MOORE BLATCH

UPDATE

Employment - August 2019

RULING ON UNREASONABLE COVENANTS COMES AS A RELIEF

BA FINED £183 MILLION

EMPLOYEE SECRETLY RECORDS MEETING WITH HR

WELCOME TO AUGUST'S EMPLOYMENT UPDATE

Welcome to this month's update with topics as scorching hot as we would hope for weather in August (but then perhaps not!)!

This issue covers a change in the law for employment competition for the first time in 100 years, the biggest data breach penalty yet and an employee secretly recording a meeting with HR.

With changes to divorce legislation on the horizon, we also feature guest article from our family team with useful pointers on how employers can better support employees going through a divorce.

As always, our expert team are more than happy to answer any queries you may have.

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QUICK NEWS: BA FINED £183 MILLION

In the biggest fine to date from the Information Commissioner's Office, British Airways (BA) has been fined £183million for a widely publicised customer data breach, whereby users of their website were diverted to a fraudulent site and their details were harvested by hackers.

The fine was 1.5% of BA's worldwide turnover - a reminder to businesses of the costly consequences of a data breach.

If you'd like help to understand your legal obligations/limitations and to draft effective privacy policies for your business our expert team would be happy to help.

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QUICK NEWS: RISE IN DEMAND FOR EARLY CONCILIATION SERVICES

Following the abolition of tribunal fees in July 2017, the demand for early conciliation services has continued to increase. The ACAS annual report shows a 20% increase in requests in the past year, 2.9% of which came from employers.

However, last year, 73% of notifications to ACAS did not lead to a tribunal claim for host of reasons which included people coming to formal and informal settlements.

Of those that did get to the tribunal, 51% settled and 18% were withdrawn by the claimant, leaving only 9,000 cases to be decided by an employment tribunal.

The full report can be found here

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PROTECTING NEW PARENTS FROM DISCRIMINATION

Pregnancy or maternity discrimination is illegal under the Equality Act, yet up to 54,000 women a year still feel forced out due to discrimination on these grounds.

On 22 July 2019, as part of The Good Work Plan, the government announced its commitment to extend legal protections against redundancy for pregnant women and new mothers returning to work (which includes those taking adoption and shared parental leave).

Currently, mothers are only protected from redundancy during their pregnancy and until their return to work following maternity leave. Those that aren't entitled to maternity leave are only protected for two weeks following their child's birth.

The aim of The Good Work Plan is to protect new parents from discrimination in the workplace, with the government committing to the following:-

- ensuring redundancy protection period applies from the point the employee informs the employer that she is pregnant, whether orally or in writing;
- extending the redundancy protection period by/to 6 months once a new mother has returned to work;
- ensuring that those taking adoption and shared parental leave are protected against redundancy for a period of time after they return to work; and
- establishing a taskforce of employer and family groups who will seek to improve the information available to employers and families on pregnancy and maternity discrimination. They would also seek to develop an action plan on what the government and other organisations can do to make it easier for pregnant women and new mothers to stay in work.

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HEATWAVE CALLS FOR FLEXIBLE WORKING

During last month's scorching heat wave, the Trade Union Congress (TUC) called for employers to let staff work flexible hours or work remotely in a bid to help them cope with the heat.

Unlike 'Snow Day', there is no summer equivalent for days that are unusually hot. Employers need only provide a workplace which has "reasonable" temperature; they are not even legally obliged to relax their dress code when the temperature soars.

Due to the nature of work of some industries where employees must work in high temperatures, the Health and Safety Executive says a limit cannot be introduced.

However, the TUC wants to change the above legal position by introducing a new maximum indoor temperature of 30 degrees (27 degrees for those with physical work) with a requirement for employers to act to cool down the workplace once the temperature reaches 24 degrees.

Employers are advised to use common sense during extreme weather, consider their employees' wellbeing plus whether it may be sensible (or not) to relax company rules on dress code.

Having clear rules and regulations about how employees are expected to present themselves at work in order to meet company brand is undoubtedly sensible. It's also important to ensure these rules are both practical and non-discriminatory.

