



STATUTORY INSTRUMENTS.

S.I. No. 600 of 2017



INDUSTRIAL RELATIONS ACT 1990 (CODE OF PRACTICE ON
LONGER WORKING) (DECLARATION) ORDER 2017

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WHEREAS the Workplace Relations Commission has prepared, under subsection (1) of section 42 of the Industrial Relations Act 1990 (No. 19 of 1990), a draft code of practice around the issue of longer working, setting out best industrial relations practice in managing the engagement between employers and employees in the run up to retirement age in the employment concerned.

AND WHEREAS the Workplace Relations Commission has complied with subsection (2) of that section and has submitted the draft code of practice to the Minister for Business, Enterprise and Innovation.

NOW THEREFORE, I, Pat Breen, Minister of State at the Department of Business, Enterprise and Innovation, in exercise of the powers conferred on me by subsection (3) of that section and the Labour (Transfer of Departmental Administration and Ministerial Functions) Order 1993 (S.I. No. 18 of 1993), the Business, Enterprise and Innovation (Delegation of Ministerial Functions) Order 2017 (S.I. No. 569 of 2017) hereby order as follows:

1. This Order may be cited as the Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017.
2. It is hereby declared that the code of practice set out in the Schedule to this Order shall be a code of practice for the purposes of the Industrial Relations Act 1990 (No. 19 of 1990).

*Notice of the making of this Statutory Instrument was published in
"Iris Oifigiúil" of 2nd January, 2018.*

SCHEDULE

CODE OF PRACTICE

Introduction

Section 42 of the Industrial Relations Act 1990 provides for the preparation of draft codes of practice by the Workplace Relations Commission for submission to the Minister for Business, Enterprise and Innovation. Codes of Practice are written guidelines, agreed in a consultative process, setting out guidance and best practice in regard to industrial relations practice and compliance.

Arising from a recommendation of the Report of the Interdepartmental Group on Fuller Working Lives (published in August 2016), the Commission was requested on 28 September 2016 by the Minister to prepare a Code of Practice around the issue of longer working, setting out best industrial relations practice in managing the engagement between employers and employees in the run up to retirement age in the employment concerned.

Background

The proportion of older workers, and, in particular, workers who want to continue in employment beyond what would have been regarded as the traditional retirement age, i.e. 65 years of age, is forecast to grow significantly in the future. Employers need to be prepared for this in the context of:

- Managing requests from people to continue to work beyond what would have been regarded as the normal retirement age;
- Developing employment practices and procedures appropriate to increasingly age diverse workplaces that encourage retention of older workers and longer working lives; and
- The changing statutory and legal framework in regard to retirement and pension entitlements.

Purpose

The main purpose of this Code is to set out, for the guidance of employers, employees and their representatives, best principles and practices to follow during the engagement between employers and employees in the run up to retirement including responding to requests to work beyond the retirement age in the employment concerned.

In preparing this Code of Practice, the Workplace Relations Commission consulted with the Irish Business and Employers Confederation, the Irish Congress of Trade Unions and relevant Government Departments.

The Code sets out best practice over the following headings:

- Utilising the skills and experience of older workers.
- Objective justification of retirement.
- Standard retirement arrangements.
- Requests to work longer.

Utilising the Skills and Experience of Older Workers

From an employer perspective, managing an older and diverse workforce in a positive way will deliver greatest value by looking at how best to maximise the experience and skills of older workers, and to harness and accommodate those experiences and skills to the advantage of the business. Such measures could include:

- Training of management at all levels about age diversity and the benefits of such diversity;
- Encouraging knowledge and experience sharing and utilising the skill and experiences of all workers;
- Exploring measures around flexible working patterns;
- “Proofing” policies and procedures for age bias; or
- Encouraging a culture that appreciates the continuing need for relevant training and development amongst all age groups.

Delivering a positive message around embracing and valuing employees of all ages, raising age discrimination awareness and having a culture that does not tolerate discrimination are key to good industrial and workplace relations.

Objective Justification

There is no statutory retirement age in the private sector. Retirement ages in the private sector are generally set out by means of:

- (a) an express term in the employee’s contract of employment;
- (b) an implied term in the employee’s contract of employment;
- (c) relevant policies, for example a staff handbook; and
- (d) custom and practice generally arising from the pension date set out in the relevant occupational pension scheme.

The rules governing the compulsory retirement ages for public servants are, in the main, set down in primary legislation.

The Employment Equality Acts 1998 to 2015 prohibit discrimination on nine grounds including age. Therefore, the termination of an employee because of age could be construed as discrimination under the legislation. The Equality (Miscellaneous Provisions Act) 2015, which came into effect on 1 January 2016 made a number of amendments to the 1998 Act. Section 34 (4) of the Act now states as follows:

“(4) Without prejudice to subsection (3) it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntary or compulsorily) of employees or any class or description of employees if—

(i) it is objectively and reasonably justified by a legitimate aim, and

(ii) the means of achieving that aim are appropriate and necessary.”

