

Protection of Employees (Fixed-Term Work) Act 2003

Explanatory Booklet for Employers and Employees

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Issued by the

Department of Jobs, Enterprise and Innovation

PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003

Explanatory Booklet

The purpose of this booklet is to provide general guidance on the Act to employees and employers in non-legal language. The booklet outlines the rights and obligations under the Act. It is important to note that this is an information booklet and not a legal interpretation of the Act.

In cases of doubt or where further information is required, interested parties should refer to the Act or contact the National Employment Rights Authority (NERA)

Lo-call 1890 80 80 90

www.employmentrights.ie

Other useful telephone numbers:

Labour Court	01 613 6666	Lo-Call 1890 220 228
Labour Relations Commission	01 613 6700	Lo-Call 1890 220 227
Rights Commissioner Service	01 6136700	Lo-Call 1890 220 227
Pensions Board	01 639 3622	

Note: The Lo-Call numbers may be used by callers from outside the 01 area.

**Department of Jobs, Enterprise and Innovation
Dublin 2**

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1. Purpose of the Act

The Protection of Employees (Fixed-Term Work) Act 2003 (No 29. of 2003) came into operation on 14 July 2003.

The purpose of the Act which implements Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-Term Work concluded by UNICE, CEEP and the ETUC is:

- (i) to provide for the improvement of the quality of fixed-term work by ensuring the application of the principle of non-discrimination (i.e. fixed-term workers may not be treated less favourably than comparable permanent workers) and
- (ii) to provide for the removal of discrimination against fixed-term workers where such exists and the establishment of a framework to prevent abuse arising from the use of successive fixed-term employment contracts.

2. Who is covered by the Act?

In general, the Act applies to any Fixed-Term Employee

working under a contract of employment

holding office under, or in the service of, the State including members of the Garda Síochána , civil servants and employees of any health board, harbour authority, local authority or vocational education committee.

The Act does **not** apply to agency workers placed by a temporary work agency at the disposition of a user enterprise; apprentices; a member of the Defence Forces; a trainee Garda or a trainee nurse. However, the Act applies to agency workers employed directly by an employment agency.

3. Main Definitions

The following definitions apply under the Act:

Conditions of Employment Includes all terms and conditions of the employment contract whether statutory or otherwise including for example: remuneration, pensions, voluntary health contributions, entitlement to sick pay, etc.

<i>Remuneration</i>	in relation to an employee, includes- <ul style="list-style-type: none"> (a) any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment, and (b) any amounts the employee will be entitled to receive on foot of any pension scheme or arrangement.
<i>Employer</i>	means, in relation to an employee, the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment.
Fixed-Term Employee	means a person who has entered into a contract of employment with an employer where the end of the contract is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event. <p>The term “fixed-term employee” does not include employees in initial vocational training or in apprenticeship schemes nor employees with a contract of employment concluded within the framework of a publicly-supported training, integration or vocational retraining programme.</p>
Permanent Employee	means an employee who is not a fixed-term employee.

4. What is a Comparable Permanent Employee?

An employee is a comparable permanent employee in relation to a fixed-term employee if-

- (a) the permanent employee and the fixed-term employee are employed by the same or associated employer and one of the conditions referred to in (i),(ii) or (iii) below is met,
- (b) where (a) above does not apply (including a case where the fixed-term employee is the sole employee of the employer) the permanent employee is specified in a collective agreement, being an agreement that for the time being has effect in relation to the relevant fixed-term employee, to be a comparable employee in relation to the fixed-term employee, or
- (c) where neither (a) nor (b) above apply, the employee is employed in the same industry or sector of employment as the fixed-term employee (and one of the conditions referred to in (i), (ii) or (iii) below is met).

The following are the conditions (i), (ii) and (iii) referred to above-

- (i) both employees perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,
- (ii) the work performed by one of the employees concerned is of the same or a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each, either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant, and
- (iii) the work performed by the relevant fixed-term employee is equal or greater in value to the work performed by the other employee concerned, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions.

The comparable permanent employee can be either of the opposite sex to the fixed-term employee concerned or of the same sex as him or her.

5. Conditions of Employment

The Act provides that a fixed-term employee shall not be treated in a less favourable manner in respect of his/her conditions of employment than a comparable permanent employee (except in the circumstances set out in paragraph 6 beneath).

