

Irish Hotels Federation Legal Guide

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As Solicitors to the Irish Hotels Federation, Mason Hayes & Curran has set out below some areas of law and regulation in Ireland that may be of interest to members. This legal guide covers the following areas:

1. Contract: Your contracts with guests and suppliers, bookings, the impact of consumer protection legislation, unfair contractual terms, late payment regulations and distance sales;
2. Obligations: your responsibility towards your guests, the operation of package holidays, occupier's liability and legislation relating to hotel proprietors;
3. Licensing: a summary of licensing laws;
4. Employees: their health and safety and recent employment legislation;
5. Company law: duties of a director of a limited liability company.

Please Note:

The information below is a summary only and should not be considered as comprehensive legal advice on any aspect of law. Before taking any action with legal consequences, please consult your legal advisor or contact Wendy Hederman of Mason Hayes & Curran at 01-6145000.

Section 1: Contract

Contract with Guests

Each booking by a guest forms a legal contract between the hotel or guesthouse and the guest. The hotel or guesthouse promises to the guest that it will provide accommodation and, in certain cases, meals and other facilities to the guest, in exchange for the guest promising to pay the charges. The contract is performed by the hotel or guesthouse providing the accommodation and, where applicable, meals and other facilities, and by the guest paying for that accommodation.

Terms of the Contract

A contract for the provision of hotel services does not have to be in writing. The terms of the contract may be partially oral, partially in writing, or entirely oral or in writing. Generally, only terms of which the guest was aware at the time of entering into the contract will be binding on the guest. Some terms which are widespread across the industry may form part of the contract even if they have not been expressly agreed with the guest. For example, a guest may not have been told at the time of the booking that he must check out by 12.00 noon, but if this is standard practice, it may be deemed to form part of the contract and be enforceable against the guest.

Cancellations

What about cancellation charges? Can the guest be charged where he does not turn up on the appointed day or cancels the reservation at an hour's notice? This will depend on whether the guest was informed at the time of making the reservation or, at the time of the confirmation of his booking, that there would be a cancellation charge.

As there is no industry standard regarding cancellation charges, the guest cannot be deemed to have known that he would be charged for a cancellation or no-show. If a hotel wishes to charge a guest in these

circumstances, the hotel should state the cancellation charges applicable in the information made available to guests before they make a reservation. The charges must be reasonable and proportionate to the loss likely to be suffered by the hotel due to the cancellation.

Where the guest is only informed of the cancellation charges and other restrictions (such as no pets, no dinner on Sunday etc.) at the time the reservation is confirmed to the guest, the guest must be given the opportunity to cancel the contract without charge within a reasonable time if he does not agree to the conditions or restrictions.

Consumer Protection Act, 2007

The Consumer Protection Act, 2007 ("the 2007 Act") came into force on 1st May 2007. This Act formally established the National Consumer Agency ("NCA" or "the Agency"), which assumes the powers and functions previously held by the Office of the Director of Consumer Affairs. It should be borne in mind that the 2007 Act does not affect pre-existing sale of goods legislation (Sale of Goods and Supply of Services Act, 1980). All the long-standing requirements that goods be as described, be fit for purpose, conform to sample and be of merchantable quality and that services be given with "due skill, care and diligence" are still in place.

The 2007 Act seeks to prohibit a range of unfair, misleading, and aggressive practices as described below:

1. Unfair Commercial Practices

A commercial practice will be regarded as "unfair" where, having regard to the circumstances, a breach of good faith occurs or the average customer is denied the reasonable standard of skill and care that they are entitled to expect, appreciably limiting their ability to make an informed choice and causing them to enter into a transaction that they would not have otherwise entered into.

2. Misleading Commercial Practices

It is a criminal offence for any trader to engage in misleading commercial practices (“commercial practices” being a broad term embracing virtually all forms of promotion, advertisement and marketing). In general, a misleading commercial practice is one which contains false information likely to cause the average consumer to buy a good or service that they would not otherwise have purchased.

An advertisement will be regarded as misleading where it causes a consumer to be deceived or mislead into making a purchase which they would not have otherwise made. It is no defence to argue that all the information contained in the advertisement is factually truthful, where the advertisement, by leaving out certain key facts, may still be misleading.

Along with this general obligation of honesty in advertising, the 2007 Act expressly requires the disclosure of certain important (or material) facts in the context of an “invitation to purchase”. An “invitation to purchase” is defined as a representation by a trader in a commercial transaction which indicates the characteristics and price of a product and which enables the customer to purchase the product. Examples would be the classic “pitch”, statements made by hotel receptionists when customers are booking rooms, representations in brochures and other advertising material or the list of prices on a restaurant menu in a hotel restaurant. Material facts which must be disclosed in this context include the main characteristics of the service, its price or, if the nature of the service is such that it cannot be calculated in advance, the manner in which the price is calculated.

3. Aggressive Commercial Practices

A commercial practice will be regarded as aggressive where it involves “harassment, coercion or undue influence” likely to dominate the average customer, impairing their freedom of choice and causing them

to buy a good or service that they would not otherwise purchase.

4. Prohibited Commercial Practices

The 2007 Act lists 32 specific practices which are prohibited in all circumstances. Any trader who engages in any of these practices commits an offence. Some of the most relevant of these practices are:

1. Making a representation that the trader has an approval, authorisation or endorsement (this might include ratings etc.) that it does not have, or where it is not in compliance with the terms of such approval authorisation or endorsement;
2. Advertising a good or service as “free” or “without charge” if the customer has to pay for anything more than the cost of responding to the representation, or the cost of delivery;
3. Engaging in bait advertising: making an “invitation to purchase” (i.e. indicating the characteristics and price of the product and offering to sell it to the customer) in circumstances where the trader has reasonable grounds to believe that they will not be able to supply, or procure another trader to supply, the goods or services or an equivalent at the same price for a reasonable period of time or in reasonable quantities and where the trader does not disclose this fact to the customer. This clause is particularly relevant to advertising rooms of a type or at a price that the hotel/guesthouse is unlikely to be able to supply due to limitations on availability or overbooking policy. Alternative accommodation, at the same price, of the same quality, with the same facilities and in a similar location should be known to be reasonably available to customers before making this type of invitation to purchase;

4. Bait and switch: making an invitation to purchase a product and then refusing to take an order from the consumer for the product with the intention of promoting a different product.

Enforcement Mechanisms

The 2007 Act contains several enforcement mechanisms through which action can be taken against a trader who breaches the Act, for example, a trader can be:

1. prohibited from engaging in an unlawful practice;
2. compelled to comply with the Act following a compliance notice;
3. allowed to give a written undertaking demonstrating that he will cease the prohibited practice and comply with the 2007 Act;
4. ordered to pay damages to a customer who suffers as a result of any conduct forbidden by the 2007 Act (other than misleading commercial practices);
5. ordered to pay on the spot fines (otherwise termed 'fixed payment notices').

Fines and Penalties

A trader who contravenes any provision of the 2007 Act which is deemed an offence is liable:

1. On summary conviction (i.e. before a judge in the District Court)
 - (i) for a first conviction up to €3,000 fine and/or 6 months imprisonment;
 - (ii) for a further conviction up to €5,000 fine and/or up to 1 year imprisonment;
2. On conviction on indictment (i.e. before a jury in the Circuit Court)
 - (i) for a first conviction, up to €60,000 fine and/or up to 18 months imprisonment;
 - (ii) for a further conviction, up to €100,000 fine and/or up to 2 years imprisonment.

It should be noted that liability for an offence under the 2007 Act extends (in certain circumstances where the offence has been committed with their consent, connivance, approval or neglect) to directors, managers and officers of a hotel or guesthouse.

Defence of Due Diligence

This is an important provision in the 2007 Act as it affords a defence to an accused

- (i) where the offence was due to a mistake or the reliance on information supplied to the accused or to the act or default of another person, an accident or some other cause beyond the accused's control; and
- (ii) where the accused exercised due diligence and took all reasonable precautions to avoid the commission of the offence.

It is particularly important to be upfront about any additional charges (e.g. service charges) in advertising and promoting your premises and not to make any claims you cannot substantiate e.g. classification, and to have a cancellation policy that is reasonable and is made known to the customer before their booking. An internal record should be kept by the hotel/guesthouse as to when and how the prospective guest was informed about the hotel's cancellation policy and written confirmation of reservation should (where time between reservation and arrival permits) be accompanied by a copy of the cancellation policy sent by email, fax or letter.

Finally, with regard to their obligations to consumers, hoteliers and guesthouse proprietors should also be aware of the obligations under the Package Holidays and Travel Trade Act, 1995 (see below) when advertising their services.

Unfair Clauses

Under the European Communities (Unfair Terms in Consumer Contracts)

Regulations 1995 - 2013, ("the Regulations") an unfair term in a contract with a consumer is not binding on the consumer. Under the Regulations, a consumer is a person who is acting for purposes outside his business (trade/profession); an unfair term is one which "contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services and all the circumstances surrounding the conclusion of the contract."

The Regulations also require that all written terms of a contract are in plain intelligible language. If there is any doubt as to the meaning of a term, the interpretation most favourable to the consumer prevails.

Examples of clauses that will be presumed to be unfair include:

1. excluding the liability of the hotel for death or personal injury to the consumer which has resulted from the acts or negligence of the hotelier;
2. permitting the supplier (hotelier) to get out of the contract at his own discretion but not permitting the consumer to do so;
3. allowing the supplier to unilaterally change the terms of the contract or what is to be provided under the contract without a valid reason which is specified in the contract;
4. requiring a consumer to pay a disproportionately high sum in compensation where he has cancelled his booking; and
5. terms which attempt to bind the consumer although the consumer did not have a real opportunity to know about the terms before the contract was made.

Such terms will not be binding on the consumer and the hotel will not be able to rely on them.

Hotel proprietors should be particularly conscious of the Regulations in issuing gift vouchers. For instance, could an expiration date on a voucher be deemed to be an unfair term? There is no clear answer but it seems likely to depend on how reasonable the expiry date is and whether it was clearly brought to the consumer's attention prior to the purchase of the voucher. Expiry dates of 12 months are common practice and unlikely to be struck out as unfair. Any shorter period would have to be capable of being justified in the circumstances and clearly indicated prior to purchasing the voucher. Further, the period should be printed explicitly and clearly highlighted on the voucher itself.

The claimant in any such matter under the Regulations would not be the recipient of the voucher (beneficiary of the gift) but rather the person who purchased it. The hotel should therefore endeavour to clearly highlight the validity period to the buyer. If the voucher is for a particularly large sum, it is recommended that the hotel contact the purchaser- before the expiration date to flag the imminent expiration. Such action would help in defending any claim brought by a purchaser/beneficiary.

Implied Conditions

Irish law implies certain terms into contracts for the sale of goods and supply of services. In other words, even if a term has not been expressly agreed between the parties before conclusion of the contract, it may form part of the contract. In every contract for the supply of a service, it is implied that:

1. the supplier has the necessary skills to render the service;
2. the supplier will supply the service with due skill, care and diligence;
3. where materials are used they will be sound and reasonably fit for the purpose for which they are required; and
4. where goods are supplied, they will be of merchantable quality.

In some instances, it is possible to exclude these implied terms with appropriately worded exclusion clauses, but hoteliers and guesthouse proprietors will be restricted by other legislation mentioned here, such as the Occupiers' Liability Act 1995, the Hotel Proprietors Act 1963, the Package Holidays and Travel Trade Act 1995 and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995-2013. Furthermore, such exclusion clauses are viewed suspiciously by the courts. It would therefore be safer for a hotel or guesthouse to assume that it is under an obligation to provide the services in accordance with the implied terms.

