



EMPLOYMENT & SOCIAL WELFARE RIGHTS: ADVICE NOTE

Revised June 2011 (Originally issued as *Employee Rights Advice Note* in July 2010)

As some RIAI members may be aware, the incidence of irregular work and payment arrangements in architectural practices appears to be growing. Examples include:

- Being paid for a three-day week but being required to work for five
- Payment of salaries being deferred for extended or indefinite periods
- Salaries being cut unilaterally without agreement
- Working without pay of any kind
- Working excessively long hours

It is understandable that in current circumstances recent graduates may offer to work for nothing so that they can accumulate the experience required to take Professional Practice Examinations and so be eligible to Register or, in the case of Architectural Technologists, to meet the experience requirement for RIAI membership. Equally, fully qualified members may consider working for little or for nothing simply to stay busy, stay networked and keep up their skills. Employers, many for entirely generous motives, are agreeing to a variety of irregular arrangements.

But it is not a satisfactory situation. While understanding the grave difficulties in which many practices find themselves, the RIAI regards any divergence from employment law as unethical and does not support it in any form. So to provide guidance for both employers and employees the RIAI sought legal advice, checked procedures and investigated approved mechanisms under which minimum wage exemptions apply.

Summary

1. Any person working for a practice must be paid at least the minimum wage unless covered by a specific exemption. This applies to all employees: technical and non-technical; student, graduate trainee or fully qualified; full-time or part-time. Unless covered by an exemption an employer who fails to pay the minimum wage is guilty of an offence.

Exemptions include:

An employer may pay a reduced wage in the case of:

- Labour Court exemption for the employer on the basis of financial hardship
- Employee in the first or second year of employment since the age of 18
- Employee on an approved or authorised course of structured training or directed study.

An employer may pay no wages if the employee is participating in a State approved scheme such as:

- FAS Work Placement Programme
- National Internship Scheme
- IBEC Gradlink programme

Minimum wage legislation does not apply when the employee is a close relative (spouse, parent, child, sibling) of the employer.

2. An employer who knowingly colludes with an employee in obtaining social welfare payments to which the employee is not entitled is guilty of a criminal offence.

3. Late or non-payment of wages or expenses due breaches the Payment of Wages Act 1991 and the employee's employment contract.

4. Unfair or dishonourable treatment of an employee is a breach of the RIAI Code of Professional Conduct.

Risks

Firms engaging in dubious practices are exposing themselves to risk of offending in at least four areas:

- Labour Law
- Social Welfare law
- Company Law

and last, but not least,

- The RIAI Code of Professional Conduct

The revised Code of Professional Conduct includes the following clauses.

“3.1 Architects in the practice of their profession, shall pursue their professional activities with independence, impartiality, confidentiality, integrity, honesty and fairness at all times.”

“Principle 5: Architects shall act honourably towards their colleagues.”

“The fact that a course of conduct is not specifically referred to in the Code does not mean that it cannot form the basis of disciplinary proceedings. Architects are expected to be guided in their professional work as much by the spirit of the Code as by its express terms.”

Unfair or dishonourable treatment of an employee is therefore a breach of the Code.

Advice

This Advice Note contains information on:

- Payment of Wages
- Social Welfare Payments
- Redundancy Payments
- Working Hours
- Approved Schemes
- PRSI Holiday
- Dole for Employers

Payment of Wages

The answers to four specific questions are given below. The answers refer only to aspects of the National Minimum Wage Act 2000, do so in a summary form and are not intended to constitute legal advice. Employers or employees must take their own specific advice on any specific scenarios. Complaints/disputes can be referred to the National Employment Rights Authority or to the Rights Commissioner Service.

Question 1. Can a practice have an architect or architectural technician/technologist work for the practice for free?

No, the National Minimum Wage Act 2000 (“the Act”) effectively precludes such a practice. The fact that the individual is receiving no pay at all does not circumvent the requirements of the Act.

