

Wexford Chamber of Industry & Commerce HR Forum

Employment compliance and the implications of the National Employment Rights Authority for Employers

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Programme

- The Employment Law Compliance Bill
- NERA an overview
 - Why NERA
 - What has NERA been doing
- The Bill
 - Inspections
 - Prosecution
 - Criminal Law
- NERA
 - Effectiveness
 - Is it necessary
- the new regime
 - Protect yourself



Employment Law Compliance Bill

- Launched March 2008, second stage, select committee
- Main Provisions
 - Establishes NERA
 - Strengthen powers of inspection
 - Strengthen powers of Minister
 - Protection of Whistleblowers
 - Increased fines
 - Co-operation at workplace level
 - Retention of documents
 - Comprehensive list of documents to be available for inspection



Why NERA?

- Good question
- Social partnership process – Towards 2016
- Perception that there is large scale non compliance
- Focus on young people
- Reaction to particular cases



Towards 2016

- Recognised broad level of compliance
- Wanted an effective employment rights compliance system:
 - Active contribution of employers/unions/employees
 - Education of vulnerable workers
 - Promotion of entitlements
 - Availability of information
 - Strengthen inspection rights
 - Adjudication by RC, EAT, Labour Court
 - enforcement



How achieved

- New statutory office
- Consolidation of resources
- Trebling of number of inspectors...80 in 2008
- €13,000,000 budget
- Greater co-ordination with outside agencies
 - Gardai, revenue, social welfare, competition authority, ODCE
- New requirements for record keeping
- Enhanced employment awareness activity
- New user friendly system of compliance
- New and higher penalties
- Criminal prosecution



The Interim Arrangement

- **Existing laws pre NERA**
 - Information – all over the place
 - Investigation – badly resourced
 - Prosecution – rarely used
- **NERA on interim basis**
 - New office
 - Resources Inspectors increased to 80 in 2008
 - One stop shop
 - Campaign of enforcement
- **ELCA in force**
 - More criminal offences
 - Higher penalties



What has NERA been doing

Three initial inspection campaigns

- Construction industry, security industry, catering sector
- Minimum wage
- Young persons

Carrying out regular inspections

Referring cases for prosecution – currently 43 referred

NERA says compliant employers have nothing to fear, those with proper record can expect inspection to be carried out quickly and easily



Summary of Inspections and Breaches Detected by Industry Sector

2007

Sector	No. of Inspections	Breaches Detected (%)	Arrears Recovered (€)
Agriculture	46	59%	€135,836
Catering	204	61%	€263,066
Retail Grocery	139	30%	€39,639
Hotels	90	58%	€441,330
Contract Cleaning	21	67%	€72,398
Security	38	53%	€33,615
Construction	416	56%	€1,336,824
Electrical	35	43%	€26,857
Other	35	26%	€0



Summary of Inspections and Breaches Detected by Industry Sector

2008

Sector	No. of Inspections	Breaches Detected (%)	Arrears Recovered (€)
Agriculture	106	37%	€45,819
Catering	1,059	73%	€682,239
Retail Grocery	182	64%	€136,046
Hotels	142	78%	€329,684
Contract Cleaning	73	85%	€284,068
Security	150	53%	€340,610
Construction	297	62%	€710,475
Electrical	34	47%	€133,351
Other	51	33%	€8,296
calls	1,928		
interviews	3,516		



Summary of Inspections and Breaches Detected by Industry Sector

2009 (1st Quarter)

Sector	No. of Inspections	Breaches Detected (%)	Arrears Recovered (€)
Agriculture	17	29%	€436
Catering	155	80%	€97,562
Retail Grocery	79	73%	€65,184
Hotels	26	69%	€17,516
Contract Cleaning	80	60%	€57,277
Security	12	42%	€20,708
Construction	100	61%	€103,348
Electrical	2	100%	€0
Other	43	9%	€18,251



Summary of Inspections and Breaches by Employment Legislation

2007

Breach Type	No. of Inspections	Breaches Detected (%)	Arrears Collected (€)
National Minimum Wage Act	1,939	10%	€122,015
Payment of Wages Act	2,655	12%	€196
Organisation of Working Time Act	2,639	48%	€3,360
Protection of Young Persons Act	2,466	1%	€617
Other	7	14%	€0



Summary of Inspections and Breaches by Employment Legislation

2008

Breach Type	No. of Inspections	Breaches Detected (%)	Arrears Collected (€)
National Minimum Wage Act	3,079	9%	€387,058
Payment of Wages Act	4,581	15%	€0
Organisation of Working Time Act	4,620	45%	€54,418
Protection of Young Persons Act	8,075	3%	€0
Other	7	57%	€0



Summary of Inspections and Breaches Detected by Industry Sector (ERO/REA)

2009 (1st Quarter)

Breach Type	No. of Inspections	Breaches Detected (%)	Arrears Collected (€)
National Minimum Wage Act	477	11%	€56,503
Payment of Wages Act	855	17%	€0
Organisation of Working Time Act	866	49%	€34,543
Protection of Young Persons Act	1,020	1%	€0
Other	0	0%	€0



Cases initiated for prosecution in 2008

67 cases in total

5 in County Wexford

8 in Offaly – worst offender by County!



