Employment*Brief*

April 2016

Brexit, What Next For Employment Law?

In the event that the UK decides to exit the European Union, there may be implications for employment law.

A significant proportion of our employment law has some basis or link with the EU, including discrimination, Transfer of Undertaking Regulations (TUPE), family leave and working time regulations. In theory if we do leave the EU, the UK Government could repeal many of these provisions. However, if they do, it is highly probable that the EU will continue to exercise significant influence even after leaving for various reasons.

Some of these rights such as maternity leave were implemented by the UK before the EU. However, despite this their later implementation through the EU has made the various rules and regulations become intertwined. It is generally considered that many of these rights are something that we would want to retain, so it is unlikely the Government would want to remove these protections from the work force.

Even where there are no pre-existing UK rights, the Government is likely to face considerable lobbying with regard to those protections which are considered good practice, such as protection against discrimination and the right to paid holiday leave.

Although it is often bandied about that all the employment rights come from Europe, it is not quite the case when you look at the detail. Although rights to parental and family leave in the UK are a mixture of rights deriving from EU and the UK, the most recent right to request flexible working is purely domestic in origin. Therefore, our exit from the EU would not in principle affect this area of employment law.

The areas at highest risk of change or complete repeal would potentially be the Transfer of Undertakings (Protection of Employment) Regulations 2006, otherwise known as TUPE and the Agency Worker regulations. Both are complex pieces of regulation which attract a lot of negative press and are not popular with the business community. It seems likely that the Government would keep the main structure of TUPE, but make a number of small changes particularly with regard to harmonising terms following a transfer. Agency Worker Regulations are the hot contender for being completely revoked.

One thing is for sure, in or out, the refrain about EU regulation affecting businesses is with us in one form or another for many years to come.

National Living Wage

As this brief hits your inbox, the National Living Wage for workers aged 25 and over will have been introduced, effective 6th April.

Currently set at £7.20 per hour predictions are that it will be increasing to somewhere in the region of £9.00 plus by 2020. It is estimated that 23% of all workers stand to benefit from the National Living Wage by 2020.

The particularly low paid areas of employment such as residential care, retail and hospitality are already maintaining that they will struggle with this 50p increase in their wage bills, but similar comments were made back in late 90s when the national minimum wage was introduced. The anticipated thousands of jobs that would disappear did not as employers adapted in a variety of ways such as raising their prices, reducing their profits and making cutbacks with regard to pay rises for higher paid workers.

Some employers have already tried to make changes to their pay structures in the run up to the introduction of the National Living Wage, including the more radical route of dismissing staff and re-engaging them on reduced terms and conditions. Such a move can run the risk of unfair dismissal claims, but if run fairly and comprehensively can achieve the desired outcome.

Employers should also beware of charges they make to employees for such items as training and uniforms. If such deductions reduce, pay to below the prevailing national hourly rate, this can give rise to litigation.

Contractors - who is in control?

Most businesses use contractors to cover their operational needs and keep head count and costs down. However some employers fall into the trap of believing health & safety can be "contracted out" like everything else. That is a recipe for disaster. This article looks at how a businesses can end up liable for any accidents involving contractors, even where the contractors have disobeyed their customer's clear instructions. For example, what if you ordered your contractors not to go on the roof, but they ignored your clear instructions and one of their employees fell and was seriously injured?

This happened in a case, when historic pottery firm Josiah Wedgwood & Sons Ltd employed contractors to work on their warehouses. The contractors went onto the roof to install barbed wire and replace skylights. Josiah Wedgwood & Sons Ltd decided not to allow them to go up again, but the contractors ignored this and went up onto the roof again the next day.

The company must have asked themselves why they were to blame, having prohibited the contractors from going on to the roof. The answer lay in not ensuring the contractors were fully integrated into their permit to work system. This is all the more important with contractors who will normally be unfamiliar with the client's premises, safety rules and processes and therefore at a greater risk to themselves and others.

For this Josiah Wedgwood & Sons Ltd picked up the greater fine, £60,000 compared with £20,000 for the contractor. The Health & Safety Executive, (HSE) expected to see a higher degree of "policing" of the contractor's activities, given the high level of risk.

