Welcome to the October 2019 issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

Irish Employers need to work harder if they're to comply with new Work-Life Balance legislation

Irish employers face legal, business and reputational risk if they are not in compliance with recently introduced and upcoming protective leave legislation. That was the consensus at a roundtable discussion on the topic *'Work-Life Integration - Protective Leave and Flexible Working Arrangements'* in William Fry's Grand Canal office.

Under new legislation, which came into effect at the start of the month, the amount of parental leave that a parent can take per child has increased from 18 weeks to 22 weeks. In September 2020, this entitlement will increase to 26 weeks. The age of a child in respect of whom leave can be taken has also increased from 8 years to 12 years. The EU has also recently approved a Directive on Work-Life Balance for Parents and Carers.

Alicia Compton, Employment & Benefits Partner at William Fry, noted: "The most significant impact of this development from an Irish perspective will be the introduction of the right of parents and carers to request flexible working arrangements. Ireland will need to introduce legislative changes to put structure around the application process and the extent to which an employee may have the right to enforce a reasonable request for flexible working arrangements. Employers will need to scrutinise the Irish legislation to ensure compliance."

Ben Conway, Senior Associate in William Fry's Employment & Benefits team, added: "We would advise all Irish employers to introduce a flexible working policy if they do not already have one in place. A robust policy should clearly outline how requests for flexible working arrangements will operate in practice. We recommend that employers consider any request in a reasonable and consistent manner before making a final decision."

The Government has said that it will introduce a Parental Leave and Benefit Bill 2019 which will make provision for two weeks of parental leave benefit (to increase to seven weeks) to be taken by a parent during the first year of their child's life. This would be separate and additional to any maternity, adoptive or paternity benefit. A breach of the Parental Leave Acts 1998 and 2019 could result in employers having to pay impacted employees' compensation of up to 20 weeks' remuneration.

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GDPR – Update for Pension Trustees

Prior to the GDPR compliance deadline of 25 May 2018, trustees and their advisors undertook the preparatory work necessary to ensure complaint arrangements were in place, in good time, ahead of the deadline. Over one year post the deadline, however, the focus should have switched to maintaining compliance with the ongoing requirements of the GDPR regime. We outline below key items that pensions trustees should keep on their agenda to ensure continued compliance with the GDPR.

1. GDPR & IORP II

Ireland, having failed to transpose IORP II ahead of last January's deadline, has yet to publish the necessary transposing legislation and related guidance. However, upon transposition, IORP II will require trustees to issue an annual benefit statement to all members (including deferred members). In preparation for this new requirement, trustees, as controllers of the personal data collected from scheme members, must consider addressing the GDPR risks attached to complying with the new requirement. GDPR principles related to data accuracy, integrity and confidentiality are particularly important in this context as data held by many schemes on deferred members could be out-of-date. In anticipation of this new IORP II requirement, many schemes have begun carrying out a *"data cleanse"* or *"data verification"* exercise. This involves contacting deferred members to confirm their current contact details and email addresses and removing any inaccurate or out-of-date contact details.

2. Updating privacy notices

Trustees will likely have already issued members with a data privacy notice, setting out the requisite details related to the processing of their personal data. However, in the event of a change in circumstance impacting the notice issued, e.g. a different lawful basis is to be used; the purpose for processing member data has changed; additional data is collected, the retention period is extended, or data is to be processed by a new data processor, an updated privacy notice or "just in time" notice should be sent to scheme members.

Ideally, the updated privacy notice should issue before the new processing takes place/change takes effect. Also, in the event the personal data was not collected by trustees directly from the members, the notice should be sent within 1 month or as soon as possible thereafter. A practical approach may be to include the updated privacy notice with annual benefit statements. However, trustees would need to consider the length of time between the changes taking effect and the issuance of statements and assess whether a separate (earlier) communication is required to ensure members are advised in compliance with the requirements.

3. Data breach management

Some trustees have had to grapple with suspected or actual data breaches in the last year. Trustees should have a Data Breach Policy in place that sets out a breach response plan and consideration should be given, in light of any such crises, to reviewing the robustness of the breach response plan. In any event, trustees should consider undertaking test runs to ensure the adequacy of the breach response plans and their ability to manage a crisis and mitigate risks for members.

Please contact our partners listed or your usual contact at William Fry for further information.

