



An Bille um Thoirmeasc ar Fhéinfhostaíocht Bhréige, 2018
Prohibition of Bogus Self-Employment Bill 2018

Mar a tionscnaíodh

As initiated



AN BILLE UM THOIRMEASC AR FHÉINFHOSTAÍOCHT BHRÉIGE, 2018
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ACTS REFERRED TO

Industrial Relations Act 1946 (No. 26)

Interpretation Act 2005 (No. 23)

National Minimum Wage Act 2000 (No. 5)

Social Welfare Acts, 1981 to 1993 (No. 16)

Social Welfare Consolidation Act 2005 (No. 26)

Taxes Consolidation Act 1997 (No. 39)

Unfair Dismissals Act 1977 (No. 10)

Workplace Relations Act 2015 (No. 16)



AN BILLE UM THOIRMEASC AR FHÉINFHOSTAÍOCHT BHRÉIGE, 2018
PROHIBITION OF BOGUS SELF-EMPLOYMENT BILL 2018

Bill

entitled

An Act to disincentivise employers from entering into bogus contracts for services, to prohibit dismissals in order to induce workers to enter into contracts for services, to prohibit misrepresenting employment as a contract for services, to prohibit false inducements for contract for services, to provide for a right to redress for workers party to a bogus contract for services and for claims to be heard under the Workplace Relations Act 2015, to amend the Unfair Dismissals Act 1977 and the Workplace Relations Act 2015 and to provide for related matters. 5 10

Be it enacted by the Oireachtas as follows:

Interpretation

1. In this Act—

“Act of 1946” means the Industrial Relations Act 1946; 15

“Act of 1977” means the Unfair Dismissals Act 1977;

“Act of 2005” means the Social Welfare Consolidation Act 2005;

“Act of 2015” means the Workplace Relations Act 2015;

“adjudication officer” has the same meaning as it has in the Act of 2015;

“bogus contract for services” has the meaning assigned to it by *section 2* of this Act. 20

“contract of employment” means a contract of service, including apprenticeship, whether it is express or implied and (if it is express) whether it is oral or in writing;

“Director General” means the Director General of the Workplace Relations Commission;

“dismissal” has the same meaning as it has in the Act of 1977;

“employee” means a person who— 25

(a) has entered into or works under (or, where the employment has ceased, worked under) a contract of employment, or

(b) performs work or provides services under the guise of a bogus contract for services within the meaning of *section 2* of this Act,

and includes, in the case of the death of the employee concerned at any time 30

following the dismissal, his or her personal representative;

“employer”, in relation to an employee, means the person by whom the employee is (or, in a case where the employment has ceased, was) employed under a contract of employment;

“enactment” has the meaning it has in the Interpretation Act 2005; 5

“Labour Court” means the body established by section 10 of the Act of 1946;

“Minister” means the Minister for Employment Affairs and Social Protection;

“national minimum hourly rate of pay” has the meaning assigned to it by the National Minimum Wage Act 2000;

Bogus contracts for services 10

2. (1) An employer shall not—
- (a) require an employee to perform work under the guise of a bogus contract for services, or
 - (b) engage in any conduct that would reasonably lead the employee to believe that he or she was expected to perform work under a bogus contract for services. 15
- (2) For the purposes of this Act, a bogus contract for services exists where, notwithstanding that the parties or one or other of them purports to confer some other description to the engagement, in truth a contract of employment subsists between the parties.
- (3) Without prejudice to the generality of *subsection (2)*, when determining the existence of a bogus contract for services for the purposes of this Act, regard may be had to the following: 20
- (a) the degree of autonomy and control that the person performing the work has over the tasks to be performed and how they are to be performed;
 - (b) the degree of supervision over the person performing the work and his or her working methods; 25
 - (c) the degree to which the person performing the work is integrated with others in a relevant workplace or undertaking;
 - (d) whether the person performing the work supplies his or her own tools, equipment or other capital items for the performance of the work; 30
 - (e) the extent, if any, to which the person performing the work has invested capital or other items related to the work performed;
 - (f) any previous contract of employment between the parties;
 - (g) whether the person performing the work is free during the engagement to perform work for, to, any person other than a person alleged to be a party to the bogus contract for services; 35
 - (h) the extent, if any, to which the person performing the work does perform work for, to, any person other than a person alleged to be a party to the bogus contract for services;

- (i) the economic dependency of the person performing the work on the relation in question;
- (j) whether the person performing the work advertises his or her availability for performance of that or other work or the provision of those or other services, to any person other than a person alleged to be a party to the bogus contract for services; 5
- (k) whether the person performing the work has had to tender or take other similar steps to secure participation in the relation in question;
- (l) whether the worker employs other persons;
- (m) the extent, if any, to which the person performing the work carries a risk of financial loss in relation to that performance or provision, and the nature of that risk; 10
- (n) the extent, if any, to which the person performing the work enjoys the opportunity of profit in relation to that performance or provision, and the nature of that opportunity; 15
- (o) the relative strength of the bargaining positions of the parties to the relation and, if applicable, any persons acting on behalf of the parties;
- (p) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the relation;
- (q) the extent to which any contract between the parties to the relation provides for remuneration by reference the completion of a particular task, rather than for the payment of, or in the nature of, wages based on time worked; 20
- (r) the extent to which any contract between the parties to the relation provides total remuneration that is, or is likely to be, less than that of an employee performing similar work or providing similar services; 25
- (s) the extent to which the contract is designed to, or would, apart from this Act, relieve the employer from paying the employee the national minimum hourly rate of pay, and
- (t) any other relevant matter.