Competition Law and pricing

Hoteliers should be aware of competition law requirements in the conduct of their business. The Irish Competition Acts 2002 – 2012 prohibit agreements between undertakings (businesses) which prevent, restrict or distort competition in trade in any goods or services. This prohibition may be relevant to pricing agreements between accommodation providers and booking engines and other platforms.

Agreements regarding pricing can be particularly problematic in the context of competition law; and competition law agencies throughout Europe and the US have in recent years been scrutinising pricing arrangements and pricing policies such as "most favourite customer" clauses and "price parity" clauses.¹ Members should seek legal advice when considering entering into any such agreements, or engaging in conduct that may reduce price competition or restrict the member's discretion to determine its' own prices.

European Communities (Late Payment in Commercial Transactions) Regulations 2002-2013 (the "Late Payment Regulations")

The Late Payment Regulations impose a penalty interest on - payments due in commercial contracts between undertakings which are outstanding 30 days after receipt of the invoice, where none is specified in the contract. The Late Payment Regulations do not apply to consumer contracts. Therefore, for hoteliers, the main relevance of the Late Payment Regulations will be their application to contracts with suppliers or corporate guests.

After the date for payment, unless otherwise specified in the contract, interest will currently accrue on the debt at a rate of 8.25% from the 1st January 2014 (based on the ECB rate of 0.25% plus the margin of 8%). That rate equates to a daily rate of 0.023%. Penalty interest should be calculated on a daily basis.

The rate is fixed twice a year, based on the ECB interest rate applicable on 1 January and 1 July and will change again on 1 July 2014. Only one rate shall be applied to a late payment, which is the rate in force on the payment date. The up-to-date rate can be checked at www.entemp.ie/enterprise/smes/latepay.htm. The ECB rate can be checked on the Central Bank and Financial Services Authority of Ireland website www.centralbank.ie

In addition, the Late Payment Regulations provide for compensation, relative to the sum outstanding, payable on late payment. The rates of compensation are as follows:

¹ For example, the recent investigation launched by the UK Office of Fair Trading ("OFT") into the alleged anti-competitive conduct of booking engines Booking.com and Expedia and Intercontinental Hotels Group. The OFT indicated that it considered the respective agreements to restrict the ability of online travel agents to discount room prices to be contrary to competition law.

**Amount of late payment
Compensation:**

<u>Amount of late payment</u>	<u>Compensation</u>
Not exceeding €1,000	€40
Exceeding €1,000 but not exceeding €10,000	€70
Exceeding €10,000	€100

The Late Payment Regulations only apply where the contract does not specify otherwise. Contractors are free to agree on a different date for payment and a rate of interest on late payments to that in the Late Payment Regulations, thus effectively contracting out of the Late Payment Regulations. It therefore remains essential to make sure contracts are in writing as far as possible, and to agree payment terms in advance. Hoteliers should read the terms of every contract with suppliers, and if the contract does provide for a late payment procedure to ensure that such terms are not unduly favourable to the hotelier. An attempt to contract out of the Late Payment Regulations will not be valid if it may be deemed "grossly unfair".

European Communities (Protection of Consumers in respect of contracts made by means of distance communication Regulations 2001–2010
(“Distance Selling Regulations”)

The Distance Selling Regulations protect consumers when they shop online or enter into contracts at a distance from the supplier (the Regulations do not apply as between businesses). Under the Regulations, consumers shopping for goods and services by telephone, mail order, fax, interactive TV, the internet and other types of distance communication are given rights to receive certain information, a cancellation period of seven working days, and protection against fraudulent use of a credit card.

However, distant contracts for the provision of accommodation, catering and leisure services on a specific date or

within a specific period are exempt from most of the key provisions of the Regulations. The most important provision of the Regulations that does apply to hotel services is in relation to credit cards. Members are obliged, where a guest has made a "distant sale" booking using a credit card, charge card, debit card or store card, to cancel, return or re-credit (as appropriate) such payment where fraudulent use has been made of the guest's payment card. Members must comply with such a request immediately and failure to do so constitutes an offence under the Regulations carrying a penalty fine of up to €3,000.

Section 2: Obligations

Responsibilities towards guests – the Package Holidays and Travel Trade Act, 1995 (the “1995 Act”)

While not obvious from its title, the 1995 Act imposes obligations and responsibilities on many hoteliers and guesthouse proprietors. The 1995 Act is intended to give greater protection to consumers taking holidays in Ireland as well as abroad. Hoteliers and guesthouse proprietors should check whether they come within the scope of the Act, and if so, ensure that they comply fully with its requirements. It implements a European Directive which is currently under review but in the meantime, the Act continues to be in force.

What does the Act cover?

The Act covers package holidays and package tours. A package is a pre-arranged combination of not fewer than two of the following when offered for sale or sold at an inclusive price and the service covers a period of more than twenty four hours or includes overnight accommodation:

- (i) transport;
- (ii) accommodation; and
- (iii) other tourist services (not ancillary to transport or accommodation) accounting for a significant proportion of the package.

An organiser is someone who regularly organises, offers for sale and sells a package to a consumer, whether directly or indirectly through a retailer. A retailer is someone who offers for sale and sells a package which has been put together by an organiser.

What does the Act require?

1. Security:

Organisers of packages must have in place sufficient security for legal liability for:

- (i) the refund of deposit monies paid over by consumers;
- (ii) the repatriation of the consumer where appropriate;
- (iii) the cost of administering claims.

Organisers must have evidence of this security. The security must be either in the form of an insolvency bond or an insurance policy to the value of 15% of the estimated turnover related to organised packages.

2. Information:

An organiser must provide certain information to the consumer before the conclusion of the contract, before the start of the package and also in every brochure produced by him and supplied to the consumer. The information in the brochure must be accurate and comprehensible among other things, and the consumer may claim compensation for any damage caused as a result of relying on information which was false or misleading.

3. The contract:

The terms of the contract must be in writing and must be clear and intelligible. The essential terms must be supplied in writing to the consumer before conclusion of the contract.

4. Remedies:

The organiser is liable to the consumer for the proper performance of all obligations under the contract, even if it was another supplier of services (such as a transport company or riding school) that was to provide part of the package.

The amount of compensation to be paid to the consumer can be limited by clear and reasonable terms in the contract, but it cannot be so limited where the consumer suffers personal injury or death, or where the damage was caused by the gross negligence or wilful misconduct of the organiser.

5. Sanctions:

The Director of Consumer Affairs is entrusted with enforcing the 1995 Act. As well as the possibility of having to pay compensation to guests, hoteliers may face fines on summary conviction of up to €3,000, and on indictment of up to €100,000 or imprisonment, if they do not comply with the Act.

Hoteliers and guesthouse proprietors who organise “packages” for guests should refer to the 1995 Act for more detail on their obligations. If necessary, they should seek legal advice on whether their current contractual arrangements with guests comply with the 1995 Act.

In the event of the 1995 Act applying, hoteliers and guesthouse proprietors should also investigate whether they are required to hold a licence as a “tour operator” or “travel agent” under the Transport (Tour Operators and Travel Agents) Act, 1982.

Hotel Proprietors Act, 1963 (the “1963 Act”)

The 1963 Act regulates many aspects of the operation of hotels. A hotel is defined as “an establishment which provides or holds itself out as providing sleeping accommodation, food and drink for reward for all comers without special contract”. An establishment registered with Fáilte Ireland as a hotel comes within this definition.

The Act places a number of duties on a hotel proprietor, namely:

1. to receive all comers unless there are reasonable grounds for refusal;
2. to have regard for the safety of its guests;
3. to have regard for the safety of its premises; and
4. to receive the guest’s property.

It is possible to limit the hotel’s liability to a maximum of €127 for the loss of or damage to the property of any one person

provided a notice in the prescribed form is conspicuously displayed where it can be conveniently read by guests at or near the reception office or desk or near the main entrance to the hotel. However, there are important exceptions to this limitation. The €127 limitation will not apply:

1. where the property was damaged, lost, stolen or destroyed through the wrongful act, default or omission of the proprietor or of a servant of his; or
2. where the property was deposited by or on behalf of the guest expressly for safe custody with the proprietor or a servant of his authorised or appearing to be authorised for that purpose and, if so required by the proprietor or that servant, in a container fastened or sealed by the depositor; or
3. where either the property was offered for the deposit as aforesaid and the proprietor or his servant refuses to accept it, or the guest or some person acting on his or her behalf wished so to offer the property but, through the default of the proprietor or a servant of his, was unable to do so; or
4. to motor vehicles brought to the hotel although it may possibly apply to any goods in the motor vehicle. This exception is without prejudice to the exceptions below.

Although the limitation of liability does not apply to motor vehicles, a hotel proprietor’s liability for loss or destruction of a motor vehicle only applies when sleeping accommodation is engaged for a person as a guest of the hotel, when the hotel is notified that a motor vehicle has been brought to the premises and the hotel proprietor has taken charge of the vehicle. Where sleeping accommodation is not enjoyed, but the person is using the facilities of the hotel, the proprietor will be liable only for the person’s safety while using the premises. It would seem therefore, that if the motor vehicle of a guest, who merely attends a function at a hotel and does not engage accommodation, is stolen or destroyed on

the premises, there would not be a liability on the part of the hotel proprietor. If however, the guest was injured as a result of lack of maintenance of a car park, there could be liability attaching to the hotel as an occupier of the premises.

A proprietor of a hotel can limit liability as provided for above, but cannot contract out of any liability that arises under the 1963 Act. The 1963 Act states it is an offence to breach the hotel proprietor's duties to receive all comers or to receive a guest's - property at a hotel where they have engaged sleeping accommodation. In return for the duties imposed on hoteliers, the Act gives the hotel proprietor the right in certain circumstances to exercise a lien on the property of guests for a debt due and a right to sell that property by public auction if the debt remains outstanding after 6 weeks. The lien may be exercised where the guest has had only a meal or drink(s) and has not and will not pay for them. Where the hotel sells the property, any surplus remaining after deducting the amount of the debt and the costs of sale must be returned to the owner of the property.

It should be noted that the issue as to whether a guest will be liable for damage to hotel property is a matter of contract and possibly tort law. The issues discussed above relating to unfair terms in consumer contracts will be of relevance when seeking to impose liability. For example, any attempt to make a guest liable for normal wear and tear would not be acceptable. It should also be noted that if a guest intentionally or recklessly damages hotel property they may be prosecuted under the Criminal Damage Act, 1991.

The Equal Status Acts 2000-2012 (the "ESAs")

The ESAs prohibit discrimination in the provision of goods and services, accommodation and education to the public or to a section of the public, subject to some exceptions.

"Discrimination" is defined as less favourable treatment than a person not associated on any of the nine "discriminatory" grounds referred to in the ESAs, namely:

- (i) gender;
- (ii) civil status;
- (iii) family status;
- (iv) sexual orientation;
- (v) religion;
- (vi) age;
- (vii) disability;
- (viii) race; and
- (ix) membership of the Traveller Community.

Discrimination includes the refusal or failure by a service provider to reasonably accommodate the needs of persons with a disability. The service provider is not obliged to provide facilities which give rise to more than a "nominal cost". The interpretation of what is nominal will obviously vary from one service provider to another and will depend on issues such as the service provider's size, resources and whether there is any public funding or grants available.

Aggrieved persons may make a complaint to the Equality Tribunal and the Equality Officer appointed to hear the case may make an award of compensation of up to €6,348 and/or order that other remedial action be carried out. The Intoxicating Liquor Act, 2003 directs that any discrimination claims against licensed premises must now be referred to the District Court.

There are a number of significant exemptions or defences provided for in the ESAs - One example is Section 15(1) which sets out circumstances in which the service provider may refuse service, i.e. where there is a reasonably held belief that if the service or accommodation is provided, there is a substantial risk of criminal or disorderly conduct or behaviour or damage to property. In order to invoke

this defence, the service provider must have strong grounds for this belief (other than discriminatory grounds) and generally he must have previous personal experience of the individual(s) concerned.