EXAMPLES:

(a) Overtime Payment

If a comparable permanent employee is paid overtime, then a fixed-term employee, who compares himself/herself with that comparable permanent employee, is also entitled to overtime payment. A fixed-term employee is entitled to the same rate of payment for overtime work as his/her comparable permanent employee.

(b) Holiday Entitlement

The holiday entitlement of a fixed-term employee is related to the holiday entitlement of a comparable permanent employee, subject to the minimum legal entitlements under the Organisation of Working Time Act 1997.

Under the Organisation of Working Time Act 1997 a fixed-term employee's minimum annual leave entitlement is

- (i) 4 working weeks in a leave year in which a fixed-term employee works at least 1365 hours (unless it is a leave year in which he/she changes employment)
- (ii) 1/3 of a working week per calendar month that the fixed-term employee works at least 117 hours
- (iii) 8% of the hours worked in a leave year subject to a maximum of 4 working weeks. These provisions have not been altered by the terms of the Protection of Employees (Fixed-Term Work) Act 2003.

6. Are there Circumstances Where a Fixed-Term Employee can be treated in a Less Favourable Manner Than a Comparable Permanent Employee?

Yes. In the following set of circumstances:

(a) Objective Grounds

The Act provides that a fixed-term employee may be treated in a less favourable manner than a comparable permanent employee where such treatment can be justified on objective grounds.

What is an objective ground for treatment in a less favourable manner?

A ground would be considered as an objective ground for treatment in a less favourable manner (including the renewal of a fixed-term employee's contract for a further fixed term), if it is based on considerations *other than* the status of the employee as a fixed-term employee and the less favourable treatment is for the purpose of achieving a legitimate objective of the employer and such treatment is necessary for that purpose.

If the treatment of the fixed-term employee is based on the fixed-term status of the employee then it is *not* an objective ground for less favourable treatment.

Where, as regards any term of his or her contract, a fixed-term employee is treated by his or her employer in a less favourable manner than a comparable permanent employee, the treatment in question shall (for the purposes of section 6(2) of the Act) be regarded as justified on objective grounds, if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.

(b) Pensions

The right not to be treated in a less favourable manner than a comparable permanent employee shall not apply, in relation to any pension scheme or arrangement, to a fixed-term employee who normally works less than 20 per cent of the normal hours of the comparable permanent employee. However, this provision does not prevent an employer and a fixed-term employee from entering into an agreement whereby that employee may receive the same pension benefits as a comparable permanent employee.

Pro-Rata Principle

Where a condition of employment is dependent on the number of hours worked by the employee, then the extent to which that condition of employment is provided to a fixed-term employee shall be related to the proportion which the normal hours of work of that employee bears to the normal hours of work of the comparable permanent employee concerned.

The Act provides that except where a different length of service qualification is justified on objective grounds such a qualification in relation to a particular condition of employment shall be the same for a fixed-term employee as for a comparable permanent employee.

7. Voidance of Certain Provisions in Agreements

The Act provides that a provision in any agreement shall be void in so far as it attempts to exclude or limit the application of any provision of the Act or is inconsistent with any provision of the Act.

Nothing in the Act shall be construed as prohibiting the inclusion in an agreement of a provision more favourable to an employee than any provision in the Act. References to an agreement are to any agreement, whether a contract of employment or not, and whether made before, or after, the passing of the Act.

8. Objective Conditions Determining a Fixed-Term Contract

The Act provides that a fixed-term employee shall be informed **in writing** by his or her employer as soon as practicable of the objective condition determining the contract i.e. whether it is

- (a) arriving at a specific date,
- (b) completing a specific task, or
- (c) the occurrence of a specific event.

9. Objective Grounds Justifying Renewal and Failure to Offer a Contract of Indefinite Duration

The Act provides that where an employer proposes to renew a fixed-term contract the employee shall be informed in writing, not later than the date of renewal, of the objective grounds justifying the renewal of the fixed-term contract and the failure to offer a contract of indefinite duration. It further provides that the written statements referred to in paragraph 8 and in this paragraph are admissible as evidence in any proceedings under the Act. It is also provided for in the Act that a rights commissioner or the Labour Court may draw any inference he or she considers just and equitable if it appears to him or her that (a) an employer omitted to provide a written statement, or (b) a written statement is evasive or equivocal.

