WILLIAM FRY

The Employer's Guide to ESG

January 2023

The social component of ESG (environment, social and governance) is set to become increasingly important in the coming years. Large volumes of domestic and EU legislation designed to improve employee rights and security have been enacted, and more are proposed. Further legislation is likely to flow from the EU Social Taxonomy Report[1] which proposes a system to classify decent work, adequate living standards and wellbeing, and inclusive sustainable communities and societies.

Employers who fail to comply with new legislation and new standards will not only face regulatory hazards but will also have difficulty in accessing capital markets and be at a disadvantage when it comes to recruiting and retaining key talent. Employers therefore need to ensure they are compliant with all existing laws and are prepared for new legislation as soon as it is enacted. Our report is based on the results of surveying over 400 employers and over 1000 employees in Ireland[2].

The term "ESG" refers to the environmental, social and governance impact of an employer's activities. This report focuses on the social component as it relates to employers' obligations to their employees. All employment law comes within the scope of the social component of ESG. Employment law sets certain minimum social obligations, but ESG-conscious employers will strive to go further than those requirements.

[1] This report was published in February 2022 by the Platform on Sustainable Finance, an expert group of the European Commission

[2] This survey was carried out by William Fry LLP in conjunction with Behaviour & Attitudes Limited

Interestingly, while 100% of employers have ESG obligations, our research has established that only 17% know what these obligations are and have no concerns about implementing them.

ESG is not a new concept having its origins in the 2006 United Nations Principles for Responsible Investment. However, until recently, businesses have focused primarily on the environmental aspect of ESG partly because of the classification system established under the EU taxonomy for sustainable activities (the "**Environmental Taxonomy**"). The Environmental Taxonomy facilitates the assessment of an employer's environmental performance using an agreed set of measures.

This focus is now expanding to embrace the social aspect of ESG and there is growing momentum within the EU for the development of a social taxonomy.

The Final Report on the Social Taxonomy was published in February 2022 at the EU's request ("**Social Taxonomy Report**") by the EU Platform on Sustainable Finance, an advisory body to the European Commission. The Commission proposes to review the Social Taxonomy Report and use it to establish a classification system to measure an employer's 'social' credentials. It is anticipated that the creation of such a social taxonomy will prompt the introduction of further employment legislation as well as additional reporting and disclosure requirements of employers.

The Social Taxonomy Report proposes a system to classify decent work, adequate living standards and wellbeing, and inclusive sustainable communities and societies. It also proposes a non-exhaustive list of means to meet the "decent work" objective including pay transparency, paying the living wage, decent working hours, formal working relationships, equal opportunities, reduction of pay gaps and job creation for young people.

It has been acknowledged that the Commission could face challenges creating a classification system that can measure social performance across each Member State, different cultures and industries. However, when a classification system is established, applicable employers will likely be required to collect, measure and report on the various measurables to ascertain whether certain standards have been met and, in turn, whether an employer is deemed to be 'social' or not. The social taxonomy will be of fundamental importance to employers who need to meet social criteria to secure investment.

Separately, and in parallel, large volumes of domestic and EU legislation designed to improve employee rights and security have been proposed and enacted. It is anticipated that new employment-related legislation will continue to be introduced in order to meet the "decent work" objective.

RECENT AND UPCOMING LEGISLATION

ENACTED LEGISLATION

PROTECTED DISCLOSURES (AMENDMENT) ACT 2022

The Protected Disclosures (Amendment) Act 2022 transposes the EU Whistleblowing Directive (2019/1397) into Irish law and amends the Protected Disclosures Act 2014 to enhance and strengthen protections for whistle-blowers. This Act came into force on 1 January 2023. Volunteers, shareholders, board members and job applicants now have statutory protection. The definition of a "relevant wrongdoing" covered by statutory protections has been broadened. With some exceptions, private sector employers with 250 or more employees (reducing to 50 employees from 17 December 2023) must establish formal channels and procedures for the making of protected disclosures.

