

Information note on the General Scheme of an Employment Permits (Consolidation and Amendment) Bill

1. Introduction

The Review of Economic Migration Policy (2018) concluded that, while the employment permits system provides a robust framework to supplement skills and labour needs in the State, the current legislation imposes considerable inflexibility in its operation.

In order to increase the agility and responsiveness of the system, to modernise it and to ensure that it is capable of adapting to rapid changes in the needs of the labour market of the future and to fluctuation in demand contingent on the economic cycle, the Review recommended that new legislation be initiated.

In this regard the Review recommended that the system's agility be increased to be able to more quickly respond to both growth and contraction in labour demand, and to align the criteria for employment permits to the changing needs of the economy by restructuring the legislation to ensure that the system's operational details and processes are prescribed in Regulations, as opposed to primary legislation.

The policy underlying the economic migration system is one where the system should synchronise to the greatest extent possible with the skills and labour needs in the economy, while prioritising the Irish and EEA labour pool. The proposed changes are intended to improve the system's flexibility without changing this core goal.

2. The current system

The employment permits regime is designed to facilitate the entry of appropriately skilled non-EEA migrants to fill skills shortages. However, this objective must be balanced by the need to ensure that there are no suitably qualified Irish/EEA nationals available to undertake the work and that the shortage is a genuine one. The system is managed using Critical Skills and Ineligible Occupations Lists, which respectively prioritise specified in-demand skills and identify occupations for which a labour supply should be available in the EEA. These lists are reviewed twice a year, to assess skills availability as set out in section 15 of the 2006 Act, as amended.

An occupation may be considered for inclusion on the Critical skills list or removal from the ineligible list provided that:

- shortages exist across the occupations, despite attempts by industry to train and there are no suitable Irish/EEA nationals available to undertake the work;
- development opportunities for Irish/EEA nationals are not undermined;
- the labour or skills shortages are not due to recruitment or retention problems (e.g. pay or other terms and conditions);

- the Government education, training, employment and economic development policies are supported;

The changes proposed in the General Scheme do not remove the obligation on the Minister, set out in Section 15 of the 2006 Act as amended, to assess the skills needs of the economy. In this context, the twice-yearly review process will be retained as it is, with the broad range of inputs and supporting research and under the guidance of the Inter-Departmental Group on Economic Migration Policy.

3. General Scheme of an Employment Permits (Consolidation and Amendment) Bill

3.1 What are the main changes to the existing legislation?

Key changes proposed in the proposed new legislation;

- A Seasonal Employment Permit to be introduced – Ireland is an outlier in not having this form of permission, so it is proposed to design a short-term employment permit with criteria to cater for short-stay and recurrent employment situations in sectors where this type of employment occurs (Head 4)
- Changes to the labour market needs test (advertising job vacancies in Ireland and EEA in the first instance) to move operational features of the process into Regulations and to more accurately reflect modern advertising practices. It is proposed that the current prescription in primary legislation for advertising in specified media e.g. national newspapers will be removed, and the advertising process will be set out in Regulations. (Head 15)
- The introduction of a special circumstances employment permit to address a need that may arise from time to time for grant of an employment permit in circumstances which do not conform to the standard criteria for an employment permit, but where such grant would nevertheless prove beneficial for social or economic development in the State. Examples include bilateral reciprocal agreements with other States or for occupations with an unusual unique skill set for which no formal training is available in Ireland. (Head 4)
- A change to allow the 50:50 rule (which requires that 50% of an employer's staff be EEA nationals before an employment permit may be granted) to be waived in all cases where the permit holder would be the sole employee. This would be subject to the employer demonstrating that they have made efforts to recruit from within Ireland and across the EEA in the first instance. The redrafting will impose the 50:50 requirement from the point at which a second employee is contracted. (Head 14)
- Improve the agility of the system by removing system operational details to Regulation for easier modification as circumstances require.
- UK nationals, by virtue of the Aliens Act 1935, will not be employment permit required following Brexit, but as a third country there may be some unintended negative consequences on the operation of the employment permit system. The legislation will make the necessary amendments to address any issues that may arise (Head 3, Head 14, Head 15 Head 37)

