AN BILLE UM CHEADANNA FOSTAÍOCHTA (LEASÚ), 2014
EMPLOYMENT PERMITS (AMENDMENT) BILL 2014

EXPLANATORY AND FINANCIAL MEMORANDUM

Background to and Purpose of Bill

The Employment Permits Acts 2003 and 2006 are being amended and extended in order to:

- Update provisions for the employment permits schemes in line with policy and economic developments since 2007;
- Provide the flexibility to deal with changing labour market, work patterns and economic development needs which often require rapid response;
- Provide for a robust employment permits regime with greater clarity; and
- Address deficiencies identified in the legislation with the potential for employers to benefit from (at the cost of the employee) the un-enforceability of employment contracts in situations where an employee does not hold an employment permit but is required to do so.

A key objective of Irish labour market policy is to ensure that labour and skills needs are met from within the Irish and European Economic Area (EEA — EU plus Norway, Iceland and Liechtenstein) labour markets. Employment permits can be issued however for the employment of non-EEA nationals where there are identified skills shortages and employers can demonstrate demand for labour cannot be met within Ireland or the EEA. These strategic skills/labour shortages are in designated occupations in key economic sectors such as healthcare, information technology and financial services. The identification of occupations and areas of skills shortages draws principally on data collated by the Expert Group on Future Skills Needs (EGFSN).

There are two Employment Permits Acts on the statute books — the Employment Permits Acts 2003 and 2006. Under the Employment Permits Acts, an employment permit must be obtained in advance from the Department in respect of a non-EEA national who is to be employed in the State (except Swiss nationals in accordance with the terms of the EC and Swiss Confederation Act 2001). The Employment Permits Act 2006 sets out in legislation the criteria in relation to the application, grant and refusal of an employment permit.

Provisions of the Bill

The Bill contains four Parts. The following paragraphs contain a

brief description and an outline of the principal amendments proposed in each Part.

PART 1

Preliminary and General

Part 1 contains the short title, collective citation, construction and commencement provisions (*section 1*), and interpretation (*section 2*).

PART 2

Amendment of Act of 2003

Part 2 addresses the 'Younis' case (Hussein v The Labour Court [2012] IEHC 364), delivered on 31 August 2012, in which Mr. Justice Hogan overturned a decision of the Labour Court to award Mr. Younis, an immigrant, back-pay and other moneys. The High Court found that the contract of employment was unlawful by reason of his failure to have an employment permit.

Section 3 amends section 2 of the Act of 2003 to provide a defence to the foreign national to the charge of having been employed without an employment permit, where it can be proven that a foreign national took all reasonable steps to ensure compliance with the section, similar to the defence provision in respect of the employer.

Section 4 amends the Act of 2003 by inserting an additional section 2B, the objective of which is to further deter employers from employing foreign nationals without an employment permit, by permitting the foreign national to take civil action for compensation against the employer, notwithstanding the illegality of the contract. This is in addition to potential criminal prosecution of the employer.

The Bill provides that a foreign national who can satisfy a Court that he/she took all reasonable steps to comply with the requirement of having an employment permit may take a civil action for compensation against the employer for work done or services rendered. The compensation for such work or services is to be calculated by a Court by reference to the national minimum hourly rate of pay or any other rate of pay which is fixed under, or pursuant to, any enactment. Also, the compensation paid shall not be treated as reckonable emoluments. This is to avoid any entitlement to claim for State benefits on the part of the foreign national concerned because it remains the case that this is an illegal contract of employment. The compensation paid does not fall outside the tax net. The charge to income tax in respect of employment income generally is imposed by the provisions of sections 18 and 19 of the Taxes Consolidation Act (TCA) 1997 and the basis of assessment of such income is set out in section 112 TCA 1997. However, in order to put beyond doubt the matter of taxation of compensation payments, a new section 124A is to be inserted in the TCA 1997 in *section 31* of the Bill.

Additionally, the Bill provides that the Minister, at his discretion, may take a civil action on the foreign national's behalf as well as the responsibility for the costs of such action. The power to make an application for compensation on behalf of the foreign national is at the discretion of the Minister and is in addition to, and separate from, the existing prosecutorial powers.