Contributed by: Jane Barrett & Anna Ní Uiginn

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Evolution of Directors’ Duties Since the Companies Act 2014

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The Companies Act 2014 has been in force for more than four years, and during this time there have been several developments that directors of Irish companies should be aware of. Many of these relate to accounting practice, with the Companies (Accounting) Act 2017 amending the filing requirements for various classes of Irish companies. A development in the area of financial reporting discussed in this article relates to the obligations of directors of certain large companies to report non-financial and diversity information in the directors report that forms part of the financial statements.

Click here or on the image below to read the full article.

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Knowledge Lawyer, Corporate Department, William Fry

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Introduction

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Financial intermediaries required to disclose commission arrangements to consumers

Background

The Central Bank of Ireland (the "Central Bank") has published an addendum to the Consumer Protection Code 2012 (the "Code"), which incorporates new rules in the area of commission payments by product producers to financial intermediaries. The new requirements have been introduced to ensure greater transparency for consumers regarding commission arrangements and to minimise the risk of commission-related conflicts of interest.

New measures

Financial intermediaries, including insurance brokers and financial advisers, will be required by the Central Bank to publish information on their website relating to the commissions they receive from product producers such as banks and insurance firms. Furthermore, intermediaries will not be allowed to call themselves "independent" in situations where they accept commission for providing financial advice.

A financial intermediary's receipt of commission will be prohibited and deemed a conflict of interest where it is linked to targets that do not consider the best interests of the consumer. It will only be allowed where it does not impair compliance with the requirements of the Code or the European Union (Insurance Distribution) Regulations 2018. Non-monetary commission benefits will only be permitted where they demonstrably enhance the quality of the service for the customer. As such, free hospitality for intermediaries such as sporting event tickets and trips will no longer be allowed under the new rules.

Transparency and supervision

The Director of Consumer Protection in the Central Bank, Gráinne McEvoy, outlined that the rationale for the new rules is to ensure that customers know exactly what they are paying for when they purchase products recommended by financial advisers and to limit the potential for bias on the part of intermediaries. The Central Bank will begin supervising compliance with the new rules when they come into effect on 31 March 2020. Supervision will be carried out by the Central Bank conducting inspections and carrying out reviews of specific issues. The Central Bank will be able to request details of non-monetary benefits given to an intermediary and an explanation for how the inducements are beneficial to the customer.

UK measures

Despite the new restrictions, the Central Bank stopped short of adopting the UK position. In the UK, broker commissions were banned altogether with the introduction of new rules stemming from the Retail Distribution Review (the "RDR") which were brought into force on 31 December 2012. The RDR essentially brought the commission system to an end and introduced a fee-based model known as "adviser charging". Under adviser charging, intermediaries are classified as either independent (who must consider all potentially suitable retail investment products) or restricted (who can limit their assessment to a restricted product range).

Conclusion

The new rules in Ireland, in comparison to the UK approach, means that broker commissions are retained while significantly restricting their application. From the time of implementation, intermediaries must:

- inform the customer about any commissions received for selling a financial product or service;
- not describe themselves as "independent" where they receive a commission;
- not take commission that could be contrary to the best interests of the customer; and
- not accept free hospitality packages or tickets from financial product or service providers.

Contributed by: James Foster

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Participants Accept Inherent Risks of Fox Hunting

Background

A recent High Court judgment demonstrated that the high threshold required to prove negligence or reasonable foreseeability in Ireland remains firmly intact in relation to participation in sporting activities.

The case arose as a result of severe back injuries sustained by the Plaintiff arising from a fall from a horse during a fox hunt in Ballygeehan, Co. Laois. The accident occurred on a jump over a tree obstacle when the Plaintiff's horse became caught in some brambles, causing the horse to fall on top of the Plaintiff.

The Plaintiff's claim was filed against both the hunting club and the landowner. The Plaintiff pleaded that the Defendants did not take reasonable care for her safety, failed to take any adequate precautions in terms of safety and caused or permitted a danger to exist.

The Defendants contended that any act or omission on the part of the Defendants was not sufficiently proximate to the alleged acts or omissions. In addition, they contended that the Field Master of the hunt had inspected the obstacle, instructed the field not to jump it and led them away from it. The Plaintiff then proceeded to attempt to jump the obstacle of her own volition.

The Plaintiff's core argument centred on her claim that she should have been advised by the hunting club not to take the jump and that more effort should have been made to pass the information back through the group to ensure that the jump was signalled as hazardous.

Voluntary participation in sport and inherent risks

O'Hanlon J. referred to the fact that voluntary participation in sport brings with it an acceptance of the inherent risks involved. Express reference was made to the Australian Supreme Court case of *Roote v Sheldon* which held that although there is an inherent risk via participation "this does not eliminate all duty of care of one participant to the other". It had to be determined, therefore, whether the Field Master had discharged his duty of care to a reasonable standard.

