RIGHT TO FLEXIBLE WORKING BILL 2022

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ACTS REFERRED TO

Employment Agency Act 1971 (No. 27)

Minimum Notice and Terms of Employment Act 1973 (No. 4)

Petty Sessions (Ireland) Act 1851 (14 & 15 Vict., c. 93)

Protection of Employees (Fixed-Term Work) Act 2003 (No. 29)

Protection of Employees (Part-Time Work) Act 2001 (No. 45)

Safety, Health and Welfare at Work Act 2005 (No. 10)

Unfair Dismissals Acts 1977 to 2015

Workplace Relations Act 2015 (No, 16)

RIGHT TO FLEXIBLE WORKING BILL 2022

Bill

entitled

An Act to provide employees with a right to make, or to have made on their behalf, a request for flexible working, to require an employer to deal with a request within a fixed period, to provide that an employer may refuse a request if it cannot be accommodated on reasonable grounds, to require employers to maintain a policy on flexible work which can be inspected by employees and the Workplace Relations Commission, to provide for a right of appeal in certain circumstances against a refusal of flexible working, and to provide for related matters.

Be it enacted by the Oireachtas as follows:

PART 1

Preliminary and General

Short title and commencement

1. (1) This Act may be cited as the Right to Flexible Working Act 2022.

(2) This Act comes into operation on such day as may be fixed by order made by the Minister, and different days may be so fixed for different provisions and for different purposes.

Objects of Act

2. (1) In passing this Act, the Oireachtas seeks in the public interest, and in so far as is reasonably practicable, to achieve or to facilitate –

(a) the enjoyment by employees of an appropriate work life balance, with due regard to the rights of employers to manage an effective and efficient workforce,

(b) a reduction in traffic congestion and in carbon emissions arising from the number of employees commuting between home and their workplaces,

(c) a rebalancing of the population and of amenities and resources between more densely and less densely populated regions in the State, and

(d) the economic and social development of the State as a whole, having regard to the policy of the Government on proper planning and sustainable development.

(2) All those concerned with the interpretation or administration of this Act or performing functions under it shall have regard to the objects for which it was enacted.

Interpretation

3. (1) In this Act –

"Act of 2015" means the Workplace Relations Act 2015;

"adjudication officer" has the meaning given by section 40 of the Act of 2015;

"collective agreement" means an agreement by or on behalf of an employer on the one hand and by or on behalf of a body or bodies representative of the employees to whom the agreement relates on the other hand, and includes:

(a) an employment regulation order,

(b) a registered employment agreement, and

(c) a sectoral employment order;

"Commission" means the Workplace Relations Commission;

"contract of employment" means –

(a) a contract of service or apprenticeship, and

(b) any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency, within the meaning of the Employment Agency Act 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not that third person is a party to the contract), whether the contract is express of implied and if express, whether it is oral or in writing;

"employee" means a person of any age, who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and includes –

(a) a part-time employee, within the meaning of Part 2 of the Protection of Employees (Part-Time Work) Act 2001, and

(b) a fixed-term employee, within the meaning of the Protection of Employees (Fixed-Term Work) Act 2003;

"employer", in relation to an employee, means the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment subject to the qualification that the person who under a contract of employment referred to in paragraph (b) of the definition of "contract of employment" is liable to pay the wages of the individual concerned in respect of the work or service concerned shall be deemed to be the individual's employer;

"flexible working" means that an employee works for his or her employer –

(a) partly at the employer's place of business and partly at a remote location, or

(b) wholly at a remote location;

"flexible work arrangement" means an arrangement for flexible working that is agreed between an employer and an employee;

"the Minister" means the Minister for Enterprise, Trade and Employment;

"remote location", in relation to the place at which an employee carries out his or her contractual work duties, means the employee's residence or some other place that is not the employer's place of business;

"request" means a request by an employee to an employer under *section 6* for a flexible work arrangement.

(2) The First Schedule to the Minimum Notice and Terms of Employment Act 1973 applies for the purpose of ascertaining under PART 2 an employee's period of continuous service.