PART 3

Amendment of Act of 2006

Part 3 amends the Act of 2006 to:

(*a*) Further provide for the Employment Permit system and give a clear legal basis for having different types of employment permits for different purposes, and additional criteria and rules in determining whether to refuse an application for an employment permit or to grant it;

(*b*) Strengthen the requirement for employers to consider EEA nationals before foreign nationals by removing the existing distinction between applications by foreign nationals and applications by employers; and

(*c*) Focus on the particular needs of start-up companies, provide necessary flexibility with key sectors of economic growth and make provision for the role that IDA Ireland and Enterprise Ireland play in enterprise and job creation.

Section 5 amends the legislation to include definitions for terms used in the Bill and amends some definitions used in the 2006 Act.

Section 6 inserts new sections 3A, 3B, 3C, 3D, 3E and 3F into the 2006 Act:

- Section 3A sets out the different purposes for which employment permits can be granted and can be regarded as the Bill's principles and policies in this regard.

- Section 3A(2)(a) provides the purpose for what is currently the Department's *Green Card* scheme. The rationale for this purpose is to attract those foreign nationals with skills that are in short supply in Ireland and which are critical to our economic success. It is likely that such employment permits will in future be called *Critical Skills Employment Permits* (CSEPs) as the term *Green Card* is confusing as it is associated with the US immigration system.

- Section 3A(2)(b) provides the purpose for what is currently called the *Spousal or Dependant Employment Permit*. It is likely that such employment permits will in future be called *Dependant/Partner/Spouse Employment Permits*. The rationale for this type of employment permit is that in order to attract foreign nationals to apply for the above CSEPs, provision has to be made for their families where appropriate. This employment permit type is also designed to provide for the family members of certain types of researchers under Council Directive 2005/71/EC. This Directive provides for the admission of third country researchers to EU Member States for the purpose of carrying out research. In line with this Directive, the Department operates a scheme known as the *Scheme for Admission of Third Country Researchers to Ireland*, which provides an alternative mechanism (to the employment permit system) for entry into Ireland of researchers who come within the scope of the Directive.

- Section 3A(2)(c) provides the purpose for what is currently called the *Work Permit*. While this employment permit currently covers a range of sub-categories e.g. Contract for Service Providers, Sports Professionals etc., the Bill clarifies that this type of employment permit will be provided for skills of a more general nature where it is proven, among other

things, that the employer was unable to fill the position from the labour market. It is likely that such employment permits will in future be called *General Employment Permits*.

- Section 3A(2)(d) provides the purpose for the *Intra-Company Transfer Employment Permit*. This employment permit facilitates transfers between branches of a company for a specified duration and project. Such employment permits are particularly important in start-up FDI situations where often the first few employees will be the team from HQ establishing the operation in Ireland.

- Section 3A(2)(e) provides the purpose for what is currently a type of Work Permit dealing with *Contract for Service Providers*. These facilitate the temporary employment in Ireland of foreign nationals working in a company based outside of Ireland. Such companies typically have won a contract for services with an Irish company.

- Section 3A(2)(f) provides the purpose for what is currently a type of Work Permit dealing with applications routed through the *Migrant Rights Centre Ireland* on behalf of foreign nationals who entered the labour market on a valid employment permit but who have subsequently fallen out of the system for a variety of reasons including redundancies, exploitation and ignorance. From a policy perspective, such foreign nationals may be at risk of entering the hidden economy and/or becoming a burden on the State's welfare system if not permitted to work. It is likely that such employment permits will be called *Reactivation Employment Permits*. A number of criteria will apply to the granting of such permits, including a requirement that the foreign national originally entered the labour market legally on an employment permit, is not working illegally, has a real offer of employment and in respect of whom the Minister for Justice and Equality is satisfied that the circumstances of the case (e.g. undue hardship, humanitarian considerations, linkages with local community, family circumstances, etc.) merit consideration of an employment permit. To prevent any abuse, the Bill gives the Minister for Jobs, Enterprise and Innovation power to restrict the number of such permits and the power to refuse such a permit if the applicant had used this scheme before and it is in the public interest to refuse.

