compliance from that date.

## REVENUE RECEIPTS

Revenue has advised that from 1 July 2011, paper receipts for tax payments will no longer issue. ROS customers will receive Statement of Account in their ROS inbox which will confirm receipt of tax payment. Taxpayers, who are not ROS customers will be at somewhat of a disadvantage as Revenue have confirmed that they will not issue paper receipts to them.



## PAY AND FILE SUMMARY

The following is a summary of upcoming pay and file dates:

### Income Tax

Filing date of 2010 return of income	
- (Self-assessed individuals)	31 October 2011
- (ROS-On-line Filing)	15 November 2011

Pay preliminary income tax for 2011	
- (Self-assessed individuals)	31 October 2011

### Capital Gains Tax

Payment of Capital Gains Tax for disposal of assets made from 1 January 2011 to 30 November 2011	15 December 2011
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### Corporation Tax

Filing date for Corporation Tax returns for accounting periods ending in February 2011	21 November 2011
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Balancing payment of Corporation Tax for accounting periods ending in February 2011	21 November 2011
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## LOCUMS IN LIMBO

Revenue guidance has left the taxation of locums in such professions as GP's, Pharmacists, Dentists and Vets confused as to what their taxable status is. The central issue is whether Revenue view locums as being employed or self-employed. Revenue has stated that they will determine each locum's taxable status on a case by case basis. However should a locum be deemed to be employed, an assessment could be raised on the employer for unpaid taxes such as Employers PRSI.



Revenue has stated that a contract stating that the locum is self-employed will not necessarily exempt the locum from being deemed an employee. Revenue will look behind the contract to see if the actual work practices determine the locum to be self-employed. They will look at such issues as whether the locum holds their own licence and professional insurance and whether or not they are entitled to holiday pay.

Revenue appealed to Practitioners to regularise their affairs without the imposition of penalties when submitting the P35 for the year ended 31 December 2010 in February 2011. Practitioners, who have not done so, should seek professional advice immediately to avoid interest and penalties in the future.

## STATEMENT OF PENSION PAYMENTS

The Department of Social Protection has recently announced that statements of Pension Payments can now be requested using an on-line facility available on [www.welfare.ie](http://www.welfare.ie).

State Pension Transition (SPT), State Pension Contributory (SPC), Widow(er)'s and Surviving Civil Partner's Contributory Pension (WSCPCP) statements can all be requested using this facility.



# PENSION PLANNING

## still a good idea?

**Pensions** have been getting a fairly hard time recently due to a combination of the temporary levy imposed by the Government on pension funds and recent investment market volatility. However, paper never refuses ink and being objective about the “headlines” we are still faced with the prospect of having to stop working at some stage in the future.

So what is likely to happen in this scenario. The possible sources of income in retirement will include:-

- State Pension
- Company Pension (if you are lucky enough to be in one)
- Personal Pension Plan
- Other savings\investments



## State Pension

The State Pension at the moment is approximately €12,000 for a single person and €22,700 for a married couple. The good news is that the State Pension represents a reasonable base income on retirement. However, increases have not been made in the last couple of years and are unlikely to happen at any significant level for some years to come.

The bigger picture here is that the State Pension which is currently payable from 65 will be pushed out to 66 from 2014, 67 from 2021 and 68 from 2028.

The message for all of us is that the amount of State Pension and the date from which it becomes payable cannot be relied on.

## Company Pension Plans

About 50% the workforce are lucky enough to be in an employer sponsored pension plan which is typically made up of a scheme based on contributions paid by both the company and employee. However, being in a pension plan in isolation is not enough. Based on standard 10% (5% Employer/5% Member) of salary, such contributions are inadequate in many cases. Unless you have joined your pension plan in your early 20's it is unlikely that the company pension plan will provide you with a reasonable level of income in retirement.