SICK LEAVE ACT 2022

The Sick Leave Act 2022 commenced on 1 January 2023 and provides an entitlement to statutory sick pay for an employee who would ordinarily work but is incapable of doing so due to illness or injury. An employee who is medically certified as unfit to work is entitled to 70% of their daily salary capped at €110 paid by the employer. The employee is initially entitled to three days sick pay per year which is set to extend to ten days by 2026.

EUROPEAN UNION (TRANSPARENT AND PREDICTABLE WORKING CONDITIONS) REGULATIONS 2022

The Transparent and Predictable Working Conditions Regulations 2022 transposed the EU Transparent and Predictable Working Conditions Directive (2019/1152) into Irish law on 16 December 2022. The purpose of the Directive is to ensure that all workers have the right to complete information on the essential aspects of their work. In particular, the Regulations provide (i) that employees must be given certain information about their employment within new set timeframes; (ii) that save for exceptional circumstances, the maximum length of a probationary period (other than that of a public servant) is six months; (iii) the right to undertake other work with a ban on exclusivity clauses subject to certain conditions; (iv) the right to more predictable working schedules (e.g., rotas); and (v) the right to receive mandatory paid training during working hours.

PAYMENT OF WAGES (AMENDMENT) (TIPS AND GRATUITIES) ACT 2022

The recently enacted Payment of Wages (Amendment) (Tips and Gratuities) Act 2022 requires employers to fairly distribute tips received from customers and prohibits employers from deducting tips from wages. The Act also requires employers to be transparent about their tipping policies and ensure that customers are provided with clear information about how their tips and services charges are distributed to staff and to contract workers.

The Act applies to certain sectors (including hospitality, services, transport) with effect from 1 December 2022. Also, with effect from 1 December 2022, employers in those sectors are required to display a tips and gratuities notice.

GENDER PAY GAP INFORMATION ACT 2021

The Gender Pay Gap Information Act 2021 and the associated Employment Equality Act 1988 (Section 20A) (Gender Pay Gap Information) Regulations 2022, require certain employers to report annually on pay by gender in their organisation. Reporting is required across a range of metrics and employers are obliged to explain any gender pay gap and outline measures the employer is taking to reduce the gap. The employer must make their report available to employees and the public for three years. The Act applies immediately to employers with 250 or more employees and will extend to employers of more than 150 in 2024 and 50 in 2025.

AMENDMENT OF THE PARENT'S LEAVE AND BENEFIT ACT 2019

With effect from 1 July 2022, parent's leave was extended from five to seven weeks leave. Parent's leave is available to each parent and must be taken during the child's first two years after birth or adoption. Employees are entitled to claim a social welfare benefit during parent's leave and there is no requirement for an employer to pay an employee during parent's leave. Parent's leave is separate to parental leave and paternity leave. Paternity leave is two weeks leave for the parent who did not take maternity or adoptive leave. This leave must be taken within the first six months after a child's birth or adoption and employees are entitled to claim a social welfare benefit for this period. Parental leave is 26 weeks unpaid leave per child before the child's 12th birthday (or before the 16th birthday for a child who has a disability or before two years after a child's adoption order when the child is above the age of 10 but under the age of 12 on the date of the order). This leave can be taken as either one continuous period or two blocks of at least six weeks. Any employee with over three months' continuous service whose child is near these age limits can take one week's unpaid parental leave for each month of continuous service completed before the leave begins.

CODE OF PRACTICE ON SEXUAL HARASSMENT AND HARASSMENT AT WORK

The Irish Human Rights and Equality Commission published a new Code of Practice on Sexual Harassment and Harassment at Work in March 2022. Employers will be deemed to be legally responsible for any harassment (including sexual harassment) of employees in the course of their employment unless they can prove that they took reasonably practicable steps to prevent, reverse the effects of, and prevent the recurrence of harassment. The Code of Practice helpfully provides practical guidance to employers on how to satisfy this legal responsibility. Whilst it is not a legal obligation to comply with the Code of Practice, failure to do so can make the successful defence of a claim a difficult task for an employer.