If you'd like help to prepare or review your existing policies, please do get in touch.

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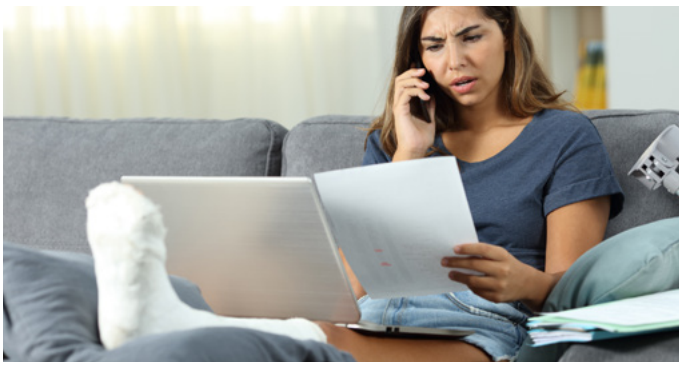
HEALTH IS EVERYONE'S BUSINESS

Wanting to reduce ill-health related job loss in the UK, in July this year the government launched a consultation entitled "Health is everyone's business: proposals for reducing ill health-related job loss."

This joint consultation between the Department for Work and Pensions and the Department of Health and Social Care will ask for views on the various proposals. These include:

- how to improve and increase access to occupational health services (OHS), including subsidising the cost of OHS for SMEs and the quality of OHS;
- major reforms to the statutory sick pay (SSP) system, including SSP payment on a pro rata basis during an employee's phased return to work after a period of sickness absence, removing the concept of qualifying days, and eliminating the lower earnings limit for eligibility; and
- a new right for non-disabled employees to request workplace modifications to assist their return from sick leave, which would be supported by a new Code of Practice and enforceable in the employment tribunal.

The proposed measures will also encourage employers to take increased responsibility and be actively involved in minimising ill-health-related job loss.



Employers have a key role to play in supporting their employees' health and well-being and the launch of this consultation reflects this.

The consultation will end in October 2019, and we will ensure you are updated.

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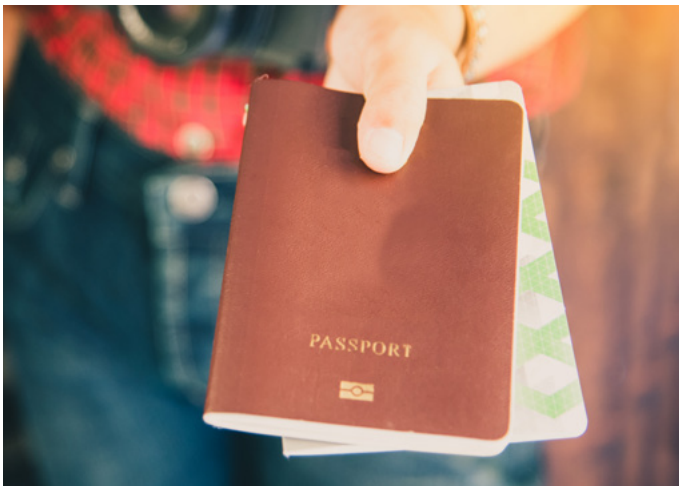
DOES AN ILLEGAL CONTRACT MEAN IT ISN'T ENFORCEABLE?

More specifically, could a breach of immigration rules render an employment contract unenforceable?



Malawian national Ms Chikale worked here in the UK from 2013 – June 2015 as a live-in domestic worker. During this time, she worked long hours, seven days a week, though received only £3,300 for this whole period of employment. In June 2015, Ms Chikale was summarily dismissed.

Ms Chikale's visa had expired in November 2013, meaning that for much of this period of employment, she was working for the family without a valid visa. Her employer had kept her passport after the visa expired, reassuring her that her visa was being taken care of. However, the visa was never extended.

Ms Chikale brought various claims against her employer, including unfair dismissal and unlawful deductions from wages. Her employer claimed that Ms Chikale's employment contract was unenforceable because without a visa, the work had been carried out illegally.