- Section 3A(2)(g) provides the purpose for what is currently a type of Work Permit dealing with reciprocal international arrangements where opportunities are afforded to Irish nationals in exchange for opportunities afforded to foreign nationals e.g. trade agreements which include labour transfers, exchange agreements concerning researchers or student work experience, etc. It is likely that such employment permits will in future be called *Exchange Agreement Employment Permits*.

- Section 3A(2)(h) provides the purpose for what is currently a type of Work Permit dealing with applications related to predominantly sports professionals. It is likely that such employment permits will in future be called *Sports & Cultural Employment Permits.* Section 3F of the Bill permits the Minister to consult with other bodies in this regard.

- Section 3A(2)(i) provides the purpose for what is currently a type of Work Permit dealing with applications related to student internship programmes involving work experience in employments on the Highly Skilled Occupations List. It is

likely that such employment permits will in future be called *Internship Employment Permits*.

Section 3B provides for a new provision in the Act of 2006 which recognises the role that IDA Ireland and Enterprise Ireland currently play in advising the Department with regard to applications made by their client companies and permits the Minister to have regard to their recommendations but not to be bound by them.

Section 3C sets out the conditions applying to *Dependant/Partner/Spouse Employment Permits*. These permits are provided to spouses, civil partners or dependants of primary permit holders (purpose specified in section 3A(2)(a)) and researchers and are dependent on the continued permission of the primary permit holder and researcher to be employed in the State. Such highly skilled primary permit holders and researchers are attracted to Ireland by such a facility which enables spouses/partners/dependants to be employed in Ireland while the primary permit holder is employed in Ireland or the researcher carries out research in Ireland.

Sections 3D and 3E provide for minimum periods of employment of foreign nationals prior to applications for employment permits in respect of Intra-Company Transfers and Contract for Service Agreements.

Section 3F permits the Minister to consult with other bodies in respect of a *Sports & Cultural Employment Permit* application (see section 3A(2)(h) above).

Section 7 amends section 4 of the 2006 Act. The amendments relate to applications for employment permits made in respect of Contract for Service Agreements and Intra-Company Transfers. The amendments provide that it is the contractor or the 'connected person' (the linked company in the State into which an employee is transferred under an Intra-Company Transfer arrangement) who applies for an employment permit in the case of the Contract for Service Provider or the Intra-Company Transfer.

The section also ensures that every application specifies the purpose for which the employment permit is sought and sets a minimum job offer period of 2 years for employment permits in relation to section 3A(2)(a) (i.e. current 'Green Cards' scheme). In addition, the section provides for the spouse/dependant/partner of the holder of a 'Green Card' in force immediately prior to the commencement of the Bill to apply for a *Dependant/Partner/Spouse Employment Permit* post-enactment.

Section 8 replaces the current section 6 and section 7 of the 2006 Act concerning information to be provided with an application. It ensures that the Minister can require a broad range of documents and other supporting information. Later, the Bill enables the Minister to refuse an application where such information is not forthcoming.

Section 9 amends section 8 of the 2006 Act which currently sets out what permission the employment permit grants to the foreign national in terms of their employment in the State, as well as the duration of the employment permit. The amendments update the references to other sections and provide for different durations for the specified types of employment permits.

Section 10 amends section 9 of the 2006 Act which concerns the type of information to be included on an employment permit. The

amendment updates cross-references and permits the Minister to include any additional information he considers appropriate.

Section 11 amends section 10 of the 2006 Act which provides powers to restrict the granting of an employment permit on the basis of what is commonly known as the Labour Market Needs Test (LMNT) and the 50:50 Rule. The LMNT is now dealt with in the new section 10A (see *section 12* below).