There is also a further defence available under Section 15(2) of the Acts. However, this defence is only available to those who have a license/authorisation to sell intoxicating liquor. This defence provides that action taken in good faith by or on behalf of the holder of a licence, solely for the purpose of ensuring compliance with the Licensing Acts 1833-2011, will not constitute discrimination. This defence has been of significant benefit to licence holders, including hoteliers. A number of claims brought under ESAs have been successfully defended on the grounds that the action taken by the licence holder was taken in good faith in order to ensure the premises were conducted in a "peaceable and orderly" manner. However, good faith is strictly interpreted and the action taken must be free from any discriminatory motivation.

The Acts prohibit sexual harassment and harassment in the provision of goods, services, and accommodation on any of the nine discriminatory grounds. Service providers must take reasonable steps to ensure such conduct does not take place on their premises or they could be liable for the conduct under the Acts.

Further, hotel proprietors will be vicariously liable for the discriminatory acts of employees in the course of their employment unless it is shown that reasonably practicable steps were taken by the proprietor to prevent the conduct.

The Occupier's Liability Act, 1995

The Occupiers' Liability Act, 1995 (the "Act") fundamentally changed the law governing the liability of occupiers of premises (including land) for injury or damage caused to certain categories of entrants or their property due to the state of the premises. The Act applies to those

who are in control of a premises which would include hotels, guesthouses, restaurants and private premises. The Act does not affect existing laws which deal specifically with certain groups e.g. it does not affect employers' duties towards their employees nor the duty of hoteliers to their customers.

The Act replaced common law rules relating to occupier's liability with a separate framework which offers greater protection to the occupier by reducing their duty of care towards trespassers, as defined in the Act.

Three categories of entrant are provided for in the Act:-

1. Visitors;
2. Recreational users; and
3. Trespassers.

A visitor generally is an entrant who is present on premises, at the invitation or with the permission of the occupier, by virtue of an express or implied term in a contract with the occupier or is an entrant as of right, and is not a recreational user. A recreational user is a person who is on the premises without charge, with or without permission, for the purpose of recreational activities. A trespasser is an entrant who is neither a recreational user nor a visitor.

The Act imposes a duty on the occupier towards visitors to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety) to ensure that a visitor does not suffer injury or damage by reason of any danger existing on the premises. A danger in relation to any premises means a danger due to the state of the premises.

This duty owed to visitors is higher than the duty owed to trespassers and recreational users. The duty owed to recreational users and trespassers is not

to injure the person or damage his/her property intentionally and not to act with reckless disregard for the person or damage his/her property. In determining whether the occupier acted with reckless disregard, regard will be had to all the circumstances of the case including those listed in the Act.

It should be noted that under section 4 of the Hotel Proprietors Act, 1963, "where a person is received as a guest at a hotel, whether or not under special contract, the proprietor of the hotel is under a duty to take reasonable care of the guest and to ensure that... the premises are as safe as reasonable care... and skill can make them". The Hotel Proprietors Act, 1963 does not define "guests", but it appears to cover persons on the premises for food and drink, and one does not necessarily have to contract for sleeping accommodation to be a guest.

It seems that a guest's statutory right against a hotel proprietor under the Hotel Proprietors Act, 1963 is wider than a visitor's right against an occupier under the Occupier's Liability Act, as the liability of the occupier is confined to liability for injury/damage due to the *state* of the premises.

An occupier may restrict/modify/exclude his liability under the Act by express agreement, or by displaying a notice in the proper form.

The restriction/modification/exclusion must be reasonable in all the circumstances and in the case of a notice the occupier must have taken reasonable steps to bring the notice to the attention of the visitor. If the notice is prominently displayed at entrances to the premises, the occupier may be presumed to have taken the necessary reasonable steps. However, a court would take account of all the circumstances of a case.

The notice cannot reduce the occupier's duty below the duty owed to recreational

users and trespassers. Also, such notice would not be effective to reduce duties owed under other legislation, such as the Hotel Proprietors Act, 1963.

European Communities (Drinking Water) (No. 2) Regulations 2007 (the "Regulations")

The Regulations impose a duty on hotel and guesthouse proprietors, as 'water suppliers' to ensure that their water is wholesome and clean. Drinking water must:

- (i) be free from any micro-organisms and parasites and from any substances which in numbers or concentrations, constitute a potential danger to human health; and
- (ii) meet certain quality standards (chemical standards) detailed in the Schedule of the Regulations.

A hotel or guesthouse proprietor who is not in control or in charge of the distribution system used for the provision of water and which is not in compliance with the Regulations will not be in breach of the Regulations in its capacity as a water supplier. However, it should be borne in mind that if such a proprietor negligently uses or makes available water which is contaminated, they may be liable for damages in negligence.

Water suppliers can be found guilty of several offences under the Regulations including:

- i. failure to maintain the domestic distribution systems of the premises so that it causes or gives rise to a risk of non-compliance with the Regulations;
- ii. failure to comply with a direction of a sanitary authority where the direction is necessary to prevent the further supply of water unfit for human consumption or to restore the domestic distribution system of the premises to a standard necessary for compliance with the Regulations;

- iii. failure to comply with a direction from a supervisory authority to keep records recording details such as the management and treatment of water, the monitoring of compliance with water quality standards;
- iv. failure to notify an authority where the water supplier discovers a failure to meet the values specified in the Schedule in its water supply;
- v. refusal to allow an authorised person on to a premises to carry out work in connection with these Regulations or to give false or misleading information to an authorised person.

A person guilty of an offence under the Regulations is liable on summary conviction, to a fine not exceeding €5,000, or imprisonment for a term not exceeding 3 months, or both, or on conviction on indictment, to a fine not exceeding €500,000, or imprisonment for a term not exceeding 3 years, or both.

The Regulations replaced the EC (Drinking Water) (No.1) Regulations 2007 in order to provide for the indictable offences.

Data Protection Acts 1988 and 2003 (the “DPAs”)

The DPAs concern the protection of individuals with regard to the processing of personal data and the free movement of data.

Hoteliers and guesthouse proprietors should be aware that since they hold and are responsible for keeping information in relation to their employees, customers and third parties, they are considered data controllers under the DPAs.

The legislation imposes two principal obligations on data controllers. First, they can only deal with personal data if they comply with a set of data protection principles contained in the DPAs as follows:

1. the personal data which they hold must have been obtained and processed fairly;
2. the personal data must be accurate and complete and, where necessary, kept up to date;
3. the personal data shall have been obtained only for one or more specified, explicit and legitimate purposes;
4. the personal data shall not be further processed in a manner incompatible with those purposes;
5. the personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they were collected or further processed;
6. the personal data shall not be kept for longer than is necessary for that purpose or purposes; and
7. appropriate security measures must be taken against unauthorised access to, or unauthorised alteration, disclosure or destruction of the personal data, in particular where the processing involves transmission of the data over a network.

Secondly, hotel owners, as data controllers, must adhere to one of a number of special pre-conditions exhaustively set out in the DPAs before they can handle or process personal data. The key pre-condition is where the data subject has given his consent to the processing. It is also lawful to process data where it is necessary for the performance of a contract to which the data subject is a party. This allows the hotel to record and use personal data to meet its obligations to guests, such as taking reservations and managing the booking.

In addition, a hotel must satisfy one of a number of further special pre-conditions exhaustively prescribed in the DPAs before it can handle or process sensitive personal data. The most important of these pre-conditions provides that sensitive personal data may be processed

only where the data subject has given his explicit consent.

Sensitive personal data means personal data as to:

- (i) the racial or ethnic origin, the political opinions or the religious or philosophical beliefs of the data subject;
- (ii) whether the data subject is a member of a trade union;
- (iii) the physical or mental health or condition or sexual life of the data subject;
- (iv) the commission or alleged commission of any offence by the data subject; or
- (v) any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

Furthermore, hotels which operate websites which collect personal data (visitors filling in web forms, feedback forms etc.); use cookies or web beacons; or covertly collect web data (IP addresses, e-mail addresses) have certain obligations under the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (“ePrivacy Regulations”).

The ePrivacy Regulations introduced changes to the rules on the use of cookies, signaling a move to a consent-based regime. Operators must give clear information and obtain consent from users before cookies can be used. Specific advice should be sought by hotels using cookies on their websites.

Hotels which operate websites which collect personal data (visitors filling in web forms, feedback forms etc.); use cookies or web beacons; or covertly collect web data (IP addresses, e-mail addresses) are required by the ePrivacy Regulations to

have a privacy statement available on their websites. A privacy statement is a public declaration of how an organisation applies the data protection principles to data processed on its website and is distinct from terms and conditions, copyright or disclaimer notices which may also be available on a website. In this regard, it might be noted that statements to the effect that a data controller will comply with their obligations under the Data Protection Acts are not considered to be of any value on their own. Rather, they need to be accompanied by an explanation of how, in practical terms, the site complies with its data protection obligations.

A privacy statement should be placed in an obvious position and should not be placed within another document in a website. The privacy statement should stand alone and be clearly identifiable. As a minimum a privacy statement should be placed in the upper half of the entry page to a website. Furthermore, it might be noted that placing a statement only on a home page of a website may not be sufficient to comply with this legal obligation. Ideally, a link to the privacy statement should be placed on each page of the website.

Data protection legislation also applies to the use of people's information for direct marketing. Electronic direct marketing is now governed by the ePrivacy Regulations. The Regulations set down differing sets of rules to apply to phone, fax, text message and email direct marketing. These rules are complex and specific legal advice should be obtained before engaging in a direct marketing campaign. Non-compliance can result on summary conviction to a fine up to €5,000 per message, and on indictment a fine of up to €250,000 for companies and up to €50,000 for individuals.

The DPAs also provide that from 1 October 2007 all data controllers must register with the Data Protection

Commissioner unless they are exempted from that requirement. Exemptions currently include data controllers who process data relating to personnel administration and those who keep details of customers and suppliers. This means that many hotels will fall within the exemptions. Legal advice should be sought if a member processes data for any reason not exempted, or if a member is in any doubt as regards its obligation to register.

In light of the increased obligations on companies and individuals that handle personal data, it would be prudent for a hotel to have a data protection policy in place to deal with their obligations under the legislation and to ensure that they are compliant.

The Data Protection Commissioner has approved a Personal Data Security Breach Code of Practice under Section 13(2)(b) of the DPAs. The Code places obligations on data controllers and processors in relation to the notification of data security breaches. The Code provides that all incidents in which personal data have been put at risk of unauthorised disclosure, loss, destruction or alteration should be reported to the Office of the Data Protection Commissioner as soon as the data controller becomes aware of the incident, except when:

1. the full extent and consequences of the incident have been reported without delay directly to the affected data subject(s) and
2. it affects no more than 100 data subjects and
3. it does not include sensitive personal data or personal data of a financial nature.

The Code does not apply to providers of publicly available communications networks or services, which are governed by the ePrivacy Regulations referred to above. These provide that the Data

Protection Commissioner can prosecute companies for failure to take appropriate security measures or failing to report data security breaches, with fines of up to €250,000. Failure to notify the data subject can lead to fines of up to €5,000 per breach.

Members should seek immediate legal advice in the event of a security breach which has occurred or is suspected.

Section 3: Licensing

Licensing

This section summarises some of the licences most commonly used by hotels and catering establishments, including publicans' licences, hotel licences, dance licences, occasional licences and music & singing licences.

Hoteliers should note that licensing law in Ireland is a vast and complex area. This section is only an overview of relevant provisions, and hoteliers are strongly advised to seek expert advice on all licensing matters. This section incorporates some of the main changes to licensing law brought into effect by the Intoxicating Liquor Acts, 2000 to 2008 and subsequent statutory instruments recently introduced.

