



WILLIAM FRY

Age in the Workplace

Employment Report 2016

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FOREWORD

Welcome to the William Fry Employment Report 2016 which focuses on age in the workplace. To explore how age-related issues are affecting the Irish workplace, we commissioned a national survey of 211 employers, 442 employees and 202 unemployed people, currently looking for work. The key areas explored include perceptions as to what constitutes an “older employee” and a “younger employee”, the challenges for older employees in adapting to technological innovation and retirement practices within organisations.

Age-related issues can pose difficulties for employees and employers at all stages of employment. In this report, we identify the challenges and solutions open to employers.

We look at the legislation governing recruitment and promotion. Employers must be able to justify recruitment and promotion decisions on objective and reasonable criteria. The impact of technology on recruitment methods is also explored.

Whether working with colleagues or hiring new staff, it is important to be aware of the pitfalls of stereotyping. Our analysis shows that certain characteristics are more often attributed to older or younger workers and such stereotyping may influence

how employers view and treat staff depending on age.

Retirement is an increasingly complex issue for employers. Failure to set and communicate compulsory retirement ages to employees can lead to difficulties for employers when older workers refuse to retire. Retirement ages must also be capable of objective justification.

A significant proportion of employers surveyed do not have clearly defined retirement ages for their employees and, as a result, may be unnecessarily exposing themselves to legal risk.

It is impossible to eliminate the risk of age-related issues emerging in the workplace. However, if employers understand their obligations, have well-drafted policies in place and adequately communicate those policies to all employees, many of the potential risks can be minimised.

We hope you find this report interesting and informative and we welcome your feedback.



Alicia Compton
Partner

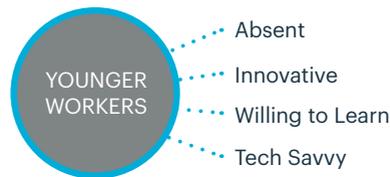
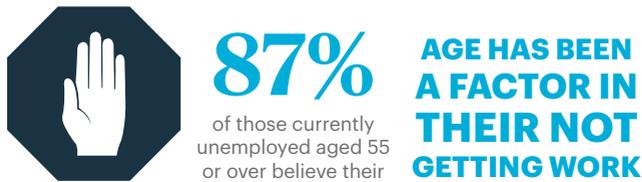


Catherine O'Flynn
Partner

Age Discrimination



KEY SURVEY FINDINGS



WHAT IS AGE DISCRIMINATION?

Since the Employment Equality Act 1998 came into effect, employers have been prohibited from discriminating against existing or prospective employees on the grounds of age in relation to access to or conditions of employment, training, promotion and re-grading or classification of posts.

Irish equality legislation prohibits direct and indirect discrimination. The employer's intent is largely irrelevant. It is the effect on the employee or prospective employee that matters.

Direct discrimination occurs where a person is treated less favourably because of age. For example, setting an upper or lower age limit for a job directly discriminates against a person outside the age band. Indirect age

discrimination occurs where a provision or practice has a greater adverse impact on workers in one age group than those in another. For example, a requirement for job applicants to have worked in a particular industry for ten years may disadvantage younger people. Whilst direct discrimination is always prohibited, indirect discrimination is not prohibited if it can be shown that it is objectively justified and is a proportionate means of meeting a legitimate business aim.

WHEN CAN EMPLOYEES/JOB CANDIDATES BE TREATED DIFFERENTLY BECAUSE OF THEIR AGE?

Employment and pensions legislation provide exceptions to the general prohibition on age discrimination. Pension schemes may fix the age for admission or entitlement to benefits under the scheme and set retirement

ages, provided that this does not result in discrimination on gender grounds. Irish equality legislation provides that employers can fix different (voluntary or mandatory) retirement ages within the workforce if the difference in treatment is objectively and reasonably justified by a legitimate aim and the means taken are appropriate and necessary.

There is ongoing debate as to whether employers should be permitted to impose mandatory retirement ages save in relation to limited exceptions. This is the position in the US and Australia.