SOON TO BE ENACTED LEGISLATION

WORK LIFE BALANCE AND MISCELLANEOUS PROVISIONS BILL 2022

The Work Life Balance and Miscellaneous Provisions Bill 2022, once enacted, will fully transpose into Irish law the EU Work Life Balance Directive (2019/1158), insofar as its provisions are not already provided for under Irish law. The Directive was due to be transposed into Irish law by 2 August 2022. Currently, the Bill is progressing through the legislative process before the Houses of the Oireachtas.

The Bill provides further rights for parents and carers to help support a better work life balance including the right to request both flexible and remote working arrangements. The Bill also introduces five additional days unpaid leave per year, to provide care and support to a child, parent, spouse, civil partner, and a person who lives in the same household who is in need of serious medical care. The Bill extends the existing maternity leave entitlements to transgender men and breastfeeding break entitlements will be extended to two years post birth.

CORPORATE SUSTAINABILITY REPORTING DIRECTIVE

The Corporate Sustainability Reporting Directive requires large companies[3] to adopt EU sustainability reporting standards. The Directive requires employers to publish information, as part of their management reports, on equal opportunities (including gender equality, equal pay, training and development and employment of people with disabilities) and working conditions (to include secure and adaptable employment, wages, involvement of the worker, work-life balance and working environments). The Directive came into force in January 2023 and, over the next five years, the requirements of the Directive will be introduced on phased approach for both large firms and small to medium enterprises. EU Member States have to introduce national legislation by 6 July 2024 to comply with the provisions of the Directive.

[3] Large companies are companies governed by the law of, or established in, an EU member state and EU stock exchange-listed companies (except listed micro-companies). A large company in this context is one meeting two or more of the following criteria: (i) at least 250 employees; (ii) annual turnover exceeding €40m; and (iii) assets exceeding €20m.

LEGISLATION IN PROCESS

PAY TRANSPARENCY DIRECTIVE PROPOSAL

The Pay Transparency Directive is an EU-proposal to introduce gender pay gap reporting to employers with over 50 employees. Gender pay gap reporting has already been introduced in Ireland for employers with over 250 employees and will be applicable to employers with over 50 employees by 2025. In addition to the reporting, the Directive proposes to shift the burden of proof on any pay-related issues onto employers and prohibit pay secrecy.

The Directive was proposed in March 2021 and is being considered by the co-legislators in the EU. If adopted in its current format, the Directive will have to be transposed into national law within two years.

GENDER BALANCE AT BOARD LEVEL DIRECTIVE PROPOSAL

The Gender Balance at Board Level Directive is an EU-proposal to set targets for listed EU companies to have 40% of the underrepresented gender among non-executive directors and 33% among all directors. The proposed Gender Balance at Board Level Directive provides that all board appointments must be clear and transparent, and objectively based on individual merits, regardless of gender.

The Directive was proposed in November 2012 and only progressed in 2022. The Directive has been adopted by the EU co-legislators. It will be published in the Official Journal of the EU, 20 days after which, it will become law. This Directive must be transposed into national law within two years but companies will have until 30 June 2026 to meet the targets.

PLATFORM WORKERS DIRECTIVE PROPOSAL

The proposed EU Platform Workers Directive, if adopted, will introduce new criteria to determine whether an online platform is an employer and whether a platform worker is an employee. It will also introduce new rights for both platform-workers and self-employed people.

The Directive was proposed in December 2021 and is being considered by the co-legislators in the EU. If adopted in its current format, the Directive must be transposed into national law within two years after it enters into force.