Regulations

4. (1) The Minister may –

(a) by regulations provide for any matter referred to in this Act as prescribed or to be prescribed, and

(b) make regulations generally for the purpose of giving effect to this Act.

(2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations concerned.

(3) A regulation under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling that regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Voidance or modification of certain provisions in agreements

5. (1) A provision in any agreement is void in so far as it purports to exclude or limit the application of any provision of this Act or is inconsistent with any provision of this Act.

(2) A provision in any agreement which is or becomes less favourable in relation to an employee than a similar or corresponding entitlement conferred on the employee by this Act is deemed to be so modified as to be not less favourable.

(3) Nothing in this Act shall be construed as prohibiting the inclusion in an agreement of a provision more favourable to an employee than any provision of this Act.

(4) References in this section to an agreement are to any agreement, whether a contract of employment or not and whether made before or after the passing of this Act.

PART 2

Flexible Working Request

Right to make request

6. An employee who has completed at least 26 weeks' continuous service with an employer is entitled to make a request to that employer under this section.

Limitation on successive requests

7. An employee who, having made a request under *section 6*, remains in the same or a substantially similar position of employment, is not entitled to make a new request under that section until he or she has completed 12 months' continuous service following –

(a) the employer's final response to the employee under *section 10*, or

(b) the date of the final decision in any appeal under *section 16*,

whichever is the later.

Details of request

8. (1) An employee who makes a request shall give details in writing of the proposal to his or her employer, specifying –

(a) the proposed remote location,

(b) the proposed start date for the flexible working arrangement,

(c) the proposed number, and the allocation, of days on which work would be done at the remote location,

(d) whether the employee has made a previous request to the employer under this Act and the date of the most recent such request, and

(e) an assessment of the suitability of the proposed remote location including (where relevant) –

(i) the ability to ensure compliance with data protection and confidentiality,

(ii) the availability of minimum levels of internet connectivity, and

(iii) the ergonomic suitability of the workspace and of any equipment or furniture,

at the location concerned.

(2) An employer may require employees to use a standard form for the purposes of subsection (1).

(3) An employee shall, if the employer so requires in writing –

(a) give to the employer such further information relating to the request as the employer may reasonably require of the employee, and

(b) meet and discuss the request with the employer during the employee's normal working time.

Withdrawing a request

9. (1) An employee may, in writing, withdraw a request.

(2) An employer may deem a request to have been withdrawn where –

(a) an employee fails to comply with a requirement under *section 8 (3)*, and

(b) the period under *section 10* for consideration of the request has expired.

(3) An employer shall give to an employee notice in writing of the withdrawal of a request under *subsection (1)* or of a request that is deemed to have been withdrawn under *subsection (2)*.

(4) Notwithstanding *section 7*, where an employee withdraws a request under *subsection (1)* or a request is deemed to have been withdrawn under *subsection (2)*, the employee may make a new request after 30 days from the date of the employer's notice under *subsection (3)*.

Time limit for employer to make decision

10. (1) An employer, having consulted the employee and the trade union (if any, and where recognised by the employer) of which he or she is a member, shall give the employee notice in writing of his or her decision whether –

(a) to approve or to refuse the request, or

(b) to approve the request subject to amendments made by the employer to the proposed flexible work arrangement.

(2) A decision under *subsection (1)* shall be made within a reasonable time, which shall be specified in the employer's Flexible Working Policy and shall not in any event exceed 12 weeks from the employer's receipt of the request under *section 6*.

Approving a request

11. (1) An employer's decision to approve a request shall set out the details of the proposed flexible working arrangement, including –

(a) the proposed start date for the arrangement,

(b) where the approval is for a trial or temporary period, the proposed end date,

(c) where the arrangement is proposed to be of indefinite duration, details of any requirement relating to periodic review of the arrangement,

(d) details of any equipment to be provided by the employer, and

(e) details of any allowances payable to the employee to cover costs associated with flexible working.