In December 2015 the Oireachtas Joint Committee on Justice, Defence and Equality published its Report on hearings in relation to the Employment Equality (Abolition of Mandatory Retirement Age) Bill 2014. The Committee's recommendations include

that this Bill “**be considered in the same context as the Civil Service (Employment of Married Workers) Act 1973 where the bar against married women working in the public service was revised by an Act of the Oireachtas, notwithstanding the loud arguments made at the time that women would displace other workers in the workplace and that the change would have adverse consequences for the Irish economy**”.

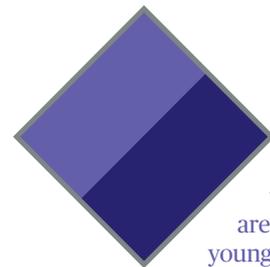
AGE-RELATED PERCEPTIONS

The perceptions surrounding older and younger persons in the workplace is one of the most interesting findings of our survey. Of particular interest is the level of consistency of response across the three groups polled, employers, employees and those currently unemployed.



61%

of employers believe that older workers are resistant to changes in work practice



50%

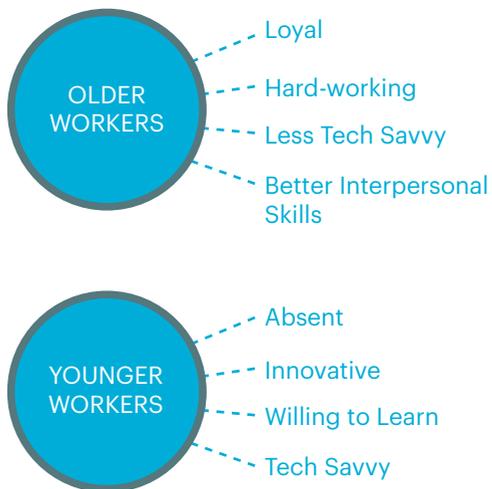
of employers believe that older workers are more loyal than younger workers

The characteristics attributed to “younger employees” and “older employees” seem to follow societal stereotypes. Younger employees are seen as being more likely to be willing to learn new skills, more innovative and more technologically capable, whereas older employees were perceived to have better interpersonal skills, be harder working, be more loyal and dependable, but more resistant to changes in work practices and hours.

Research in this area indicates that stereotypes held about older workers in particular are generally not consistent with the research evidence.

Employers should be live to the risk of stereotyping staff/job candidates on age grounds.

EMPLOYERS TYPICAL PERCEPTIONS:



WHAT AGE DO EMPLOYERS REGARD AS AN OLDER/YOUNGER WORKER?

Older = 51 Years

Younger = 26 Years

HIGH PROFILE AGE CASES

Increasingly employees/candidates are bringing age based discrimination claims. Age is regularly cited as one of the discriminatory acts/omissions alleged. Often gender based discrimination is also alleged.



In the case of **O'Reilly v British Broadcasting Corporation and**

Bristol Magazines Ltd [2010], Miriam O'Reilly was a presenter with the BBC programme 'Countryfile'. In late 2008 all but one of the programme presenters were removed, including Ms. O'Reilly. The new presenters, apart from John Craven (68), were in their 30s compared to Ms. O'Reilly who was 51 and her former co-presenters who were in their 40s.

Ms. O'Reilly was initially considered for other positions within the BBC. However, when these positions did not materialise, she brought proceedings against the BBC alleging sex and age discrimination.

The English Equality Tribunal upheld Ms. O'Reilly's claim for age discrimination stating that the BBC's lack of documentation in relation to their decision making process made it "much more difficult for the [BBC] to explain the decision and to state with clarity the grounds upon which the decision was taken".



This case can be contrasted with the **McCririck v Channel 4 Television Corporation and IMG Media Ltd (2013)** case brought by John McCririck, who had worked for Channel 4 Racing since 1984, becoming a well known betting pundit. Mr. McCririck averaged about 70 appearances a year with Channel 4 Racing.