The result accords with the HSE's guidance Use of Contractors – a Brief Guide (INDG368) and Managing Contractors, a guide for employers (HSG159 2nd edition 2011). Each says the appropriate level of checking by a client will depend on the level of risk. In some cases, the client does not need to involve himself at all, for example if the job is a new build office. In other situations, the contractors may be working alongside the client's own employees and others, for example refurbishing an existing workplace. In such cases, clients (and main contractors) must remember their statutory duties towards contractors and their employees namely:

- Section 3 HSWA 1974
- Paragraph 11 MHSWR 1999
- Part 4 CDM Regulations 2015
- Paragraph 3 COSHH 2002
- Paragraph 3(3) Control of Asbestos Regulations 2012
- Occupiers' Liability Act 1957

They should also follow the six steps in INDG368 namely:

- Identify the job
- Select a suitable contractor- consider experience, qualifications, memberships, arrangements for using sub contractors, previous accident/safety records. Inspect insurances, H&S policies, RAMS and training records. Give contractual force to this kind of "due diligence" exercise.
- Assess the risks - including assessing the risks jointly
- Provide information instruction and training. contractor staff must be integrated into policies and procedures to the same level as the client's own employees.
- Cooperate and coordinate.
- Consult – ie ask your staff how the contractors' work might affect their health and safety.
- Manage and supervise, this includes monitoring and checking the level …. depends on the risks.

HSG159 lists five steps namely:

- Planning
- Choosing a contractor, the guidance contains a useful toolkit for assessing competence
- Contractors working on site, arrangements like signing in and having a site contact
- Keeping a check
- Reviewing the work

The steps in INDG368 and HSG159 (originally written for the chemical industry) unfortunately do not match exactly! However, it would be as well to follow both.

Clients should also "build in" health and safety requirements into their procurement procedures. For example, contractors should explicitly acknowledge applicable rules such as permit to work procedures. This will heighten health and safety awareness on the part of the contractor, lead to the job being done better and faster and with luck contain the client's own exposure in the event of a claim or HSE investigation.

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Are you meeting the new First Aid at Work Guidelines?

In 2013 the Health and Safety Executive (HSE) issued new First Aid at Work Guidelines for employers, as well as a new type of first aid needs assessment. With the new guidelines affecting every workplace in Great Britain, it is imperative that every business checks its first aid policy to ensure that it is meeting the new guidelines. Here are the key points worth noting when considering First Aid at Work.

What is first aid at work?

Every workplace should have a first aid policy in place. Employees can be taken ill or suffer injuries at any time, so it is important to give them immediate attention. Even a low-risk workplace such as an office should have a first-aid box and a person appointed to take charge of first-aid arrangements.

What do I need to do as an employer?

Accidents and illness can happen at any time. Provision for first aid needs to be available at all working times. It is your responsibility to ensure that your employees receive immediate attention if they are injured or taken ill. You must make appropriate first aid arrangements for your business, considering the circumstances of your workplace and the potential health and safety risks that may be present.

What should I consider when assessing first-aid needs?

One of the more complicated areas of the new first aid needs assessment is considering 'the nature of the work, the hazards and the risks'. As an employer, you should consider the risks and identify possible injuries that could occur to ensure that you provide the correct type of first aider(s). Appropriate first-aid equipment, facilities and people vary depending on the size of the workplace. There are now two levels of workplace first aider, the Emergency First Aider at Work (EFAW) and a First Aider at Work (FAW). Not all workplaces will need both, but you should ensure that your first aiders are trained to deal with the injuries and illnesses that could occur.

What should I put in the first-aid box?

There is no mandatory list of first-aid items. The minimum level of first aid equipment is a suitably stocked first aid box, which varies depending on the size of the business. Your needs assessment may indicate that additional materials and equipment are required, and will also assess how many first aiders/ appointed persons will be needed.

What information should I provide for employees?

It is imperative that you inform your employees of the first aid arrangements you have put in place. Many employers find it useful to put up notices telling staff who and where the first aiders or appointed persons are, and where the first aid box is.

Remember to make special arrangements to give first aid information to employees with reading or language difficulties.

Information on first aid at work is available of the first-aid web pages of HSE's website: www.hse.gov.uk/firstaid

For more information or your free first aid assessment contact Jono Erodotou on 0203 286 9993 or email jono@semedical.co.uk

Quick reference section

Statutory minimum notice periods
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years' service the notice period does not extend beyond 12 weeks.

National Minimum Wage
From October 2015

16 – 17	£3.87
18 – 20	£5.30
21+	£6.70
Apprentices	£3.30

National Living Wage
From April 2016

25+	£7.20

Statutory Sick Pay
From April 2016
£88.45 per week

Statutory Shared Parental/Maternity/ Paternity/Adoption Pay
Basic rate from April 2016
£139.58

Statutory Holiday
5.6 weeks for a full time employee. This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 weeks' pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped for dismissals after 6th April 2015 under the Statutory Scheme at £475.00 (Expected to rise to £479.00).

Amanda Finn joins forces with Young Kent and Girlguiding

Gullands Solicitors' Partner Amanda Finn has been appointed as a Trustee of both Young Kent and Girlguiding London and South East.