## Personal Pensions

If you are self employed or work for a company that does not operate a pension plan then you are entirely on your own (apart from the State Pension). In the absence of a company contribution there is a greater need for you to plan early and to save on a regular basis for your retirement. With very attractive tax breaks the contribution to any such arrangement is more than prudent. Depending on your age, it is possible for you as an individual to pay between 15% - 40% (to a max. salary of €115,000) and to obtain tax relief at either 20% or 41% on any contributions that you make to an approved pension plan.

## Personal Savings Investments

A pension plan is not the only way you can save for the future although as outlined above because of the tax advantages attached it remains one of the most attractive.

In conclusion, we would say that the most important thing is to consider the future and to put money aside so that you can have a reasonable standard of living in retirement. An approved pension plan is not the only way to save to retirement but when you check into the tax advantages that are available it really beats all other options!

## €15 MILLION INVESTMENT IN SCIENCE

The Government recently announced funding of €15 million to be provided over the next four years for 79 research projects as part of Science Foundation Ireland's 2011 Research Frontiers Programme.

Achieving International recognition for our continued improvement in innovation is a long-term and constant challenge. Ireland's continued improvement in the world innovation rankings, up from 19th in 2010 to 13th in the 2011 Global Index, is fundamental to building a sound economy for the 21st century which will lead to the creation of new and better jobs.



## SMES URGED TO USE R&D TAX CREDIT SCHEME

Research and Development (R & D) tax credits may be more relevant to SMEs than they realise and such credits are under claimed.

Introduced in 2004, the R&D Tax Credit refunds companies up to 25% of their eligible R&D expenditure, both revenue and capital, either in the form of a tax credit or in cash, subject to certain conditions being met. The 25% credit is available on top of the 12.5% corporation tax deduction levied at the standard rate.

The Finance (No.2) Act 2011 heralded positive news for more Irish companies wishing to avail of Revenue's refund mechanism. Listed among the most significant changes will be an increase in the maximum amount of cash refunds available to companies who cannot fully utilise the R&D tax credit against their corporation tax. Effectively, the change means that not alone will the maximum amount of the cash refund payable increase, but it will now include payroll costs related to the previous years accounts as well as the current financial year.

Disappointingly, the Finance (No.2) Act 2011 also stopped short of introducing measures that specifically target SMEs, which were proposed in the Programme for Government. Cash flow is a big issue for SMEs and the acceleration of the refund period from three to five years would have been a welcome boost. The move to a volume based approach for SMEs would also have been very welcome.

## JOB EXPANSION FUND

Companies implementing a development plan with significant growth potential that will increase employment may be eligible for support through Enterprise Ireland's Job Expansion Fund. The fund was launched recently with support to be allocated on a competitive basis following monthly calls for proposals.

The Job Expansion Fund is open to existing SMEs that are in manufacturing and/or high growth potential traded services, including software, have 10 or more full-time employees at the time of application and have been trading for at least two years. The company must be looking to recruit a minimum of three new employees per application, the new jobs must not result in the displacement of existing jobs and there must be a minimum increase in turnover of €350,000 over the next two years.

For successful companies, the support rate will vary up to a maximum of €15,000 per job and a company can obtain a maximum grant support of €150,000.

[www.enterprise-ireland.com/jobexpansionfund](http://www.enterprise-ireland.com/jobexpansionfund).

## IRISH POPULATION UP

The Irish population now stands at 4.6 million – up 8.1 since 2006. The first results of the census, released recently show that Ireland's population is growing strongly, primarily due to a high number of births. The highest percentage increase was in Laois (20.0%), more than twice the rate of the State as a whole. Other counties showing strong population growth were Cavan (13.9%), Longford (13.3%), Meath (13.0%) and Kildare (12.7%)




## JOBBRIDGE

### National Internship Programme

JobBridge, a national internship Programme, was launched recently, offering up to 5,000 individuals who are on the Live Register for at least three months the opportunity to undertake a quality internship in an organisation in the private, public or community or voluntary sectors for a six or nine month period.

Interns will receive an allowance of €50 per week in addition to their existing social welfare entitlements for the duration of the internship, so there will be no direct cost to participating organisations.