The Licensing (Ireland) Act, 1902 introduced a general prohibition against the granting of new licences except in certain defined circumstances. The Intoxicating Liquor Act, 2000 relaxed or abolished the previous restrictions, which created separate licensing arrangements for towns and cities as opposed to rural areas and introduced the ability to obtain new licences by way of extinguishment.

The 2000 Act also made provision for the upgrading of restricted licences, and the transfer of licences, which allowed for greater mobility of licences from rural areas which in some cases may be over provided for, to cities and towns which may have been "under pubbed". The purpose of these provisions was to make it easier for licence applications to succeed in areas of greatest need.

Once the Circuit Court grants a certificate, a new on-licence may be issued by the Customs and Excise Authority (otherwise known as NELO – National Excise Licence Office). Such licences should be renewed annually by 30 September within each licensing year and the renewal is

subject to the issue of a tax clearance certificate, which should be applied for no later than June of that year to ensure it is received in time.

Publican's Licence

This licence is also known as an Ordinary 7 Day Publican's Licence. A publican's licence authorises the sale by retail of all types of intoxicating liquor (including beer, cider, spirits and wines) for consumption both on and off the premises. Permitted trading hours for holders of publican's licences are as follows:

Mon/Tues/Wed/Thurs	10.30am - 11.30pm
Fri/Sat	10.30am - 12.30am
Sun	12.30pm - 11.00pm
Sun/Mon/Tues/Wed	
(eve of public holiday)	10.30am - 12.30am
	Between 12.30pm and 12.30am on the following day.

There is a half an hour "drinking up" time attached to the above trading hours.

Trading on Good Friday and Christmas Day is prohibited.

Off-Licensed Sale of Alcohol:

The 2008 Act introduced new hours for off licence sales, which must now only occur between the hours of 10.30am and 10pm Monday to Saturday and 12.30pm to 10pm on Sunday and St. Patrick's Day. This relates to both off licences and publican's licences.

Hotel Licences

A hotel is defined as a "house containing at least ten apartments if situated in a rural area, and at least twenty apartments if situated in an urban area, which are used exclusively for the sleeping accommodation of travellers and having no public bar for the sale of intoxicating liquor." Hotels which operated prior to 1902 hold ordinary publican's licences.

The introduction of the Intoxicating Liquor Act, 1960 enabled hotels operating under

a hotel licence granted since 1902 to apply for a court order permitting a public bar on the premises. However, this procedure requires the acquisition and extinguishment of an existing seven-day publican's licence. A hotel licence will be invalidated if the premises cease to comply with the statutory definition of a hotel.

Hotel licences should be renewed annually by 30 September within each licensing year and the renewal is subject to the issue of a tax clearance certificate to the licence holder, which should be applied for no later than June of that year to ensure it is received in time. The Revenue Commissioners will also require a certificate that the hotel is registered on the register of hotels kept by Fáilte Ireland.

A hotel licence enables a hotelier to apply for special exemption orders which permit the licence holder on any 'special occasion' to sell alcohol up to 2.30am (except Monday: 1am). A hotel licence holder may also sell intoxicating liquor to residents of the hotel at any hour. However, on Good Friday intoxicating liquor may only be sold to residents for consumption with a meal.

Restaurant Licences and Certificates

There are three types of restaurant licenses, all of which enable a restaurant to supply intoxicating liquor:

1. Special Restaurant Licence

This type of licence was created by the Intoxicating Liquor Act, 1988 and it allows the sale of all types of intoxicating liquor in connection with the provision of a substantial meal in premises which are structurally adapted for use as a restaurant and do not contain a bar. In addition, the intoxicating liquor may be sold for one additional hour after permitted times provided it is consumed in conjunction with a substantial meal. A special restaurant licence may be

renewed annually on 30 September on application to the Customs and Excise Authority. The applicant must also produce a tax clearance certificate. A special restaurant licence holder may not apply for special exemption orders or occasional licences. Drinking-up time does not apply to these licences.

2. Restaurant Certificate

A restaurant certificate entitles the holder to sell intoxicating liquor with meals for one extra hour after normal closing times and on Sunday afternoons between 2.00pm and 3.00pm, and on Christmas day between 1.00pm and 3.00pm and between 7.00 pm and 10.00pm. The holder of an ordinary publican's licence may apply for a restaurant certificate. The applicant must satisfy the court that the premises are structurally adapted for use and bona fide are used primarily as a restaurant refreshment house or other place for the supply of substantial meals to the public.

Restaurant certificates should be renewed annually at the annual licensing session.

3. Limited Restaurant Certificates

A limited restaurant certificate enables the holder to sell intoxicating liquor with meals after normal closing hours similar to those permitted to the holder of a restaurant as outlined above. However, the holder of a limited restaurant certificate is not entitled to apply for a special exemption order. The licensee may only sell intoxicating liquor with meals in a specially designated area of the licensed premises which must be structurally adapted for use and bona fide used primarily as a restaurant refreshment house or other place for supplying substantial meals to the public. The area must not contain a public bar nor may the public gain access to a public bar through this area. A limited restaurant certificate may be renewed at the annual licensing session.

A hotel does not require any of the above mentioned certificates/licences in order to sell food.

Night clubs

A special exemption order coupled with a public dance licence is the means by which most nightclubs operate. The need to provide a meal as a concession for the special exemption has been abolished by the 2003 Act as well as the requirement that the premises be a hotel or restaurant. Restrictions on the granting of special exemption orders were introduced by the 2008 Act and these are discussed in detail later on.

Special exemption orders will be granted in normal circumstances to allow alcohol be sold until 2.30am (save for Mondays: 1am) unless the court considers it expedient, for stated reasons, to grant an exemption for a shorter period. In addition 30 minutes "drinking up" time will now be permitted after the period of special exemption.

Wine Retailer's On-Licences

A wine retailer's on-licence may be granted by the Revenue Commissioners for the sale and consumption of wine in premises which come within the definition of 'refreshment house' without the necessity of having to produce a court certificate. This is a typical type of licence held by night club owners in, for example, the Leeson Street area of Dublin. A wine retailer's on-licence is relatively easy to obtain and is renewed annually on 30 September, directly with the Revenue Commissioners subject to the issue of a tax clearance certificate.

The holder of a wine retailer's on-licence can offer beer and wine for consumption on the premises if the premises also enjoys the benefit of a restaurant certificate.

Public Music and Singing Licence

An obligation to apply for a public music and singing licence arises in an area

where Part IV of the Public Health Acts (Amendment) Act, 1890 has been adopted by the relevant authority. The Act applies to any house, room, garden or other place which is used for music, singing or other public entertainment irrespective of the fact that the premises may or may not be licensed for the sale of intoxicating liquor. There is no need to apply for a music and singing licence where a public dancing licence already exists for the premises or where the area in which the premises is situate is exempted from the requirement. A music and singing licence is required in order to apply for or renew a Theatre licence. An application may be made to the District court for the relevant court area and the licence may be renewed at the annual licensing session. The Judge may grant a temporary public music and singing licence for any period not exceeding fourteen days.

Special Exemption Orders

The holder of an on-licence (publicans licence, hotel licence or a wine on-licence) may apply for a special exemption order, the effect of which, if granted, will permit the licence holder to serve alcohol to 2.30am (except Mondays: 1am). The Licence-holder may apply for a special exemption order for a 'special occasion', (e.g. a private dinner or dinner dance), or alternatively, where the applicant holds a dance licence in addition to their on-licence.

An application may be made to the District court on any court sitting date (ordinarily every Wednesday) provided that notice has been served upon the Garda Síochána for the licensing area at least forty-eight hours before the application is made. A number of restrictions and conditions on the grant of special exemption orders have been introduced by the 2008 Act, which are specified in detail below.

Occasional Licence

An occasional licence permits the holder of an on-licence to sell any intoxicating liquor permitted by his on-licence at a place that is not already licensed for a "special event". An occasional licence granted for a special event may not exceed 6 days in duration. An application may be made to the District court at any time provided that notice has been served upon the Garda Síochána for the licensing area at least forty-eight hours before the application is made.

It shall be a condition of an occasional licence granted for a dinner or dance that the sale of intoxicating liquor pursuant to the licence be confined to persons attending the dinner or dance to which the licence relates. An occasional licence shall not be granted in respect of Christmas Day or Good Friday.

Area Exemption Orders

An area exemption order can be applied for where a special event is taking place in a locality which is liable to attract a large number of people to the locality. The court can grant an area exemption order allowing licensed premises to open at such times and on such days as it thinks fit with the provision to impose certain conditions if the event exceeds 12 days.

Licensing for Authorised Events at Racecourses and Greyhound Racetracks.

This provision allows for the sale and consumption of intoxicating liquor at the above venues after the public have been admitted to such events and for 30 minutes after the conclusion of such proceedings.

Intoxicating Liquor Act 2003

The aim of this Act is primarily to combat drunkenness, disorderly behaviour and underage drinking.

Drunkenness

The Act prohibits the supply of intoxicating liquor to drunken persons by licensees, as

well as drunkenness in the bar of licensed premises. It provides that licensees shall not admit a drunken person to the bar, and that where a person is drunk on leaving licensed premises, it is presumed that the person was drunk on those premises.

"Drunken Person" under the Act means "*a person who is intoxicated to such an extent as would give rise to a reasonable apprehension that the person might endanger himself or herself or any other person, and "drunk" and "drunkenness" are to be construed accordingly*". This places a significant onus on the publican to make a decision when each customer comes to the bar as to whether that person could be deemed drunk for the purposes of the Act.

The licensee faces severe penalties if he allows drunkenness to take place in the bar or to admit a drunken person to the bar. The Act draws a distinction between licensed premises and the bar of licensed premises. Bar is defined as "*any open bar or any part of a licensed premises exclusively or mainly used for the sale and consumption of intoxicating liquor and includes any counter or barrier across which drink is or can be served to the public*". This may create uncertainty, for example with respect to the function room/reception area part of premises.

Admission of Persons under the Age of 21 and Underage Drinking

The Act prohibits persons under 18 from bars of licensed premises. However, the publican may allow:-

1. a child of under 15 to be in the bar if accompanied by a parent/guardian but not after 9.00 p.m.;
2. a person aged 15-17 to be in the bar unaccompanied by a parent/guardian but not after 9.00 p.m.; and
3. a child under 15 accompanied by a parent/guardian or a person aged 15-17 to be in the bar after 9.00 p.m. on the occasion of a private function at

which a substantial meal is served to persons attending the function (e.g. at a wedding reception).

Furthermore, this prohibition shall not apply where a person under the age of 18 is passing through the bar of a licensed premises solely for the purpose of leaving another part of the premises.

The 1988 Act prohibited the sale by the licence holder of intoxicating liquor to persons under the age of 18. The 2003 Act fleshes out this prohibition by providing that a person (e.g. a parent) cannot purchase intoxicating liquor for delivery to or consumption by a person under the age of 18, except where it is delivered to and/or consumed by the person under 18 in a private residence with the explicit consent of that person's parent or guardian. Therefore, even at a private function and even with parental permission, a person under 18 cannot consume or be served alcohol on a licensed premises.

The Act also requires that persons aged 18-20 carry an "age document" in order to be in the bar of licensed premises after 9.00 p.m. That age document may be one of the following:

- (i) a Garda age card;
- (ii) a passport;
- (iii) an identity card of an EU Member State;
- (iv) a driver's licence;
- (v) a document prescribed by regulations made by the Minister.

The difficulty regarding the definition of "Bar" referred to above may also arise in respect of these provisions.