- Make adjustments to allow for persons undertaking duties in the State on the basis of international free trade agreements to which the State, as a Member State of the EU, is party (Head 4). These personnel are intra-company transfers or contract for services employees of foreign companies providing services in line with trade agreements, and this change will simplify the administration of their entry to the State.
- Allow for the refund of fees where the employment permit cannot be taken up in prescribed circumstances such as the Immigration permission not being granted, which would mean that the employee cannot take up the employment offer.
- The definition of remuneration and requirements around it are to be examined and simplified as its current level of complexity has created difficulty for users of the employment permits system. Specifically, the current wording can make it difficult for companies with outsourced or shared payroll services, for example, to meet the provisions set out for the payment of the salary to the permit holder.
- Allow for conditionality to be prescribed in Regulations such as employer commitments to the provision of training, knowledge transfer, process innovation or specified supports such as accommodation, health insurance, etc. (Head 11, Head 39)
- Allow for the revocation of an employment permit where the permit holder doesn't take up the employment within a prescribed period (Head 22)
- Allow for additional refusal reasons such as where an alternative non-transferable permission has been granted by another Minister of the Government, for example the Working Holiday Authorisation; where the Minister is not satisfied that an application for the proposed new Special Circumstances Employment Permit would be of economic or social benefit; where the application is for a second employment where the foreign national is already employed in the State; where the foreign national is required to be registered with a Minister for Government or regulatory body to undertake the employment and has not done so; and where a review of a decision incidentally reveals a further failure to meet the criteria for grant (Head 17)
- Repeal and replacement of earlier employment permits legislation (Head 51)

4. Additional information regarding the proposed legislative changes

4.1 Seasonal Employment Permit

The Review of Economic Migration Policy (2018) found that there is a clear role for time limited work permissions for seasonal contracts for typically 6-9 months, and that there is a demand for such a permit type for lower skilled workers. To meet that demand, the development of a seasonal employment permit is proposed, to provide for a non-EEA national to work in the State temporarily while retaining a legal domicile in a third country, for the purposes of employment in a sector of seasonal activity. The possibility of addressing recurrent employment – staggered renewal – will be considered (currently renewals are made on the basis of continuous

employment). The development of criteria for this permit will involve an examination of seasonal permits in other jurisdictions and will address key issues such as: sectors which might avail of the permit type; seasonal duration; remuneration; conditionality; employer commitments; benefits and supports; limiting the permit to certain sectors and occupations plus any potential risks. (Head 4)

4.2 Special Circumstances Employment Permit

This scheme would address the need which may arise from time to time for grant of an employment permit in circumstances which do not conform to the standard criteria for an employment permit, but where such grant would nevertheless prove beneficial for social or economic development in the State. The availability of this type of permit will provide flexibility to allow the employment permits system to meet unusual circumstances without undermining the policy applying more generally to the grant of employment permits. The circumstances in which such a permit might be granted will be prescribed in Regulations, and a limited number of such employment permits might be granted in any calendar year. Anchoring the prescription securely in primary legislation and setting the criteria precisely in Regulations, so that this permit type can't be used routinely to waive the requirements of the system, will be a priority.

The broad criteria to be prescribed would be:

- Where one or more criteria for grant of a permit cannot be satisfied, but no training for the occupation is available in Ireland; where it requires an unusual skill set; and for niche employments that do not occur with sufficient frequency to attract individuals into training or for which no formal training exists, and where it is evident that the employment of the specific foreign national is essential for the competitiveness or development of the employing organisation.
- Where a bilateral agreement with another country is made facilitating the employment in the State of a specified group (Head 4)

4.3 Streamlining to improve agility

4.3.1 Renewals

The criteria for renewals of employment permits should be limited to ensuring that the employment and its terms are in line with that initial application. The proposed legislation separates refusal reasons for grant of an employment permit from refusal of renewal of an employment permit. This will simplify and speed up the application process for renewal. (Head 27)

4.3.2 Labour Market Needs Test (LMNT)

Changes to the labour market needs test (i.e. advertising), allowing the prescription in Regulations of its elements to better suit current employment practices, will fit the hiring process undertaken by the employer more neatly with the requirements of the economic migration process. This will make the test's application both more targeted

and more efficient. The changes proposed include seeking the agreement of the Minister for Employment Affairs and Social Protection, and officials will ensure clear channels of communication are maintained in this regard. (Head 15) Specifically, the intention is to remove the operational requirements from primary legislation, instead allowing the media for advertising of vacancies to be prescribed in Regulations and varied where necessary eg. some types of vacancies may be best advertised through social media, others in sector specific journals, or by a radio campaign. Allowing leeway to employers to advertise as best fits their industry will improve the coherence and utility of the Labour Market Needs Test.

