Employment*Brief*

April 2013

Establishing the right to work in the UK

Employers have a duty to carry out certain checks before an individual commences employment and to keep a record of the checks that are carried out in order to comply with the Immigration, Asylum and Nationality Act 2006.

An employer may be liable to a civil penalty or commit a criminal offence if it:

- negligently employs someone without the right to undertake the work for which they are employed; or
- knowingly employs an individual who does not have the right to undertake the work for which they are employed.

Although the Act applies only to individuals who are employed under a Contract of Service or Apprenticeship, in practice Immigration Officers may not take the time to distinguish employees from consultants and so the safest course of action is for employers to carry out the checks for every individual.

There is a civil penalty of up to £10,000 for each individual who does not have the right to work in the UK. The criminal offence also carries the risk of imprisonment and/or a fine. Details of the civil penalty will be published in a Public Register including the name and location of the employer.

So how can employers safeguard themselves against this legislation?

Employers should make any offer of employment subject to the candidate providing proof of permission to work in the UK. An employer will be excused from paying a civil penalty if it can establish the statutory excuse by demonstrating that it undertook steps before the employment began to ensure that the employee could work in the UK. The steps are set out in the UK Border Agency (UKBA) Comprehensive Guidance for Employers on Preventing Illegal Working.

Mainly, the employer needs to request and keep copies of original documents to establish the employee's eligibility to undertake the work on offer. For individuals not subject to immigration control, they should usually provide an original passport. Alternatively, if the individual is subject to immigration control, they need to produce

original documentation such as a passport or a travel document endorsed to show that the holder is allowed to stay in the UK and do the type of work in question. The full list of documents that employers can accept is included in the UKBA's guidance.

Documents which will not establish a right to work in the UK include a temporary NI number or a permanent NI number alone, a driving licence or a short birth certificate issued in the UK which does not have details of at least one of the holder's parents.

Employers need to check the validity of original documents to satisfy themselves that the individual is the person named in them. This involves checking any photographs and dates of birth to ensure consistency, checking expiry dates and any UK Government endorsements, and making sure that the documents are genuine, have not been tampered with and belong to the holder.

Employers are not expected to be experts in identifying false documents and will only be liable to pay a civil penalty if the falsity of the original document is "reasonably apparent".

If an individual presents documents showing that they have limited leave to remain, the employer must re-check the worker's documents every 12 months.

In order to avoid claims for discrimination, employers should carry out appropriate checks on all prospective employees, not just those who appear to be of non-British descent, and this should be part of your recruitment process.

Seminar:

The A-Z of Sickness and Absence Management

What's the right solution when a member of staff is regularly absent from work or is away for a long period? Absence can be very expensive and choosing the correct intervention can make a major difference to morale and a successful outcome.

There was a good turnout and excellent feedback for this free seminar on 19 March, where expert advice was given on proactive and sustainable ways to manage sickness absence.

The speakers explained best practice in respect of documentation and procedures and how to actively and positively manage getting people back to work. In a lively discussion, scenarios such as pregnancy, disability, reasonable adjustments and holiday pay were discussed. There was also advice on how to manage longer absences and how proceed when it becomes necessary to consider dismissal or ill health retirement.

Gullands co-hosted the event with OT Work Solutions, which offers an innovative alternative to traditional occupational health services. As occupational therapists they focus on the occupation rather than the illness, disability, or other barrier.

If you missed the seminar and would like further details or would like to ensure you are on the list of invitees to attend future Gullands seminars, contact Amanda Finn at a.finn@gullands.com

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 2012)

16 – 17	£3.68
18 – 20	£4.98
21+	£6.19
Apprentices	£2.65

Statutory Sick Pay
(from April 2013)
£86.70 per week

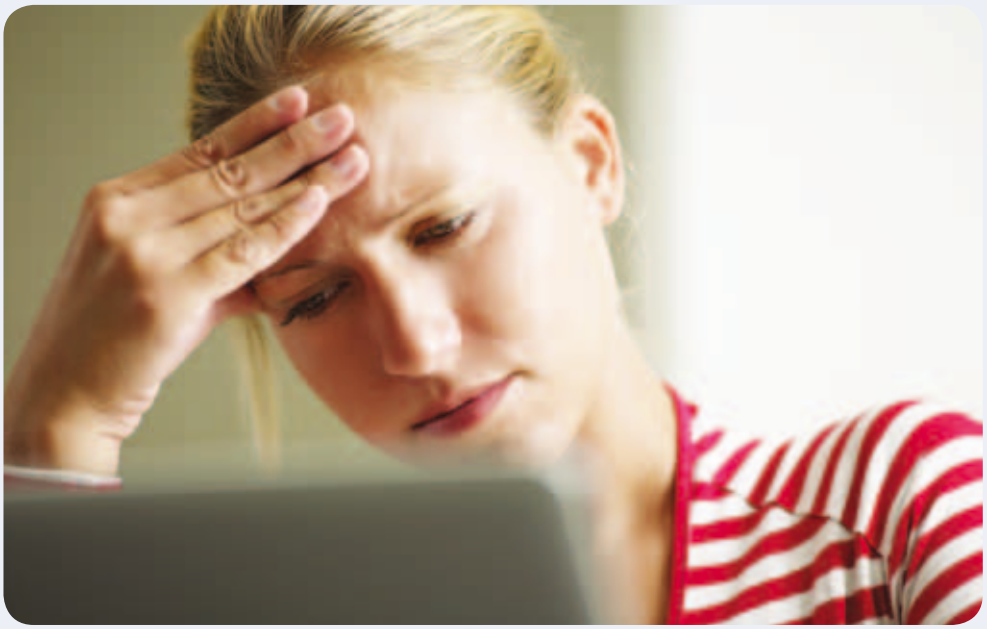
Statutory Maternity/Paternity/Adoption Pay
(basic rate) (from April 2013)
£136.78