Section 1(1) of the Intoxicating Liquor Act 2004 provides that, for the purposes of Section 34 of the 1988 Act, it shall not be unlawful for the holder of a Licence of licensed premises to allow a person under the age of 18 to be on the licensed premises, or any part of those premises, at a time when:

- (i) intoxicating liquor is not being sold, supplied or consumed on the premises or, as the case may be, that part, and
- (ii) physical access to intoxicating liquor on those premises or, as the case may be, that part is securely prevented.

Prohibition of 'Happy Hours'

The 2003 Act prohibits the supply of intoxicating liquor at reduced prices on the licensed premises during a limited period on any day.

Intoxicating Liquor Act 2008

The Intoxicating Liquor Act 2008 commenced on the 23rd of July, 2008 being the date when all sections of the Act (except for Section 9 and parts of Section 14) came into operation.

Section 6 now provides that the Revenue Commissioners shall not grant a new Wine Retailer's Off Licence to a person unless a Certificate is presented to them which has been received by the person from the District Court and which entitles the person to a Wine Retailer's Off Licence. The grounds on which the District Court may refuse such a Certificate are set out in Section 7.

Section 9 (which has not yet come into force) deals with the situation pertaining to mixed trading and it will be necessary, where non-licensed business is carried on in any premises to which an Off Licence is attached, to ensure that, not later than the first anniversary of the commencement of the Section (which has not yet commenced), that part of the premises, in which intoxicating liquor is sold, is structurally separate from the remainder of the premises by means of a wall, or similar barrier, to which access from the remainder of the premises by members of the public may only be obtained by means of a door, gate, turnstile, or similar means of access and to which members of the public do not have to pass through in

order to obtain access to the remainder of the premises and in which none of the non-licensed business is carried on except the exposure for sale and the sale of non alcoholic beverages and that the only place within the premises at which members of the public may pay for intoxicating liquor is at a counter, or point of sale, situated within the part of the premises which is set aside for the exposure and sale of intoxicating liquor and that, not later than the first anniversary after the commencement of this Section, the exposure for sale and the sale of intoxicating liquor (other than wine) is exclusively confined to a part of the premises to which access by members of the public is prevented in such a manner that the sale of such intoxicating liquor to members of the public by means of self service cannot be effected.

The above provisions of Section 9 do not apply in relation to:

- (i) any premises the subject of a Licence granted under Part 4 of the Intoxicating Liquor Act 1943; or
- (ii) any premises where the only non licensed business carried on is the exposure for sale and sale of:
 - (a) non alcoholic beverages;
 - (b) ice;
 - (c) confectionary;
 - (d) cigarettes, tobacco, cigars and matches; and
 - (e) such other commodities (if any) as may be prescribed in regulations made under Sub-Section 1(c) of the aforesaid Section.

Special Exemption Orders

The provisions with regard to Special Exemption Orders under Section 10 of the 2008 Act are particularly onerous and are as follows:

1. In the case of a special occasion, a closed circuit television system must be in operation on the premises

concerned during the course of the special occasion;

2. Any person providing, in respect of an event, function or dance, a security service as a door supervisor, within the meaning of Section 2(1) of the Private Security Services Act 2004, must be a holder of a Licence required under the Act to provide such service;
3. A Fire Safety Certificate will be required for any part of the premises completed after the Building Control Act, 1990 came into effect; and
4. That premises comply with fire safety standards will be required. The premises must comply with the Fire Safety standards under the Building Control Act, 1990.

If the conditions 1 – 4 are not met, or if the Judge is not satisfied with same, the application for a Public Dance Licence will have to be adjourned, or refused, as the case may be. This will, in turn, impact on the granting of Special Exemption Orders.

Holders of Theatre Licences are restricted to normal licensing hours, but will be entitled to apply for Special Exemption Orders.

Under Age

Section 14 amends the Act of 1988 in so far as that the Gardaí are given certain powers where they believe, with reasonable cause, that:

- (i) a person under the age of 18 is in a relevant place, alone or accompanied by another person;
- (ii) a bottle or container which contains intoxicating liquor is in the possession of the relevant person, or the accompanying person; and
- (iii) intoxicating liquor (whether in whole or in part) has been, or is been, or is intended to be consumed by the relevant person at such relevant place, or any other relevant place.

The Section also provides for the action which the Gardaí may take in such circumstances.

The aforesaid Section also provides for a situation whereby a member of the Gardaí Síochána may, in the course of his or her duty as such member (and in accordance with guidelines to be issued), send a person, who is at least 15 years of age, but under the age of 18 years, into licensed premises for the purpose of the person purchasing intoxicating liquor therein ("Test Purchasing"), but only if:

- (i) the parent or guardian of the person has consented in writing to him or her being sent into those premises for that purpose; and
- (ii) the member is satisfied that all reasonable steps have been taken to avoid harm to the welfare of the person.

The Commencement Order in relation to Test Purchasing has been signed into law by way of statutory instrument 449/2010 and takes effect from October 1st 2010.

Expected Legislative Changes:

Sale of Alcohol Bill

The Sale of Alcohol Bill is due for publication later in 2014. The Government legislation programme makes provision for the publication of a Sale of Alcohol Bill which will update and streamline the law relating to the sale and consumption of alcohol. This Bill will repeal the Licensing Acts 1833 to 2008, as well as the Registration of Clubs Acts 1904 to 2004, and replace them with provisions more suited to modern conditions.

The proposed reforms are intended to modernise and streamline licensing law in order to make it more understandable and user-friendly for the licensed trade, the courts and members of the public.

Objectives include the following:

- (i) to reduce alcohol-related harm, especially among young people,
- (ii) to promote coherence between the planning and licensing codes, including a strengthening of the role of local authorities in licensing matters,
- (iii) to improve compliance with licensing law by licensees, and its enforcement by the Gardaí; and
- (iv) to simplify and streamline the licensing laws.

Section 4: Employees

Duties of Employers to their Employees

The sources of law in Ireland which apply in the sphere of employment law are statute law, European Community law, common law, equity and the Irish Constitution. Statute law is the most significant, bearing in mind the ever-increasing amount of employment legislation that is driven by membership of the European Union. Employment legislation in Ireland is governed mainly by acts of the Oireachtas.

Some employees in Ireland, including employees working in the hotel industry, are also covered by other agreements regarding their employment. These agreements deal with the pay and working conditions of the employees concerned and may be included in an employee's contract of employment.

- (i) The various agreements on pay and conditions made by Joint Labour Committees (JLCs) are known as Employment Regulation Orders (EROs). Traditionally, EROs regulated employment in hotels.
- (ii) Agreements which result from negotiations between trade unions and employers are called Collective Agreements.
- (iii) If a Collective Agreement has been registered with the Labour Court it is known as a Registered Employment Agreement (REA).

Following a High Court decision all existing EROs ceased to have statutory effect from 7 July 2011.

On 1 August 2012 the Industrial Relations (Amendment) Act 2012 ("2012 Act") came into effect and set stricter conditions for the establishment of EROs. Under the 2012

Act all EROs will not be legally enforceable until they are vetted by the Labour Court and ultimately the Minister for Jobs, Enterprise and Innovation. The 2012 Act provides that the Labour Court's review will occur "*as soon as practicable after the commencement [of the Act], and at least once every 5 years thereafter*". The 2012 Act further allows companies to derogate from the terms of EROs in cases of financial difficulty, while ensuring the protection of employees and avoiding distortion of competition.

A JLC for a sector must now take into account the following when drafting an ERO:

1. Legitimate financial and commercial interests of employers;
2. Efficient, economical and sustainable work practices;
3. Agreeing and maintaining fair and sustainable minimum rates of remuneration;
4. Maintaining harmonious industrial relations;
5. Levels of employment and unemployment in the sector
6. General level of wages in comparable sectors;
7. Current national minimum wage
8. Any National Wage Agreement in force;
9. Wages in another Member State where enterprises in the relevant sector are in competition with enterprises in that other Member State.

On 1 October 2013, the Minister for Jobs, Enterprise and Innovation published the Labour Court Report of the JLC system along with his response to the Labour Court's Report. One of the Labour Court's recommendations was that the JLC for Hotels in Dublin should be abolished and the JLC for hotels outside Dublin should be retained. In his response the Minister for Jobs, Enterprise and Innovation outlined the necessary legal steps to implement the Labour Court's recommendations.

On 9 May 2013, the Supreme Court held that the Registered Employment Agreement ("REA") system for determining pay rates and working conditions was unconstitutional. Legislation to address this Supreme Court ruling is expected to be introduced in 2014.

Employees who were covered by an ERO or an REA have existing contracts of employment which govern their pay and conditions of work. If an employer reduces an employee's rate of pay this would constitute a change in their contract of employment and normally such change requires the employee's consent. If and until new EROs are made the pay and conditions of employees who start work after 7 July 2011, are governed by employment legislation such as the National Minimum Wage Act, 2000. This also applies to the pay and conditions of new employees in the sectors previously governed by REAs who start work after 9 May 2013.

This document does not address employment rights which arise in relation to the acquisition or disposal of a business (which may include the contracting out, transfer between contractors, or bringing back in-house of a function such as running a restaurant or cleaning which may be governed by regulations relating to the transfer of undertakings). Specific advice should be obtained before entering into a binding agreement in respect of such a transaction.

Terms of Employment (Information) Acts, 1994 - 2012

The Terms of Employment (Information) Acts, 1994 – 2012 provide that new employees must be given written confirmation of the terms of their employment within two months of the commencement of employment. This written statement must be signed by or on behalf of the employer and must be retained for one year after the employee's employment has ceased. Such statements must include the following:

- (i) the full names of the employer and employee as well as the address of the employer in the State;
- (ii) the title of the job or the nature of the work as well as the date of commencement of work;
- (iii) the place of work;
- (iv) in the case of a temporary contract of employment, the expected duration thereof or, if the contract of employment is for a fixed term, the date on which the contract expires;
- (v) details of pay, including the rate or methods of calculation and whether pay is to be on a weekly, monthly or any other basis;
- (vi) terms and conditions as to hours of work and overtime, holiday entitlements, absence due to sickness and injury and sick pay arrangements, pension schemes or pension arrangements in place and the period of notice which the employee is required to give and entitled to receive in order to terminate the employment relationship;
- (vii) a reference to any collective agreements which affect the terms and conditions of the employee's employment;
- (viii) details of working hours and the times and duration of rest periods and breaks (in accordance with the breaks provided for in the Organisation of Working Time Act 1997);
- (ix) a reference to an employee's right to make a request under Section 23 of the National Minimum Wage Act 2000 for a written statement of his/her average hourly rate of pay as provided for in that section.
- (x) a reference to any collective agreement which applies to the employee.

Employees who were employed prior to the commencement into force of the Acts are entitled to a written statement within two months of a request for same. Any changes in terms and conditions must be

notified to the employees within one month of the changes.

Section 14 of the Unfair Dismissals Acts 1977-2007 provides that employees must be given a written copy of an employer's dismissal procedure (usually contained in the disciplinary procedure) within 28 days of the commencement of the employment relationship.

The Payment of Wages Act, 1991

This Act gives rise to three basic principles:

- (i) the right of every employee to a readily negotiable mode of wage payment as prescribed by the Act;
- (ii) the right of every employee to protection against unlawful deductions;
- (iii) the right of all employees to a written statement of wages and any deductions therefrom.

The National Minimum Wage Act, 2000 (“2000 Act”)

The national minimum hourly rate of pay was increased to €8.65 per hour on 1 July 2011 and this is the current rate in force at the time of updating this Guide. The 2000 Act lists a number of components that can be regarded as reckonable for the purposes of determining the minimum hourly rate of pay. These include basic pay, shift premia, productivity payments, commission and bonuses, the monetary value of board and lodgings, service charges distributed through the payroll and zero hours payment.

