The Safety, Health and Welfare at Work Act 2005 Update

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The Safety, Health and Welfare at Work Act 2005 was enacted in September 2005 and will have serious implications not only for employers but also employees. It includes a provision for testing employees for intoxicants and new liabilities for directors, employers and senior managers who, for the first time, could be personally liable for breaches of health and safety legislation, and could face either two years imprisonment or a maximum fine of up to €3 million, or both, on conviction on indictment. Geoffrey Shannon details some of the key changes.

INTRODUCTION

The Safety, Health and Welfare at Work Act 2005 ("the 2005 Act") repeals and replaces the Safety, Health and Welfare at Work Act 1989 ("the 1989 Act") as the statutory framework for securing the safety, health and welfare of persons at work. It came into force on September 1, 2005.[1] The 2005 Act re-enacts an expanded version of many of the provisions contained in the 1989 Act, with some significant additions. It is organised in eight parts and seven schedules. In introducing the Bill at Second Stage in the Oireachtas, the Minister of State at the Department of Enterprise, Trade and Employment, Tony Killeen TD, stated that it represented:

> "… a modernisation of our occupational health and safety laws. It is significant social legislation which affirms the Government's interest in ensuring that labour law is kept up to date and relevant".[2]

The 2005 Act is a framework that focuses on broad general duties and the organisational arrangements necessary to achieve better safety and health. It sets out the duties of employers, employees, and other parties such as the designers of workplaces and work equipment and the suppliers of goods for use in the workplace. As with its predecessor, the general ethos of the Act is that of prevention of accidents and illnesses. There is increased emphasis on deterrence by strengthening of the enforcement provisions. The 2005 Act reflects and accommodates many of the radical changes that have occurred since the 1989 Act was introduced. In particular, these changes have taken place in the nature of the work occurring in Ireland and how and where that work is carried out. The 2005 Act has also taken account of the increasing ethnic and cultural diversity of the Irish workforce.

While the 2005 Act could not be described as a radical departure from its predecessor, some of the more striking features in the Act include:

- a definition of "competent person" and "reasonably practicable";
- an increase in the explicit duties and responsibilities of both employees and employers;
- provision for testing employees for intoxicants;
- specific provision regarding the responsibilities of designers, manufacturers and importers;
- new duties for persons who commission, procure, design, or construct places of work;
- a reduction in the onus on small business and the farming sector regarding safety statements;
- joint safety and health agreements;
- a new dispute resolution mechanism for dealing with disputes between employers and employees concerning health and safety matters;
- expanded provisions concerning responsibilities of directors and managers;
- evidentiary changes for the prosecution of directors and persons significantly influencing the management of a company; and

[1] See SI No 328 of 2005 which brought into force many of the provisions of the 2005 Act except, for example, the provision that repeals the Safety, Health and Welfare at Work (General Application) Regulations, 1993 and 2003. The 1993 Regulations therefore remain in place, save for arts 5 to 15 (see SI No 392 of 2005) which are now incorporated into ss 8–12 of the 2005 Act.
[2] D·il Debates, October 14, 2004, p 600.

- a strengthening of the enforcement powers for non-compliance (increased penalties and also on-the-spot fines).

Although the 2005 Act largely retains the same structure as the 1989 Act, it clarifies certain matters with an expanded list of definitions in Pt 1 of the Act, which deals with preliminary and general matters.

EMPLOYERS

Chapter 1 of Pt 2 of the 2005 Act sets out a range of general duties of employers. Some of the new duties identified in s 8(2) of the 2005 Act include:

> "(a) managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;[3]
> (b) managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk".[4]

The foregoing provisions require employers to manage and conduct work activities:

1. in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees; and
2. in such a way as to prevent, so far as is reasonably practicable, any improper conduct likely to put the safety, health or welfare at work of his or her employees at risk.

These new provisions underline the importance of an employer having an integrated safety management system and are particularly relevant when addressing the identification of bullying, harassment, and stress in the workplace. The enforcement mechanisms available under the 2005 Act could be invoked, for example, where the Authority considered that an employer was exposing his or her employees to unacceptable levels of stress. In such circumstances, the Authority could issue directions for an improvement plan.

