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Briefing Note – March 2018

UK: EMPLOYMENT UPDATE

The Government has now published its response to the Taylor Review and four consultation papers on: employment status, measures to increase transparency in the UK labour market, agency workers and the enforcement of employment rights.

This Briefing considers those consultations and the Taylor recommendations that the Government proposes to take forward.

Key issues

What is not changing?

Although the Government has indicated its willingness to progress many of the Taylor recommendations, it has clarified that the following will not be taken forward:

- A fourth employment status of "dependant contractor" will not be introduced;
- The three categories of employed, worker and self-employed will be retained albeit that it is possible that the worker category may be renamed in the future;
- When an individual's employment status is disputed, the burden of proof will not be placed on the employer to rebut a presumption of worker status. However, in the future this issue may be revisited once any final decisions on the implementation of statutory employment tests and on-line employment status tool have been taken;
- Holiday pay: a right to receive rolled up holiday pay will not be implemented;
- Restrictive Covenants: no action is going to be taken in relation to the use of non-compete clauses following the Government's call for evidence; and
- Tax Arrangements: The Government will not revisit the level of National Insurance contributions paid by employees and self-employed people.

Employment status

The Government examines the issues that currently arise in relation to the tripartite employment status regime (i.e. employed, self-employed or worker). It raises a number of questions about whether codification of the employment status test

would be beneficial and whether a better employment status test reflecting modern working arrangements can be devised. It is seeking views on what factors should be included in any employment test; whether control, mutuality of obligation and personal service are still relevant and what they mean in practice. Questions are also raised about whether "employer" and "self employed" should be defined in statute and whether there should be a new test to determine who is a worker.

Working Time

Other aspects of the "gig" economy are also addressed. The consultation examines how "working time" should be defined and whether a specific approach needs to be adopted in relation to all platform based workers. Reference is made to the recent Uber litigation where it was held that the claimants were workers entitled to receive the National Minimum Wage (NMW) during the time that they were working which was when they had the Uber app switched on and were in the territory in which they were licenced to use the app and were ready and willing to accept tasks. The Government is seeking views on how to ensure platform workers received the NMW for their work but also acknowledges that there is a risk that the practical impact of determining working time to be when an app is switched on could force employers to pay the NMW to individuals who open multiple apps simultaneously or who log in to an app knowing that there will no tasks available or that an individual may open the app to receive the NMW but refuse to accept tasks.

Holiday

Although it acknowledged that rolled up holiday pay would potentially make matters more straight forward, the Government has ruled this out on the basis that the ECJ has ruled that it is unlawful. Post Brexit there must be a possibility that this could be revisited.

The Government does seem committed to changing the reference period by which holiday pay is calculated from the current 12 week reference period to 52 weeks. This will allow peaks and troughs in working hours and pay to be evened out and would remove any incentive for employers to prevent employees taking holiday at times which would result in elevated levels of holiday pay; for example following a busy period generating high levels of commission or overtime pay.

Clarification of hours worked and paid for

With effect from 6 April 2019, payslips will have to include the number of hours employees are being paid for where pay varies by reference to time worked. At the same time, the right to receive a pay slip will be extended to all workers. This greater visibility of what has been paid for may well prompt more employment tribunal challenges.

Tax

The thorny subject of alignment between the statutory employment protection regime and the tax regime is raised. In particular, the Government questions whether the definitions of "employee" and "self-employed" should be aligned and whether an individual who is classified as an employee for tax purposes should be automatically eligible for some employment rights, and if so which rights?

A voice in the workplace

One recommendation that the Government has tentatively indicated that it might progress is in relation to the legislation which triggers the obligation to establish a domestic works council; the Information and Consultation of Employees Regulations 2004 (the ' ICE Regulations'). At present a company will be subject to the ICE Regulations if it has 50 or more employees. The obligation to start a negotiation process with a view to reaching an agreement in respect of information

and consultation of employees is triggered if a request is made by 10% of the employees in the undertaking.

The Government is considering the recommendation that workers, as well as employees, should be taken into account for the purposes of the various threshold triggers in the ICE Regulations alongside a second suggestion that the trigger for negotiating an agreement should be reduced from 10% to 2% of the workforce.

Whether or not the Government ultimately has the appetite for making these changes it is clear that the trade unions certainly have the appetite to apply to the Central Arbitration Committee for recognition for pay bargaining purposes in respect of 'workers' in the bargaining unit. The Independent Workers Union of Great Britain (IWGB) application to the Central Arbitration Committee (CAC) for recognition in relation to Deliveroo drivers failed because the CAC concluded that the Deliveroo drivers were not 'workers'; the IWGB is however considering applying for a judicial review of this decision. Separately there is an ongoing CAC application by the IWGB for recognition in relation to couriers engaged by 'The Doctors Laboratory'.

Also indicative of the general direction of travel is last December's consultation by the FRC on amendments to the UK Corporate Governance Code. One area being consulted on is the ability of the workforce to raise concerns in relation to management and colleagues and an obligation on the board to establish a method for gathering the views of the workforce. It should be noted that 'workforce' is used in a broader sense than just employees and in principle covers workers. The final version of the revised Code is expected to be published in early summer 2018 to apply to accounting periods on or after 1 January 2019. What remains to be seen is if this proposal is taken forward how the views of the workforce can be taken into account where there are atypical arrangements in place perhaps with rotating pools of temporary workers and a heavy use of agency workers on short term contracts?

The Future

The consultations close on 1 June 2018. The direction of travel is still largely uncertain and in reality it is unlikely that any legislative or other changes to the meaning of employee, worker, employer and self-employed will be implemented before the end of 2019. In the meantime, however, the Supreme Court has now heard the appeal against the decision that the Pimlico Plumber claimant was a "worker" and the Court of Appeal will hear the appeal against the Uber worker towards the end of this year. Both courts may provide some further guidance on the factors to be taken into account when determining whether an individual is an employee, worker or self-employed and what amounts to "working time" for the purposes of calculating NMW and holiday pay entitlements. Any such guidance may also feed into the Government's response to the Consultation Papers.

In practice, however, it does mean that companies with atypical workforces and/or working arrangements are potentially vulnerable in a number of areas:

- Has the workforce's employment status been correctly classified?
- Is there a latent liability for accrued holiday pay, national minimum wage and employer's national insurance contributions?
- Has the "working time" been correctly identified and any NMW entitlement paid for the appropriate period?

The Government response to the Taylor Report and the four consultation papers can be found here:

- Government response to Taylor Report
- Government Consultation on Employment Status
- Transparency in the Labour Market consultation paper
- Agency Workers consultation paper
- Enforcement of employment rights consultation paper

CONTACTS

Chris Goodwill
Partner
T +44 207 006 8304
E chris.goodwill@cliffordchance.com

Mike Crossan
Partner
T +44 207 006 8286
E michael.crossan@cliffordchance.com

Alistair Woodland
Partner
T +44 207 006 8936
E alistair.woodland@cliffordchance.com

Tania Stevenson
Senior PSL
T +44 207 006 8938
E tania.stevenson@cliffordchance.com