The 2000 Act also details non-reckonable components including overtime premia, call-out premia, unsocial hours premia, service pay, tips or gratuities paid into a central fund managed by the employer and paid through payroll, public holiday premia, Sunday premia, expenses and allowances incurred by the employee in carrying out his/her employment, payments for absence from work such as holiday pay, sick pay or pay in lieu of notice, employer pension contributions,

loans, compensation payments, payments for loss of office or redundancy, benefits in kind, payments to staff otherwise than in their capacity as employees or payments under a staff suggestion scheme.

Employers can pay sub-minimum rates of pay to certain categories of employees as follows:

- (i) those under 18 years are entitled to not less than 70% of the national minimum hourly rate of pay;
- (ii) those who either enter employment for the first time or continue in their employment after reaching 18 years of age are entitled to 80% of the national minimum hourly rate of pay in year 1 and 90% in year 2;
- (iii) trainees undergoing certain prescribed study or training authorised by their employer are entitled to 75% of the national minimum hourly rate of pay for the first one-third of the training/study period, 80% for the second one-third period and 90% for the third one-third period (these percentages would apply respectively for year 1, year 2 and year 3).

The Pensions Act, 1990 (as amended)

There is no obligation under Irish law on employers to provide a work/occupational pension scheme for employees. Under the Act employers are obliged, to provide access for all its employees including part-time, fixed-term contract and seasonal employees to a pension arrangement known as a Personal Retirement Savings Account (“PRSA”) if:

- (i) the employer does not operate a pension scheme;
- (ii) the employer does operate a pension scheme but eligibility for membership of the pension scheme does not cover all employees; or
- (iii) employees have to wait more than six months from the date of joining employment to be included in the scheme for retirement benefits; or

- (iv) the scheme only provides members with death in service benefits; or
- (v) the scheme does not offer an AVC facility (the entitlement to make additional voluntary contributions).

Employees in relation to whom any of the above limitations apply are termed "excluded employees".

A PRSA is a contract between an individual and a PRSA provider (please see the website of the Pensions Board at www.pensionsboard.ie for a list of approved PRSA providers and products) pursuant to which a long-term savings and investment account is established in order to provide retirement benefits for that individual. There are two types of PRSA, namely a Standard and a non-Standard PRSA. A Standard PRSA is only permitted to invest, apart from temporary cash holdings, in pooled funds and a limit is imposed on the level of charges that the PRSA provider can levy. A non-Standard PRSA may invest in any funds and no limit is imposed on the amount of charges or fees that can be levied.

In order to facilitate employees in accessing a PRSA an employer should in respect of at least one type of PRSA:

- (i) select at least one Standard PRSA provider to enable excluded employees to participate in a Standard PRSA;
- (ii) notify excluded employees of their right to contribute to a Standard PRSA;
- (iii) allow the selected PRSA provider or its intermediaries access to excluded employees at their workplace for the purpose of concluding Standard PRSA contracts;
- (iv) subject to work requirements, allow excluded employees reasonable paid leave of absence to enable them to make arrangements for the establishment of a Standard PRSA;

- (v) at the request of an excluded employee who has entered into a Standard PRSA contract and on receipt of appropriate information from such employee (i.e. in relation to chosen level of contribution etc.), make the relevant payroll deductions;
- (vi) remit the deductions to the Standard PRSA provider within 21 days following the end of the month in which the deduction is made;
- (vii) provide a statement to employees each month setting out the contributions deducted in the preceding month. This information can be incorporated into the employee's payslip.

An employer is not obliged to contribute to a PRSA on behalf of its employees but if it chooses to do so, the employer will be granted tax relief in relation to such contributions in accordance with prevailing tax legislation.

Protection of Employees (Part-Time Work) Act, 2001

This Act provides that, with the exception of part-time employees who work on a casual basis, part-time employees must be treated no less favourably than comparable full time employees in relation to their terms and conditions of employment. The purpose of the Act is to afford part time workers the same rights to benefits as their full time counterparts irrespective of how many hours they may work.

Protection of Employees (Fixed Term Work) Act, 2003

The Act provides that employees who work on fixed term contracts are not to be treated less favourably than comparable employees who work on a contract of indefinite duration. The Act also provides a framework to prevent abuse arising from the use by employers of successive fixed term employment contracts. Where an employee is employed on two or more fixed-term contract and the aggregate

duration of those contracts exceeds four years, the employee will be entitled to a contract of indefinite duration (unless there are objective grounds to justify the renewal of the fixed-term contract).

Protection of Employees (Temporary Agency Work) Act, 2012

The Act provides protections for temporary agency workers and equal treatment between temporary agency workers and directly recruited employees in respect of basic working and employment conditions. In addition, the Act provides for information on job vacancies within the hirer to be given to agency workers and for agency workers to be given access to the hirer's collective facilities and amenities such as canteen, crèche and transport services.

Organisation of Working Time Act, 1997

This Act deals with rest periods, weekly working time, night working, annual leave and public holidays. Some of the principal provisions of the Act are as follows:

- (i) 15 minute rest break every 4.5 hours
- (ii) 11 hours consecutive rest every 24 hours
- (iii) 24 hours consecutive rest every 7 days
- (iv) average 48 hour weekly working limit;
- (v) compensation for Sunday working;
- (vi) 4 working weeks' holidays where an employee works 1365 hours in leave year;
- (vii) if less than 1365 hours worked, then one third of a working week's holidays for every month an employee works 117 hours; and
- (viii) where hours worked by employee are less than 117 per month, holidays equal to 8% of hours worked in the leave year (up to a maximum of 4 working weeks).

The provisions with regard to rest periods are modified in respect of workers under 18 years of age (see below).

Employees are entitled to 9 public holidays per year, although the employer is not obliged to give the day off but instead may offer either a paid day off within a month, an extra day's pay or an extra day's annual leave.

Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations, 2001

These Regulations require employers to keep:

- (i) a record of the number of hours worked by employees (excluding meals and rest breaks) on a daily and weekly basis;
- (ii) a record of leave granted to employees in each week by way of annual leave or in respect of a public holiday and payment made in respect of that leave;
- (iii) a weekly record of the starting and finishing times of employees.

These records must be retained for a minimum of three years.

Maternity Protection Acts, 1994 and 2004

The Maternity Protection Acts deal with maternity leave and provide that an employee is entitled to 26 weeks' ordinary maternity leave together with 16 weeks' additional maternity leave.

Employees may be entitled to collect social welfare maternity benefit during their ordinary maternity leave. There is no obligation on an employer to continue payment of an employee's salary during any period of maternity leave. There is however a statutory right to paid time off for ante-natal and post-natal medical care. In addition, expectant mothers are entitled to attend a complete set of ante-natal classes (with the exception of the last three classes in a set) without loss of pay and fathers are entitled on a once-off basis to paid time off to attend the last two classes in the set of ante-natal classes.

The principal purpose of the legislation is to protect an employee's right to return to work either to the job she was doing before the commencement of maternity leave or, if that is not reasonably practicable, to a suitable alternative job.

Parental Leave Act, 1998 (as amended)

The Parental Leave Act 1998, as amended provides for men and women to take up to 18 weeks unpaid leave from their work in order to take care of young children. Persons acting in loco parentis are also entitled to parental leave.

The Act also provides for paid leave in circumstances where there is an emergency involving an illness or injury to a family member of an employee. This is known as *force majeure* leave. Significantly, the 2006 Act extended the *force majeure* provisions to include persons in a relationship of domestic dependency, including same-sex partners.

Parental leave must be taken continuously or in separate blocks of a minimum of six continuous weeks before the child is eight years old (16 years old in the case of children with disabilities or long-term illness or in the case of an adopted child under eight, within two years of the adoption order).

Other types of "protective leave" such as adoptive leave and carer's leave are provided for in other legislation.

Employment Equality Acts, 1998-2011

The Employment Equality Acts, 1998-2011 prohibit discrimination in employment on nine distinct grounds:

- (i) gender;
- (ii) civil status;
- (iii) family status;
- (iv) sexual orientation;
- (v) religious belief;
- (vi) age;
- (vii) disability;
- (viii) race; and

- (ix) membership of the Traveller community.

In general terms discrimination is prohibited:

- (i) in relation to access to employment, conditions of employment, training and promotion;
- (ii) in collective agreements;
- (iii) in job advertisements;
- (iv) by employment agencies;
- (v) in vocational training; and
- (vi) by certain vocational bodies e.g. trade unions and professional and trade associations.

Compulsory Retirement Age

On and from 1 January 2014, the State Pension (transition) which was payable at age 65 was abolished. The State Pension (Contributory) which is payable at 66 will continue to be paid but this will itself become payable from age 67 in 2021 and age 68 in 2028.

Following the changes, employees with a contractual retirement age of 65 and who would currently expect to receive a state pension at that age will no longer receive a state pension until they reach 66 years of age.

At present there is no statutory retirement age in Ireland, however employers often include one in their contracts of employment. While currently it is lawful for employers to adopt compulsory retirement ages, both the European Court of Justice and the Equality Tribunal have required the employer to establish that the retirement age was "*objectively and reasonably justified by a legitimate aim..... and the means of achieving that aim are appropriate and necessary*". Therefore when setting a retirement age, an employer should be mindful that there is a risk that it could be subject to legal challenge, and therefore should be in a position to objectively justify its contractual age.

Safety, Health and Welfare at Work Act, 2005 (the “2005 Act”)

Both employers and employees have duties under the 2005 Act. In particular, an employer is under a duty to appoint a competent person to perform a health and safety function.

Together with an employer’s duties to protect the health, safety and welfare of their employees, they have duties under the Act to protect persons other than their employees at the place of work (such as contractors and visitors).

Every employer is obliged to have a hazard analysis and risk assessment carried out on the place of work and to compile a Safety Statement. The Safety Statement should specify the manner in which the safety, health and welfare of persons in the workplace should be secured and give details of people in the workplace who are responsible for health and safety. The employer must indicate in the Safety Statement what action is necessary to fulfil his duties under the Act in making the workplace as safe as is reasonably practicable. The Safety Statement must be reviewed regularly and where there has been a change to the manner in which work is carried out. There is an obligation on an employer to bring the terms of the safety statement to the attention of employees when they commence work and thereafter at least annually or more often if there has been a change in the manner in which an employee carries out his work. Employers should also ensure that all workplace accidents are reported to them and recorded by them, and notify the Health and Safety Authority where an accident results in an absence of more than three days.

The Act makes provision for testing for intoxicants, but these provisions will only become effective when the Minister for Jobs, Enterprise and Innovation, makes Regulations providing for the circumstances in which such intoxicant testing may be carried out. It is expected,

at least for the moment, that mandatory testing for intoxicants will be limited to specified safety critical work environments. Pending such Regulations an employer may only require an employee to undergo an intoxicant test where he has reserved such a right in the contract of employment, or where the employer has formed the reasonable belief that the employee is in attendance at work under the influence of an intoxicant, and/or where the employee agrees to such testing

Safety, Health and Welfare at Work (General Application) Regulations 2007 (the “GAR Regulations”)

The Regulations deal with housekeeping matters in relation to the physical environment of the workplace and set out minimum standards for facilities in every workplace. In summary, these include the following:

- (i) workplaces and work equipment;
- (ii) personal protective equipment;
- (iii) manual handling of loads;
- (iv) display screen equipment;
- (v) electricity;
- (vi) working at a height;
- (vii) noise and vibration;
- (viii) children and young persons;
- (ix) pregnant, post-natal and breastfeeding employees;
- (x) night and shift work;
- (xi) safety signs;
- (xii) first aid;
- (xiii) explosive atmospheres.

These Regulations compliment the 2005 Act by including in one set of Regulations most of the specific safety and health laws which apply generally to all employments.