4.3.3 Moving employment permit operational practice from primary to secondary legislation

The current legislation, while robust, has proved inflexible in the face of continually adapting employment practices. Removing operational detail – such as the detailed composition of the labour market needs test which was set out in section 10A of the Employment Permits Act 2006 as amended – and setting such detail out in Regulations will result in an economic migration system which can adapt to the demands of the labour market and can target requirements to ensure a good fit within specific sectors. This will improve the utility of the legislation and keep it relevant for the purposes of both employers and migrant workers.

The General Scheme proposes, in almost every instance of a quantifiable operational requirement, that prescription in Regulations is appropriate. The prescription of variables in secondary legislation, necessary to give the system the agility to respond quickly to changing conditions in the economy, nevertheless should remain securely anchored in primary legislation. (Head 19)

4.4 50/50 Rule

In existing legislation, the 50:50 rule, which requires that an employer's staff comprises at least 50% EEA nationals before a permit may be granted, is waived only for start-ups for a two year period at the recommendation of an enterprise development agency, or where there will only be one employee and the Minister is satisfied there will be no further employees. The rule is applied to all permit types. The changes being proposed are

- An exemption from the 50:50 rule in clearly prescribed circumstances for the Special Circumstances Employment Permit
- Extend the waiver from the rule in all cases where the holder will be the only employee, whether or not there is a potential for expansion of the enterprise. This waiver was initially conceived to provide for situations such as the employment of a carer; however, situations have arisen where enterprises with medium to long term potential for expansion need in the first instance to employ only one individual and have been unable to source an employee in Ireland/EEA (Head 14)

4.5 Remuneration

The existing legislation provides for the detailed composition of the remuneration of the employment permit holder. The definition currently identifies remuneration as salary (with National Minimum Wage or other statutory minimum specified as the minimum possible level) and health insurance. In the case of Intra-Company Transfer and Contract for Service Employment Permit holders, the salary may require a top up to take it over this minimum possible level and may also have board and accommodation components. The requirements are cumbersome and difficult for stakeholders to interpret, so a review of remuneration scheduled to commence shortly will examine the current definition and requirements to devise a clearer and more appropriate stipulation in relation to remuneration as the review may recommend.

The policy of requiring the proposed basic salary to achieve a Minimum Annual Remuneration level will not be changed as a result of the review. (Head 20)

4.6 New refusal reasons

Further provision to refuse to grant an employment permit has been inserted, where:

- Another Minister of Government has granted a permission for the foreign national to be in the State and that permission is not transferable or renewable, for example the Working Holiday Authorisations administered by the Minister for Foreign Affairs and Trade (these are bi-lateral agreements made with other States which stipulate reciprocal permission to visit and undertake short-term, casual employment by each other's nationals on a non-transferable or renewable basis).

- The foreign national is not registered with a regulatory body or a Minister for Government where this is required for the occupation to be undertaken in the State.
- A review (appeal) of a refusal to grant a permit has uncovered an additional failure to meet the criteria for granting the permit at the application stage. The Office of the Attorney General has observed that this is a complex matter. Currently the review process provides for a review of only those points of contention which occasioned the original refusal of a permit. However, there are instances during the review process where an additional refusal reason to meet the criteria for the permit is incidentally uncovered, and where that reason falls outside of the scope for the review. A mechanism to address this is being considered if possible, in the drafting process, subject to discussion with the Office of the Attorney General.
- The Minister is not satisfied that the grant of a Special Circumstances Employment Permit would be of significant benefit to social or economic development in the State. The intention is that this permit type will only be used in exceptional circumstances, where the benefit of granting the permit justifies the waiver of a criterion normally applied (such as hours of work, or ineligibility). (Head 17)

4.7 Regulations

The interdependence that is proposed between primary and secondary legislation calls for simultaneous drafting, so that operational aspects of the economic migration system are both responsive to the labour climate while retaining a clear source in every case in the legislation mandated by the Oireachtas. As with the 2014 Amendment Act, Regulations should come into effect in tandem with the commencement of the Bill when it is enacted.

Economic Migration Policy Unit

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