Employment Law Compliance Bill

- Launched March 2008, anticipated July 09
- Main Provisions
 - Part 2 – established NERA on statutory footing
 - Part 3 – compliance
 - Part 4 - enforcement
 - Part 5 – strengthening rights of employees
 - Part 6 - penalties
 - Increased inspection rights and powers
 - On the spot fines
 - Prosecution
 - Increased fines
 - Criminal law for employers



Part 3 - Notices

- Must display notices
- In a prominent place
- Does not facilitate employers who use electronic communication
- Left to employer to draft content
- Must translate
- Offence not to display
- Offence to damage, deface or destroy notices



Part 4 - Inspection

- Enter at “all reasonable times”
- No time limit as long as it is reasonable
- Unannounced and pre-arranged inspections
- Inspect premises or any books/documents/computers relating directly or indirectly to employment
- Search and inspect
- Secure for later inspection
- Take copies and extracts
- Remove and retain
- Require any person on premises to give details
- Interview with consent of person
- Take photographs
- Compel person to appear before Director (Section 38)
- Right to get documents from third parties (section 42)



Inspection

- If prevented
 - Make application to District Court for warrant authorising entry
 - An offence if a person
 - In light of investigation falsifies, conceals, destroys etc
 - “without reasonable excuse” fails to comply with requirement to appear before the Director ,



What an Inspector will look for

- Employer Registration Number
- Name and address and PPS number of each employee
- Terms of employment for each employee
- Payroll details (gross to net rate per hour, overtime, deductions, shift and premium allowances, commission, bonus etc)
- Copies of all payslips
- Employees job classification
- Dates of commencement and termination
- Hours of Work (rosters, breaks, start and finish time)
- Register of employees under 18 years of age
- Holidays and public holidays
- Other documentation to prove compliance



Following Inspection

- Compliance Notices
- Enforcement Orders
- Protection of Whistleblowers...immunity unless not in good faith
- Protection from Penalisation...criminal offence



Part 5 – new record keeping requirements

- New requirement to furnish statement to employees on leaving – duration and nature of work, general description of work involved and relevant documents
- To get passport for each employee
- Three years or duration of employment which ever is shorter
- Two years after employment has ceased
- Code of practice to be put in place



Part 6 - Penalties

- **Minor Offence – Summary conviction**
 - If found guilty liability is a fine not exceeding €5,000 and/or up to 12 months imprisonment or both
- **More Serious Offence – conviction on indictment**
 - A fine not exceeding €250,000 and/or up to 3 years imprisonment or both
- **Fixed payment notice**
 - Other offences e.g. failure to disclose information :- €5,000 fine
 - Costs

Defence to show that you exercised due diligence and took reasonable precautions to avoid the commission of the offence



Some problems with the Bill

- Definition of employer is extended
- Commences one month after passing of bill
- Puts responsibility of drafting notices on employer
- Costs of notices...may result in selective employment
- Excessive powers – to carry out searches, not just inspections
- Unannounced inspections – should only be where there is cause
- Right to require person to give evidence to director is quasi judicial and unnecessary given extensive powers
- Right to require information from third parties interferes with privilege
- Compliance notices give Director judicial function – inappropriate in employment context
- Criminal context to penalisation is inappropriate
- Record keeping is different to other legal requirements
- Criminal penalty is inappropriate – consider TUPE rights!!



Criminal Law

- Individuals may be liable to criminal conviction
- Reversal of the onus of the burden of proof
- Is this Constitutional?



Protect yourself

- Awareness of the law
- Awareness of your rights and responsibilities as employer
- Be prepared
- Record keeping and systems
- Management awareness in case of inspection
- Allocate responsibility
- Identify most common breaches as they affect your business



Most common breaches

- Hours of work - start and finish times not recorded
- No statement of terms and conditions (query foreign workers)
- Contract does not comply fully with TEIA
- Minimum pay not paid
- No pay slips
- Organisation of working time – breaks
- Non payment of overtime
- Holidays and public holidays
- Sunday premium
- Incomplete records



Most serious breaches

- Not keeping any records or failing to produce
- Falsifying records including pay slips and time sheets
- Requiring employee to work in excess of legal limit
- Paying for significantly less hours than worked
- Paying less than legal entitlement
- Not providing pay slips
- Making unlawful deductions



Compliance - records

- Do rosters in writing particularly for young persons
- Distribute to managers and employees – sign in?
- Established rule on clocking in and out – breaks
- Have manual or electronic clock in system
- Rules on being dressed and ready for work – definition of work
- Treatment of Sunday premium
 - Contract term – wording important – no confusion
- Record keeping
- **Remember you have to prove your case**



Are the new increased powers necessary?

- Greater access to information is good
- criminal convictions are unnecessary
- Are the increased powers appropriate?
- Name and shame
- Greater liaison between agencies
- The big stick - counterproductive
- Do we need the additional sanctions of the ELCB?

- Would the law be just as effective as is?



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