WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the December issue of Legal News. For further information on any of the topics covered in this issue, please call or email any of the key contacts or your usual William Fry contact person.

Carol Plunkett

Partner

Directors' Compliance Statement – What does a company with a 31 December year end need to do?

What is it?

The Companies Act 2014 imposes an obligation on directors of certain companies to make an annual compliance statement in the Directors' Report that forms part of the company's statutory financial statements. In this statement, the directors must acknowledge that they are responsible for securing the company's compliance with its "*relevant obligations*", i.e. provisions of the Act the contravention of which is a category 1 or category 2 offence (the most serious categories of offences), serious market abuse, prospectus and transparency requirements (where applicable) and tax law.

The Directors' Report must confirm that the directors have:

- Drawn up a **compliance policy statement** setting out the company's policies respecting compliance with its relevant obligations
- Put in place **appropriate arrangements or structures** that are designed to secure material compliance with relevant obligations
- Conducted a **review** during the financial year of the arrangements and structures put in place

If this statement and confirmations and reviews have not been made or carried out, the directors must specify the reasons why not.

What companies does it apply to?

The obligation will apply to:

- All public limited companies (except certain investment companies)
- All other large private companies and guarantee companies. In this context, "*large*" means having a balance sheet total exceeding €12.5 million and turnover exceeding €25 million

The obligation does not apply to unlimited companies. It is possible that regulations will be made in future to exempt other types of companies (such as Section 110 special purpose vehicles) from the requirement to produce a directors' compliance statement, although this has not yet been confirmed.

When does it apply?

The obligation to include a directors' compliance statement in the statutory financial statements of a company will apply in respect of all financial years commencing on or after 1 June 2015. So, any PLCs and large private companies with a 31 December year end should have their compliance policy statements and appropriate compliance arrangements or structures in place early in the new year.

What do I need to do?

Companies in scope will need to consider drafting a compliance policy statement and putting in place appropriate arrangements or structures that are designed to secure material compliance with the company's relevant obligations in advance of the financial year to which the first directors' compliance statement relates. A company should familiarise itself with its relevant obligations under the company and tax law, and determine how the company proposes to ensure that these obligations are complied with.

William Fry has developed framework documentation which can be used by companies as a base for a compliance policy statement. We would be delighted to assist you in finalising the relevant compliance policy statement, identifying the company's relevant obligations under the Act and suggesting arrangements and structures that can be put in place to comply with the new requirements.

Contributed by Aoife Kavanagh

Irish Tax Resident Non-domiciled Private Wealth Structures in Need of Review

The Finance Bill 2015 (due to be enacted this month) includes a number of changes to existing anti-avoidance provisions which will be relevant for private clients with offshore structures.

The most significant change is the extension of certain anti-avoidance rules to non-Irish domiciled tax resident individuals with offshore structures. We understand from the Department of Finance that this change has been introduced specifically to capture deliberate structuring by non-domiciled individuals tax resident in Ireland to avoid a liability to Irish income tax. Such individuals should review such structures and obtain up to date taxation advice.

The remittance basis of taxation for non-domiciled individuals with personally held income and capital gains are not affected by these changes.

A summary of this change and other changes is set out below.

Income tax attribution provisions – transfer of assets abroad

This anti-avoidance rule operates to counter Irish tax resident individuals avoiding income tax by structuring their assets abroad such that income becomes payable to a person resident outside of Ireland e.g. to a trustee of an offshore trust or to a foreign resident company. Where the rules apply, the income derived from the assets abroad can be attributed to the Irish resident individual and/or his/her spouse where they have the power to enjoy the income.

The Finance Bill 2015 has introduced two changes to this provision.

The first change extends the application of this anti-avoidance provision to non-domiciled individuals with effect from 1 January 2016. This change provides that the remittance basis of taxation will no longer apply for non-domiciled individuals who have the power to enjoy income from assets which have been transferred abroad.