Dismissal prohibited 30

3. (1) An employer shall not dismiss, or threaten to dismiss, an employee who:

- (a) has a contract of employment; and
- (b) performs particular work for the employer;

in order to engage the employee to perform the same, or substantially the same, work under a contract for services. 35

(2) A dismissal contrary to *subsection (1)* shall be deemed to be an unfair dismissal for the purposes of section 6 of the Act of 1977.

Misrepresenting employment as a contract for services

4. A person who employs, or proposes to employ, another person shall not represent to that other person that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services.

False inducement to enter into a contract for services

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5. A person who employs, or has at any time employed, another person to perform work shall not make a statement that the employer knows, or ought reasonably to know, is false in order to persuade or influence that other person to enter into a contract for services under which that other person would perform the same, or substantially the same, work, or provide the same or substantially the same services, for the employer.

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Person deemed to be an employee

6. (1) *Subsection (2)* applies where—

- (a) a person (in this section referred to as the “applicant”) has performed work or provided services under the guise of a bogus contract for services,
- (b) the relation of the applicant to the person for whom he or she has performed the work or to whom he or she has provided the services is such that the relation between the parties in substance is or was that of employer and employee as contemplated by *section 2*, and
- (c) the applicant would, but for his or her having been engaged under a bogus contract for services rather than under a contract of employment have been entitled under any enactment to present a complaint, refer a dispute, or have a matter treated as being the presentation or a complaint or referral of a dispute, to the Director General.

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- (2) The applicant—

- (a) shall be deemed to be an employee in any enactments referred to in *subsection (1)* in so far as the context allows,
- (b) has, in so far as the context of the enactment referred to in *subsection (1)* allows, the same entitlement to redress, whether from an adjudication officer, the Labour Court, or any other court, body, or person, that he or she would have had had he or she been employed under a contract of employment with the person for whom the work has been performed or to whom the services have been provided, but subject, other than as duly modified by regulations as referred to in *section 7*, to all otherwise applicable procedural requirements, time limits, rights of appeal, and similar considerations.

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Redress for bogus contracts for services

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7. (1) Where an employee is, or has been, a party to a bogus contract for services contrary to this Act, the employee shall be entitled to redress consisting of whichever of any or all the following the adjudication officer or the Labour Court, as the case may be, considers appropriate having regard to all the circumstances:

- (a) a declaration that a contravention of *section 2, 3, 4* or *5* of this Act has occurred

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and a direction that a person cease such contravention;

- (b) re-instatement by the employer of the employee in the position which he or she held immediately before the contract for services on the terms and conditions on which he or she was employed immediately before the contract for services together with a term that the re-instatement shall be deemed to have commenced on the day of the contract for services or such as is reasonable having regard to all the circumstances; 5
- (c) re-engagement by the employer of the employee either in the position which he or she held immediately before his contract for services or in a different position which would be reasonably suitable on such terms and conditions as are reasonable having regard to all the circumstances; 10
- (d) direct the employer to pay all contributions under the Act of 2005, in respect of any period of the bogus contract for services concerned, which would have been required to be paid if the worker had a contract of employment;
- (e) direct the employer to pay all payments, taxes, charges and penalties under the Tax Acts in respect of any period of the bogus contract for services concerned, which would have been required to be paid if the worker had a contract of employment; 15
- (f) direct the employer to pay all payments, taxes, charges and penalties under the Tax Acts due by the worker resulting from or arising out of any period of the bogus contract for services concerned including any failure by the worker to pay such taxes, charges or penalties; 20
- (g) (i) if the employee incurred any financial loss attributable to the contract for services, payment to him by the employer of such compensation in respect of the loss as is just and equitable having regard to all the circumstances, or 25
(ii) if the employee incurred no such financial loss, payment to the employee by the employer of such compensation as is just and equitable having regard to all the circumstances,

and the references in the foregoing paragraphs to an employer shall be construed, in a case where the ownership of the business of the employer changes after the contract for services, as references to the person who, by virtue of the change, becomes entitled to such ownership. 30

- (2) Without prejudice to the generality of *subsection (1)* of this section, in determining the amount of compensation payable under that subsection regard shall be had to—
 - (a) the extent (if any) to which the financial loss referred to in that subsection was attributable to an act, omission or conduct by or on behalf of the employer, 35
 - (b) the extent (if any) to which the said financial loss was attributable to an action, omission or conduct by or on behalf of the employee, and
 - (c) the measures (if any) adopted by the employee or, as the case may be, his failure to adopt measures, to mitigate the loss aforesaid. 40
- (3) In calculating financial loss for the purposes of *subsection (1)*, payments to the employee—