In 2008, Mr. McCririck's appearances were reduced to 55 days per year and to 40 days in 2010. Following the appointment of a new production company in 2012, Mr. McCririck was advised that his services were no longer required.

Channel 4 was hoping to broaden the image of horse racing and had engaged a market research agency to undertake a survey in relation to presenters, the results of which showed that viewers held negative views of Mr. McCririck.

Mr. McCririck alleged age discrimination on the part of Channel 4 noting that of the 13 proposed presenters, only one was over 50.

The Equality Tribunal found that Mr. McCririck's claim of age discrimination failed on the basis that he was dismissed because of his persona emanating from appearances on celebrity television shows and the associated press articles and not his age. Channel 4 was able to produce documentary evidence to prove its decision making process was unrelated to age.



Best Practice

- Educate and train employees on the grounds of discrimination which are prohibited by Irish equality legislation.
- Ensure that handbooks refer to the fact that discrimination on any of the grounds, to include age, is prohibited.
- Review employee contracts and handbooks and ensure a retirement age has been identified for the organisation.
- Consider the reason for having a specific retirement age, if one is identified.
- Avoid using age as a determinative factor in any decisions on candidates or employees.
- Retain documentary evidence of all decision-making processes in case of a challenge in accordance with data protection requirements.

Recruitment & Promotion



RECRUITMENT

Job candidates and employees are protected by employment equality legislation which prohibits discrimination on a number of grounds, including age. Accordingly, an employer may be liable if a candidate or an employee can show that the reason they were not offered a job or granted a promotion was connected to age.

When recruiting, employers should avoid questions which seek a candidate's age or date of birth. However, a maximum age for recruitment may be set if an employer can show that there will not be a reasonable return on the investment needed to train a new recruit to the necessary standard prior to retirement age.

Whilst candidates are no longer expected to state their dates of birth in applications, our survey shows that a significant proportion of employers (45%) still try to deduce a candidate's age by analysing their CVs. The sectors in which this practice was found to be most prevalent were financial services, retail and transportation.

45% of employers try to deduce a candidate's age by analysing their CV.



42%

of employers suggest that there are upper age limits for customer facing roles



87%

of those currently unemployed believe that their age has been a factor in their not getting work

CASE LAW ON RECRUITMENT



The UK air traffic control service was found to have discriminated on the grounds of age when it set an age limit for trainee applicants – **Baker v NATS (2009)**. Mr. Baker, who was 50 at the time of his application, was rejected on the basis that applicants had to be under the age of 36. A UK employment tribunal found that there were legitimate aims behind the age bar, for example, to achieve a high rate of success in training, to allow for a reasonable period of service post training and to ensure safety was not compromised. However, the age bar was held not to be a proportionate means of achieving those aims, particularly when the evidential basis for setting the bar was assessed. The UK air traffic control service



52%

of employees believe that age plays a role in whether a candidate is successful in getting a job

had also failed to show that it had considered alternatives to reduce the potential issues posed by older employees.

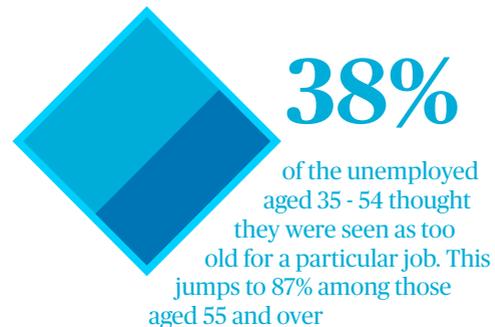
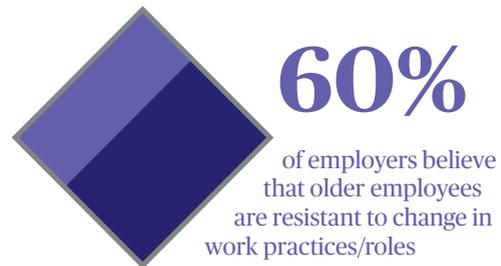