ADEQUATE MINIMUM WAGES DIRECTIVE PROPOSAL

The Adequate Minimum Wages Directive is an EU-proposal to establish a framework for adequate minimum wages and protects employees who are entitled to minimum wage. This Directive aims to promote collective bargaining on wages and improving the enforcement and monitoring of the minimum wage protection.

Simultaneously, the Minister for Enterprise Trade and Employment has proposed that a living wage of 60% of the median wage in any given year in Ireland, will be introduced as the new base wage and that the national minimum wage will be phased out by 2026.

The national changes to the minimum wage are set to be fully introduced by 2026. The Adequate Minimum Wages Directive was proposed in October 2020 and is currently being considered by the EU co-legislators. If adopted, this Directive must be transposed into national law within two years of its entry into force.

CONSIDERATIONS FOR EMPLOYERS

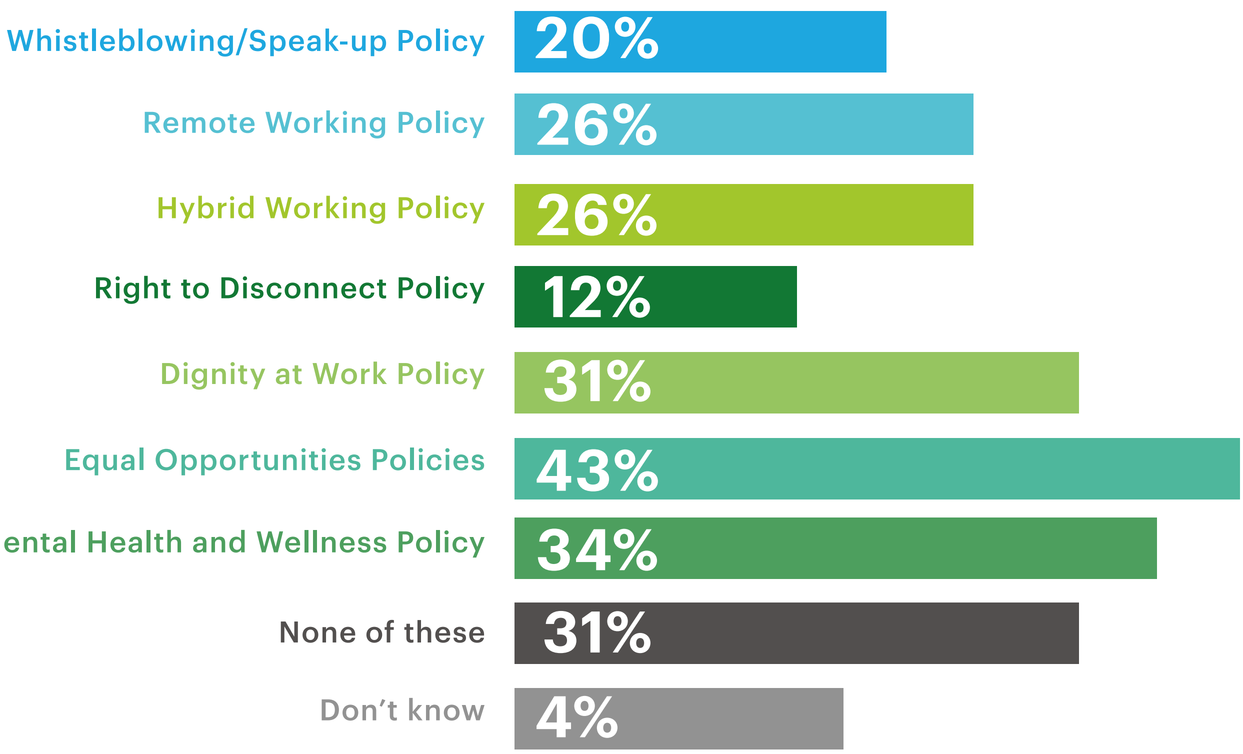
According to the European Banking Authority, employers who fail to comply with ESG-related requirements expose themselves to credit, market, operational, reputational, liquidity and funding risks. In addition, employers who do not meet at least basic ESG standards may also struggle with recruitment and retention of employees and risk facing legal and regulatory action.