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 week's pay for each full year of service where age during year is 41 and over.

The calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme at £430.00 for dismissals prior to 1.2.13 and £450 for those after.



Stop and think before you click!

Information that is written on the internet or in e-mails can seriously damage your business' reputation and the reputation of individual employees. Your employees could lose their job, be sued or face criminal charges and your business could be sued or fined. The following are some key points to consider.

- Writing something on the internet or in an e-mail is exactly the same as writing on paper and, because of the lack of control over who might ultimately see it, sometimes worse. Your business cannot control what the recipient does with an e-mail.
- Inappropriate information that is written online or in an e-mail can have severe financial repercussions for your business. It can also create serious personal and disciplinary issues for individual employees.
- Even if your employees are e-mailing or using social media in their own time, they could still get themselves and your business in serious trouble.
- E-mails and internet postings can be used against your business in legal proceedings or other regulatory investigations and you may have a legal obligation to disclose them to the other party, even if it is not aware of them. Your business should never delete e-mails relating to:
  - a legal dispute;
  - an investigation; or
  - a potential dispute or investigation.
  - Simply deleting e-mails or internet postings will not necessarily solve the problem Forensic IT equipment can still find supposedly "deleted" messages.
- Online content or e-mails that could be thought of as obscene, racist, sexist, bullying or hurtful should never be posted or sent. Your business can be held liable for discriminatory acts committed by your employees.
- If a comment is made about another employee online or in an e-mail that amounts to harassment, your business could be liable even if the employee was using their own equipment when they made the comment.
- Exaggerating or making false or inaccurate statements about another company or person online or in an e-mail could lead to your business being sued, even if the e-mail was only sent to one person.
- Where possible, avoid sending confidential information by e-mail. Your business should take legal advice on how the information can be best protected. Any e-mail containing confidential information should be clearly marked as "confidential". If your business receives an e-mail that contains "dangerous" material (for example, another company's trade secrets), you should take legal advice immediately.
- A legally binding contract can be made by a simple exchange of e-mails. Your business should make it clear if it does not intend to be bound by what is communicated in an e-mail.
- Other people's work should not be used in e-mails or online posts unless:
  - your business has permission from the original author; or
  - you know that it is not protected by copyright.
- Encourage your employees to carefully monitor what arrives in their inbox, especially if they do not recognise the sender or the title of the e-mail seems peculiar. If there is a risk that an e-mail may contain a virus, it should not be opened and your IT department should be contacted immediately. Make your employees aware that they could be disciplined or even dismissed for forwarding inappropriate e-mails or accessing inappropriate websites at work. In severe cases it could also be a criminal offence.

Checklist: TUPE transfers

What is TUPE?

TUPE is an acronym for the Transfer of Undertakings (Protection of Employment) Regulations 2006. Where TUPE applies, employees automatically transfer from one employer to another with their terms of employment and continuity of service intact.

When does TUPE apply?

TUPE applies to a "relevant transfer". A relevant transfer can be where:

- A business or part of a business is sold.
- Work is outsourced from a client to a contractor.
- Outsourced services are transferred from the original contractor to another contractor.
- A client brings the outsourced services back in-house.

Which rights are automatically transferred under TUPE?

- Employees transfer to the new employer on their existing terms of employment and with all related employment rights, powers, duties and liabilities. Old age, invalidity and survivors' benefits under occupational pension schemes are excluded.
- The new employer steps into the shoes of the transferring employer in relation to the transferred employees. Any acts or omissions committed by the transferring employer are treated as having been done by the new employer.
- Employees who object to the transfer do not automatically transfer to the new employer. Their contracts will instead terminate on the transfer date.

Changing terms of employment

Any changes to an employee's terms of employment are void if the main reason for the change is either:

- The transfer itself.
- A reason connected with the transfer that is not an economic, technical or organisational reason requiring changes in the workforce (an ETO reason).

However, it is possible to make changes to transferring employees' employment terms if the reason for the change is unconnected with the transfer or is connected with the transfer but is for an ETO reason.