There are limited circumstances in which an employee can be paid at a rate less than the minimum wage, including:

- *If the Labour Court has granted an exemption to the employer from the obligation to pay minimum wage due to financial hardship.*
- *A reduced minimum wage applies in the case of an employee who is in the first or second year of employment since the age of 18.*
- *A reduced minimum wage can be payable if the employee is on an approved or authorised course of structured training or directed study. (National Minimum Wage Act, 2000 (Prescribed Courses of Study or Training) Regulations, 2000. See ‘Approved Schemes’ below.)*
- *If the employee is on one of various FAS programmes or schemes. (For FAS Work Placement and National Internship Programme schemes, see ‘Approved Schemes’ below.)*

If a practice wishes to rely on one of these circumstances in order to argue that it is entitled to pay a wage less than the national minimum wage, specific advice should be taken by the practice to ensure that it is legally entitled to do so.

Question 2. Could a practice pay an employee on the basis of a 3 day week but in fact require them to work a 5 day week or facilitate them in so doing?

This is likely to breach the Act and therefore be illegal, if doing so results in the employee's hourly pay (calculated by reference to the 5 day week) being less than the national minimum wage. The Act specifically provides that the employee's "working hours" for the purposes of calculating whether he or she is being paid less than the minimum hourly rate is the greater of the hours required by the contract of employment or the total weekly hours during which the employee is required to be available for work.

Separately, such a practice is also likely to give rise to a breach of a number of provisions of employment legislation and social welfare payment legislation (see below).

Question 3. Is it legal not to pay an individual who is on a post-graduate programme and who attends at a practice's place of business to "shadow" architects and learn from them?

The key issue here is as to whether the individual is properly regarded as working for the practice on foot of a contract of employment (whether written or unwritten).

If an objective assessment of the work being carried out by the individual led to the conclusion that the individual was carrying out the normal duties of an employee, then the Act would apply and the employer would be in breach of its provisions.

If, on the other hand, it is clear that the individual is not carrying out work in the manner of an employee and does not have similar duties and obligations to the practice as those of an employee, then the Act may not apply.

It is strongly recommended that any practice who does have graduates attending its premises on a basis similar to this would take specific advice to ensure that they are not in breach of the Act or any other employment law.

Question 4. What is the position when a practice fails to pay an employee's salary at the time it is due? Or when expenses incurred on behalf of the practice are not reimbursed?

In this situation, the practice is likely to be in breach of the Payment of Wages Act 1991 and to be in breach of the contract of employment. The employee would be entitled to make a complaint to a Rights Commissioner or commence Court proceedings to recover the monies.

If the reason the salary payments have not been made on a timely basis is because the practice is insolvent, it is strongly recommended that the practice take legal advice so as to ensure that it cannot be accused of engaging in reckless trading, or any similar activity.

Social Welfare Payments

In order to qualify for unemployment benefit or unemployment allowance on a day other than Sunday, the individual must be:

1. capable of work
2. available for employment
3. genuinely seeking, but unable to obtain, suitable employment

A person shall not be entitled to unemployment benefit or assistance for the first 3 days of any period of interruption of employment. In respect of days actually worked, the individual is only entitled to work a maximum of 3 days in respect of a six day period while retaining some of their unemployment benefit or unemployment allowance. The answers to four questions frequently asked by employees are given below.

Q. Can I claim unemployment benefit if my employer has reduced my working week to 3 days?

A. Yes, as long as you fulfill the 3 requirements set out above on the days in which you are not at work.

Q. Can I claim unemployment benefit if my employer has reduced my working week to 4 days?

A. No. The minimum number of days that can be claimed is 3 in a working week of 6 days. Sunday is not

included in the working week.

Q. If my working week is reduced to 3 days, can I work for my employer on the other 3 days of the working week?

A. Yes but you may **not** also claim unemployment benefit or unemployment assistance in respect of these days. The reason for this is that you are not available for employment on those days as required by the legislation.

Q. What penalties can I expect as an employee if I claim unemployment benefit or unemployment assistance when I am not entitled to?