Essentially the law is now that compulsory retirement ages set by employers must be capable of objective justification both by the existence of a legitimate aim and evidence that the means of achieving that aim is appropriate and necessary. Examples of what constitutes a legitimate aim by an employer may include:

- Intergenerational fairness (allowing younger workers to progress);
- Motivation and dynamism through the increased prospect of promotion;
- Health and Safety (generally in more safety critical occupations);
- Creation of a balanced age structure in the workforce;
- Personal and professional dignity (avoiding capability issues with older employees); or
- Succession planning.

Standard Retirement Arrangements

1. Identifying Individual Intentions

Good workforce planning is a critical element in any workplace. Central to this are appropriate employee numbers and skill sets, recruitment, and planning for departures including retirement. Where no contractual retirement date exists, it is reasonable as part of workforce planning for an employer to raise and discuss with the employee, their retirement intentions.

2. General Information/Supports

Good information and suitable guidance can enable employees to make more informed choices in planning for their retirement. Employers could

consider the provision of certain supports, for example, suitable pre-retirement courses, a flexible or part time working arrangement, counselling etc., essentially with a view to assisting the transition to retirement.

It is recommended that an employer should provide clear information on how retirement procedures work, both at recruitment and at regular occasions throughout an employee's career. At the very least, appropriate guidance on how reliable and informative information can be sourced should be made available to the employee. This should be the case irrespective of whether the employment has a pension scheme in place or not.

The Retirement Process

It is good practice for an employer to notify an employee of the intention to retire him/her on the contractual retirement date within 6 — 12 months of that date. This allows for reasonable time for planning, arranging advice regarding people succession, etc. While the initial notification should be in writing, it should be followed up with a face-to-face meeting which should focus on addressing the following:

- Clear understanding of the retirement date and any possible issues arising;
- Exploration of measures (subject to agreement) which would support the pathway to retirement, for example flexible working, looking at alternative roles up to the date of retirement;
- Transitional arrangements in regard to the particular post; and
- Assistance around guidance and information.

Request to Work Longer

Questions for the Employer and Employee

A request from an employee to work longer than their contracted retirement age should be considered carefully. There are a number of matters to be considered by the employer and employee in this regard including:

For the Employee

- Is the employee confident that he/she can continue to perform the role to the required standard?
- Can flexible working options or alternative roles be considered?
- What is the duration of the extension being sought?
- Are there any pension implications?

- Are there contract of employment implications?

For the Employer

- Are there good grounds on which to accept or refuse the request e.g. can the retirement be justified on a legitimate and objective basis? It is important to note that the Equality (Miscellaneous Provisions) Act 2015 requires that a fixed-term contract post-retirement age must be objectively justified.
- What are the objective criteria applicable to the request? This should form the basis of any assessment of a request to work beyond retirement age to ensure an equal and consistent approach to addressing this and other future requests.
- How would the arrangements for the employee remaining on in the workforce be contractually framed (e.g. fixed term contract)?
- Could granting the request be on the basis of a more flexible working arrangement (e.g. less than full hours or an alternative role)?

Request to Work Longer Procedure

In dealing with a request to work longer it is recommended that the parties engage as follows:

1. The employee should make such a request in writing no less than three months from the intended retirement date to be followed up with a meeting between the employer and employee. This meeting gives both the employee an opportunity to advance the case and allowing the employer to consider it. It is important that the employee is listened to and that any decision made is on fair and objective grounds.
2. The employer's decision should be communicated to the employee as early as practical following the meeting.
3. Should the decision be to offer a fixed-term contract post-retirement age, the period should be specified, setting out the timeframe, and the legal grounds underpinning the new contract should be made clear (i.e. fixed-term contract). It is good practice to include a reference that the decision is made solely having regard to the case being made by the employee and does not apply universally.
4. Where the decision is to refuse the request, the grounds for the decision should be set out and communicated in a meeting with the employee. This will help the employee to understand why the request has not been granted, and give the employee confidence that his/her case has been given serious consideration and that there are good grounds for refusing the request. The applicant should have recourse to an appeals mechanism, for

example through the normal established grievance procedures in the organisation.

5. An employee may be accompanied to a meeting by a work colleague or union representative to discuss a request to the employer to facilitate working longer and in any appeals process around same.

GIVEN under my hand,
20 December 2017.

PAT BREEN,
Minister of State at the Department of Business, Enterprise
and Innovation.

EXPLANATORY NOTE

This note is not part of the Instrument and does not purport to be a legal interpretation.

The effect of this Order is to declare that the draft code of practice set out in the Schedule to this Order is a code of practice for the purposes of the Industrial Relations Act 1990.

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