EMPLOYEES

Chapter 2 of Pt 2 imposes a number of general duties on employees and persons in control of places of work such as landlords. One of the most significant additions to the duties of employees is to submit to any appropriate testing for intoxicants.[5] Regulations will be introduced detailing the circumstances and sectors to which this provision will apply. An "intoxicant" is defined in s 2(1) of the 2005 Act as "alcohol and drugs and any combination of drugs or of drugs and alcohol". This definition does not discriminate between prescription and non-prescription drugs and provides no guidance on what is an acceptable quantity of drugs or alcohol. The testing must be carried out by a registered medical practitioner. It would appear that the requirement to submit to tests for intoxicants in s 13(1)(c) of the 2005 Act is not limited to health and safety requirements, as it is not made subject to s 13(1)(b).

The provision for testing employees for intoxicants is short on detail, although it will not come into force in the absence of Regulations which are expected to be introduced in mid-2006. Section 13(1)(c) of the 2005 Act prescribes three preconditions that must be satisfied before such testing may be carried out. These preconditions are that the test must be appropriate, reasonable, and proportionate.

In light of the possible violation of an employee's constitutional right to liberty,[6] the above preconditions must be strictly construed. Whether a test for intoxicants is reasonably required will depend on the individual circumstances and the nature of the work activity. Regard should be had, for example, as to whether the employee, if intoxicated, would be likely to cause harm to himself, herself, or others. The work activities of an employee will be relevant; an office worker might not pose the same risk to himself, herself or indeed others as a bus driver or a person operating machinery. It is likely that an employer must be satisfied that the employee is under the influence of intoxicants before requiring that the employee submit to tests. To satisfy the test of proportionality, it is likely that the employer will have to show that the test was nescessary to prevent the employee endangering his or her own safety, or the safety of others, and was the least restrictive means to achieving that objective.[7]

An issue likely to arise is the entitlement of an employer to dismiss an employee for refusing to submit to tests. Would such a dismissal be presumed unfair under the Unfair Dismissal Acts? As there is no specific guidance on this issue in the 2005 Act, it is likely that the persumption of unfairness will prevail. In any event, it would appear that a request to an employee to submit to such a test will have to be done in accordance with the three conditions prescribed. It is clear from s 13(1)(c) that these three conditions will have to be strictly adhered to.

RISK ASSESSMENT

Section 19 of the 2005 Act incorporates many of the provisions in the 1993 Regulations including the requirement in art 10 that risk assessments must be in writing and periodically reviewed. It provides that every

[3] See s 8(2)(a) of the 2005 Act.
[4] See s 8(2)(b) of the 2005 Act.
[5] Section 13(1)(c) of the 2005 Act.
[6] Art 40.1.4 of the Constitution. The enactment of the ECHR Act 2003 is also relevant as it arguably gives added impetus to Art 40.1.4 of the Constitution.
[7] For a more detailed exploration of the principle of proportionality, see *Heaney v Ireland* [1994] 3 IR 593; *R v The Intervention Board, ex parte E.D. & Man (Sugar) Ltd* [1985] ECR 2889; and *Haur v Land Rheinland-Pfalz* [1997] ECR 3727.

employer and every person controlling a workplace must identify the hazards at the place of work, assess the risks presented by those hazards, and have a written assessment of the risks as they apply to his or her employees, including any single employee and group (or groups) of employees who may be exposed. The words "hazards" and "risks" are not defined in the 2005 Act. That said, the Authority has produced useful guidance on these terms.

SAFETY STATEMENT

Section 20 is probably the most important provision in the 2005 Act in terms of the implementation and application of health and safety measures. Under s 20, every employer must prepare or cause to be prepared a statement in writing which is known as a safety statement. This statement is to be based on the hazards identified and the risk assessment carried out under s 19 of the 2005 Act. It must set out how the safety, health and welfare of employees is to be secured and managed in the workplace.

Section 20(3) of the 2005 Act provides that the employer must bring the terms of the safety statement to the attention of employees annually or following any amendment of it. Employers must also bring the safety statement to the attention of new employees upon commencement of employment, and other persons at the place of work who may be exposed to any specific risk to which the safety statement refers. This must be done in a form, manner and, as appropriate, language that is reasonably likely to be understood by the employees. This requirement should prompt employers to examine the profile of their workforce in order to decide whether the safety statement should be made available in one or more languages. A similar requirement applies in respect of a Safety Plan.