Both the employment tribunal and the employment appeal tribunal rejected the employer's defence, and the case eventually went to the Court of Appeal (COA).

The COA held that Ms Chikale did not knowingly participate in any illegality. As the COA did not believe it was Parliament's intention to deprive an innocent employee of all contractual remedies against an employer, the appeal was dismissed.

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RULING ON UNREASONABLE COVENANTS COMES AS A RELIEF

Tillman v Egon Zehnder Limited

A recent judgment that unreasonable covenants will not necessarily prevent enforcement of remaining restrictions will undoubtedly come as a relief to many employers.

Ms Tillman (a departing senior employee) tried to extricate herself from six-month non-compete restrictions, arguing that the wording of one of the clauses was so wide she was effectively prevented holding any shareholding in a competitor - therefore an unreasonable restraint of trade and unenforceable.

The Supreme Court agreed. However, they held that the offending wording could be removed thereby removing the unreasonable effect and making enforceable the remainder of the covenant.

The two factors which the Supreme Court considered to be critical questions of severance are:-

- there can only be removal of words if, once removed, there is no need to add or modify what remains; and
- removal should not generate any major change in the overall effect of all the post-employment restraints in the contract.

This judgement was a reversal of the Court of Appeal authority, which had been applicable for 99 years, and loosened the severance test quite significantly.

LEGAL OPINION

Whilst employed, an employee - especially if they are senior - is likely to have access to important, sensitive information about their employer, the business and its future plans, therefore putting an employer in a vulnerable situation if that employee's employment is terminated.

It is for this reason that post-termination restrictive covenants are usually included in employment contracts. However, unless they protect a legitimate business interest and the protection is no more than is reasonably necessary to protect that interest, such covenants will be void.

If you would like your contracts reviewed and/or re-drafted to ensure they are effective, enforceable and tailored to protect confidential information and business interests, we'd be happy to help.

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ARE YOU LIABLE FOR AN EMPLOYEE'S FACEBOOK POST?

Forbes v LHR Airport Ltd

Sharing a racially offensive Facebook post with a Facebook friend colleague wasn't done 'in the course of employment', so an employer wasn't vicariously liable for harassment.

An employee at London's Heathrow Airport (LHR), known as 'S', shared a racially offensive post on Facebook. 'F' was a fellow LHR employee, but not a 'Facebook friend' of S. F was shown the post by another colleague whilst at work.

F raised a grievance, and as result S was disciplined and given a final written warning.

F also claimed that LHR was vicariously liable for S's actions. However, the tribunal disagreed, finding that the offensive post was not done "in the course of employment" (a key legal test in establishing employer liability).

On appeal, the EAT upheld the tribunal's decision on the basis that:

- S was not at work when the offensive image was posted;
- The post did not refer to LHR or any of its employees;
- S did not use the employer's systems or equipment in sharing the post;
- S's Facebook account was private with mainly personal Facebook 'friends'; only a small number were work colleagues (which didn't include F);
- S offered to apologise when the impact of her post was explained to her; and
- LHR was found to have taken reasonable steps to prevent discrimination by taking S's misconduct seriously when dealing with F's grievance.

LEGAL OPINION

It's important to note that this ruling does not mean employers cannot be liable for their employees' social media posts as each case and judgment will be fact-sensitive.

With so many people now using social media, the risk of employees making discriminatory posts is considerable. Discriminatory posts not only cause offence, they can also be costly to businesses and result in reputational damage. Robust social media and IT policies, which are supplemented by regular training, are arguably more important than ever, especially for those who use social media solely or principally for work.

If your business utilises social media, our expert team can prepare or review your existing policies and ensure that appropriate and adequate training is provided, helping you to minimise any risks.

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EMPLOYEE SECRETLY RECORDS MEETING WITH HR

Phoenix House Ltd v Stockman

An employee who secretly recorded a meeting with HR was not found to have breached their implied duty of trust and confidence to their employer.

Further to a restructure of the employer's finance department which would result in her redundancy, Stockman complained of unfair treatment. She later interrupted a meeting to discuss her complaints, demanded to know what was being said and refused to leave.