In the Australian case of **Virgin Blue Airlines Pty Ltd v Stewart & Ors (2007)**, a number of flight attendants successfully claimed that they had been discriminated against on the basis of age in the recruitment process. Candidates were assessed on a number of characteristics

including “Virgin flair”. This was defined as “a desire to create a memorable, positive experience for customers: the ability to have fun, making it fun for the customer”. The candidates contended that the Virgin flair characteristic operated to the disadvantage of older employees as only one of the successful applicants from a pool of over 750 was over the age of 36. An Anti-Discrimination Tribunal in Brisbane concluded that although there was no intention to discriminate, the criterion produced a subconscious bias in the assessors which affected the selection process. This decision was upheld on appeal by the Supreme Court of Queensland.

PROMOTION

The issues considered in relation to the recruitment process apply equally to promotion. Employers should remember that job descriptions and interview questions can potentially form the basis of an age discrimination claim. As candidates for promotion will generally know a lot more about their employer and their colleagues/competitors for the promotion than external job candidates, the promotion process can cause problems for employers if age is a factor in the decision making process.



CASELAW ON PROMOTION

In **A Teacher v A National School (2015)**, a teacher was employed by a school as deputy principal for eight years before she applied for the position of principal. She was significantly more qualified and experienced than her competitor candidate, a fact acknowledged by the chair of the interview board. Despite this, the interview board rated both candidates as equally qualified. The teacher brought a discrimination case on a number of grounds including age. The Equality Tribunal found the significant difference in qualification and age between the candidates raised a prima facie case of age discrimination which the school failed to rebut. The teacher was awarded €54,000, equal to one year's salary, in compensation for

the effects of the discrimination. Two of the interviewers could not provide the Tribunal with notes of the interview process, as they had discarded them. The Tribunal noted that “these irregularities do not favour the respondent, as it is trite law by now that such actions constitute poor practice in hiring and promotion processes”.



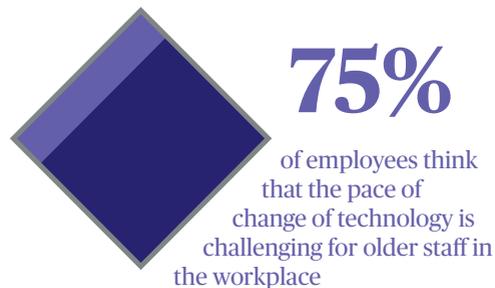
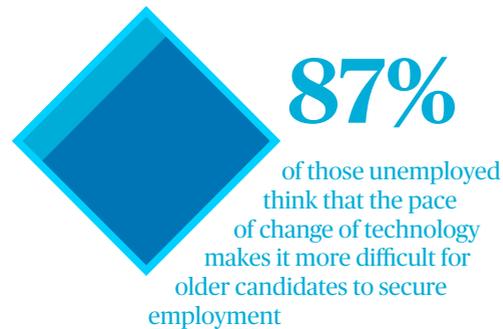
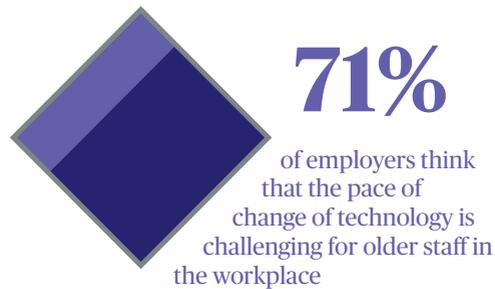
Homer v Chief Constable of West Yorkshire Police (2012).

The West Yorkshire police made it a requirement that to be eligible for promotion to a certain grade, a candidate needed to have a university degree or equivalent. The candidate was approaching retirement age and would be beyond retirement age by the time he completed his degree. It was alleged that this new criterion indirectly disadvantaged older candidates who

were approaching the end of their careers. The UK Supreme Court overturned the previous rulings and found that the requirement for a law degree to qualify for the grade was a rule placing those in Mr. Homer’s age group at a particular disadvantage and referred the case back for reconsideration of the question of whether this could be justified.