10. Can an Employer Employ an Employee on a Series of Fixed-Term Contracts Indefinitely?

No.

Employees on fixed-term contracts which commenced prior to the passing of the Act(14 July 2003)

Once such an employee completes or has completed 3 years continuous employment with his or her employer or associated employer (any or all of the 3 years service may have occurred

prior to the passing of the Act) the employer may renew the contract for a fixed term on one occasion only and that renewal may be for a period of no longer than 1 year.

Employees on a fixed-term employment contract which commences after the passing of the Act:

Where such an employee is employed by his or her employer or associated employer on two or more continuous fixed-term contracts, the aggregate duration of those contracts may not exceed 4 years.

Where a term of an employment contract purports to limit the term of the employment contract of either category of employee mentioned above, in contravention of the above rules, that term shall be void and of no effect and the contract concerned shall be deemed to be one of indefinite duration – a permanent contract.

However, the above-mentioned rules do not apply where there are objective grounds justifying the renewal of a contract of employment for a fixed term only.

The First Schedule to the Minimum Notice and Terms of Employment Act, 1973 relating to continuous employment determines whether employment on fixed-term contracts is continuous or not.

11. Must an Employer Inform a Fixed-term Employee of Permanent Vacancies and Training Opportunities?

Yes.

The Act provides that in order for a fixed-term employee to have the same opportunity as other employees to secure a permanent position, an employer shall inform him or her in relation to relevant vacancies which occur in the undertaking. This information may be provided by means of a general announcement at a suitable place in the employee's place of employment. However, as regards access by a fixed-term employee to appropriate training opportunities, the Act provides that such access to appropriate training shall be provided by an employer as far as practicable.

12. Information about Fixed-Term Working

The Act provides that employers shall, as far as practicable consider informing employees' representatives about fixed-term work in the undertaking.

13. Prohibition of Penalisation of an Employee by an Employer

The Act prohibits an employer from penalising a fixed-term employee on the grounds that:

- (a) he/she has exercised or proposes to exercise his/her right not to be treated in a less favourable manner than a comparable permanent employee in relation to conditions of employment,

- (b) he/she has in good faith opposed by lawful means an act which is unlawful under the Act,
- (c) he/she has given evidence in any proceedings under the Act or given notice of his or her intention to do so or to do any other thing referred to in (a) or (b) above,
- (d) he/she has been dismissed from his/her employment and the dismissal is wholly or partly for or connected with the purpose of avoiding that a fixed-term contract is deemed to be a contract of indefinite duration (i.e. permanent) under the provisions of the Act dealing with the abuse of successive fixed-term contracts.

14. What Constitutes Penalisation of an Employee?

The following constitutes penalisation by an employer of an employee:

- (a) dismissal of the employee,
- (b) any unfavourable change in the conditions of employment of the employee,
- (c) any unfair treatment of the employee, including selection for redundancy, or
- (d) any other action which is prejudicial to his or her employment.

15. Protection against Penalisation Including Dismissal

Where an employee has:

less than one year's service and is dismissed within the meaning of the Unfair Dismissals Acts 1977 to 2001 he/she may refer a case to a Rights Commissioner under the Protection of Employees (Fixed-Term Work) Act 2003.

more than one year's service and is dismissed within the meaning of the Unfair Dismissals Acts 1977 to 2001, he/she may refer a complaint to a Rights Commissioner under the Protection of Employees (Fixed-Term Work) Act 2003 or under the Unfair Dismissals Acts 1977 to 2001. However, relief may not be granted to the employee in respect of that penalisation under both these Acts.

16. What Form of Redress is Available under the Act?

An employee may refer a dispute in relation to an entitlement under the Act to a Rights Commissioner of the Labour Relations Commission for adjudication. A decision of the

Rights Commissioner can be appealed to the Labour Court for a legally binding determination.

17. Referral of Complaints

An employee or any trade union of which the employee is a member may, with the consent of the employee, present a complaint to a Rights Commissioner if it appears that the employer has failed to provide an entitlement to which the employee is due under the Act.

Written notice of complaint must be presented **within 6 months of the date of the alleged contravention**. The **time limit** for submitting a complaint for redress of the alleged contravention may be extended by a further **12 months** if the Rights Commissioner is satisfied that the failure to present the complaint within the normal 6 month period was due to reasonable cause.