The second change is that where income becomes payable to a person (for example, a trustee or a company) resident in an EU member state or in the EEA, the anti-avoidance provision will not apply where the Revenue Commissioners is satisfied that:

- It would not be reasonable to conclude that the main purpose of the structuring was the avoidance of liability to tax
- A genuine economic activity is being carried on in the relevant EU / EEA state

Capital gains tax attribution rules – gains accruing to non-resident companies

Under existing law, gains accruing to private companies tax resident outside of Ireland can be attributed to Irish tax resident participators (for example shareholders) in certain circumstances.

The Finance Bill 2015 introduces a "*bona fide*" test and provides that the anti-avoidance rule will not apply in cases where the disposal giving rise to the capital gain is made for bona fide commercial reasons and is not part of an arrangement of which one of the main purposes is to avoid a liability to tax in Ireland.

The legislative changes will be effective from 1 January 2016.

Contributed by Tina Curran

Leading Telcos Prosecuted for E-marketing Offences

The Data Protection Commissioner initiated proceedings against telecommunications companies, eircom, now trading as eir, and Imagine Telecommunications, in relation to breaches of direct marketing rules.

Counsel for eir pleaded guilty to six charges of making unsolicited marketing phone calls without consent and one charge of sending a marketing SMS to over 11,000 customers without an opt out message. The Court was told that the calls were numerous and an "*unwanted intrusion*" into the privacy of those affected. Separately, Imagine Telecommunications pleaded guilty to one charge of making an unsolicited marketing phone call without consent.

eir was ordered to donate €15,000 to Pieta House, €10,000 to Laura Lynn and €10,000 to Our Lady's Children's Hospital, Crumlin. This sum represents the highest financial imposition enforced on any company in relation to marketing offences under the ePrivacy Regulations.

Imagine Telecommunications was ordered to donate €2,500 to Merchant's Quay Ireland.

The defendants also agreed to cover the costs incurred by the Office of the Commissioner in bringing the prosecutions.

Speaking after the proceedings, the Commissioner, Ms Helen Dixon, said: "*Data protection is about the citizen's fundamental right to privacy. My Office treats offences in relation to electronic marketing* *extremely seriously, vigorously prosecuting repeat offenders. The significant sums imposed today send a clear message that this type of marketing without consent is unacceptable*."

While most of the focus recently has been on international data protection issues following the invalidation of the Safe Harbor programme (see our article here), the latest prosecutions are a timely reminder to Irish businesses to maintain focus on data protection compliance matters closer to home.

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Contributed by John Magee

Publication of Government Commissioned Report on Zero Hours Contracts

On 3 November 2015, the Minister for Business and Employment, Ged Nash TD, published "A Study on the Prevalence of Zero Hours Contracts among Irish Employers and the Impact on Employees".

A research team at the University of Limerick was appointed to undertake this study – the first of its kind – on zero hours contracts in Ireland. The Terms of Reference of the study specified a broad scope, covering both the public and private sectors, with a particular focus on the retail, hospitality, education and health sectors.

Trades Unions in recent times have focused their attention on the area of low-paid flexible contracts where employees have little protection and face increased difficulties in relation to childcare, accessing social welfare benefits, unstable income and challenges accessing financial credit. Earlier this year, Mandate Trade Union and Dunnes Stores' workers went on strike in relation to the use of such "*casual contracts*" or "*zero hour contracts*".

The report found that there are two types of contracts in Ireland with non-guaranteed working hours – zero hours contracts and "*if and when*" contracts. While the study found that zero hours contracts are not prevalent, "*if and when*" contracts are commonly used by employers. The fundamental difference between the two types of contract is that individuals with a zero hours contract are contractually required to make themselves available for work with their employer and have protections under employment legislation, while individuals with an "*if and when*" contract are not.

The report outlines the views of employer organisations which argue that "*if and when*" contracts suit employees because they provide flexible working hours. In contrast, trades unions and NGO's claim that "if and when" contracts have **both** significant **and** negative implications for employees, particularly with regard to the unpredictability of the number and scheduling of working hours. The report finds that people on "*if and when*" contracts are particularly vulnerable because they may not be defined as employees under employment law and therefore may not be entitled to the protections of employment legislation.