Smoking in the Workplace

Environmental Tobacco Smoke (“ETS”) is a recognised hazard with associated risks. Section 8 of the 2005 Act, requires that “reasonably practicable” measures be taken to ensure the health of employees.

Public Health (Tobacco) (Amendment) Act, 2004

The Act prohibits smoking in the workplace. The Act provides that smoking is forbidden in enclosed places of work which includes offices, public houses restaurants and company cars.

There are a number of exceptions to the ban on smoking in the workplace which include, but are not limited to, bedrooms in hotels, bed and breakfast accommodation and guesthouses.

While smoking in an enclosed workplace is forbidden under the Act employers have discretion to provide an outdoor smoking area. An outdoor area is defined as a place or premises or part of a place or premises which is wholly uncovered by any roof, fixed or mobile or is covered by a roof as long as not 50% of the perimeter is covered by a wall, window, or gate.

Any person found guilty of breaching Act may be subject to a fine of €3,000. Under the Act the occupier, manager or other person in control of an area where a person smokes in breach of the Act commits an offence and is liable to an equivalent penalty. It is a defence to show that all reasonable efforts were made to ensure compliance with the Act.

Minimum Notice and Terms of Employment Acts, 1973 - 2005

These Acts provide for a graduated scale of notice periods according to the employee's length of service. These minimum statutory notice periods which an employer must give an employee are as follows:

- (i) between 13 weeks and 2 years' service - 1 week's notice;
- (ii) between 2 years and 5 years' service - 2 weeks' notice;
- (iii) between 5 years and 10 years' service - 4 weeks' notice;
- (iv) between 10 years and 15 years' service - 6 weeks' notice;

- (v) more than 15 years' service - 8 weeks' notice.

Unless the employment contract obliges an employee to give a longer period of notice, employees are only required to give an employer one week's notice unless the contract of employment provides otherwise. Employees are entitled to accept payment in lieu of notice and both employers and employees may waive their right to notice. An employee who is dismissed for reason of gross misconduct is disentitled to notice.

Unfair Dismissals Acts, 1977-2007

This legislation provides that all dismissals are deemed to be unfair unless there are substantial grounds justifying same. A dismissal may be deemed to be fair if it is by reason of capability, competence, conduct, qualifications, redundancy, a statutory restriction or for some other substantial ground. However, not only must the reasons for the dismissal be fair, the procedures followed must also be fair in order to uphold a dismissal as fair.

For an employee to qualify for protection under the Acts, he must have at least one year's continuous service (subject to certain limited exceptions mentioned below) and be aged 16 years or over and have not reached the normal retirement age for employees in similar employment within that employer's organisations. Furthermore, a claim must be lodged using the Workplace Relations Complaint form within six months of the date of dismissal (or twelve months in exceptional circumstances). If successful in such an action, an employee may be re-engaged, re-instated or compensated. The maximum award of compensation under the Acts is 104 weeks' remuneration limited to an employee's actual financial loss.

However, employees dismissed by reason of pregnancy or related matters, and employees dismissed for exercising or proposing to exercise their right to carer's

leave, parental leave, adoptive leave or rights under the National Minimum Wage Act 2000 and employees dismissed by reason of trade union membership or activity are covered under the legislation from the first day of their employment.

There are circumstances where a dismissal may be fair. These include dismissals due to the capability, competence or qualifications of the relevant employee; the conduct of the relevant employee; for reasons of redundancy. However, not only must the reasons for the dismissal be fair, the procedures followed must be fair (and constitutionally acceptable) if a finding of unfair dismissal is to be avoided.

Redundancy Payments Acts, 1967-2011

These Acts regulate the area of redundancy, dealing with individual, collective, voluntary and compulsory redundancies. Employees come within the scope of the Acts if:

- (i) they are employed in insurable employment;
- (ii) they have been employed in such employment for a continuous period of 104 weeks;
- (iii) they are at least 16 years of age.

An employee who fulfils the criteria above is entitled to a tax free lump sum payment from the employer. The amount of the payment is directly related to the employee's length of service and to his normal earnings up to a maximum fixed rate, which is currently €600 per week. This lump sum payment is calculated (subject to the statutory ceiling of €600 per week) as follows:

- (i) two weeks' statutory redundancy payment for each year of service;
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- (ii) the equivalent of one week's pay.

From 1 January 2013 the employer statutory redundancy rebate was abolished.

Under the Redundancy Payments Acts, 1967 to 2011, dismissal is deemed to occur wholly or mainly by reason of redundancy where:

- (i) the employer's business or place of employment has partially or completely closed down; or
- (ii) there has been a decrease in the employer's requirements for the category or qualification of the employees made redundant; or
- (iii) fewer employees are required due to a restructuring or reorganisation of the business or because there has been a downturn in trade; or
- (iv) the employer has decided that the work for which the employee had been employed should henceforth be done in a different manner for which the employee is not sufficiently qualified or trained; or
- (v) the employer has decided that the work should henceforth be done by a person who is also capable of doing other work for which the employee in question is not sufficiently qualified or trained.

Collective Redundancies

Collective redundancies arise where, during any period of 30 consecutive days, the employees being made redundant are:

- (i) 5 employees where 21-49 are employed
- (ii) 10 employees where 50-99 are employed
- (iii) 10% of the employees where 100-299 are employed
- (iv) 30 employees where 300 or more are employed

Under the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 Act a Redundancy Panel has been set up by the Department of Jobs, Enterprise and Innovation in accordance with the partnership agreement Towards 2016. Some collective redundancies may be referred to the Panel to determine whether

the redundancies were (or are being) carried out in order to replace the employees with workers on lower pay or other less favourable terms and conditions.

These are known as exceptional collective redundancies. If the panel decides the redundancies were carried out for this reason, the employees concerned will be able to take action for unfair dismissal.

In such a situation, under the Protection of Employment Act 1977-2007 an employer is obliged to enter into consultations with a view to agreement with employee representatives.

This legislation is separate from the Redundancy Payments Acts 1967-2007. These consultations must take place at the earliest opportunity and at least 30 days before the notice of redundancy is given. The aim of the consultation is to consider whether there are any alternatives to the redundancies.

An employer is also obliged to provide the following information in writing to employee representatives:

- (i) The reasons for the redundancy
- (ii) The number and descriptions of the employees affected
- (iii) The number and descriptions of employees normally employed
- (iv) The period in which the redundancies will happen
- (v) The criteria for selection of employees for redundancy
- (vi) The method of calculating any redundancy payment.

An employer is also obliged to inform the Minister for Jobs, Enterprise and Innovation in writing of the proposed redundancies at least 30 days before the occurrence of the first redundancy.

The Employees (Provision of Information and Consultation) Act 2006 requires employers to consult with employees on

substantial changes in the workplace, including proposals for collective redundancies. Since 23 March 2008 the Act applies to employers of 50 people or more.

Employees (Provision of Information and Consultation) Act 2006

The Employees (Provision of Information and Consultation) Act 2006 transposes in part EU Council Directive 2002/14/EC on Information and Consultation of Employees and provides for the establishment of a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings employing at least 50 employees in any one Member State. The Act obliges employers to provide information to, and consult with, employees on issues such as the probable development of an undertaking's activities and economic situation; the structure and probable development of employment within the undertaking and measures anticipated; and any decisions likely to lead to substantial changes in work organisation or contractual relations. Information must be given at such time, in such fashion and with such content as appropriate to enable employees or their representatives to conduct an adequate study and, where necessary, prepare for consultation.

The Act now applies to all employers with over 50 employees. However, unless there is a pre-existing information and consultation agreement in place in the workplace, employers may wait until they receive a request from the requisite number of employees (10% but not less than 15 employees) to enter into negotiations to establish information and consultation arrangements. Where a negotiated agreement is not put in place within a stated timeframe following a request from employees, the standard rules contained in the Act will apply to that workplace.

Foreign Employees

Any member of the European Economic Area (EEA) or any Swiss national is entitled to work in Ireland without an employment permit. The EEA includes all of the Member States of the European Union, in addition to Iceland, Norway and Liechtenstein. An employment permit must be obtained for employees of any other nationality. Applications should be made to the Department of Jobs, Enterprise and Innovation. Application forms may be downloaded from the Department's website (www.djei.ie).

Under the Employment Permit Acts 2003-2012, there are four types of employment permit: Green card permit, work permit, spousal/dependant permit and intra-company transfer. Changes were made in 2013 intending to facilitate the granting of work permits and green cards to highly skilled employees.

The Department Jobs, Enterprise and Innovation have prepared a list of occupational sectors which it considers ineligible for work permits. Since April 2013, this list includes all positions in the hotel, catering and tourism industry except for chefs. However, this list is subject to change from time to time.

Since 1 June 2009, the spouses, civil partners or dependants of employment permit holders must apply for work permits in their own right.

The Acts makes it an offence to employ an individual without an employment permit where one is required, and provides that any person contravening the provisions of the Acts should be liable on conviction to a fine of up to €250,000 or up to 10 years' imprisonment.

From 28 August 2009, employees who have been working lawfully and who have held an employment permit for 5 consecutive years will no longer need to

have an employment permit to remain in employment.

Employment of Young Persons

The employment of persons below the age of 18 is regulated by the Protection of Young Persons (Employment) Act 1996 and a number of statutory instruments. A number of these provisions are relaxed for "close relatives" as defined in the Act.

Pursuant to the Act any employer must, before employing a person below the age of 18, obtain a copy of the person's birth certificate or other proof of age. If the person is under 16, the employer must obtain the written permission of the parent or guardian of the person. Having employed the person the employer must maintain records of their name, date of birth, starting and finishing times each day, rate of pay and total amounts paid. Failure to comply with these requirements is an offence under the Act.

There are two statutory instruments of relevance to employing young people in the hotel trade: The Protection of Young Persons (Employment) Act, 1996 (Employment in Licensed Premises) Regulations, 2001 (the "Licensed Premises Regulations") and the Protection of Young Persons (Employment) Act, 1996 (Bar Apprentices) Regulations 2001 (the "Apprentices Regulations").

The Licensed Premises Regulations permit young people (16 and 17 year olds) employed on general duties in a licensed premises to be required to work up to 11 pm on a day that does not immediately precede a school day during a school term where the young person is attending school. The Licensed Premises Regulations also make some provisions regarding hours of work (see below) and provides that employers shall have regard to the Code of Practice concerning the Employment of Young Persons in Licensed Premises.

On starting employment a young person must be given training which must include being given copies of the code of practice, a statement of their terms of employment, a summary of the Act and a copy of any relevant collective agreement or ERO. Ideally the code of practice should be printed out and signed by the prospective employee, their parent or guardian and the employer prior to the commencement of employment, or equivalent terms incorporated into a contract of employment.

The outline of permitted working time by young persons is set out in the table on the following page:

	Holiday work		Work Experience		Term Time		FÁS Approved Scheme	
Age	14	15	14	15	14	15	15+	16/17
Daily maximum hours	7	7	8	8	0	N/A	8	8
Weekly maximum Hours	35	35	40	40	0	8	40	40
Minimum holiday over summer	21	21						N/A
Latest Finish	8 PM	8 PM	8 PM	8 PM	8 PM	8 PM	8 PM	10PM or 11 PM
Earliest Start	8 AM	8 AM	8 AM	8 AM	8 AM	8 AM	8 AM	6 AM or 7 AM
Minimum hours rest between finish and start	14	14	14	14	14	14	14	12
Minimum rest days per week	2 days	2 days	2 days	2 days	2 days	2 days	2 days	2 days
Daily Breaks	30 Minutes every 4 hours							30 mins every 4.5 Hours

By virtue of the Licensed Premises Regulations the finishing time for 16 and 17 year olds may be 11 PM on a night which does not precede a school day and the employee is not required or permitted to commence work before 7 AM the following day.