The 2005 Act introduces a significant change to the requirement that every employer have a safety statement where the employer has three or fewer employees. In particular, s 20(8) of the 2005 Act adopts a more streamlined approach to complying with the requirement to prepare a safety statement by removing the requirement on an employer with three or fewer employees to have an up-to-date safety statement. It provides that such an employer can satisfy the safety statement requirement by observing the terms of a special Code of Practice,[8] if any, to be developed by the Authority for a number of industries and sectors. The farming sector and small businesses in the maintenance and service sectors are the likely beneficiaries of the relief available under this provision. In fact, the Authority is currently working on the drafting of three codes of practice, one of which is in relation to agriculture.[9] If there is no code of practice covering the type of work activity carried on by the employer, what duty arises for such an employer in respect of the preparation of a safety statement? The Act is silent on this point, though prudence would dictate that such an employer should prepare a safety statement. Regulations on this issue are expected in the early part of 2006.

HEALTH SURVEILLANCE AND MEDICAL FITNESS TO WORK

Section 22 of the 2005 Act mirrors art 15 of the 1993 Regulations.[10] It imposes specific duties in respect of health surveillance on every employer. Health surveillance is defined in s 2(1) of the 2005 Act as follows:

> "'health surveillance' means the periodic review, for the purpose of protecting health and preventing occupationally related disease, of the health of employees, so that any adverse variations in their health that may be related to working conditions are identified as early as possible".

Section 22(1) provides that:

> "[e]very employer shall ensure that health surveillance appropriate to the risks to safety, health and welfare that may be incurred at the place of work identified by the risk assessment … is made available to his or her employees".

This duty could be construed as requiring an employer to make available a counselling service or an employee assistance programme. It should be noted that in *Hatton v Sutherland*,[11] the Court of Appeal held that an employer who offers a confidential advice service, "with referral to appropriate counselling or treatment services", was unlikely to be found in breach of his or her duty to employees. Hale LJ stated:

> "The key is to offer help on a completely confidential basis. The employee can then be encouraged to recognise the signs and seek that help without fearing its effects upon his job or prospects; the employer need not make intrusive inquiries or over-react to such problems as he does detect; responsibility for accessing the service can be left with the people who are best equipped to know what the problems are, the employee, his family and friends; and if reasonable help is offered either directly or through referral to other services, then all that reasonably could be done has been done. Obviously, not all employers have the resources to put such systems in place, but an employer who does have a system along those lines is unlikely to be found in breach of his duty of care towards his employees … except where he has been placing totally unreasonable demands upon an individual in circumstances where the risk of harm was clear".

[8] A Code of Practice prepared and published by the Authority under s 60 of the 2005 Act.
[9] The other codes of practice in preparation are in the areas of quarrying and construction.
[10] Art 15 of the 1993 Regulations was the provision which dealt with health surveillance in the 1993 Regulations.
[11] [2002] 2 All ER 1.

In *Michael Maher v Jabil Global Services Ltd*, Clarke J adopted a similar approach, although he noted *obiter* that the benefit of providing counselling to avoid a finding of liability would be subject "to a caveat that if the court was satisfied that notwithstanding the provision of such a service the truth was that an employer was intent on removing an employee the availability of such a service might be regarded as being more a matter of form than substance".[12]

JOINT SAFETY AND HEALTH AGREEMENTS

Section 24 of the 2005 Act includes an innovative new provision which has its origins in a number of the northern Member States of the European Union. In summary, it enables the social partners (i.e. trade unions and bodies representing employers) to enter into agreements setting out practical guidance on safety, health and welfare, and the requirements of health and safety laws. Such an agreement is known as a "joint safety and health agreement". The parties can apply to the Authority for approval of a joint safety and health agreement or of its variation.

