

UK: Employment Update

This edition of the Update reviews the new family friendly rights announced in relation to: flexible parental leave, unpaid parental leave and flexible working requests. We also consider the proposed new Directive aimed at improving the gender balance of non-executive appointments to listed companies, the ABI's 2012 Principles of Remuneration and further revisions to the Government's plans for employee-owners.

New family friendly policies announced

Flexible Parental leave and antenatal appointments

The Government has announced a number of proposals aimed at providing working parents with more flexibility and choice in relation to their working arrangements. The Government has also announced changes that are intended to benefit the workforce at large whether they are working parents or not.

In summary the new proposals are as follows:

- From March 2013 the amount of unpaid parental leave available to eligible employees will increase from 13 to 18 weeks.
- From 2015 a new system of flexible parental leave (FPL) will come into effect.
- The working mother will be able to trigger the FPL at any point after the first two weeks of compulsory maternity leave.
- A maximum of twelve months FPL may be taken in total.
- FPL will be paid (for a maximum of 39 weeks) at a rate equal to the flat rate statutory maternity pay or 90% of pay if lower.
- At the point that the FPL is triggered then the balance of the mother's 12 months' maternity leave comprises the amount of FPL available.
- FPL may be taken by the mother's partner/father of the child; alternatively mother and father/partner can divide up the FPL between them and take it in turns to care for the child or take the time off together.
- The right to take the FPL will be subject to notice obligations and eligibility criteria.
- Parents who adopt children will also be eligible for FPL and pay.
- Men will be entitled to take unpaid leave in order to attend two ante-natal appointments – there is no qualifying service requirement.

The Government will review the flexible parental leave regime by 2018. As part of that review it will also consider whether an extended block of paternity leave should be granted to fathers.

Employers should keep an eye out for the consultation document that will be launched in the New Year on how the system will work in practice. Clifford Chance would be happy to provide feedback on behalf of clients (on a named or unnamed basis). Many practical issues are currently unclear and employer input into the consultation is highly recommended; for example, it is unclear how employers can keep track to ensure that no more than 12 months FPL is taken in total and that the combined entitlement to a maximum 39 weeks' FPP is not exceeded.

Flexible working – all round

The Government has also announced that as previously trailed, it will extend the right to request flexible working to all employees regardless of whether they are working parents or caring for close relatives. It aims to put this extended regime in place in April 2014 at the earliest.

Key issues

- New family friendly policies announced
- Proposed Directive on improving gender imbalance amongst NEDs
- ABI Principles of Remuneration 2012
- Employee-owners: Government response

Under the new regime employees will have to satisfy the 26 weeks' continuous service qualifying requirement and may not make a request more than once in any 12 month period. Other aspects of the existing regime will, however, change:

- the statutory procedure through which employers consider requests will be replaced by a duty on employers to deal with requests in a reasonable manner and within a "reasonable" period of time;
- a statutory Code of Practice will be created by ACAS to give guidance as to the meaning of reasonable;
- the Employment Tribunal will have to have regard to the ACAS Code;
- employer best practice guidance will be produced, addressing, amongst other matters how to prioritise requests made at the same time.

At present employers have the right to refuse a request for flexible working arrangements if they have one or more of a number of listed business reasons for doing so:

- the burden of additional cost;
- the detrimental effect on the ability to meet customer demand;
- the inability to reorganise work among existing staff;
- the detrimental impact on quality;
- planned structural changes;
- the detrimental impact on performance;
- the inability to recruit additional staff; and
- insufficiency of work during the periods the employee proposes to work.

It would appear that the Government proposes to retain these business reasons as a reference point by which the reasonableness of an employer's refusal may be judged.

At this stage it is unclear what sanctions will apply if an employer is found to have breached the duty to deal with requests in a reasonable manner and/or within a reasonable time. The current sanction for an unreasonable refusal is capped at 8 weeks' pay (subject to the statutory maximum on a weeks' pay, currently £430). However it should not be forgotten that refusal of a flexible working request can give rise to a sex discrimination claim, in relation to which there is no ceiling on the amount of compensation that can be awarded and this will be equally true under the new flexible working request regime.

Time frame

- The draft legislation will be laid before Parliament before April 2013.
- The Code of Practice will be consulted on during 2013.
- The new regime will take effect in 2014, but no earlier than April.

[\[Modern Workplace consultation response\]](#)

Proposed Directive on improving gender imbalance amongst NEDs

Following the European Commission's announcement that it was not going to impose gender quotas on Boards, the European Commission has now published a draft Directive that proposes a minimum representation of 40% of women amongst non-executive board-members in publicly listed companies, with the exception of small and medium enterprises.

The proposal is that Member States will be exempt from the Directive's objectives in relation to the gender make up of appointments if they put in place measures to improve women's representation on the company board before the Directive comes into force. However, Member States will be required to demonstrate that their methods have enabled at least 40% female NED representation by 1 January 2020 or by 1 January 2018 for listed companies which are public undertakings.

The draft Directive requires Member States to ensure that listed companies, where 'members of the under-represented sex' hold less than 40% of the NED positions on the board, make appointments on the basis of a 'comparative analysis of candidates' qualifications, applying pre-established clear, neutrally formulated and unambiguous criteria. Where candidates are equally qualified, priority must be given to the under-represented sex.

These measures are aimed at achieving a 40% to 49% female NED membership by 1 January 2020 at the latest, or 1 January 2018 for listed companies which are public undertakings.