Young Kent supports people aged 8-25 years from across Kent and Medway, through work with the youth sector, and via its own direct delivery of support programmes for disadvantaged, disengaged or disabled young people.

Girlguiding is a leading charity for girls and women across the UK. The charity offers a space for girls and young women to be themselves whilst gaining treasurable experiences and invaluable life long skills. Girlguiding offers a space for females to speak out publicly about issues they care passionately about, giving a much needed voice in today's society.

Carole Hardy, Deputy Commissioner of Girlguiding London and South East England said: "The Board is delighted that someone of Amanda's caliber and skills is to join us! Amanda has been a great support over the past year and I am thrilled that her hard work is being recognised."

Amanda Finn comments: "Both charities work really hard to help young people build the confidence and skills they need to overcome barriers. I am really looking forward to getting more involved with two brilliant charities!"

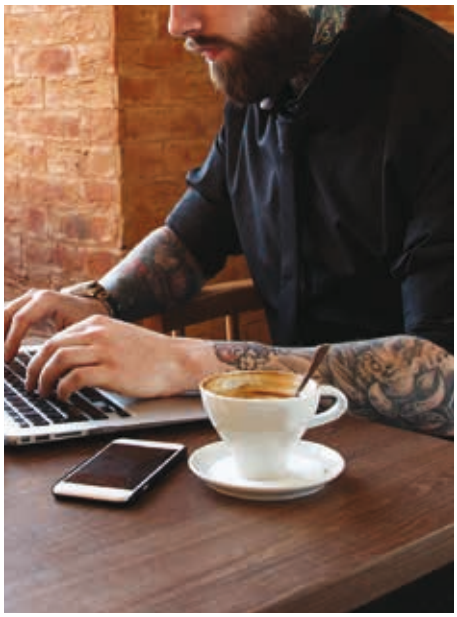
Dress codes

Following British Airways settling a two-year dispute over the dress code enforced by them on new recruits, the issue of whether employers need a dress code and how they may enforce it has come to the fore.

The amount of detail that as an employer you include in a dress code, is likely to depend very much on the nature of the business and the extent to which there may be health and safety hazards in the work. Even those employers who require their staff to wear a uniform, may need to consider issues relating to the image that employees present to their customers.

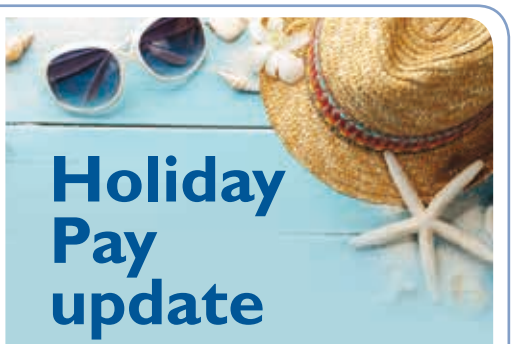
The key issue for employers is to keep potential issues of discrimination in mind when formulating a dress code. Regard should be paid to any religious sensitivities as well as the issue of whether it is permissible to have different rules for men and women as per the BA case, where there was, for new recruits a policy that women should not wear trousers.

Some policies also contain reference to tattoos and body piercings. There should be a sound business reason for asking any employee to



cover a tattoo or remove a piercing. Much will hinge on the industry you work in and the clientele you are seeking to interact with.

Quite apart from any religious reasons that may exist, consideration on a case by case basis is usually sensible.



Holiday Pay update

The Employment Appeal Tribunal has recently upheld a decision of an employment tribunal in connection with commission payments in the calculation of holiday pay.

The employee in question was a worker who had normal working hours, but commission earnt on sales was a particularly important part of his remuneration package and represented about 60% of his basic pay. When the employee took holiday he was entitled to basic pay and continued to receive commission based on earlier sales. However, his commission payments were lower during the months that followed his holiday because of course he had been unable to generate sales whilst on that holiday. Faced with an apparent conflict between domestic and EU law, the tribunal made a reference to the ECJ for a preliminary ruling.

Previous ECJ cases held that commission payments must be taken into account when calculating holiday pay under the EU directive. This employee claimed that he had suffered an unlawful deduction in the months that followed his holiday, because these future payments should be enhanced to reflect the future commission he otherwise would have earnt on sales that would have taken place, but for his annual leave.

The situation with regard to holiday pay becomes clearer but is by no means certain and employers should analyse carefully the issue as to whether their overtime arrangements are voluntary, non-guaranteed or compulsory before making a decision.

Commission payments however seem to be now a necessary part of not only the pay whilst the employee is away on holiday, but for the months after they come back.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

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