A. To do so is a criminal offence. A person guilty of such an offence can expect:

- on summary conviction, a fine not exceeding €1,500 or imprisonment for a term not exceeding 6 months, or both, or
- on conviction on indictment, a fine not exceeding €13,000 or imprisonment for a term not exceeding 3 years, or both.
- furthermore, the Minister for Social Protection is also entitled to recover any amount wrongfully obtained by the employee from either the employee or employer where the party is aware of the criminal activity.

Redundancy Payments

Where an employee's job ceases to exist, and the employee is not replaced (rationalisation, re-organisation, not enough work available, financial state of the firm, company closures etc.) any employee aged 16 or over with 104 weeks' continuous service with the employer is entitled to a statutory redundancy payment. The statutory payment is two week's gross pay per year of service up to a ceiling of €600 per week plus one week's pay, which is also subject to the ceiling of €600. This payment is tax-free.

Employers who pay the statutory redundancy entitlement and give proper notice of redundancy (at least two weeks) are entitled to a 60% Rebate from the Social Insurance Fund, into which they make regular payments themselves through P.R.S.I. contributions. The Redundancy Payments Section of the DETI processes applications for these rebates, which should be submitted using Form RP50.

If the employer is not in a position to pay the statutory redundancy to their employees then they should sign the RP50 form and submit the following information to the DETI:

- A letter from Accountant or solicitor confirming that the company is not in a position to pay and that the employer accepts liability for the 40% owing to the Social Insurance Fund.
- also if available documentary evidence i.e Audited accounts/statement of affairs which has been signed by auditor/accountant.
- Claims submitted without this information will be returned to the sender.

Further information from: <http://www.deti.ie/employment/redundancy/guide.htm>

Working Hours

Under current conditions, when principals and any remaining staff may be working all the hours available, practices also need to keep in mind the Organization of Working Time Act 1997. This sets out statutory rights for employees in respect of rest, maximum working time and holidays. People who control their own working hours (i.e. principals in practice) are not covered by these rules.

For everybody else, the maximum average working week is 48 hours. Averaging may be balanced out over a 4, 6 or 12 month period depending on the circumstances.

The 48 hour net maximum working week can be averaged according to the following rules:-

- For employees generally - 4 months;
- For employees where work is subject to seasonality, a foreseeable surge in activity or where employees are directly involved in ensuring continuity of service or production - 6 months;
- For employees who enter into a collective agreement with their employers which is approved by the Labour Court - 12 months.

In addition, every employee has a general entitlement to:-

- 11 hours daily rest per 24 hour period;
- one period of 24 hours rest per week preceded by a daily rest period (11 hours);
- rest breaks - 15 minutes where up to 4 and a half hours have been worked; 30 minutes where up to 6 hours have been worked which may include the first break.

Approved Schemes

National Minimum Wage Act, 2000 (Prescribed Courses of Study or Training) Regulations, 2000.

S.I. No. 99/2000 sets out the conditions that must be met for a practice to be entitled to pay the reduced minimum wage. Provided that the candidate takes the RIAI/UCD Lecture Series the RIAI Examination in Professional Practice appears to meet the requirements for a prescribed course of study or training. But the Regulations also make demands of the employer (including payment of any fees for the course) which must be set out in a written agreement. The Statutory Instrument, which is quite short, explains the conditions that must be met and can be found at www.irishstatutebook.ie.

FAS Work Placement Programme*

The FAS Work Placement Programme (WPP) allows participants to gain experience while not affecting their social welfare payments. Participants can avail of a nine month placement, but are not paid by the employer during this period.

The guidelines for participants and providers are very clear, with predetermined outcomes for both parties, qualifying criteria for companies and visits from the FAS placement officers. The practice's local FAS office and placement officers should be primary source of information. Contact details and all of the information for providers (i.e. employers) and participants are available at <http://www.fas.ie/en/WPP/Provider.htm>.