The report makes a number of recommendations, which include:

- A statutory requirement to furnish a written statement of employment to employees on first day of employment
- Protections for "*if and when*" contracts to be legislated for
- At least 72 hours advance notice of work to be given to employees
- A minimum of 3 continuous working hours to be given or payment for such
- Consideration to be given to the legal position of people with "*if and when*" contracts and their employment status

Minister Nash has indicated that he will engage in a short consultation process with employers, trades unions and other interested parties on the report's findings and recommendations. He then intends to bring recommendations surrounding non-guaranteed working hours to Government in early 2016 and it is likely that legislation will be introduced in the near future.

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Contributed by Catherine O'Flynn and Kirsten Kingerlee

Insurance Cover for Storm and Flood Damage – Who is Responsible?

Clause 26 of the Articles of Agreement issued by the Royal Institute of the Architects of Ireland deals with responsibility for insuring existing structures where construction works involve alteration or extension of existing facilities. This clause provides that the employer bears the risk of loss or damage to existing structures and contents (owned by the Employer) caused by perils such as fire, storm, tempest or flood.

Given the rise in weather-related insurance claims at this time of year, it seems timely to consider what might constitute a *"storm"* or a *"flood"* for the purposes of Clause 26, as most insurance policies do not define such events. There is no Irish case on this point and as such, when seeking to define these risks for insurance purposes, we must look to UK case law for guidance.

According to UK case law, a storm involves violent wind and is usually accompanied by rain, hail or snow. A storm does not mean persistent bad weather, nor does it mean heavy rain or persistent rain by itself.

With respect to what constitutes a flood, there have been some contradictory judgments in the UK. In one UK decision, a flood was stated to be caused by a rapid accumulation or sudden release of water from an external source, which is not necessarily confined to the result of a natural phenomenon. However, in contrast to this, another UK decision determined that a flood is a natural phenomenon which has some element of violence, suddenness or largeness about it.

The leading authority in the UK on this topic states that it is a question of degree as to the size and character of the premises and while the ingress of water must be more than slow seepage or percolation, it can be a slow build up which eventually damages the property. There is no requirement for a flood to be violent or abnormal under this decision.

Employers should be aware of their insurance responsibilities when carrying out alterations or extensions to existing facilities. They should ensure that they are adequately covered against such risks as they have no right to recover any consequential loss from the Contractor.

Contributed by Fionnualla Cleary

Radio Presenter Awarded €26,000 in Constructive Dismissal Case

A former Highland Radio presenter has been awarded €26,000 by the Employment Appeals Tribunal (EAT) for constructive dismissal following a significant reduction in his income without his agreement.

The employee worked at the radio station in County Donegal for 9 years prior to his resignation. His presenting role also included some commission-based sales work. In his evidence, he submitted that he had no choice but to resign from his role following a significant salary reduction. This arose as a result of his advertising client list initially being reduced and subsequently completely removed.

The employee also alleged that he was pressurised to meet targets despite the recession and that his use of a company car (previously provided to facilitate meeting with clients) was rescinded. These measures occurred against the background of a difficult period in his personal life, of which his employer was aware.

The employer denied these claims and maintained that it had attempted to encourage the employee to improve his sales performance. The employer further contended that the employee had rejected a number of suggestions that were put forward to him to improve his sales.

The employee told the EAT that he was dependent on the additional income generated by advertising sales to supplement his salary for presenting an afternoon radio show. He felt that he had "*no other choice*" but to resign and, in his letter of resignation, he described his unsatisfactory working conditions. The employer contended that it had made a counter-offer of a higher salary to prevent the employee leaving but, at that point, the employee had already made up his mind.

The EAT was satisfied that "*the employer's behaviour justified the claimant's resigning and claiming constructive dismissal. There was a fundamental breach of contract in allowing an accumulation of losses which led to his income being very significantly reduced without his agreement.*" The claim of constructive dismissal was therefore successful.

The EAT made some interesting comments about the employee's efforts to mitigate his loss after termination of his employment (as required under the Unfair Dismissals Acts). The employee limited his attempts to find alternative work to broadcasting roles and it was noted that this was "*too restrictive an approach in the climate that prevailed at the time".* Despite the fact that the EAT is entitled to have regard to attempts (or lack thereof) to mitigate loss in determining the level of compensation payable, an award of €26,000 was made.