Member States will have to lay down appropriate and dissuasive sanctions for companies in breach of the Directive.

The Commission's proposal will now pass to the European Parliament and Council of the European Union (representing Member States' national governments) for consideration under the normal legislative procedure or 'co-decision procedure' with the Council voting by qualified majority and the European Parliament voting by simple majority.

[\[Directive on Improving gender imbalance among non-executive directors of companies listed on stock exchanges\]](#)

ABI Principles of Remuneration 2012

The ABI has published its annual statement on Principles of Remuneration (the Principles), updated to reflect current investor views. The Principles have been updated:

- to provide a clear preference for simple remuneration structures (i.e. one annual bonus incentive and one long term incentive). The Principles do not, however, prescribe or recommend any particular type of scheme. The ABI's view is that it is a matter for the Remuneration Committee, based on the company's circumstances and strategy; and
- to include a reference to operational measures in the guidance on performance measures for long term incentives.

The ABI has also identified some themes that it will be focussing on in 2013:

- Simple remuneration structures are encouraged with one annual bonus and one long term incentive;
- Clearly linking remuneration structure and performance measures to the delivery of the company's strategy;
- The Remuneration Committee (Rem Co) ensuring that the performance period for long term incentives is aligned with the timing of the implementation of the company's long term strategy;
- The Rem Co considering whether performance or holding periods should be increased;
- Rem Co's clearly demonstrating the link between pay and performance, and providing clear and concise disclosures which help shareholders make informed voting decisions;
- Shareholders continuing to be mindful of employee costs generally, and executive pay specifically, in the context of the general finances of the company, including its investment and capital needs and returns to shareholders; and
- Rem Co's being cognisant of the salary increases for employees in the wider workforce when considering salary increases for Executive Directors.

Although BIS has not yet published its response to its consultation on 'Remuneration Reporting', the ABI has outlined its expectations on how companies can report in accordance with the new regime by addressing general aspects; the company's policy table; and its approach to service contracts and exit payments, stipulating that companies should disclose their definition of good and bad leavers and the approach they will take for each type of leaver for each type of pay.

[\[ABI 2012 Principles of Remuneration\]](#)

The National Association of Pension Funds has published a revised Corporate Governance Policy and Voting Guidelines that include a simplification of remuneration policies which also focus on directors holding shares for the longer term and base pay increases being in line with the rest of the workforce.

[\[NAPF Policy and Guidelines\]](#)

Employee-owners: Government response

Following the publication of the Government's response to its consultation on implementing employee-owner status, the details of the scheme are becoming clearer. In summary the new employee-owner (to be renamed employee-shareholder) regime will operate as follows:

- The new employment status of "employee-shareholder" will be separate and distinct from other forms of employment (employee and worker).
- Employee-shareholders will not have the right to: (i) claim unfair dismissal (apart from where it is automatically unfair to dismiss, for example in response to 'whistle-blowing' or on discriminatory grounds), (ii) claim a statutory redundancy payment or (iii) request time off to train under the statutory regime.
- Employee-shareholders will be eligible to take parental leave and to request flexible working upon their return from parental leave. However the government has not yet decided whether to restrict the right to make the request to the four week period following the return from parental leave.
- When the right to request flexible working is extended to all employees, employee-shareholders will be limited to making such a request following a return from parental leave. Employee-shareholders who are not working parents will not be able to make flexible working requests.

- Employee-shareholders will be required to give their employer 16 weeks' notice of their intention to return early from maternity, adoption and additional paternity leave.
- Employee-shareholders will be eligible to take flexible parental leave when that regime comes into effect in 2015.
- In exchange for forfeiting the above employment rights employee-shareholders will be issued with shares of not less than £2,000 in the employing company and/or its parent company and will be exempt from any capital gains tax (CGT) on any gains made on shares issued up to the value of £50,000; shares exceeding £50,000 in value may be issued but will not attract the CGT exemption.
- There will be no restriction on the type of shares issued but they must be fully paid up and issued free of charge. The value must represent the shares' restricted value i.e. it must take into account the limits on the rights attaching to the shares.
- Forfeiture conditions attached to the shares issued will be a matter of contractual agreement between the parties and not legislation.
- Non UK registered companies may enter into employee-shareholder agreements with their employees in the UK.

Guidance

The Government is to provide guidance addressing the tax and employment rights implications of the new employee-shareholder status. In addition the Government intends to provide clarification on issues surrounding the initial share valuation and share forfeiture. It is not clear whether this will take the form of guidance or legislation.

Taxation issues

On the 11th of December the Government will publish draft legislation on the CGT exemption. It is also considering options to reduce income tax and national insurance liabilities that arise when an employee-shareholder receives their shares.

Timetable

The Government's stated intention was that the new employee-shareholder status should come into effect in April 2013. Further amendments need to be made to the Growth Infrastructure Bill and guidance needs to be produced. However there is no suggestion that the Government intends to deviate from its original timetable.

[\[Implementing employee-owner status – Government response\]](#)

Contacts

Chris Goodwill
Partner

Imogen Clark
Partner

Mike Crossan
Partner

Alistair Woodland
Partner

Tania Stevenson
Senior Professional Support Lawyer

T: +44 (0) 20 7006 1000
F: +44 (0) 20 7006 5555

To email one of the above please use:
firstname.lastname@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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