Under the Act, the Rights Commissioner, on receipt of a complaint, will send a copy of the notice of complaint to the employer. The Rights Commissioner will then give the parties an opportunity to be heard by him/her and to present any evidence relevant to the complaint. After hearing the parties, the Rights Commissioner will issue a written decision. Proceedings before a Rights Commissioner will be held in private.

18. Rights Commissioner's Decisions

A decision of the Rights Commissioner shall do one or more of the following: -

declare that the complaint was, or was not, well founded,

require the employer to comply with the relevant provision of the Act,

require the employer to re-instate or re-engage the employee, (including on a contract of indefinite duration),

require the employer to pay the employee compensation not exceeding 2 years' remuneration.

In a case where the ownership of a business changes after the contravention to which the complaint relates, the new employer will be considered as the employer with reference to the above decision.

19. Appeals from Decisions of Rights Commissioner

The employer or employee may appeal the Rights Commissioner's decision to the Labour Court within 6 weeks from the date it was communicated to the parties. The Labour Court shall copy the notice of appeal to the other party and hear the parties according to its own procedures.

A complaint by an employee that a Rights Commissioner's decision has not been implemented may be made by the employee concerned to the Labour Court **6 weeks** after the date on which the decision was communicated to the employee. The Court will issue a determination to the like effect of the Rights Commissioner's decision. The Act precludes the Court from hearing the employer concerned or other evidence in this case.

20. Appeals to the High Court

A party to proceedings before the Labour Court may appeal to the High Court on a point of law from a determination of the Labour Court and the determination of the High Court shall be final and conclusive.

21. Referrals by the Minister to the High Court

The Minister for Jobs, Enterprise and Innovation may, at the request of the Labour Court, refer a question of law arising in proceedings before the Court to the High Court.

22. Enforcement of Labour Court Determinations

Following the hearing of the appeal, the Labour Court shall issue a determination. If the Court's determination is not implemented **within 6 weeks** from the date on which the determination is communicated to the parties, the Circuit Court, on application by the employee concerned, by a trade union of which the employee is a member if it has the employee's consent or by the Minister, if the Minister considers it appropriate and without further hearing, shall make an Order directing the employer to carry out the determination in accordance with its terms.

The Rights Commissioner Service is available at Tom Johnson House, Haddington Road, Dublin 4, Tel. (01) 6136700. Lo-call 1890 220227 (if calling from outside the 01 area).

23. Relief

The Act provides that relief may not be granted to an employee, in respect of a penalisation in contravention of section 14(1) of this Act which constitutes a dismissal of an employee within the meaning of the Unfair Dismissals legislation, both under Part 3 of this Act and under those Acts. It also provides that a person who is a fixed-term employee under this Act and a part-time employee under the Protection of Employees (Part-Time Work) Act 2001 may not obtain relief in respect of the same circumstances under both this Act and the 2001 Act.

24. Miscellaneous provisions of the Act

(a) Amendment of the Employment Agency Act 1971 –Increase in Fines

The Act raises the fines of £50 and £10 provided for in section 10(1) of the Employment Agency Act 1971 to €2,000 and € 1,000 respectively.

(b) Amendment of the Organisation of Working Time Act 1997 and the Protection of Employees (Part-Time Work) Act 2001

(i) Time Limits

The Organisation of Working Time Act 1997 (section 28(8)) and the Protection of Employees (Part-Time Work) Act 2001 (section 17(8)) provide that – where a decision of a rights commissioner in relation to a complaint has not been carried out by the employer (and the employer has not lodged an appeal in due time) – the employee concerned may, within six weeks of the expiry of that time, bring the complaint to the Labour Court which, without re-hearing the case, will make a determination to the like effect as the decision. This six-week limit is now removed.

(ii) Technical Amendment

The Organisation of Working Time Act 1997 (section 39(2)) provides that – as regards a list of Acts - a Rights Commissioner, the Employment Appeals Tribunal or the Labour Court shall have the power to correct errors in their decisions (or determinations) in relation to the name of the employer concerned (or some other material particular). This list of legislation is now extended

(c) Transnational Information and Consultation of Employees Act 1996

The Act provides that when calculating the threshold above which employees' representative bodies may be constituted in an undertaking in line with section 4 of the Transnational Information and Consultation Of Employees Act 1996, fixed-term employees shall be taken into account.