
PROTECTION OF EMPLOYMENT (PLATFORM WORKERS AND BOGUS SELF-EMPLOYMENT) BILL 2021

EXPLANATORY MEMORANDUM

Purpose of Bill

In most cases it is clear whether an individual is an employee or an independent contractor, but it may not always be obvious. There is widespread and growing concern that increasing numbers of individuals are being categorised as self-employed when the indicators are that employee status would be legally more appropriate to their situation.

The growth of the ‘gig’ economy in general and platform work in particular is leading to the casualisation of work and to workers being offered no choice but to accept self-employed status. While workers may benefit in the short term from a reduced liability to PRSI, the greater economic benefit redounds to the employer – who also escapes obligations to his or her workforce under employment protection laws.

Meanwhile the State, and the Social Insurance Fund in particular, lose out when taxes and social insurance contributions are either not paid at all or are paid at a reduced rate.

A common misconception is that parties are free to choose whether to provide services as employees or as self-employed – and that they can design their contracts accordingly. In reality, the test of employment status is a matter of law, and is not decided simply by the label attached to the relationship by the parties. In applying the law, it is important that the job as a whole is looked at, including working conditions and the reality of the relationship. The basic underlying consideration, in both Irish and EU law on the issue, is whether the person performing the work does so “as a person in business on their own account”. Is that person a free agent, with a genuine economic independence of the person engaging the service?

Legislation is needed in order to eliminate misconceptions and provide clarity. However, it is not the purpose of this Bill to bring individuals who are genuinely self-employed into the employee framework.

Provisions of Bill

Section 1 deals with the object and application of the legislation. The object is to clarify for the general purposes of the law the distinction between employment and self-employment. The Bill is to apply (unless specifically excluded) where, for the purposes of any enactment or rule of law, it falls to be determined whether an individual executing work or a service for a person under a contract is doing so as an employee or is self-employed. Its application includes the areas of tax, social welfare and social insurance.

Section 2 provides for a presumption of employment status. Where for the purposes of any enactment or rule or law the employment status of an individual falls to be determined, it is to be presumed that an individual who executes work or a service for a person under a contract is an employee of the person, until the contrary is shown.

Section 3 elaborates upon the legal meaning and effect of the employment relationship. Where an individual enters into or works under a contract of service or apprenticeship, or any other contract whereby the individual agrees with a person personally to execute any work or service for a third party, an employment relationship exists between the individual and the person. This applies whether the contract was made before or after the passing of this Bill, is express or implied and, if express, whether oral or written.

This rule includes but is not confined to cases where a party to the contract provides an online platform which enables the individual to execute work or services on demand, in return for payment.

By way of exception to this general rule, where an individual agrees personally to execute work or service for a person whose status under the contract is that of a client or customer of a profession or business carried on by the individual on his or her own account, an employment relationship will not, by virtue of that contract only, exist between them.

Section 4 makes it clear that the employment relationship is a ‘status relationship’: accordingly, the creation, continuance, termination and other incidents of the relationship are governed by law, and not purely by agreement between the parties.

The question whether an individual who executes work or a service for a person under a contract is an employee or is self-employed must be determined by identifying the actual relations between the parties, and the relevant conditions and circumstances attaching to those relations; if the form of any agreement or arrangement between the parties is inconsistent with the substance of those relations, regard must be had to the substance.

For that purpose, any agreement, decision, transaction, course of action or conduct or arrangement that purports to define or govern the individual’s status, or to evidence the belief or intention of the individual or of other persons in relation to that status, is not conclusive. Further, any perceived advantage or disadvantage to a party or parties arising from the determination, in relation to liability to tax or to social insurance contributions, or the applicability of employment protection laws, must be disregarded save to the extent that it may provide a motive for misrepresenting the nature of the agreement.

Subsection (4) makes it clear that an employment relationship may exist in cases where –

- the individual is an employee also of other persons,
- the individual is also, in respect of other work being done by him or her, self-employed,
- the individual works as an outworker or teleworker,
- the individual does part-time work, temporary work, seasonal work or occasional work,
- the remuneration of the individual is calculated by reference to the amount of work actually done, or
- the hours of work or remuneration of the individual are otherwise uncertain.

Section 5 outlines tests to be considered in determining whether an individual is self-employed, i.e., working as someone in business “on their own account”, as a free agent with economic independence of the other contracting party. Regard shall be had, where relevant, to whether the individual –

- owns his or her own business,
- is exposed to financial risk by having to bear the cost of making good faulty or substandard work carried out under the contract,
- assumes responsibility for investment in or management of an enterprise or undertaking,
- has the opportunity to profit from sound management in, for example, the scheduling and performance of engagements and tasks,
- has control over what work is done, how it is done, when and where it is done and whether he or she does it personally,
- is free to hire other people, on his or her terms, to do the work which has been agreed,
- is free to execute the same work or service to more than one person,
- provides the materials for the work,
- provides equipment and machinery necessary for the job, other than small tools of the trade or other equipment which would not generally be an indicator of a person in business on their own account,
- has a fixed place of business where materials, equipment and the like can be stored,
- is free to cost and agree a price for the work,
- provides his or her own public liability or other appropriate insurance cover,
- controls the hours worked to fulfil the contractual obligations.

Section 6 makes an amendment to the Terms of Employment (Information) Act 1994, to apply in cases where an individual agrees with a person personally to execute any work or service for a third party. The employer must provide the employee, as a term of the employment contract, with details of the operation of any automated process maintained by the employer for allocating work between available employees, and also with details of any system maintained by the employer for using customer reports or reviews in connection with the future allocation or remuneration of work.

Section 7 deals with disputes and provides a mechanism for their resolution by the Workplace Relations Commission. An individual who is party to a contract giving rise to a disputed status, or a trade union of which the individual is a member, may refer the dispute to the Director General of the Commission. It shall be treated as a dispute referred under section 41 of the

Workplace Relations Act 2015 and Part 4 of that Act shall, with any necessary modifications, apply accordingly. A decision on such a dispute may –

- declare that an employment relationship does or does not exist,
- require an employer to take a specified course of action (including making any necessary adjustment to the employee's terms and conditions of employment, or to tax and social insurance arrangements), or
- require an employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances but not exceeding 2 years remuneration.

This remedy is without prejudice to the application of the Bill generally by courts or tribunals to the circumstances of relevant cases before them.

Section 8 provides in standard form for the short title of the Bill.

*Senator Marie Sherlock
March, 2021.*