Protection against dismissal

- Employees are entitled to enhanced protection against unfair dismissal. Any dismissal of an employee with the qualifying period of service is automatically unfair where the main reason for the dismissal is either:
  - the transfer itself; or
  - A reason connected with the transfer that is not an ETO reason.
- This enhanced protection also applies if:
  - an employee resigns in response to a serious breach of their contract; or
  - the new employer makes a substantial change in the employee's working conditions which is detrimental to them.
- Employers can be ordered to reinstate, re-engage or compensate the dismissed employee if their complaint is upheld by an employment tribunal.

Obligations to inform and consult

- Both parties involved in the transfer are obliged to inform and (if appropriate) consult recognised trade unions or elected employee representatives in relation to their own employees who may be affected by the transfer. If there are no existing representatives they must be elected by the affected employees for the purposes of consulting over the transfer.
- An individual employee has the right to bring a claim for breach of these requirements if an employer:
  - fails to take any steps to invite employees to elect representatives; or
  - in the absence of election, fails to give information to the affected employee.
- Certain information (for example, the reason for the transfer and where it is expected to take place) must be provided to the representatives long enough before the transfer to enable the transferring employer to consult with them about it. Although the duty to inform always arises, the duty to consult only arises where an employer envisages taking measures in relation to affected employees.
- Failing to comply with these obligations can expose both parties involved in the transfer to up to 13 weeks' uncapped pay for each affected employee. In certain circumstances, both parties can be held to be jointly and severally liable.

Employee liability information

- The transferring employer must provide information (for example, the disciplinary and grievance records of the transferring employees) to the new employer not less than 14 days before the transfer takes place.
- If the transferring employer fails to comply with this duty, the new employer can apply for compensation based on the losses suffered, with a minimum award of £500 for each employee that the information was not provided for.

Insolvent businesses

To help the rescue of failing businesses, some key TUPE employment protections are relaxed if the transferring employer is insolvent. The extent of these modifications depends on the type of insolvency proceedings the transferring employer is involved in.

Who Owns the Email?

If a member of staff uses your computer system to exchange emails, does the content of the email become the property of your business?

This question was addressed recently in a court case concerning a dispute that arose between a shipping company and its former chief executive. The company had gone to court to obtain an order to prevent the executive from deleting emails he had received, which it wished to access in order to investigate alleged accounting irregularities and in order to look into a dispute over a contract. The chief executive was technically employed by a service company and the company he had run had automatically deleted from its own servers emails which it had forwarded to him.

The High Court concluded that unless the business has a contractual right to the contents of the email or it contains confidential information relating to the business or the business can claim copyright over content within the email, the business does not have a legal right to the content of the email.

Accordingly, the company had no right to claim ownership over the content of the emails in question or to access them.

'Third party employment' agreements are common with both senior executive and specialist staff. This case illustrates an important planning point: it is sensible to ensure that if employment arrangements involving external companies are involved, a contractual right to retain all emails passed through your company's servers or relating to the company's business is obtained.

Case illustrates importance of signing employment contracts

A recent High Court case highlights the importance when issuing new employment contracts of making sure that employees sign and return a copy of the contract.

In the case of S.W. Farnsworth Limited v. Lacy, the employer sought to enforce restrictive covenants which prevented the employee from working for a rival business and soliciting defined customers in the six months following termination of his employment. The restrictive covenants were not contained in the employee's original employment contract which he had signed in 2003 but were in a subsequent contract issued in 2009 after a promotion, and which Mr Lacy did not sign or return to his employer. The employee had briefly reviewed the contract, filed it back in his desk drawer and had not raised any objections to it.

Mr Lacy resigned some time later and commenced work in breach of the restrictions contained in the updated contract. At the trial, the employee did not dispute the covenants but argued that he was not bound by them because he had not signed and therefore had not accepted the later 2009 contract.

Luckily for the employer, the Court decided that the employee was bound by the 2009 contract. However, this was only because he had applied for Private Medical Insurance (PMI) which was a benefit in the 2009 but not the earlier contract. However, if the employee had not applied for the Private Medical Insurance, it seems that the Court would not have found that he was bound by the 2009 contract and therefore the post-termination restrictions contained in it. It is also worth noting that the employee did not actually apply for the Private Medical Insurance until a year after he was issued with the new contact, so arguably was not bound by the new contract for a period of one year after being issued with the contract.

This case highlights that where an employer wishes to issue a new employment contract it is crucial to make sure that the employee signs it. In the case in question it is only the fact that the employee had signed up for the PMI that led to a finding that he was bound by the new contract.

Conversely for employees the case highlights that if an employee does not wish to be bound by an updated contract but continues to work for the employer they must make it clear that they are working under protest and that they do not accept the new terms. The Court will look at the employee's conduct rather than their wishes or intention when deciding whether a change in terms has been effected.

COMING SOON!

Ever spent the best part of the hour searching for where you wrote down the statutory holiday entitlement? Do you know where to lay your hands on the redundancy pay calculation? Due to the popularity of the Quick Reference Section of the newsletter we are currently working on an Employment facts and figures card that will keep all the answers to those quick queries to hand. If you would like a copy please let us know - our contact details are below.

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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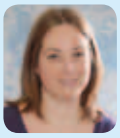

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