This decision serves as a reminder to employers that unilateral alterations to terms and conditions of employment may lead to a breach going to the root of the employment contract and, in turn, a claim of constructive dismissal.

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Contributed by Catherine O'Flynn and Nuala Clayton

Knowledge Development Box – Latest Developments

Changes will be required to existing Irish patent legislation in order to implement some aspects of the new KDB regime.

The Finance Bill 2015 provides for an additional category of assets (known as "*intellectual property for small companies*") that qualify for the KDB where SMEs are concerned (see our previous article on the KDB here). The introduction of this additional category of assets is awaiting separate legislation which will amend the powers of the Irish Patents Office to allow it to introduce and implement a new IP certification process. This legislation is not expected before the New Year at least.

This new category of qualifying IP is intended to assist small and micro companies who may not patent IP due to cost or other factors.

In anticipation of the introduction of this new patent legislation, Minister for Finance, Michael Noonan has speculated about whether there was a need for a broader review of the patent system in Ireland, specifically around the examination of patents. The Minister for Jobs, Richard Bruton, cautioned that reintroducing a substantive search and examination function in the Patents Office would be "*highly resource intensive and hence extremely costly*" (the Irish Patents Office patent search and examination function is currently outsourced to the UK Patents Office). By way of example, he said that the UK Patents Office currently employs 400 people, 300 of whom are designated to the examination of patents.

Given the concerns voiced by Minister Bruton, the practical implementation of the KDB and, in particular, the SME qualifying mechanism for "*intellectual property for small companies*" will be interesting concepts to follow in the coming months.

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Contributed by Leo Moore and Brian McElligott

In Short: New Codes of Practice on Protected Disclosures and Victimisation

The Protected Disclosures Act 2014 became law on 15 July 2014. A Code of Practice on the Act was published in October 2015.

The Code answers questions relating to the Act and underpins the principle that it is in the interests of employers, workers and their representatives to have in place clear and agreed procedures providing for whistleblowing in the workplace. The Code therefore contains a "*Model Whistleblowing Policy*".

Further information in relation to the Act can also be found here.

In addition, a new Code of Practice on Victimisation has been published and outlines, for the guidance of employers, employees and trades unions, the different types of practice which would be regarded as constituting victimisation as a result of membership of/activity on behalf of a trade union by an employee.

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Contributed by Catherine O'Flynn and Nuala Clayton

In Short: No USC for Employer Contributions to PRSA

The Finance Bill 2015 was published on 22 October 2015 and it has amended certain provisions relating to PRSAs. PRSAs will now be treated in the same manner as occupational pension schemes where employer contributions do not attract a Universal Social Charge liability for the employee. Employer contributions to a PRSA will no longer attract a Universal Social Charge for the employee.

Contributed by Ciara McLoughlin

In Short: ODCE Tips to Reduce Costs Associated with Company Stationery

The Companies Act 2014 requires that the names of a company's directors be printed on all business letters bearing the company's name. The Office of the Director of Corporate Enforcement (ODCE) recently issued guidelines in order to alleviate the administrative cost implications of this.

The guidelines confirm:

- There is no legal obligation for the directors' names to be pre-printed on company stationery.
- There are no rules regarding format or font size so long as the text listing the directors' names is legible.
- Companies can pre-order stationery without any directors' names printed and later add the relevant details as and when the stationery is used.
- Labels can be placed over directors' names to reflect a revised list and names of directors who have resigned can be blanked out.

By outlining these simple measures the ODCE hopes that Irish companies can reduce the unnecessary expense associated with the loss of company stationery which has incorrect directors' names printed.

Contributed by Adam Synnott

In Short: MiFID II Implementation Delay

On 18 November 2015, ESMA published a note (dated 2 October 2015) on the possibility of a delay in the implementation of MiFID II.

The note explains that it is unlikely that the Level 2 provisions will be published before March 2016. This will leave less than nine months to develop the systems needed for MiFID II implementation, which ESMA acknowledges is insufficient for the most complex systems. ESMA estimates that the delay could be by up to one year.

On 27 November 2015, the European Parliament's MiFID II negotiating team informed the European Commission that it is ready to accept a one-year delay of the entry into force of MiFID II subject to certain conditions.

Contributed by Niall Crowley