The Apprentices Regulations permit a person who is a full time apprentice in a licensed premises to work up to 12 midnight when they will not be required or permitted to start work before 8 AM the following day and are supervised by an adult.

The maximum hours of work permitted are in total across all employments and the employer is required to make reasonable enquiries to ensure that they are not being exceeded by virtue of the young person having a second employment.

Employers are also required to provide employees under 18 years of age with a copy of the official summary of the Protection of Young Persons (Employment) Act 1996 and to display an abstract of the Act at the workplace.

Pursuant to Chapter 1 of Part 6 of the GAR Regulations (referred to above) an employer must carry out a separate risk assessment in respect of young employees, taking into account their age, lack of experience, lack of awareness of risks and maturity. They must inform the employee and their parent or guardian of any such risks identified.

Workplace Policies and Procedures

Employers are legally obliged to have the following policies and procedures in place which should be provided to their employees at their induction:

- (i) Grievance Policy and Procedure;
- (ii) Disciplinary Policy and Procedure;
- (iii) Bullying and Harassment Policy and Procedure

- (iv) Electronic communications and workplace monitoring policy.

Protected Disclosures Bill 2013 The Protected Disclosures Bill was published on the 3 July 2013 and passed by the Seanad on 20 November 2013. The Bill aims to protect workers from penalisation where they make a disclosure of information that comes to their attention in their workplace and which is a "Protected Disclosure" as defined in the Bill.

The Bill does not confine itself to protecting persons in the traditional employer/employee relationship but instead, it uses the wider term "Worker". Therefore the protection and remedies provided for will also apply to contractors, trainees, and agency staff engaged by the employer. If a Worker makes a disclosure in accordance with the various conditions and requirements under the Bill, he will enjoy protection against penalisation by the employer. Compensation for penalisation of up to a maximum of five years remuneration can be awarded by a Rights Commissioner. An award under the Unfair Dismissals Acts 1977-2007, would be limited to the worker's financial loss. Penalisation includes suspension, lay-off or dismissal, demotion or loss of opportunity for promotion, transfer of duties, change of location of place of work, reduction in wages or changing working hours.

In circumstances where the Bill may be enacted in the near future, employers should consider putting in place internal structures to deal with protected disclosures, drafting policies to deal with protected disclosures (public sector bodies have a statutory requirement to do so) and rolling out training to its workers and management, to ensure the objective of the legislation can be achieved.

Employment Fora

Consolidation of Employment Law Fora

In April 2012, the Minister for Jobs, Enterprise and Innovation published a “Blueprint to Deliver a World-class Workplace Relations Service”. The Blueprint proposed creating a new structure consisting of only two statutorily independent bodies to deal with employment law claims, namely: the Workplace Relations Commission and the Labour Court which will replace current fora such as the Rights Commissioner and the Employment Appeals Tribunal. The expected Workplace Relations (Law Reform) Bill (the “Bill”) has been delayed until 2014. The passing of the Bill will require significant amendments to roughly 22 key acts on employment law (as well as changes to parts of other acts).

Although the legislation has been delayed to 2014, a new website (www.workplacerelations.ie) was launched in 2013 and it replaces the individual websites of the existing statutory bodies.

National Employment Rights Authority (NERA)

NERA was established on an interim basis in 2007 under the auspices of the Department of Jobs, Enterprise and Innovation. NERA aims to increase the level of monitoring and compliance with employment rights in Ireland. Its main functions are to provide information, carry out inspections of workplaces, enforce employment rights legislation, prosecute offenders and protect young persons who are working.

Section 5: Company Law

Many hotels and guesthouses in Ireland are owned by and operated by companies. A company is a legal person, with the power to hold property, enter contracts and sue or be sued. However, a company is incapable of acting on its own; it acts through its directors, who manage the company's business on its behalf. As a result, the directors owe legal duties to the company itself and, in certain circumstances, to its creditors.

Directors – General Duties

A director is obliged to ensure that the company complies with its obligations under the Companies Acts. While the practical tasks of routine compliance are often delegated to the company secretary, which may be a professional services firm appointed for this purpose, legal responsibility for compliance with the Companies Acts remains with the directors.

A director must act in accordance with the company's memorandum and articles of association and cannot do anything outside the powers of the company set out in them. The director must exercise his or her powers only for the purposes allowed by law.

A director must not act negligently in conducting the business of the company. The standard of care, skill and diligence expected of each director has two elements. The director must exercise the care, skill and diligence that would be exercised in the same circumstances by a person with both the knowledge and experience that may reasonably be expected of a person: (i) in the same position as the director; and (ii) having the knowledge and experience which the director actually has (such as any special training or professional qualifications). A person who accepts the office of director has a responsibility to understand the

nature of the duties he or she is called upon to perform. A director has a continuing obligation to acquire sufficient knowledge and understanding of the company's business to enable him or her to properly to discharge these duties. However, a director is not liable simply for imprudent choices or errors of judgment.

Directors – Fiduciary Duties

A director has a general duty to the company to act in good faith in what he or she considers to be the best interests of the company as a whole and not, for example, in the interest of only a section of the members.

A director is in a fiduciary position in relation to the company. This entails a duty to avoid secret profits. For example, a director must not use the company's property, information or opportunities for his or her own or anyone else's benefit unless he or she is allowed to do so by the company's constitution or the use has been approved by a resolution of members of the company. A director is not permitted to take any business opportunity which the company is actively pursuing for him or herself or divert that opportunity to a person or entity associated with the director.

A director should not allow circumstances to arise where there is a conflict between his or her own interests and those of the company – such as where the director is involved in a competing business.

There are significant restrictions on companies making loans or quasi-loans, or entering into guarantees or credit transactions in favour of a director or to any person connected with a director. In certain defined circumstances, a company may enter into a guarantee or provide security in connection with a loan, quasi-loan or credit transaction made by any other person for a director or a connected person of a director but certain procedures must be adhered to. If such a transaction takes place without complying with the

required procedures it will be voidable at the instance of the company. Furthermore, the benefiting director or connected person, along with every director who approved the transaction, will be liable to the company for any gain made and may have to make good any loss suffered by the company.

Directors – Insolvent Trading

Where it appears to the directors of a company that either the company cannot pay or will be likely to become unable to pay its debts as they fall due, the directors effectively must run the company for the benefit of the company's creditors. In such a situation of insolvency or threatened insolvency, the directors owe their duties to the creditors of the company. If the directors fail to act in accordance with these duties, the directors may be liable for fraudulent or reckless trading. Experience shows that if a company's financial difficulties are not addressed early the situation may quickly deteriorate. Directors must be proactive and protect the company, its creditors and, by extension, themselves.

Reckless trading arises where a director has been party to the carrying on by the company of business where he or she knows or ought to have known that his or her actions would cause loss to any creditor, for example where he or she knows the company will be unable to pay that creditor. Personal liability may be imposed by a court where a director is knowingly a party to the carrying on of any business of the company in a reckless manner.

Fraudulent trading arises where a company trades with the intention of defrauding its creditors or others. The directors of the company can be made personally liable for the debts of the company in this instance as well as being subject to criminal penalties.

Directors – Penalties

A person may be restricted or disqualified from being a director for various breaches of the Companies Acts. Applications for restriction are automatically brought by the Director of Corporate Enforcement against all directors of all insolvent companies that are wound up. Once restricted, a person can only act as a director of a company where it has a minimum capital of the required level. It is a valid defence for the director to show that he or she acted honestly and responsibly in relation to the conduct of the company's affairs.

Personal liability for the debts of the company may be imposed on directors where in the course of winding up the company it appears to the liquidator that directors have been party to fraudulent trading, reckless trading or a failure to keep proper books of account.

Directors – Financial Protection

It is permitted for directors to seek an indemnity from the company or another group company to attempt to protect against personal liability. However, since it is not permissible for a company to indemnify a director in respect of negligence, default, breach of duty or breach of trust, a directors' and officers' insurance policy to protect against these risks may also be put in place.

Directors – Residence Requirement

A company must have at least one director who is resident in a member state of the European Economic Area (the EEA comprises the Member States of the EU plus Iceland, Liechtenstein and Norway). If not, then the company is required to put a bond in place for the payment of any Companies Acts penalties or fees.

Companies incorporated in Ireland are usually tax resident in Ireland, unless residence is arranged in a state with whom Ireland has a double taxation treaty. Where Irish residence is important, directors not resident in Ireland should be aware of the desirability to hold board

meetings in Ireland in order to emphasise the Irish tax residence of a company to their home country's tax authorities.

Compliance

Annual returns with accounts information must be filed with the Companies Registration Office. The filing must be effected within 28 days of the company's annual return date in order to avoid a late filing penalty. A director is subject to prosecution for a criminal offence where the company does not file its statutory returns on time. In addition, a late filing penalty of up to €1,200 is charged by the Companies Registration Office. A fine of up to €1,904.61 and/or imprisonment for a term not exceeding 12 months may be imposed on the company or a director of the company if a prosecution is successful. Where a company fails to make annual returns it may be struck off the register of companies which results in the company's dissolution as a matter of law.

A company must keep its register of members and minute book up to date. It must notify the Companies Registration Office of various matters such as appointments and resignations of directors. The company must ensure that proper books of account are kept and, save where the company qualifies for an exemption as a small private company, that the accounts are audited.

Business Information

A company that carries on business using a name, such as the name of a hotel, which is not the full legal name of the company (including the word "limited") must register that business name with the Companies Registration Office. This obligation is designed to protect persons dealing with the company rather than the company itself. Accordingly, registration of a business name does not provide any protection or any rights in that name. For example, registering the business name "Seaview Hotel" does not prevent another company or person from registering the

same business name in connection with another business, including another hotel. (Protection of business names may in certain circumstances be provided under the laws of passing off and/or trade mark.)

A company must include the following information on its business letters (including order forms and invoices):

- (i) the company's name and legal form;
- (ii) the company's place of registration and registered number;
- (iii) the address of the company's registered office;
- (iv) in the case of a company that is being wound up, the fact that it is being wound up;
- (v) if reference is made in the letter or order form to the share capital of the company, the capital that is subscribed and paid up; and
- (vi) for every director:
 - (a) his or her present forename or initials and present surname;
 - (b) any former forename and surnames; and
 - (c) his or her nationality, if not Irish.

The website of an Irish-incorporated company must display the following information in a prominent and easily accessible place:

- (i) the company's name and legal form;
- (ii) the place of registration and registered number; and
- (iii) the address of the company's registered office.

Similarly, electronic communications relating to business matters must also display this information.

Company Law Reform – Companies Bill 2012

Company law in Ireland will undergo major change in 2014 as the Companies Bill 2012 finally completes its passage through the legislative process. The Bill is

the largest single piece of legislation ever to come before the Dáil. It is over 1,000 pages long, consolidates over 25 enactments and reforms Irish company law as we know it.

The most striking feature of the Bill is its focus on the private company limited by shares (the most common form of company in Ireland). It will amend the statutory corporate governance requirements for such companies with a view to removing those procedures that, in the case of small companies, have become hollow formalities—for example: such companies will have a shorter, single-document constitution; they will be able to dispense with the requirement to hold an annual general meeting (AGM); and they will be able to pass written resolutions without unanimity (so that the company will not have to convene a general meeting for this purpose).

The Bill also sets out the duties of directors in statutory form for the first time while imposing some additional duties. For example, a director of a company that does not avail of the statutory audit exemption will now have to provide a statement that there is no relevant audit information of which the company's statutory auditors are unaware.

Directors should familiarise themselves with the provisions of the Bill and should take steps to review their corporate governance procedures in advance of the Bill becoming law, which is expected to occur in the second half of 2014.

The information set out above does not constitute legal advice by the Irish Hotels Federation or its advisors and should not be regarded as such. In the case of a specific legal question, you are advised to consult your legal advisor.

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