# NEW RCT SYSTEM

A new system for the operation of Relevant Contracts Tax (RCT) is expected to be introduced on 1 January 2012. The ultimate date for the introduction of the new system will be subject to a commencement order by the Minister for Finance. However Revenue are well advanced on the plans for the new system and accordingly will be writing to all applicable businesses or companies in the coming weeks with an outline of the proposals.

From 1 January 2012, the operation of the RCT on the Revenue On-line System (ROS) will be mandatory. Revenue anticipate that Principal Contractors will be able to register contracts on-line from 28 November 2011. The new system will apply to all principal contractors in the construction, forestry and meat processing sectors. The system is expected to operate as follows:

- There will be three rates of RCT, 0%, 20% and 35%. Subcontractors who satisfy the current criteria for a C2 card will qualify for the 0% rate. The 35% rate will apply to subcontractors who are not registered with Revenue or where there are serious compliance issues to be rectified. All other subcontractors will be eligible for the standard 20% rate.
- Principal contractors will register any contract entered into with a subcontractor on-line, which will include giving Revenue the details of the subcontractor and the contract on-line. This will negate the need to submit a form RCT1 to Revenue.

- Immediately before making a payment under the contract, the principal must notify Revenue (by electronic means) of his or her intention to make the payment. The principal must provide a copy of the authorisation to the subcontractor.
- Revenue will issue a deduction authorisation to the principal. This authorisation will set out the applicable RCT rate and the amount of tax to be deducted. The principal will be obliged to provide a copy of the authorisation to the subcontractor.
- Revenue will automatically credit RCT deducted to the subcontractors tax record, which will be available for offset as it arises or repayment annually.

Revenue will have an on-line record of all payments made by principal contractors, to that end they will issue a deduction summary of the payments to the principal on a monthly or quarterly basis depending on the filing frequency. If the summary is correct, the principal needs only to arrange payment of same on or before the due date of the return. The return will be deemed to have been made on that date. If the summary is incorrect, the principal can amend same on-line.

Revenue has indicated that one of the benefits of the new RCT system will be the reduction of the administration burden.

Should the New RCT System be introduced on 1 January 2012, contractors would need to ensure that the relevant details are sent to Revenue immediately to ensure that payments to subcontractors are not delayed.

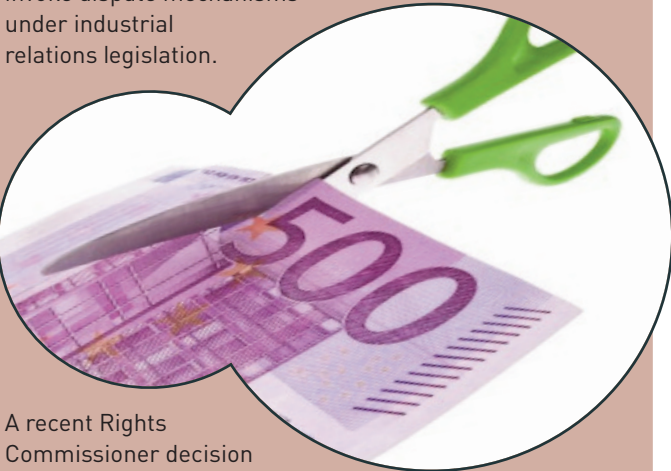
## EARLY WARNING

Those involved in advising on or implementing Irish tax-related transactions will need to consider whether they have reporting obligations to the Irish Revenue Commissioners (Revenue) under the mandatory disclosure regime that came into effect in Ireland in January 2011. The new rules will impact on 'promoters' (such as legal and accountancy firms and financial institutions) and in some cases 'users' of planning that involves an Irish tax advantage, whether those persons are based in Ireland or elsewhere.

## EMPLOYERS BEWARE - PAY CUTS AND JLCS

Employers may now feel that they are entitled to cut employees' salaries in light of the recent High Court judgment in which Joint Labour Committees were declared unconstitutional.