(2) Where, pursuant to a flexible work arrangement an employer provides or provides for equipment at the employee's home that is adequate and appropriate in relation to the work of the employee, the duties of the employer under section 8 (1) (c) of the Safety, Health and Welfare at Work Act 2005, and under any regulations to give full effect to that paragraph, are deemed to be complied with.

(3) (a) An employer may approve a request subject to amendments made by the employer if he or she is satisfied, on one or more of the grounds mentioned in *subsection 12 (3)*, that the arrangement as requested is not reasonably practicable but that the arrangement as so amended would be.

(b) Where an employer approves a request subject to amendments made by the employer, notice of the employer's decision shall specify details of the amendments made.

(c) Where a notice is given to which *paragraph (b)* applies –

(i) the employee shall, within one month of the receipt by him or her of the notice, in writing either agree to the proposed amendments or reject them, stating the reasons for any such rejection, and

(ii) an employee who rejects the proposed amendments may deem his or her request to have been refused.

Refusing a request

12. (1) An employer may refuse a request if he or she is satisfied, having regard to one or more of the grounds mentioned in *subsection (3)*, that the arrangement requested is not reasonably practicable.

(2) A written notice under *section 10* of an employer's decision to refuse a request shall set out details of the grounds relied upon in making the decision.

(3) The grounds referred to in *subsection (1)* are –

(a) that the nature of the employee's work does not permit that it be done at a remote location,

(b) that it is not reasonably practicable for the employer to reorganise the work done by his or her employees amongst them, so as to facilitate the proposed arrangement,

(c) that the proposed arrangement is reasonably likely, notwithstanding any remedial measures or safeguards that are reasonably available, to adversely affect –

(i) the quality of the employer's product or service,

(ii) the quality of the work of the employee or other employees,

(d) that the proposed arrangement would give rise to unreasonable costs, regard being had to both the cost of the arrangement and to the financial resources of the employer's business,

(e) that the workspace at the proposed work location, notwithstanding any remedial measures or safeguards that are reasonably available, is not a suitable workspace for the employee to work in, due to concerns relating to –

(i) the need to protect business confidentiality or intellectual property and to comply with enactments relating to data protection,

(ii) the health and safety of the employee at work,

(iii) internet connectivity and other infrastructural resources at the proposed remote location,

(iv) where any proposed arrangement would entail some attendance by the employee at the employer's place of business, the distance between the proposed remote location and that place of business,

(f) that the proposed arrangement conflicts with the provisions of an applicable collective agreement.

Right of appeal

13. (1) An employee who makes a request under *section 6* may make a complaint in accordance with Part 4 of the Act of 2015 in respect of any of the following matters:

(a) the employer has failed to give notice of a decision under *section 10*,

(b) the has failed to give notice of the grounds for refusal under *section 12 (2)*,

(c) the employer's notice under *section 9* did not satisfy the requirements of that section,

(d) in a case where the employer has approved a request subject to amendments which the employee has rejected, that the amendments are in all the circumstances unreasonable, or

(e) in a case where the employer has refused a request, that the refusal is in all the circumstances unreasonable.

(2) An employee may not make a complaint under this section until the expiry of two weeks after the conclusion of any internal appeal process provided for in the employer's flexible working policy, the employee's contract of employment or any applicable collective agreement.

Flexible Working Policy

14. (1) Every employer shall have and maintain a written policy statement (to be known and referred to in this Act as a "Flexible Working Policy"), specifying the manner in which employees' requests will be managed, the time frame in which decisions will be made and the conditions which will apply to flexible working generally.

(2) An employer shall have regard to any code of practice under *section 18* in preparing a Flexible Working Policy.

(3) Every employer shall bring the Flexible Working Policy, in a form, manner and, as appropriate, language that is reasonably likely to be understood, to the attention of –

(a) his or her employees, at least annually and at any other time following any amendment to the policy,

(b) new employees upon commencement of their employment.

(4) (a) An employer who, without reasonable cause, fails to bring a Flexible Working Policy to the attention of his or her employees is guilty of an offence and is liable on summary conviction to a class C fine.

(b) Summary proceedings for an offence under this section may be brought and prosecuted by the Commission.