Stockman met with HR to discuss her conduct, and it was this meeting that she secretly recorded. She was later summarily dismissed on the basis that her relationship with senior management had irretrievably broken down.

Stockman successfully brought a claim for unfair dismissal. However, at an Employment Tribunal (ET), her secret recording came to light.

As a result, Phoenix House argued that Stockman's basic and compensatory awards should be reduced to nil because, had they known about the recording, Stockman would have been dismissed for gross misconduct.

The ET held that a reduction of the compensatory award by 10% would be sufficiently reflective of her conduct. Their reasons included the fact that such conduct was not specified in the employer's policy as amounting to gross misconduct and that it was not used to entrap the employer.

On appeal, the EAT did not find a reason to interfere with the ET's decision, and made clear that the following factors will be relevant:

- Purpose of the recording;
- Blameworthiness of the employee;
- Nature of what is recorded;
- Employer's attitude to such conduct; and
- To ask: was the employee expressly told that recording the meeting was not permitted, or was covert recording expressly listed as an act of gross misconduct in the employer's disciplinary policy?

LEGAL OPINION

Each case will turn on its own facts and, as noted in this case, there will be instances in which such recordings will be acceptable (and desirable) to protect both parties.

Whilst we note that it is not always possible to have an exhaustive list, employers are encouraged to review their disciplinary policies and procedures and consider expressly including "covert recording" as an example of gross misconduct.

We would advise that it is always best to communicate an intention to record a meeting (whether by the employee or the employer) as it would usually amount to misconduct not to do so.

If you'd like further information, don't hesitate to get in touch.

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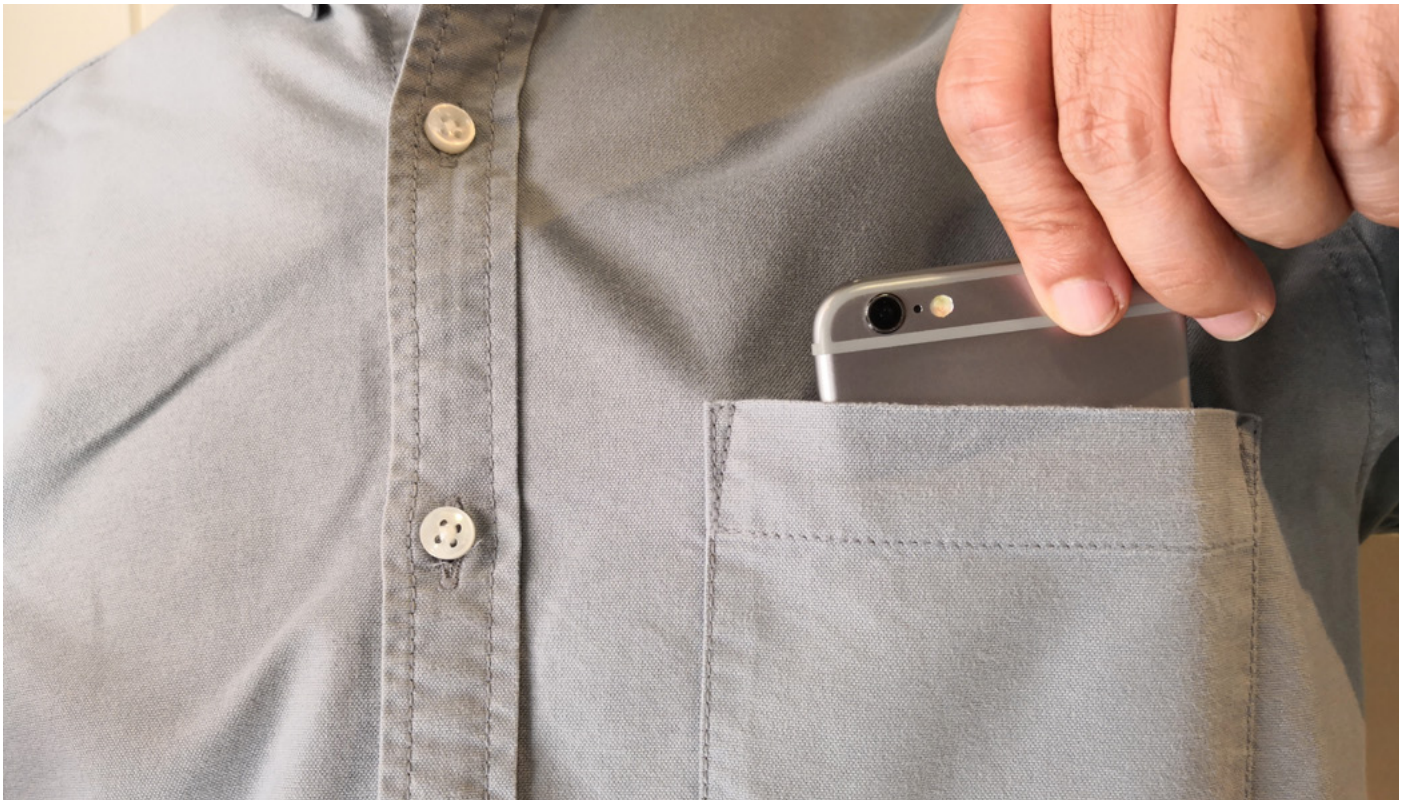