However, an employer cannot unilaterally change an employee's material terms and conditions without the employee's consent. In the present economic climate many employees may consent to pay cuts where the alternative is redundancy. If consent is not forthcoming, employees affected by unilaterally imposed pay cuts could pursue a breach of contract claim in the civil courts or invoke dispute mechanisms under industrial relations legislation.



A recent Rights Commissioner decision supports employers' efforts to reduce costs in times of economic crisis. In this case it was acknowledged that there had been a breach of the Act but no compensation was awarded, as the Rights Commissioner did not believe that an award of compensation was reasonable, due to the financial circumstances of the employer. This decision has been appealed to the Employment Appeals Tribunal.

As can be seen from above, the law in this area is now unclear. However, what is clear is that unilaterally amending the terms and conditions of an employee's contract of employment is never without risk. It can leave employers open to claims via one of the above mechanisms available to employees. Advice should always be sought prior to implementing any unilateral changes to an employee's terms or conditions of employment.

## HIRE PURCHASE RULING MAY HELP STRUGGLING FAMILIES

A MOTHER and daughter have won a High Court case against a finance company which could help thousands of people trying to terminate hire purchase agreements and hand back goods bought on credit.

Michelle and Noreen Gabriel, from Togher, in Cork, took the case against GE Money and also the Financial Services Ombudsman, who ruled in favour of GE Money when the pair brought their difficulties to his attention.

Mr Justice Michael Hanna said there was "significant error" in the ombudsman's decision and said a section of the Consumer Credit Act 1995 relied on by both the company and the ombudsman was being interpreted more restrictively than was intended by the legislature.

The Gabriels bought a Renault Clio on a four-year hire purchase plan from GE Money in 2008. In 2009, they tried to end the agreement. GE Money refused to take the car back until half the full four-year value of the hire purchase was paid.

Mr Justice Hanna ruled while the act did state at least half the value must be paid if an agreement was terminated, the company could not refuse to take back the car in advance of that sum being paid.

## REPOSSESSION CLAIMS INVALIDATED

A High Court ruling of 25 July 2011 has left many lenders without the right to apply for an order for repossession.

The court held that a lender cannot apply for an order for repossession where a mortgage was created before 1 December 2009 but a demand for repayment was not made until after that date. The Land and Conveyancing Law Reform Act 2009 came into force on 1 December 2009. The court found that where a mortgage was created before 1 December 2009, the lender may only apply for an order for repossession if it had made a demand for repayment before 1 December 2009. Ms Justice Dunne noted that this anomaly arose as an unintended consequence of the 2009 Act and its repeal of earlier statutory provisions. However, while she acknowledged the existence of a "lacuna" in the law, she determined that it was not the function of the courts to step in to fill this gap. The court was ruling on four test cases brought by a number of lenders against borrowers represented by 'New Beginning', a group of lawyers which defends mortgage holders who are in default. The case could however have implications for other lenders seeking to enforce mortgages created before 1 December 2009 where a demand for repayment was not made until 1 December 2009 or later.

It is expected that the decision will be appealed but in the meantime, the government is expected to act to fill the gap in the law by enacting further legislation.

# Who Do You Want To Get What?

The reason for making a Will is that the Testator can clearly express his wishes. He can then be satisfied, having carefully chosen his Executor(s) that those wishes will be carried out. The reason that a Will has to be written is that the Will is the primary evidence in the event of a dispute amongst the beneficiaries or in the case of ambiguity.



## Interpretation

The general rule when it comes to interpretation of a Will, is that words and phrases are to be given their ordinary grammatical meaning unless there is something in the context which indicates otherwise.

When a Testator uses technical terms in his Will, he is presumed to have intended them to be given their usual technical meaning and this is a question which would have to be determined by expert evidence if it became an issue. When a Testator uses technical legal terms in his Will he is presumed to have used them with their legal significance unless the context clearly indicates otherwise.