This is leading some employers to link executive remuneration to ESG metrics. A publication by the Institute of Directors[2] in 2021 reported that 34% of EU companies incorporated ESG metrics into their executive compensation in 2020 and 37% of Irish respondents planned to do so in 2021. William Fry LLP's survey in conjunction with Behaviour & Attitudes Limited identified that 71% of employees think that senior management bonuses should, or possibly should, be linked to their employer achieving its ESG social targets, including reducing the gender pay gap and improving equal opportunities.

[2] Institute of Directors, "ESG Strategy, Leadership, and Integration in Irish Companies" dated November 2021 (link)

Our survey shows that 77% of employers surveyed believe that they are compliant with all current employment legislation. However, only 20% of the employers surveyed have the legally mandated whistleblowing policy[3], only 26% have the proposed mandatory remote working policy and only 12% have followed the Workplace Relations Commission guidance and implemented a right to disconnect policy. Nearly a quarter of employers surveyed are not compliant or do not know if they are compliant with current employment laws which could expose such employers to numerous claims and offences. Employers are advised to follow the necessary legislation and ensure that all guidance is implemented, as it is difficult to defend employment claims if an employer is not compliant with best practice.

POLICIES EMPLOYERS HAVE IN PLACE



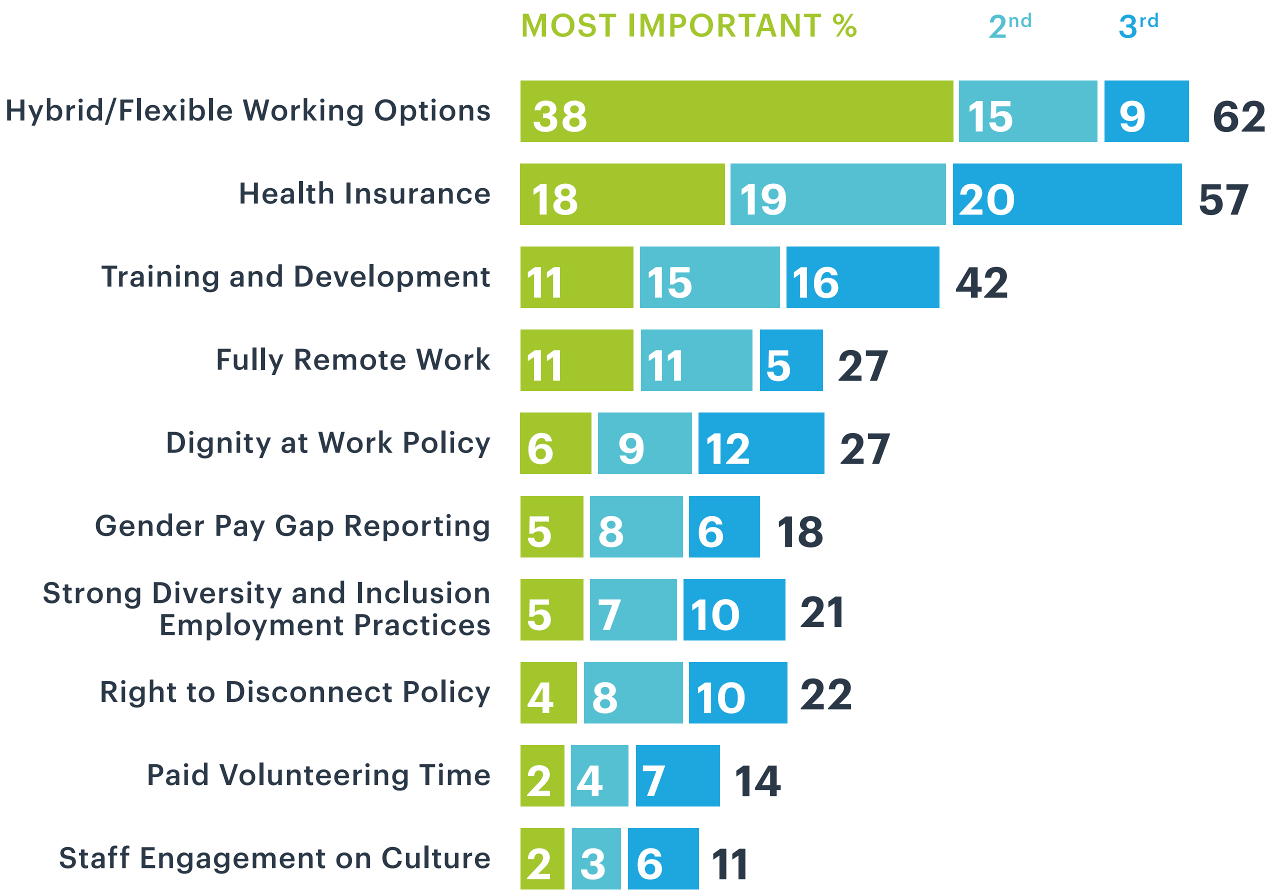
[3] From 17 December 2023, all public sector employers and all private sector employers with over 50 employees must have formal channels and procedures for the making of protected disclosures.

