

SUBSIDIARY LEGISLATION 452.108**EMPLOYMENT STATUS
NATIONAL STANDARD ORDER**

31st January, 2012

LEGAL NOTICE 44 of 2012, as amended by Legal Notices 110 and 364 of 2012.

1. (1) The title of this Order is the Employment Status National Standard Order.

Citation.
Amended by:
L.N. 364 of 2012.

(2) This Order shall be without prejudice to and shall not apply in the case of:

(a) any other law defining or regulating either the specific conditions of employment of employees falling under that particular law or the relationship between persons providing a service and a service user and the respective conditions thereof;

(b) any right and, or obligation which the person providing the service and the person for whom the service is provided may have in regard to their agreed contract for service, as existing and in relation to events occurring before the coming into force of this Order, including the right to *inter alia* institute legal proceedings before the appropriate court of law:

Provided that the provisions of article 6 shall prevail over paragraph (b); and

(c) the relationship between tied insurance intermediaries and authorized insurers under the Insurance Distribution Act.

Cap. 487.

(3) Subject to sub-article (2), any declaration made by any individual in relation to his own or to another person's employment status shall be considered to be null and void and without effect if its consequences are in any way in conflict with the provisions of this Order.

2. (1) For the purposes of this Order, "the Act" means the Employment and Industrial Relations Act.

Definitions.
Cap. 452.

(2) Terms and expressions used in this Order, unless the context otherwise requires, shall have the same meaning assigned to them in the Act.

3. (1) Subject to the provisions of sub-article (2), when considering the employment status of a person who is nominally self-employed and is *prima facie* not considered as an employee, it shall be presumed that there is an employment relationship and that the person for whom the service is provided is the employer and that the provisions of the Act and of the regulations or orders issued thereunder apply to that relationship if at least five of the following

Presumption of an
employment
relationship.

criteria are satisfied in relation to the person performing the work:

- (a) he depends on one single person for whom the service is provided for at least 75% of his income over a period of one year;
- (b) he depends on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out;
- (c) he performs the work using equipment, tools or materials provided by the person for whom the service is provided;
- (d) he is subject to a working time schedule or minimum work periods established by the person for whom the service is provided;
- (e) he cannot sub-contract his work to other individuals to substitute himself when carrying out work;
- (f) he is integrated in the structure of the production process, the work organisation or the company's or other organization's hierarchy;
- (g) the person's activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and
- (h) he carries out similar tasks to existing employees, or, in the case when work is outsourced, he performs tasks similar to those formerly undertaken by employees.

(2) Notwithstanding the presence of five or more of the criteria referred to in the previous sub-article in a relationship between two persons or more, any person in a relationship which would by virtue of the presence of such criteria be automatically considered to be an employment relationship may, before entering into such a relationship, submit a written request to the Director to exempt such a relationship from being considered to be an employment relationship and the Director may exempt in writing that relationship if it is considered that there are particular grounds relating to that activity to exempt it from this requirement, including that the activity being carried out is an uncommon occurrence or of very short duration and such exemption shall remain valid unless rescinded by the Director:

Provided that in the case of relationships established before the coming into force of this Order, the person concerned shall have a period of six weeks from the said entry into force to make such a request in respect of such a relationship.

Effective date of
employment,
notice and
probation.
Amended by:
L.N. 110 of 2012.

4. (1) A person who was considered to be performing services as a self-employed person for another person, whether prior to, or at any time following, the date of the entry into force of this Order and is subsequently found to be an employee in terms of article 3, shall be considered to have been engaged as an employee on an indefinite contract of the person for whom he was providing services.

(2) The date of engagement on an indefinite contract referred to

in the subarticle (1) shall be considered to be the date of the initial continuous provision of services and the seniority and any notice due in case of an eventual redundancy shall be computed accordingly:

Provided that for the purpose of this subarticle the term 'continuous provision of services' shall include those contracts, whether on a self-employed or employment basis, when the work performed was essentially the same and where the period between a contract and another does not exceed a period of six months and the periods between such contracts shall be taken into account.

(3) If a person had been performing services for another person on a self-employed basis prior to the date of entry into force of this Order and whose relationship by virtue of article 3 is deemed to be an employment relationship, it shall be presumed, for all intents and purposes of the Act, that the probationary period in terms of article 36 of the Act in that relationship has elapsed prior to the coming into force of this Order unless the employer proves otherwise.

(4) If a person performs services for another person on a self-employed basis on or after the date of entry into force of this Order and whose relationship by virtue of article 3 is deemed to be an employment relationship, the probationary period in that relationship shall be considered to have commenced on the date of engagement to provide services.

(5) The indefinite contract of employment referred to in this sub-article shall be deemed to be whole-time on the same basis as the hours of work of a comparable whole-time employee, or, in the absence of a comparable whole-time employee, on the basis of the hours specified in the applicable sectoral or Wage Council Wage Regulation Order, or, in the absence of an applicable Order, on a forty-hour normal working week, unless, in relation to hours of work, otherwise is specified in writing in terms of article 7.

5. The employer shall be obliged to grant a person who is considered to be his employee in terms of this Order:

Conditions of employment.