(c) In proceedings for an offence under this section, it is a defence for the accused to prove that he or she exercised due diligence and took reasonable precautions to ensure that this section was complied with by the accused and by any person under the control of the accused.

(d) Notwithstanding section 10 (4) of the Petty Sessions (Ireland) Act 1851, summary proceedings for an offence under this Act may be instituted within 12 months from the date of the offence.

PART 3

Employment Rights

Protection of employees from penalisation

15. (1) An employer shall not penalise an employee for proposing to exercise or having exercised his or her entitlement to make a request.

(2) If a penalisation of an employee, in contravention of *subsection (1)*, constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to 2015, relief may not be granted to the employee in respect of that penalisation both under this Act and under those Acts.

(3) In this section ‘penalisation’ means any act or omission by an employer or a person acting on behalf of an employer that affects an employee to his or her detriment with respect to any term or condition of his or her employment, and, without prejudice to the generality of the foregoing, includes –

(a) suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2015), or the threat of suspension, lay-off or dismissal,

(b) demotion or loss of opportunity for promotion,

(c) an unfavourable change in conditions of employment of the employee, transfer of duties, change of location of place of work, reduction in wages or change in working hours,

(d) imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty), and

(e) coercion or intimidation.

PART 4

Resolution of Disputes

Decision under Section 41 or 44 of the Act of 2015

16. (1) A decision of an adjudication officer under section 41 of the Act of 2015 in relation to a complaint specified in section 13 shall do one or more of the following namely:

(a) declare that the complaint was or, as the case may be, was not well founded;

(b) where the decision is that the complaint was well founded, award compensation in favour of the employee to be paid by the employer;

(c) where the decision is that the complaint was well founded –

(i) in respect of a complaint under *section 13 (1) (a)*, direct the employer to make and give notice of a decision in compliance with *section 10* within a period of 4 weeks,

(ii) in respect of a complaint under *section 13 (1) (b)*, direct the employer to give notice of the grounds for refusal in compliance with *section 12 (2)* within a period of 4 weeks,

(iii) in respect of a complaint under *section 13 (1) (c)*, direct the employer to make and give notice of a decision in compliance with *section 10*,

(iv) in respect of a complaint under *section 13 (1) (d)*, remove or amend as the adjudication considers appropriate any amendments proposed by the

employer which the officer finds to be in all the circumstances unreasonable, and

(v) in respect of a complaint under *section 13 (1) (e)*, approve the employee's request subject to such amendments as the adjudication officer considers appropriate.

(2) An award of compensation referred to in *subsection (1) (b)* shall be of such amount as the adjudication officer or the Labour Court, as the case may be, considers just and equitable having regard to all the circumstances but shall not exceed 4 weeks' remuneration in respect of the employee' s employment calculated in such manner as may be prescribed.

(3) A decision of the Labour Court under section 44 of the Act of 2015, on appeal from a decision of an adjudication officer to which this section applies, shall affirm, vary or set aside the decision.

Proof of previous remote working

17. (1) For the purposes of this Act and any proceedings to which it is relevant, where it is shown that an employee, due to Covid-19 measures, did not work wholly at his or her normal place of work and instead worked wholly or partly at a remote location, it shall be presumed that it is reasonably practicable for work of that or a substantially similar nature to be done under a flexible work arrangement.

(2) In subsection (1), "Covid-19 measures" means measures required to be taken by an employer in order to comply with, or as a consequence of, enactments and Government policies to prevent, limit, minimise or slow the spread of infection of Covid-19.

PART 5

Miscellaneous

Codes of Practice

18. (1) In this section, "code of practice" means a code that provides practical guidance as to the steps that may be taken for the purposes of complying with this Act or any of its provisions.

(2) The Commission may and, at the request of the Minister, shall, prepare a code of practice for the purposes of this Act or any of its provisions or, in the case of a request by the Minister, any provision of this Act specified in the request.