- (a) under the Social Welfare Acts 1981 to 1993, in respect of any period following the contract for services concerned, or
- (b) under the Tax Acts arising by reason of the contract for services,
- shall be disregarded.
- (4) In this section— 5
- “financial loss” includes any actual loss and any estimated prospective loss of income attributable to the bogus contract for services and the value of any loss or diminution, attributable to the bogus contract for services, of the rights of the employee under any enactment;
- “remuneration” includes allowances in the nature of pay and benefits in lieu of or in addition to pay. 10
- (5) Where a term or condition of the bogus contract for services contravened any provision of or made under the Tax Acts or the Social Welfare Acts 1981 to 1993, the employee shall, notwithstanding the contravention, be entitled to redress under this Act. 15
- (6) The Revenue Commissioners may view the use of a bogus contract of service as a tax avoidance transaction under the Taxes Consolidation Act 1997.
- (7) Where, in proceedings under this Act, it is shown that a term or condition of a bogus contract for services contravened this Act the adjudication officer or the Labour Court, as may be appropriate, shall notify the Revenue Commissioners or the Minister, as may be appropriate, of the matter. 20

Determination of claims

8. (1) (a) A claim by an employee against an employer for redress under this Act may be referred by the employee to the Director General and, where such a claim is so referred, the Director General shall, subject to section 39 of the Act of 2015, refer the claim to an adjudication officer for adjudication by that officer. 25
- (b) Section 39 and section 41 of the Act of 2015 shall, subject to the modification that references in section 39 or section 41 to a complaint or dispute shall be construed as references to a claim for redress under this Act.
- (c) An adjudication officer to whom a claim is referred under this section shall— 30
- (i) inquire into the claim,
- (ii) give the parties to the claim an opportunity to be heard by the adjudication officer and to present to the adjudication officer any evidence relevant to the claim,
- (iii) take a decision in relation to the claim consisting of an award of redress in accordance with *section 6* of this Act or the dismissal of the claim, and 35
- (iv) give the parties to the claim a copy of that decision in writing.
- (2) A decision of an adjudication officer under *subsection (1)* consisting of an award of redress in accordance with *section 7* shall include a statement of the reasons for the award of such redress and the reasons for the adjudication officer’s deciding not to 40

award other redress under that section.

- (3) Subsection (14) of section 41 of the Act of 2015 applies to a decision of an adjudication officer under *subsection (1)*.
- (4) A claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under the Act of 2015 to the Director General and a copy of the notice shall be given by the Director General to the employer concerned as soon as may be after the receipt of the notice by the Director General. 5
- (5) Proceedings under this section before an adjudication officer shall be conducted otherwise than in public. 10
- (6) An adjudication officer shall notify the Labour Court of any decision he makes under this section.
- (7) A person may be represented by a trade union when seeking redress under this Act.

Amendment of Act of 1977

- 9. The Act of 1977 is amended in section 6 by inserting the following paragraph after paragraph (ba): 15
 - “(bb) an intention to re-engage under a contract of services the employee to perform the same or substantially the same work, or provide the same, or substantially the same services, as the employee had thitherto provided under his or her contract of employment, as proscribed by section 3(1) of the Prohibition of Bogus Self-Employment Act 2018,”. 20

Short title

- 10. This Act may be cited as the Prohibition of Bogus Self-Employment Act 2018.

An Bille um Thoirmeasc ar Fhéinfhostaíocht
Bhréige, 2018

BILLE

(mar a tionscnaíodh)

dá ngairtear

Acht do dhídhreasú fostóirí chun conarthaí bréige le haghaidh seirbhísí a dhéanamh, do thoirmeasc dífhostú d'fhonn oibrithe a aslú chun conarthaí le haghaidh seirbhísí a dhéanamh, do thoirmeasc fostaíocht a mhífhaisnéisiú mar chonradh le haghaidh seirbhísí, do thoirmeasc aslaigh bhréagacha maidir le conradh le haghaidh seirbhísí, do dhéanamh socrú maidir le ceart chun sásaimh d'oibrithe is páirtithe i gconradh bréige le haghaidh seirbhísí agus chun go ndéanfar éilimh a éisteacht faoin Acht um Chaidreamh san Áit Oibre, 2015, do leasú an Achta um Dhífhostú Éagórach, 1977 agus an Achta um Chaidreamh san Áit Oibre, 2015 agus do dhéanamh socrú i dtaobh nithe gaolmhara.

Na Teachtaí Micheál de Barra, Pól Ó Murchú, Ruth Copping, Risteard Buíd Bairéid, Bríd Nic Gabhann agus Gino Ó Cionnaith a thug isteach,

8 Márta, 2018

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BILL

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Introduced by Deputies Mick Barry, Paul Murphy, Ruth Copping, Richard Boyd Barrett, Bríd Smith and Gino Kenny,

8th March, 2018

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