(a) with respect to wages:

- (i) the same wages paid to a comparable employee or,
- (ii) where there is no such comparable employee, to the same remuneration he used to receive in return for services rendered on a self-employed basis as wages:

Provided that if there is disagreement as to the payable wage and the employee terminates his employment, the provisions laid down in article 7(2) shall apply;

(b) with respect to other conditions of employment, the same conditions of employment as those enjoyed by a comparable employee or, where there is no such comparable employee, to the applicable minimum conditions of employment in terms of the Act and the regulations or orders made thereunder.

Penalty clauses.

6. Notwithstanding any provision in any law or in any collective agreement or individual contract, if a person had been performing services for another person on a self-employed basis prior to the date of entry into force of this Order and whose relationship by virtue of article 3 is deemed to be an employment relationship, any penalty clause laid down in the previous contract for service in relation to events occurring before the coming into force of this Order, shall, on the entry into force of this Order, be null and void unless and until it is authorized by the Director in terms of the Act:

Provided that this does not in any way waive any right to initiate civil procedures for damages which may be available to either party to the contract for service in terms of article 1(2)(b).

Information to employees.

S.L. 452.83

7. (1) In situations where the employment status of a person is deemed to be one of employment in terms of this Order, the employer shall be bound to give or send to the employee a letter of engagement or a signed statement, which shall include the information laid down in the Information to Employees Regulations, and in these cases, notwithstanding the different timeframe set out in the Information to Employees Regulations, the timeframe for delivery of the relevant document to the employee shall be:

- (a) in the cases of persons rendering services who by virtue of this Order shall be considered to be employees on the date of entry into force of this Order, as soon as possible, but in any case, not later than eight weeks from the date of entry into force of this Order, and
- (b) in the case referred to in article 3(2), where the person for whom the services are provided requests an exemption in terms of that same subarticle and the Director does not accede to such a request, within two weeks from the date of the Director's refusal.

(2) If an employee does not agree with -

- (a) any of the conditions of employment listed in a letter of engagement or a signed statement in accordance with this article; or
- (b) the amount of wages being proposed to be given as specified in article 5(1),

and leaves employment, he may institute proceedings before the Industrial Tribunal where he may claim unfair dismissal and the relevant provisions of the Act shall apply.

Authorization to convert contract of service into contract for service.

8. Any conversion of a contract of service or of a contract of employment into a contract for service can only have legal effect for the purposes of the Act if it is authorized by the Director. Until such authorization is obtained and if it is refused once sought, the employment status of the person concerned shall be considered to be unchanged and shall be the same as that enjoyed prior to the request for authorization.

9. Unless otherwise expressly stated, nothing in this Order shall be interpreted as conferring on employees the right to carry with this status benefits which are particular to their previous self-employed relationship.

Extent of rights.

10. (1) The provisions in the Constitution or in any other law which apply to employment with the public service or public sector shall prevail over this Order and nothing in this Order shall confer a right to any person to consider a relationship between a person providing a service and the public sector or service for whom the service is provided to be an employment relationship.

Public sector
employment.
Amended by:
L.N. 110 of 2012.

(2) However, in the public service or public sector, if a relationship which is entered into after the date of entry into force of this Order is nominally a self-employed one and satisfies the requirements set out in article 3(1), but which, by virtue of sub-article (1), cannot be considered to be one of employment, and in respect of which no exemption has been obtained as specified in article 3(2), the person providing the service may refer his case to the Industrial Tribunal to claim compensation from the person for whom that service is provided at any time during the relationship or within four months from when the relationship is terminated. If the Tribunal is satisfied that the reason for the continuation of the contract on a self-employed basis is because of the provision in sub-article (1), it shall grant an award of compensation and establish an amount to be paid by the person for whom the service is provided to the person who provides the service for the duration of the relationship.

In such cases, the Tribunal shall award the equivalent of what would have been one week's wages had the relationship become one of employment -

- (a) for each year, or part of, of the duration of the self-employed relationship, in the case of a relationship which has been terminated; and
- (b) in the case of a relationship which has not been terminated, in addition to paragraph (a), the Tribunal shall order the employer to continue paying this penalty annually in respect of each year, or part thereof, until the said relationship is terminated.

11. (1) It shall be the duty of the person to whom services are provided, or the employer, as the case may be, to provide a written statement to the person rendering the services or to his employee, as the case may be, who requests such statement in writing and who considers that the person to whom services are rendered or his employer, as the case may be, may have treated him in a manner which infringes a right conferred on him by this Order.

Right to receive a
written statement.

(2) Such statement shall state the reasons for any difference in treatment and shall be provided within twenty-one days from the date of the request.

(3) A written statement made in terms of this article shall be admissible as evidence in any proceedings under this Order.

Complaints to the
Industrial Tribunal.

12. (1) An employee may present a complaint to the Industrial Tribunal that his employer or the person for whom he has rendered services has infringed a right conferred on him by this Order within a period of four months from the date when the employee became aware of the infringement of his rights and the Tribunal may make such order and, or award compensation as it deems necessary in order to remedy any breach.

(2) The right of referral of a case to the Industrial Tribunal for compensation shall also apply in respect of a person referred to in article 10 on the basis and conditions set therein.

Offences.

13. Any person contravening the provisions of this Order shall be guilty of an offence and shall be liable on conviction to a fine of not less than one thousand euro (€1000) in respect of each employee affected.