(3) In preparing a code of practice, the Commission shall invite such organisations representative of employers, such organisations representative of employees and such other bodies as the Commission considers appropriate to make submissions, whether orally or in writing, to it in relation to the proposed code of practice and shall have regard to any submissions made to it in response to its invitation.

(4) The Commission shall submit a copy of a code of practice prepared by it under this section to the Minister, who may –

(a) by order declare the code (which shall be scheduled to the order) to be a code of practice, or

(b) make such modifications to the code as he or she considers appropriate and declare the code as so modified (which shall be scheduled to the order) to be a code of practice.

(5) The Minister may, at the request of the Commission or of his or her own volition after consultation with the Commission, by order –

(a) amend or revoke a code of practice the subject of an order under *subsection (4)* (and the code of practice shall, in case it is amended by the order, be scheduled, in its amended form, to the order), and

(b) declare, accordingly, the code of practice, as appropriate –

(i) to be no longer a code of practice, or

(ii) in its form as amended by the order, to be a code of practice, for the purposes of the provision concerned of this Act, and

(c) revoke, as the case may be, the order concerned under *subsection (4)* or the previous order concerned under this subsection.

Amendment of enactments

19. (1) The Act of 2015 is amended –

(a) in section 36 (5) –

(i) by the substitution of "National Minimum Wage Act 2000" for "National Minimum Wage Act 2000, or" in paragraph (c),

(ii) by the substitution of "Terms of Employment (Information) Act 1994, or" for "Terms of Employment (Information) Act 1994" in paragraph (d), and

(iii) by the insertion of the following after paragraph (d):

"(e) section 14 of the Right to Flexible Work Act 2022.",

(b) in section 41 (7) –

(i) by the substitution of "has died" for "has died, and" in paragraph (f) (iii),

(ii) by the substitution of "occurrence of the dispute, and" for "occurrence of the dispute" in paragraph (g), and

(iii) by the insertion of the following after paragraph (g):

“(h) in the case of a dispute relating to the entitlement of an employee under the Right to Flexible Working Act 2022, it has been referred to the Director General after the expiration of the period of 6 months beginning on the day immediately following the date of the occurrence of the dispute.”,

(c) in Part 1 of Schedule 1 by the insertion of –

“24. Right to Flexible Working Act 2022”,

(d) in Part 1 of Schedule 5 by the insertion of –

“31. Sections 9, 10 and 12 of the Right to Flexible Working Act 2022”,

(e) in Part 1 of Schedule 6 by the insertion of –

“39. Section 16 of the Right to Flexible Working Act 2022”, and

(f) in Part 2 of Schedule 6 by the insertion of –

“39. Section 16 of the Right to Flexible Working Act 2022”.

(2) The Terms of Employment (Information) Act 1994 is amended in section 3 (1) by the insertion after paragraph (m) of the following –

“(n) a copy of the employer’s Flexible Working Policy as required by section 14 of the Right to Flexible Working Act 2022.”.

Records

20. (1) An employer shall keep, at the premises or place from which the work of the employee is principally directed or controlled, such records (in such form, if any, as may be prescribed) as will show whether the provisions of this Act are being complied with in relation to the employee, and those records shall be retained by the employer for at least 3 years from the date of their making.

(2) The Minister may by regulations exempt from the application of *subsection (1)* any specified class or classes of employer, and the regulations may provide that any such exemption does not have effect save to the extent that specified conditions are complied with.

(3) An employer who, without reasonable cause, fails to comply with *subsection (1)* is guilty of an offence and is liable on summary conviction to a class D fine.

(5) Without prejudice to *subsection (3)*, where an employer fails to keep records under *subsection (1)* in respect of his or her compliance with a particular provision of this Act in relation to an employee, the onus of proving in any proceedings that the provision was complied with in relation to the employee lies on the employer.

Review of Act

21. The Minister shall, not earlier than 2 years and not later than 3 years after the commencement of this Act, after consultation with persons whom he or she considers to be representative of employers generally and persons whom he or she considers to be representative of employees generally, conduct a review of the operation of this Act and shall prepare a report in writing of the findings of the review and shall cause copies of the report to be laid before each House of the Oireachtas.