The 50:50 Rule requires that employers seeking to hire foreign nationals on an employment permit have at least 50% of their workforce from the EEA. This policy underpins the Government's employment creation objectives by requiring employers in the State to hire in a balanced manner from the local labour market and fulfils our EU obligations regarding community preference under the Treaties. It also ensures that further employment permits will not be granted to employers in Ireland who have a workforce already consisting of a majority of non-EEA nationals.

The amendment requires the 50:50 Rule to be applied in all situations except in the case of a start-up company (i.e. a company registered with the Revenue Commissioners within the two years preceding the application) where an enterprise development agency recommends the granting of the employment permit *and* where the Minister is satisfied that to do so would help develop the potential for further employment. Often start-up companies, including those arising by reason of FDI, will initially be comprised solely of foreign nationals from the company's HQ sent to Ireland to set up and establish operations. It would be counter-productive to insist they meet the 50:50 Rule from the outset. Other sections of the Bill ensure that they must meet the 50:50 Rule within a reasonable period of time.

Section 12 amends the Act of 2006 by inserting a new section 10A to deal with the LMNT. The amendments will ensure that such tests will apply to relevant applications for employment permits irrespective of who makes the application.

The LMNT seeks to ensure that an offer of employment is first made to people already in the local and European Economic Area (EEA) labour markets before an application is made for an employment permit to employ a non-EEA national ('foreign national'). This supports Government policy to ensure that those currently in the labour market (be they employed or unemployed) are the first cohort of people that employers should look to.

The LMNT will, subject to the specified exceptions, apply to *General Employment Permits* (see subsection 3A(2)(c) above) and employment permits relating to *Contract for Services Agreements* (see section 3A(2)(e) above). In effect, this will increase the current proportion of employment permit applications undergoing an LMNT after enactment.

Section 10A also provides that the Minister may make Regulations in relation to the requirements of the LMNT.

Section 13 amends section 11 of the 2006 Act which concerns the matters the Minister has regard to in considering an application. The amendment adds a provision so that consideration will include the purposes specified in section 3A(2) inserted by *section 6* of the Bill.

Section 14 amends section 12 of the 2006 Act which provides the grounds for refusing to grant or renew an employment permit. There

are two classes of amendment, firstly, those relating to issues identified in the operation of the current Acts and secondly, those which are consequential on the amendments to the Acts made by the Bill and in particular those made by section 3A. Some of the amendments introduce new grounds and others broaden the scope of existing grounds.

Section 15 of the Bill amends section 13 of the 2006 Act to give the Minister the power to review a refusal to grant a permit. This provision is considered necessary to address a situation that gave rise to judicial review proceedings, whereby the employer, as applicant, refused to appeal a decision not to grant a permit.

Section 16 amends section 14 of the 2006 Act which provides the Minister with regulation making powers to provide for each type of employment permit and to regulate for different requirements to apply, depending on the type of employment permit and the different circumstances.

Section 17 inserts a new section 14A into the Act of 2006 which ensures that the Minister, when making regulations in respect of remuneration, can:

- take into account the going rate in the marketplace for such employments and can take into account any other benefits provided by an employer in respect of the remuneration package; and
- refuse to grant a permit if the remuneration offered is less than the minimum annual remuneration specified in regulations in respect of the employment concerned. This refusal ground is regardless of whether or not the hours of work for the employment concerned are equal to or less than 39 hours per week. If the weekly hours of work for the employment concerned exceed 39 hours, the minimum annual remuneration must be increased pro rata. This underpins the public policy prerogative that a foreign national should be earning a sufficient remuneration to prevent his or her recourse to the social welfare system.

Section 18 amends section 15 of the Act of 2006 which identifies the criteria to which the Minister may have regard in regulating under section 14. The section already provides for criteria such as the sectors that are important for economic and social development, and labour market surpluses and shortages. The amendments strengthen the provisions of the 2006 Act by providing regulation making power for the Minister in respect of the experience of a foreign national as a criterion. The amendment also tidies up the section on foot of other amendments.

Section 19 amends section 16 of the Act of 2006 by providing for additional grounds for the revocation of an employment permit.