TECHNOLOGY

Technology has had a major impact on how employers advertise jobs. 37% of employers surveyed said that their main method of recruitment is currently online, however 63% believe that their primary method of recruitment will be online within the next five years. Our survey results are that the unemployed are twice as likely as existing workers to look to print advertisement rather than online. Candidates will have to adapt to online developments to keep up to date with job opportunities and ensure they are looking in the right places for their next job.



That such a high percentage of the workforce believe that the pace of technological change presents a challenge to older staff indicates the necessity for workers to have access to and be open to continuous training in this area during their working lives.

Best Practice

- Ensure that decisions not to recruit/promote or permit access to training are based on factors other than age.
- Check that job advertisements, job descriptions and interview questions do not infer that age is a factor in the process.
- Ask the same questions of all candidates as far as possible.
- Take detailed notes at all interviews, and retain selection documents for at least 12 months after the conclusion of the selection process. Ensure that this information is kept in accordance with data protection obligations.
- Ensure opportunities for promotion and training are made known to all employees.
- Provide appropriate training for managers required to manage colleagues older than them.

Retirement



THE LAW ON RETIREMENT AGE

While Ireland has one of the youngest populations in the EU, the proportion of older workers in the workplace will continue to grow in the coming years. Some steps to address the challenges that an ageing population will create for the public finances have been taken including changes to the State retirement age. In 2014, the State Pension age became 66. It is scheduled to increase to 67 in 2021 and 68 in 2028.

Traditionally, employers in Ireland have set compulsory retirement ages in line with the previous State pension age of 65. To date the majority of employees have retired in or around this age and employers have not been faced with a significant portion of employees who wish to continue in employment. However, our survey found

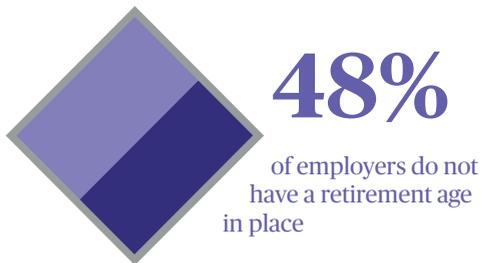
that 63% of employees over 55 want or believe that they will have to work past the age of 66. Enforced retirement is therefore likely to become an increasingly significant issue for employers.

While Irish equality legislation permitted employers to set retirement age, the European Court of Justice established that the setting of compulsory retirement ages and/or the provision of fixed term contracts on the basis of age could amount to age discrimination if not objectively and reasonably justified. The Irish courts and tribunals have been applying the European position for a number of years.

The state pension age is scheduled to increase to 67 in 2021 and 68 in 2028.

Examples of objective justification which have been accepted by the Irish courts /tribunals

- Motivation of younger employees by facilitating promotion
- Succession planning
- Workplace safety
- Public safety



Since 1 January 2016 with the commencement of the Equality (Miscellaneous Provisions) Act 2015, employers may only set a mandatory retirement age to achieve an aim which can be reasonably and objectively justified and the setting of that retirement age, is appropriate and necessary.

Consequently, employers should operate on the basis that they will be able to objectively justify the retirement age they have set in their organisation, if they are called upon to so do.

Other key components of defending a discrimination claim based on compulsory retirement is establishing that a normal retirement age does exist, it had been communicated to the relevant employee and it has been applied consistently across the organisation. Our survey found that 48% of the employers surveyed do not have a retirement age in their workplace.



CASELAW ON RETIREMENT AGE

O'Mahony v Southwest Doctors On Call Ltd (trading as SouthDoc) (2014), when Dr. O'Mahony commenced employment with SouthDoc the contract that he signed did not refer to a retirement age. Following a reduction in the HSE subvention, employees were given new contracts of employment with a new clause stating the normal retirement age was 65. Dr. O'Mahony did not sign the new contract. He was compulsorily retired at 65.