Of the employers surveyed with such employment policies in place, 39% do not provide ongoing training in relation to any of those policies and 54% do not measure the effectiveness of those policies. This is unsatisfactory for employers as those who have implemented policies have no way of ensuring that their policies are being understood by their employees and/or having the desired meaningful impact.

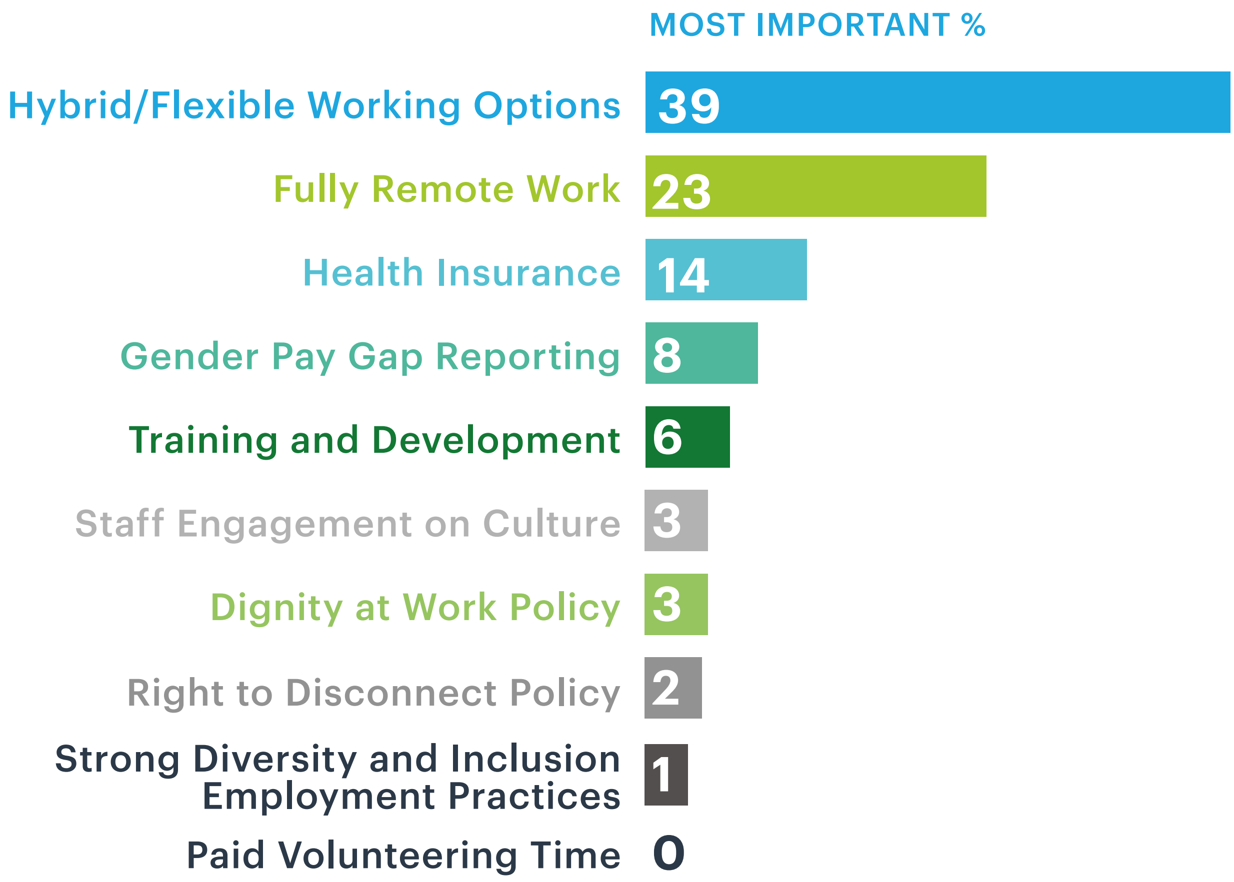
Employers collecting data to measure the impact of their policies and in particular, data referring to race, health, or sexual orientation, must comply with the General Data Protection Regulation. Our survey of employees showed that only 56% of them are willing to share their data with their employers on an anonymous basis to measure and improve the effectiveness of their employer's policies. This suggests that employers need to do more to gain their employees' trust so that they can collect and analyse data to ensure their policies have the desired effect.