'JobBridge' National Internship Scheme*

Announced on 10 May 2011 this comes into force on 1 July 2011. Full information is expected to be available on a new website shortly. The employer can be in the public, private or voluntary sector. The intern must have been unemployed for at least 3 months and in receipt of jobseekers payments or credits. Internships can be from 6 – 9 months, during which the intern continues to receive social welfare payments, plus an additional €50 p/w paid by the government. The employer must provide relevant and appropriate supervised experience but there is no explicit training or educational element in the programme. <http://www.jobbridge.ie/>

IBEC Gradlink*

This IBEC graduate scheme is intended to encourage graduate internships with a view to people acquiring more skills during the downturn so as to be ready when the economy recovers. The website has information pages for companies (who must be IBEC members), for graduates, and a search facility to identify internships being offered. On the date of checking there were no architectural internships on offer. Graduates, who should check with their local Social Welfare office to establish eligibility, may be able to keep their social welfare payments during the internship, but in that case can receive no pay from the employer. Alternatively, the intern can be paid by the employer in which case normal employment rights apply. www.ibec.ie/GradLink

*** Implications for Candidates for RIAI Examinations in Professional Practice or Architectural Technologist membership of the RIAI.**

Practical Experience Requirements: RIAI Regulations for the RIAI Examination in Professional Practice or for Architectural Technology Practical Experience require that the two years of post-graduate practical experience be 'paid'. However, under the controlled conditions set for the FAS Work Placement Programme, National Internship Programme, IBEC Gradlink or an EU Leonardo da Vinci Mobility programme, this condition would be waived for the duration of the internship/work placement involved. (The UCD Post-graduate Diploma in Professional Practice has a similar requirement for paid experience. Candidates for that Examination should contact UCD.)

Monitored Case Studies: the 'Monitored Case Study' provision in the RIAI Examination in Professional Practice Regulations allows a candidate to 'monitor', as a basis for their Case Study, a project which is being run by a practice in which the candidate is not an employee. However, the *RIAI Guidelines for Employers and Mentors* make it quite clear that that this has implications in terms of supervision, insurance, liability, etc. that need to be considered and that practices should be aware that if they allow the candidate to carry out any 'work' on behalf of the practice without payment they may be in breach of the Payment of Wages Act 1991.

PRSI Holiday

An Employer's 'PRSI holiday' came into effect in late June 2010, backdated to 1 January 2010. Subject to certain conditions being met, employers will not be liable for PRSI in respect of new employees for a period of 12 months from the date of employment. The employee's PRSI is not affected.

The main conditions attaching to the scheme, as outlined by the Dept of Social Protection, are:

- The employee concerned must have been on the Live-Register (Unemployed) for at least 6 months;
- The job must be full-time and must be new and additional – employers will not be allowed to substitute existing employees to avail of the scheme;
- The employer will be required to furnish an up-to-date Tax Clearance Certificate;
- Employers will be limited to a maximum participation rate of 5% of their existing workforce or, for smaller companies, a maximum of 5 new jobs;
- The job must last for 6 months or more. If it does not the PRSI exempt amounts will have to be repaid by the employer.

Information on the scheme is being handled by the Employer Job (PRSI) Incentive Scheme section, Department of Social Protection, Floor 2, Shannon Lodge, Carrick-on-Shannon, Co Leitrim - LoCall 1890 927 999. (Source: Chartered Accountants Ireland www.charteredaccountants.ie.)

'Dole for Business Owners'

In a Dail response in July 2009 Minister Hanafin stated:

"Self-employed people can apply for the means-tested Jobseeker's Allowance if they are on low income as a result of a downturn in demand for their services." <http://www.kildarestreet.com/wrans/?id=2009-07-01.1757.0>

A self-employed person whose practice closes down, or whose practice is getting less work and no longer provides them with a sufficient income, may qualify for a social welfare payment. They do **not** need to de-register as self-employed to get a social welfare payment.

Additional information is available at:

<http://www.citizensinformation.ie/categories/social-welfare/social-welfare-payments/unemployed-people/self-employed-and-unemployment>