The Equality Tribunal decided that a prima facie case of discrimination had been established. It found that the discrimination could not be justified by submissions for intergenerational fairness, rather, the employer was trying to reduce headcount in the least expensive way. The Tribunal also found that there was no health and safety justification



Best Practice

as there had been no evidence to demonstrate why 65 was appropriate and necessary when employees had worked beyond 65. Dr. O'Mahony was awarded €12,000.

  In **Richard Lett v Earagail Eisc Teo (2014)** the

employer's retirement age was included in the company handbook; however, the Equality Tribunal found that Mr. Lett did not receive a copy of the company handbook as part of his contract. This was sufficient to establish a prima facie case of discrimination, which the employer did not successfully rebut. This case illustrates the importance of clearly communicating compulsory retirement age to employees.

- Consider updating the organisation's retirement age to mirror the State retirement age. Changing the retirement age will normally require employee consent.
- Engage with the organisation's pension fund trustees prior to any change. Amending a pension scheme will likely require actuarial and legal input.
- Identify legitimate reasons for the level at which a retirement age is set.
- Beware that allowing employees to work beyond the organisation's retirement age may provide a basis for other employees to claim that there is no objective justification of an existing compulsory retirement age.
- Set out compulsory retirement ages in contracts of employment and in employee handbooks.

Dealing with Age-Related Issues



REDUCING THE RISK OF AGE DISCRIMINATION CLAIMS

The employment equality acts provide that employers may be vicariously liable for acts of their employees. Employers may also face liability in the civil courts for injuries suffered by employees in connection with age-related bullying.

It is not a defence for an employer to say that discrimination took place without the employer's consent or knowledge. However, if an employer can point to the practical steps taken to educate staff and reduce the possibility of discrimination or bullying occurring, the employer's exposure to liability can be reduced. Key steps are to ensure that equality policies deal adequately and appropriately with equal treatment on the grounds of age and that all staff, managers in particular,

have appropriate training to recognise and eradicate age discrimination.

Increasingly younger employees are required to manage colleagues who are older than them. Our survey found that 60% of employers believe that this can be difficult. This is an example of an area where employers should ensure that practical and focussed training is given to staff.

Even with the best training, awareness programmes and equality policies in place, age discrimination claims may still arise. Awards for breach of equality or unfair dismissals legislation can be up to two years remuneration. An employer can also be required to take direct action, including making changes to existing policies or procedures, or to reinstate or re-engage a dismissed employee. Apart from claims of breach of equality

legislation, employees who believe they have suffered age-related bullying in the workplace can bring claims before the Civil Courts seeking damages.

For employers age discrimination claims can mean reputational damage, financial cost and low staff morale.



CASELAW

 In **Koh v Sainsbury's Supermarkets Limited (2009)**,

Ms. Koh, then a 51 year old manager, gave evidence of incidents of alleged age discrimination including being asked in a performance review whether, in light of her age, she should seek less demanding work. Ms. Koh eventually resigned and brought a claim for unfair dismissal and age discrimination. The UK employment tribunal held in her favour awarding £124,182.

 In **Roberts v Cash Zone (2013)**, Ms. Roberts, then an 18 year old employee, was called “a stropky kid” and “a stropky little teenager” before being dismissed. Ms. Roberts claimed these comments amounted to age harassment. The UK employment tribunal agreed and

found that the terms were not used in a neutral manner but in a manner which accorded with a negative stereotype. Ms. Roberts was awarded £2,000.

DEALING WITH AGE DISCRIMINATION CLAIMS

It is important for employers to have thorough investigation and dispute resolution procedures in place and to ensure that appropriate action is taken to remedy any consequences of discrimination. It may be necessary to discipline employees who have acted in breach of equality and dignity at work policies. If so, sanctions should be proportional and consistently applied.