PROTECTION AGAINST PENALISATION

Section 27 of the 2005 Act includes an important new provision that employees should not be penalised for acting in good faith in the interests of health and safety. This section prohibits an employer from penalising an employee for:

- being a safety representative;
- complying with health and safety legislation;
- making a complaint or a representation about health and safety to the safety representative or to the employer or to an inspector;
- giving evidence in enforcement proceedings; and
- leaving, or while the danger persisted, refusing to return to his or her work in the face of serious or imminent danger.[13]

The dismissal of an employee following such penalisation will be deemed to be unfair under the Unfair Dismissal Acts 1977 to 2001.

OFFENCES UNDER THE 2005 ACT

The 2005 Act creates three categories of offences. They are:

1. summary offences for which a fine (not exceeding €3,000) only can be imposed;[14]
2. summary offences for which a fine (not exceeding €3,000) and/or imprisonment (not exceeding six months) can be imposed;[15]
3. indictable offences punishable by the imposition of a fine (not exceeding €3 million) and/or imprisonment (not exceeding two years).[16]

In summary, the first category applies to less serious matters and the second and third categories cover the more serious offences. In addition, the person convicted can be ordered to pay the Authority's costs and expenses. The main changes under the 2005 Act include a significant increase in the level of fines and also the fact that certain summary offences can attract a prison sentence of up to six months.

Significantly, s 60(1)(a) of the 1989 Act has been omitted from the 2005 Act in what is a fundamental departure from the approach adopted under the 1989 Act. This section provided that a failure to comply with the general duties of employers and self-employed persons did not give rise to a cause of action in civil proceedings. Contravention of these general duties merely attracted criminal sanctions.[17] The removal of the civil liability exemption in respect of a failure by an employer to comply with his or her general duties will necessitate increased vigilance on the part of employers to ensure compliance with the expanded list of general duties imposed on employers under the 2005 Act.

ON-THE-SPOT-FINES

Section 79 of the 2005 Act, which is not yet in force, introduces a new procedure for the imposition of on-the-spot fines by an inspector in lieu of a prosecution.[18] Section 79(1) provides that where an inspector has reasonable grounds for believing that a person is committing or has committed a prescribed offence under the relevant statutory provision, he or she may serve the person with a notice in the prescribed form. The maximum on-the-spot-fine which can be imposed is €1,000, which is to be paid "during the period of 21 days beginning on the day of the notice".[19]

The level of the on-the-spot fine will be detailed in Regulations along with the offences and employment sectors to which this fine will apply. A necessary precondition for the exercise of the on-the-spot-fine is that the inspector must have reasonable grounds to believe a prescribed offence is being committed, and serve a valid prescribed notice.

LIABILITY OF DIRECTORS

Section 80 of the 2005 Act introduces new liabilities for directors, employers and senior managers who, for the

[12] Unreported, High Court, May 12, 2005 at pp 21–22.
[13] See s 27(3) of the 2005 Act.
[14] S 78(1) of the 2005 Act.
[15] S 78(2)(c)(i) of the 2005 Act.
[16] S 78(2)(c)(ii) of the 2005 Act.
[17] See s 48 of the 1989 Act.
[18] Regulations on this issue are expected in the early part of 2006.
[19] S 79(2) of the 2005 Act.

first time, could be personally liable for breaches of health and safety legislation, and could face either two years' imprisonment or a maximum fine of up to €3 million or both, on conviction on indictment. In summary, s 80 of the 2005 Act adopts an evidence-based approach.

Section 80(1) of the 2005 Act is broadly similar to s 48(19)(a) of the 1989 Act. It attributes liability to a director, manager, or other similar officer in the undertaking or a person purporting to act in such capacity, as well as the undertaking, when an offence is committed by an undertaking and the acts involved were authorised or consented to, or were attributable to connivance or neglect by those persons. The reference to a person "who purports to act in any such capacity" is a new provision in the 2005 Act rendering a person who does not have management functions but purports to act in such capacity liable to prosecution.