## Gifts/Legacies

The Beneficiary of a gift under a Will cannot be forced to accept it and he may if he so wishes disclaim by refusing to accept it. A Beneficiary may disclaim in writing or he may simply advise the Executor that he does not wish to accept the gift. A Beneficiary cannot however disclaim after he has derived some benefit from the gift. If a Beneficiary receives a gift which consists of more than one asset, he cannot pick and choose and disclaim some of the assets and take others. A Disclaimer in these circumstances means that he disclaims all gifts.

Because a Will speaks from death, the death of a Beneficiary prior to the death of a Testator in circumstances where the Testator has not changed the terms of his Will means that that particular gift has to lapse. It is of course possible for a Testator to provide for the circumstances of a Beneficiary predeceasing him and putting alternative provisions in his Will to cater for such circumstances.

There may also be circumstances where the Testator has disposed of the gift which he intended to leave to one of his Beneficiaries, i.e. he may have sold a painting or a valuable collection of stamps which he had gifted in his Will - the gift is said to be 'adeemed' should this situation arise. In other words, the subject of the gift does not exist at the date of death of the Testator and an Executor has no discretion to give the Beneficiary a gift in lieu unless this is expressly provided for in the Will.

## Clarity

It is vital that Beneficiaries are properly identified in a Will. It is not uncommon, particularly in Ireland, to find a number of generations having the same name - John Murphy may have a son called John Murphy, who in turn might have a son called the same name. It is quite possible that a Testator would have two nephews or nieces having the same name. It is therefore vital that the precise relationship between a Testator and the Beneficiary is identified by including the address of the

Beneficiary. Similarly any ambiguity should be avoided in identifying the gift which the Testator wishes to give. A Testator needs to be advised that a gift can be either of a general nature or specific nature. A general gift is a gift from an unspecified part of the Testator's general Estate i.e. €1,000 to my neighbour Tom Duffy. There is no particular account earmarked for this legacy and if the Estate has insufficient funds to pay it in full, the Beneficiary may receive some of the gift on a pro rata basis or he may not receive any of it. Similarly, a Testator may leave a gift of a "painting" without specifying a particular painting. This makes the administration of the Testator's estate extremely difficult for the Executor.

A specific legacy on the other hand, means just that - a specific item or a specific amount of money from a specified Bank Account. The Testator may leave his Shares in XYZ Company to a Beneficiary, in which case the Executor's job is made much easier in that there can be no discussion or ambiguity. Similarly, if a Testator wishes to gift a painting, then rather than gift "one of my Yeats paintings" he ought to gift the painting by referring to its title. It may be the case, of course, with regard to a specific legacy that the Testator has already disposed of it or has used the funds from a particular Bank Account prior to his death in which case the Executor has no discretion to give the Beneficiary a substitute gift.

People very often give gifts to a Charity of their choice. It is very important that the correct name and address of the Charitable Institution is given. In cases where Charities have many branches in different locations the Testator may intend the local Branch to benefit and it is therefore necessary that the details of the local Branch be written into the Will.

## Conditions attached to a gift

A Testator may attach Conditions to a particular gift, i.e. a Testator may for example leave a gift of €5,000 to his grandchild when he reaches his 21st Birthday. This condition is easily satisfied and such a condition can be clearly interpreted. Of more difficulty, however, is a situation where the Testator leaves his house to his sister for her life and thereafter to his nephew on condition that the nephew has lived with the Testator's sister until her death. The nephew may have done his utmost to live with the Testator's sister but she may have refused to allow him to live with her and therefore the nephew could not comply with the condition of the Testator. These circumstances could lead to a situation where the nephew was unable to take the gift which the Testator clearly intended for him despite his own best efforts. The Executor's function becomes extremely difficult should a situation like this arise and he may have to look to the Court for directions.

People are often tempted to buy a template Will in the local bookshop and they are relieved when they have completed the template and have put it in a safe place that they have sorted out their affairs. It is not advisable that one would draft a Will without taking legal advice. If indeed one has drafted a Will using a template, it is advisable that he or she would then show it to a Solicitor and discuss the terms of the Will to ensure that the Will achieves what the Testator wants it to achieve and also that it has been properly signed and witnessed. Will drafting is technical and requires considerable expertise.