The Court held that the navigation of an unpredictable terrain expanding between 30 and 35 acres brought with it an inherent risk of falling that could not be denied. The Court noted that the warning of the Field Master, to turn away from the tree obstacle, was properly communicated, that it was obviously given to a considerable number of people and that only three of the hunt group of 40 to 50 riders, attempted to jump the particular obstacle.

With regard to the landowner, it was accepted that a general rule exists in fox hunting that the members waive all claims against landowners for injuries to themselves or their horses. The landowner's only involvement in this case was his acceptance of a call from the Master of the Hunt and subsequent permission for the hunt to travel across his land and as such he was held to have no liability.

Conclusion

The Court ultimately held that the Field Master followed the rules and discharged a reasonable duty of care to the Plaintiff. The Court further held that the Plaintiff voluntarily assumed the risk to her own detriment. The high bar required to prove negligence or reasonable foreseeability in a sports injury claim had not been reached and the Court dismissed the Plaintiff's claim. In this case the rules and procedures of the sport were followed and other sporting bodies should take note that this will be crucial to a negligence action for such an injury.

Contributed by: Patrick Murphy

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Central Bank to introduce rules for dealing with Fund Errors

On 9 September 2019, the Central Bank of Ireland published a consultation seeking feedback on a proposed set of rules covering the 'treatment, correction and redress of errors in investment funds'. The consultation, which is open until 9 December 2019, poses a series of questions to industry on a proposed approach to the development of a regulatory framework in this area. Currently, there is no formal Irish regulatory regime for the treatment of errors in investment funds. This consultation, therefore, represents the first step by the Central Bank in the establishment of a set of rules and requirements to govern how funds and their management companies should address fund errors.

Click here or on the image below to read the full article.

Contributed by: Nessa Joyce.

In Short

ESMA Beefs Up Liquidity Risk Management Rules for Funds & Other Briefings Sep 19

Welcome to the September 2019 edition of our monthly update from the Asset Management & Investment Funds team.

In this month's edition we examine ESMA's guidelines for liquidity stress testing by investment funds which were published on 2 September along with other topical updates. ESMA's guidelines apply to UCITS managers and AIFMs (16 of the 18 guidelines apply to managers), depositaries and National Competent Authorities. Currently, both UCITS managers and AIFMs are, under their respective legislative regimes, subject to liquidity risk management requirements which include obligations, in the case of AIFMs, to regularly conduct stress tests and, for UCITS managers to do so "where appropriate".

The Guidelines, which ESMA published in response to a recommendation from the European Systemic Risk Board, detail practices to be followed by UCITS managers and AIFMs in conducting such stress testing of both assets and liabilities of funds under management. The publication of the guidelines was preceded by a consultation process which drew over 30 responses from industry and a summary of this feedback received by ESMA was published along with the guidelines on 2 September.

Notwithstanding a significant majority of industry suggesting a lengthy implementation period of up to 24 months, the Guidelines are set to apply to both in respect of new and existing funds from 30 September 2020.

Please click here or on the image below to access the full update.

Contributed by: Nessa Joyce

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Department of Finance Publishes Proposed Draft Transfer Pricing Legislation

On 2 September 2019, the Department of Finance issued a feedback statement concerning the proposed update to Ireland's transfer pricing rules. The feedback statement follows a public consultation, to which William Fry Tax Advisors / TAXAND Ireland contributed. The public consultation was launched on 18 February 2019. The feedback statement can be viewed here.

The proposed legislation, while still in draft form, reflects a pragmatic and sensible approach taken by the Department of Finance concerning the implementation of the updated 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the 2017 Guidelines) and in particular takes into account key concerns raised in our consultation submission.

In line with our recommendations, the draft legislative changes focus on harmful tax practices and seek to carve out domestic transactions and certain capital transactions below a material threshold of €25 million from the scope of the extension to the transfer pricing rules. This is to be welcomed and should be seen as a significant boost to domestic businesses who are facing increased burdensome compliance costs and who would have been disproportionately impacted by a full introduction of the 2017 Guidelines.

A further consultation period has been announced until 13 September 2019 for feedback from stakeholders.

Central Bank of Ireland AML/CFT Guidelines for the Financial Services Sector

On 6 September 2019, the Central Bank of Ireland published revised 'Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector'. The Guidelines set out the key legislative requirements provided by the 2010 Act under seven headings together with the CBI expectations of the risk factors to be considered by credit and financial institutions.

Read our full briefing here.

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