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Briefing Note – Dec 2018/Jan 2019

UK: EMPLOYMENT UPDATE

Just in time for Christmas, the Government has published the 'Good Work Plan' setting out its latest response to the Taylor Review of Modern Working Practices, together with some draft legislation and several proposals aimed at improving the enforcement of worker rights. Additional seasonal reading is provided in the form of the Government response to the Women and Equalities Committee (WEC) Report on sexual harassment in the workplace.

This Briefing considers what preparatory steps employers should be considering in light of these proposals.

Key issues

Good Work Plan

The key proposals include the following:

- changing the rules on continuity of employment, so that a break of up to four weeks (currently one week) between contracts will not interrupt continuity;
- extending the right to a written statement of terms and conditions to workers (as well as employees) and requiring the employer to give the statement on the first day of work (rather than within two months). The employer will also be required to provide additional information in the statement (see below);
- legislation to streamline the employment status tests so they are the same for employment and tax purposes and to avoid employers misclassifying employees/workers as self-employed;
- a new right for all workers (not just those on zero hours contracts) to request a more stable and predictable contract after 26 weeks of service;
- with effect from 6 April 2019, increasing the penalty for employer's aggravating conduct from £5,000 to £20,000 (although it should be noted that this penalty is rarely imposed in practice);
- abolishing the Swedish Derogation, which allows agency businesses an opt-out from the obligation to pay agency workers the same as comparable permanent workers, after 12 weeks in the same assignment in circumstances where they are engaged under a contract, which pays them between assignments;
- lowering the threshold required for a request to set up a domestic works council;
- extending the holiday pay reference period to 52 weeks (from the current 12 weeks) from 6 April 2020; and
- a new obligation on employment businesses to provide every agency worker with a Key Facts Page.

Written statement: mandatory information

In addition to the current mandatory information that must be provided in a written statement, the following will need to be provided to workers who commence employment on/after 6 April 2020:

- how long a job is expected to last, or the end date of a fixed-term contract;
- how much notice an employer and worker are required to give to terminate the agreement;
- details of eligibility for sick leave and pay;
- details of other types of paid leave e.g. maternity leave and paternity leave;
- the duration and conditions of any probationary period;
- all remuneration (not just pay) – contributions in cash or kind e.g. vouchers and lunch;
- which specific days and times workers are required to work.

This additional information does not have to be provided to employees whose employment began before 6 April 2020 unless the employee makes a request for a statement on/after 6 April 2020 or where there is a change to any of the statement details (including the new mandatory information) on/after that date.

Key Facts Page data

The Key Facts Page will include the following information:

- the type of contract a worker is employed under;
- the minimum rate of pay that they can expect;
- how they are to be paid; and
- if they are paid through an intermediary company any deductions or fees that will be taken, and an estimate or an example of what this means for their take home pay.

The Employment Agency Standards Inspectorate will have enforcement powers where a Key Facts Page has not been provided.

Name and shame scheme

One of the new enforcement measures announced is the new name and shame scheme in respect of employers who do not pay employment tribunal awards (of £200 or more) within a reasonable time. Awards registered with the Department for Business, Energy and Industrial Strategy (BEIS) on or after 18 December 2018 are in scope for naming. The employer will be notified that they will be named and will have the opportunity to apply to BEIS to be exempt on one of the specified (and very limited) exception grounds.

No doubt this scheme will provide good fodder for the newspapers and potentially prompt them to trawl the employment judgments register for details of cases they were not otherwise aware of.

Employment status

The Government's proposal to align the framework for the purposes of employment rights and tax is welcome. However, there is no detail on whether the tripartite employment status regime (i.e. employed, self-employed or worker) will remain or whether it will move to a strict employment/self-employment regime? It remains to be seen whether the new regime will place more emphasis on control and less on whether there is a contractual right of substitution; although this does appear to be the direction of travel. The Government has also proposed to improve the guidance and online tools to help individuals understand their employment status.

Holiday Pay

The reference period by which holiday pay is calculated will be extended from the current 12-week reference period to 52 weeks from 6 April 2020 for workers with 52 weeks' or more service. Where a worker has less than 52 weeks' service the reference period is the number of weeks for which the worker has been employed. This will allow peaks and troughs in working hours and pay to be evened out and thereby 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.

In addition, legislation will be introduced to enable state enforcement of vulnerable workers' holiday pay rights. At this stage, it is unclear who will qualify as a 'vulnerable worker'.

A voice in the workplace: Domestic Works Councils

The legislation which triggers the obligation to establish a domestic works council (the Information and Consultation of Employees Regulations 2004 (the "ICE Regulations")) will be amended with effect from 6 April 2020 to lower the trigger threshold. 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 trigger for negotiating an agreement will be reduced from 10% to 2% of the workforce. However, the 15 employee minimum threshold for initiation of proceedings will remain in place.