Section 80(2) of the 2005 Act is a significant provision and should be noted in that it is likely to be very useful to the Authority and the DPP in initiating prosecutions under the Act. It is presumed by virtue of this provision, until the contrary is proven, that at the material time, the acts resulting in the offence were authorised, consented to, or were attributable to connivance or neglect on the part of a director or a person significantly influencing the management of a company.[20] This provision was imported from corporate enforcement law, and introduces a presumption that a director consented or was neglectful in his or her duties under the 2005 Act unless he or she can disprove this. The existence of such a rebuttable presumption makes the task of prosecution somewhat easier, by obviating the necessity to prove the foregoing. It underlines the importance of senior management taking ownership of health and safety.

The presumption may, however, be rebutted, and where this is the case, the prosecutor must then prove the matters beyond all reasonable doubt. For the presumption to be rebutted, it is not entirely clear what standard of evidence the defendant must adduce. A question may be raised about the constitutionality of s 80(2) of the 2005 Act, which is in essence a "guilty until proven innocent provision". It may be argued that it reverses the normal burden on the prosecution to prove all the elements of the offence beyond all reasonable doubt. However, it is submitted that this argument would not be successful especially in the light of the Supreme Court judgments in *Hardy v Ireland*[21] and, in particular, *O'Leary v Attorney General*.[22] In *O'Leary v Attorney General*,[23] where the statute provided that possession of an incriminating document was "evidence until the contrary is proved", the Supreme Court upheld the constitutionality of the section and stated that the provision merely shifted the evidential burden and not the legal burden.[24]

NAMING AND SHAMING

Section 85 of the 2005 Act provides that the Authority can compile a list of persons upon whom a fine or penalty has been imposed, upon whom a prohibition notice has been served or in respect of whom an interim or interlocutory order has been made by a court. The concept of naming and shaming is not new to the Irish legal system. It already exists in company and revenue law.

CONCLUSION

There has been a powerful movement towards greater protection of the safety, health, and welfare of employees at work. The general provisions of the 2005 Act which include on-the-spot fines, increased sentences and fines, the naming and shaming by the Authority, testing for intoxicants, employers' duties, safety statements, safety representatives, codes of practice, and joint safety and health agreements will improve the safety and health standards which employees enjoy in the workplace. However, the success of the 2005 Act is dependent not only on ensuring compliance with the new statutory provisions but will also depend on changing existing mindsets.

In the future, it is likely that individual members of management will face criminal charges arising out of deaths and injuries at work where it is possible to connect the individual failures of senior executives with the corporate body. A safety management system must be in place for directors to avoid conviction. There is now a strong case for express statutory provision for the offence of corporate manslaughter. Where someone loses his or her life through employer negligence, the offence of corporate manslaughter is likely to apply if such an offence is introduced in this jurisdiction.

In October 2005, the Law Reform Commission published its final report on corporate killing. It recommended in that report that corporations should be subject to criminal liability for corporate killing. The Law Reform Commission's report identified the Stardust nightclub fire, the Whiddy Island disaster, and the train crashes at Buttevant and Cherryville as instances where organisational failures in Ireland resulted in death. It also made reference to the Blood Transfusion Service Board, which breached its own rules when it neglected to investigate complaints adequately and to recall contaminated batches of blood produce, leading to the infection of large numbers of people.

The Law Reform Commission has recommended the introduction of a new statutory offence of "corporate manslaughter", "which would make an organisation responsible for a death arising from its gross recklessness". This offence would facilitate the

[20] S 80(2) of the 2005 Act.
[21] [1994] 2 IR 550.
[22] [1995] 1 IR 254.
[23] [1995] 1 IR 254.
[24] The presumption introduced by s 80(2) of the 2005 Act also applies to members responsible for the management of an undertaking. See s 80(3) of the 2005 Act.

prosecution of company directors and individual managers if they:

- knew or ought reasonably to have known of a substantial risk of serious personal harm or death;
- failed to make reasonable efforts to eliminate that risk; and
- were aware that such failure fell far below what could reasonably be expected in the circumstances.

Significantly, it would render them liable for unlimited fines and imprisonment for up to 12 years in circumstances where they are found to have neglected the health and safety of those affected by their activities.[25]

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[25] Such an offence was proposed in the United Kingdom by the Law Commission in 1996 (Law Com. No 237, *Legislating the Criminal Code: Involuntary Manslaughter*, HMSO, 1996). This led to the publication by the British Government in March 2004 of a draft Bill on Corporate Manslaughter.