Section 20 amends section 19 of the Act of 2006 by deleting the distinction in the 2006 Act in respect of applications by foreign nationals.

Section 21 amends section 20 of the Act of 2006 which deals with the renewal of employment permits and sets out the circumstances in respect of which a permit may or may not be renewed. Importantly, the amended section 20 applies the 50:50 Rule to all renewal applications in respect of permits issued following enactment. This is consistent with, and further to, the policy as set out under section 11 above. Nonetheless, the section exempts

renewal applications of existing (pre-enactment) permits from the 50:50 Rule on the basis that, at the time the initial application was made, neither the employer nor the foreign national could have foreseen this new requirement.

In addition, the amendment provides the Minister with an opportunity to verify that the waiving of the 50:50 Rule for start-up companies has not resulted in a negative effect in terms of the balance of the workforce concerned. The Minister is obliged to refuse to renew employment permits if the employer has not reached the 50:50 Rule threshold within two years of the first employment permit being granted, unless an enterprise development agency has made a recommendation under section 3B and the Minister is satisfied that the renewing of the employment permit will contribute to further development of employment in the State. If the Minister renews a permit on foot of such a recommendation, the renewal will be for the period of one year and if then achieved, a further renewal of two years may be granted.

Section 22 of the Bill inserts three new sections — 20A, 20B and 20C — into the Act of 2006. These sections give an additional six months to a foreign national who has been made redundant to find employment and apply for a new permit. They also exempt them from certain rules that would otherwise apply (e.g. Labour Market Needs Test and eligibility criteria in relation to the job).

Section 23 amends section 23 of the Act of 2006 by removing references to applications by foreign nationals. This ensures all applications, be they from employers or employees, are treated on an equal basis and are subject to the same rules when being considered for an employment permit.

Section 24 amends section 24 of the Act of 2006 by removing the reference in that section to applications by foreign nationals. This again ensures all applications, be they from employers or employees, are treated on an equal basis and are subject to the same rules when being considered for an employment permit.

Section 25 tidies and updates the provisions of section 27 of the Act of 2006 in relation to the requirements on an employer to retain records for inspection.

Section 26 amends section 28 of the Act of 2006 concerning the type of information that the Minister may retain in relation to the operation of the employment permit system. The current legislation includes terms such as employers, foreign nationals and contractors whereas the new legislation provides for other parties including 'relevant person' (the person who has contracted a contract for services provider), and 'connected person' (the linked company in the State into which an employee is transferred under an Intra-Company Transfer arrangement). This section updates the provision to include these new terms where relevant.

Section 27 amends section 29 of the Act which provides for regulations setting out the process and information requirements for the making of an application for an employment permit.

Section 28 amends section 30 of the Act of 2006 which sets out further provisions concerning regulations.

Section 29 of the Bill amends section 31 of the Act of 2006 to allow for the issue of notices or documents by ordinary prepaid post instead of registered prepaid post.

Section 30 of the Bill amends section 37 of the Act of 2006. The amendment provides for the sharing of information held by the Minister with the Garda Síochána in addition to those already specified in the section.

PART 4

Miscellaneous

Section 31 amends the Taxes Consolidation Act (TCA) 1997. The section inserts a new section 124A and seeks to impose an income tax charge on any payments made under a Court order under new section 2B of the Act of 2003 (see *section 4* above) and to have the PAYE system applied to the payments. The section also puts beyond doubt that the exemption provided for in section 192A TCA 1997 does not apply to payments made under a Court order under section 2B of the Act of 2003.

Section 32 repeals a number of existing provisions primarily to remove the distinction between applications by foreign nationals and employers. It also repeals section 35(2) of the Act of 2006 which provides for evidence given in proceedings for an offence under the Act to be video-recorded. Video recording is no longer required.

Section 33 provides for transitional arrangements and savings in respect of employment permits that are in force immediately before the coming into operation of this section.

Financial Implications

There are no discernible financial implications for the Exchequer.

Department of Jobs, Enterprise and Innovation,
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Wt. —. 626. 4/14. Clondalkin. (44084). Gr. 30-15.