The Government does not appear to be taking forward the recommendation that workers, as well as employees, should be taken into account for the purposes of applying the various threshold triggers in the ICE Regulations.

What is not changing (or not immediately)?

The following Taylor recommendations will not be taken forward:

- no premium will be added to the National Living Wage for non-guaranteed hours worked;
- hours and hourly earnings will not have to be captured in Real Time Data returns to HMRC;
- for the time being, joint responsibility measures will not be introduced to render the brand name at the top of a supply chain jointly liable for non-compliance with employment rights (such as the national minimum wage and holiday pay) further down its own supply chain. However, the Government proposes to return recommendations following consultation;
- 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. This issue may be revisited once the new employment status framework is finalised;
- a right to receive rolled up holiday pay will not be implemented;
- a proposal to enable the embargo of "hot goods" to disrupt supply chain activity where employment law non-compliance is found will be revisited following consultation; and
- the Government will not revisit the level of National Insurance contributions paid by employees and self-employed people.

Preparatory steps

The Good Work Plan does not set out clear timeframe or commitments to legislate for all proposals, however some draft legislation has now been published. Although the devil will be in the detail of the unpublished legislation, there are some preparatory steps that it may be advisable for employers to consider, including:

- undertaking an audit of the current composition of the workforce to identify the size of the 'worker' population that will be required to receive a written statement;
- giving some thought to what form the new written statement for workers should take from April 2020; it may be possible to make use of the Government template statement;
- considering the potential (tax and employment rights) implications of all or a portion of the worker population being classified as employees;
- assessing the financial and other impact (if any) of the change in holiday pay reference period from 12 to 52 weeks; and
- feeding into any further Government consultation exercises particularly those in relation to the alignment of employment status for tax and employment law purposes.

[The Good Work Plan can be found here.]

Sexual harassment in the workplace

In response to the WEC Report the Government proposes, amongst other things, to:

- introduce a new statutory code of practice on sexual harassment;
- commission a survey to gather regular data on the prevalence of sexual harassment;
- consult on non-disclosure agreements;
- consult on the evidence base for a new legal duty on employers to prevent sexual harassment in the workplace;
- consult on strengthening and clarifying the laws on third party harassment in the workplace;
- consult on whether further legal protections are required for interns and volunteers;
- consult to explore the evidence for extending employment tribunal time limits for Equality Act 2010 cases; and
- work with regulators for whom sexual harassment is particularly relevant to ensure they are taking appropriate action.

Code of Practice

The Government seems to be reluctant to impose a statutory duty to prevent harassment in the workplace (although it is not ruling out the possibility altogether). Instead it considers that once a statutory code of practice is in place employers will be able to better understand and demonstrate that they have taken all reasonable steps to prevent their employees from acting unlawfully and that it will in effect have the same impact as the WEC recommended statutory duty.

At this stage the Government will not take forward the WEC proposal that an uplift can be made to compensation awarded by the employment tribunal in cases where there has been a breach of the new code but it will keep this option under review.

Extension of time limits

The Government will consult on proposals to extend the time limit Equality Act claims (including harassment) from the current three months to six months from the date of the act/omission complained of. It has, however, ruled out the suggestion that the time limits should be calculated from the date of the conclusion of any internal grievance process.

Non-disclosure agreements

The Government accepts that there needs to be better regulation about the use of non-disclosure agreements (NDA's) (including such provisions in settlement agreements) and will consult on this. It has however ruled out the suggestion that it should be a criminal offence to propose an NDA that is unenforceable.

Action Points

The Government has given no indication of the timeline for any of the proposed research, consultations or introduction of the statutory code and/or any new legislation. It has, however, stated that specific policy and guidance for sexual harassment is being developed for civil service organisations and will be available by the end of 2018. Until the statutory code is published private sector employers may wish to benchmark their current arrangements against such guidance. At the very least employers should audit their existing policies and practices to assess potential areas of weakness:

- what [sexual] harassment training is currently provided?
- who is it provided to?
- how frequently is it provided; is there any refresher training?
- does the training help equip staff to identify and 'call out' inappropriate behaviours of colleagues and/or clients and customers?
- is there a standalone [sexual] harassment policy or is harassment dealt with as part of a grievance or whistleblowing policy?
- do current procedures for assessing whether an individual continues to meet regulatory standards (for example 'fitness and propriety' under the senior managers and certified persons regime) consider disciplinary action for harassment (of any nature) or similarly inappropriate behaviour?

- are non-disclosure provisions routinely used in termination agreements? If so has it been made clear to the individual that they are not precluded from making public interest disclosures, reporting matters to the police or relevant regulatory authorities. Consider whether the language of the agreement should be revised to ensure that the independent adviser to the employee certifies that they have explained this to the individual.

The Government's Response to the WEC Report on Sexual Harassment in the Workplace can be found here

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