TOP PRIORITIES FOR EMPLOYEES

Our survey results indicate that, of the policies listed, the top three priorities for employees are hybrid, flexible working options, health insurance and training and development. Our survey results also demonstrate that different groups of employees have different priorities. With many employers struggling with recruitment and retention, employers should be sensitive to the fact that employees in different demographics value different things. As mentioned, of the policies listed, the top priority of the employees surveyed is hybrid and flexible working policy, but interestingly only the 25–34-year-olds indicate that fully remote working is a high priority. 25-34-year-olds prioritised training and development the least while the over-50s prioritise gender pay gap reporting the least, out of all of the age groups. Interestingly, strong diversity and inclusion practices were ranked as the second least important policy to 25–34-year-olds, just ahead of paid volunteering time. An ESG proactive employer will listen to what is a priority for the demographics of their workplace.



25-34 YEAR OLDS PRIORITIES



Employees' rights are increasingly protected by legislative developments and are further enhanced by the social component of ESG. At a minimum, employers need to comply with current legal obligations, but they cannot afford to become complacent and should ensure they are prepared to adopt and comply with new legislation as soon as it becomes effective, if not before.

CONTACT US

Please contact us for further information regarding ESG updates, the implementation of the necessary policies and training for you and your workforce.

Catherine O'Flynn
Head of Employment & Benefits
+353 1 639 5136
catherine.oflynn@williamfry.com

Alicia Compton
PARTNER
+353 1 639 5376
alicia.compton@williamfry.com

Bryan Bourke
Co-Head of ESG & Sustainability
+353 1 639 5106
bryan.bourke@williamfry.com

Lorena Dunne
Co-Head of ESG & Sustainability
+44 20 8610 1535
lorena.dunne@williamfry.com

Jenny Martin
SENIOR ASSOCIATE
+353 1 639 5108
jenny.martin@williamfry.com

Eimear O'Leary
ASSOCIATE
+353 1 639 5191
eimear.oleary@williamfry.com