62%

of employees aged 16-35 believe that not being taken seriously negatively impacted on their career



CASELAW

  **Fortune v Children At Risk in Ireland (2011)**. Ms. Fortune, who was in her 20s, was employed by CARI as a psychotherapist. She alleged that she suffered harassment by another employee, Ms. A, on the basis of her age. Ms. A was older than Ms. Fortune and would, Ms. Fortune alleged, comment on Ms. Fortune's lack of client experience, lack of years of clinical practice and clinical hours prior



Best Practice

to accreditation and lack of general life experience. Ms. A also allegedly stated that in her opinion, psychotherapy training courses should have an intake age of over 30 years to ensure graduates had the necessary life experience. These statements were made on a fortnightly basis over a two-year period.

Ms. Fortune claimed that she was repeatedly harassed on the basis of her age, that her employer had failed to take adequate steps to deal with this harassment and that this behaviour towards her ultimately led to her resignation. The Equality Tribunal found that Ms. Fortune had been discriminated against due to her age, leaving her no option but to resign. Ms. Fortune was awarded €35,000. Significantly, the Tribunal cited the “drawn-out, haphazard, start-and-stop manner”

in which her employer attempted to deal with her situation as one of the contributing factors to its award.

- Educate all employees on age discrimination, including the behaviours that may be considered as harassment, direct or indirect discrimination and victimisation.
- Ensure that the bullying and harassment policy refers to and prohibits age-related harassment or bullying.
- Ensure that HR/other policies cross-refer as appropriate e.g. the disciplinary policy and the equality, dignity at work policies.
- Train managers to avoid age discrimination in decision-making.
- Ensure that good investigation and dispute resolution procedures are followed where age discrimination claims are made.
- Ensure all claims are investigated speedily and thoroughly.
- Adopt a consistent and proportionate approach to disciplinary sanctions.

ABOUT THE RESEARCH

Behaviour & Attitudes (B&A), Ireland's largest independent Market Research company, has been successfully growing and evolving since 1985.

B&A offers a comprehensive suite of tailor made quantitative and qualitative research solutions, advising clients on all aspects of consumer behaviour and its implications. B&A is wholly owned by its management team, all of whom are active researchers.

The company works across many sectors looking at consumer, business, employee and employer behaviour. It designs and runs research and analytics studies to help understand and address the needs of a wide client base.

The company has unrivalled local resources, with more than 200 face-to-face interviewers, a 60 station telephone unit, an extensive internet panel and a team of highly skilled Focus Group Moderators and quantitative Data Analysts.

B&A is a long term council member of International Research Institutes, the world's largest network of independent agencies, enabling active participation and international studies across its 34 country network. Although mainly Irish focussed, B&A works in 10 countries, for Irish and international clients each year.

The research contained in this report was carried out in October 2015.

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ABOUT WILLIAM FRY EMPLOYMENT & BENEFITS DEPARTMENT

One of Ireland's largest law firms, William Fry offers unrivalled legal and tax expertise across the full breadth of the business sector. We advise many leading Irish and international companies, covering the public and private sectors.

With a staff of over 450, we operate a large international practice with offices in Dublin, London, New York and Silicon Valley.

Our Employment & Benefits lawyers advise on all aspects of employment law and practice. Our clients include many leading multinational and Irish companies, pension scheme trustees and public sector organisations.

Specialist areas include:

- Recruitment & promotion
- Equality
- Employment contracts and employee policies
- Health & safety
- Bullying & harassment
- Disciplinary investigations and procedures
- Employment injunction proceedings
- Unfair dismissal claims
- Redundancy programmes
- Post-termination restrictions
- Employment issues in receiverships, examinerships, administrations & liquidations
- Industrial relations
- Employment issues in business sales, restructuring, outsourcing & service provider changeovers
- Corporate immigration
- Pensions
- Employee share plans
- Termination of employment



“William Fry stands out for its peerless dedication and strength across the board.”
(Legal 500 EMEA, 2015)

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