WHAT EMPLOYERS NEED TO KNOW ABOUT NEW NO FAULT DIVORCE LAWS

Divorce is regularly cited as one of life's most stressful events. It's no surprise, therefore, that the impact of divorce – especially if it's particularly acrimonious – affects not only an individual's private life, but their professional life too. 'Presenteeism' can be a particular problem where divorce is concerned, when an individual is present at work yet pre-occupied with the issues he or she faces outside. Knowledge of the divorce process itself as well as the ways in which employers can help is important for the smooth running of your business and the health and well-being of your staff.

NEW NO FAULT DIVORCE LAWS

The introduction of 'no fault divorce' has been widely reported. It is hoped that, without the blame game that the current process encourages, divorce may become easier for those involved. From an employers' perspective it is useful to know what, exactly, these changes mean and how you can support employees in enabling the process to be as smooth as possible, especially where finances are involved.

Currently, couples must prove their marriage has irretrievably broken down and this must be done by proving one spouse is at fault; reasons could include adultery, unreasonable behaviour or desertion. However, the new law will only require one spouse (or both if preferred) to make a statement of irretrievable breakdown - no-one needs assume any blame.

This change undoubtedly bodes well in terms of lessening the acrimony; something that, arguably, the current laws promote. But one shouldn't be too optimistic about the extent to which these changes will impact the experience of divorce itself; there will still be much scope for acrimony, especially surrounding any children and finances. And it's concerning finances where an employer can help.

FINANCES

The forthcoming changes will not impact how finances are managed. Couples will still need to exchange financial information and documents which often includes requiring information from employers about their salary, any benefits, bonus schemes or even a company pension scheme. Providing any information requested by an employee as quickly as possible all helps to prevent the whole divorce process from dragging on for far too long.

In order to do this effectively, it is worthwhile employers apprising themselves of what financial information is required from each spouse. A Form E financial statement, which can be easily accessed via GOV.UK, is the requisite form the courts will usually expect spouses to complete. It also makes clear what, if any, supporting documentation is required.

COURT HEARINGS AND TIME OFF WORK

Deciding how finances are to be managed can take up to three hearings, sometimes more, which may mean both spouses needing to take time off work to attend court. If children are involved and the court is asked to decide how their time is spent, parents will be required to attend separate hearings which, again, there could well be up to three and sometimes more depending on the issues. With matters concerning finances and children being treated wholly separately, this means there are potentially six or more occasions where a parent going through an acrimonious divorce could require time off work.

Although the new divorce laws have been widely welcomed, one should be cautious about the extent to which they will impact the divorce process itself. An understanding of that process and the important role an employer can play will benefit not just your staff, but your business itself.

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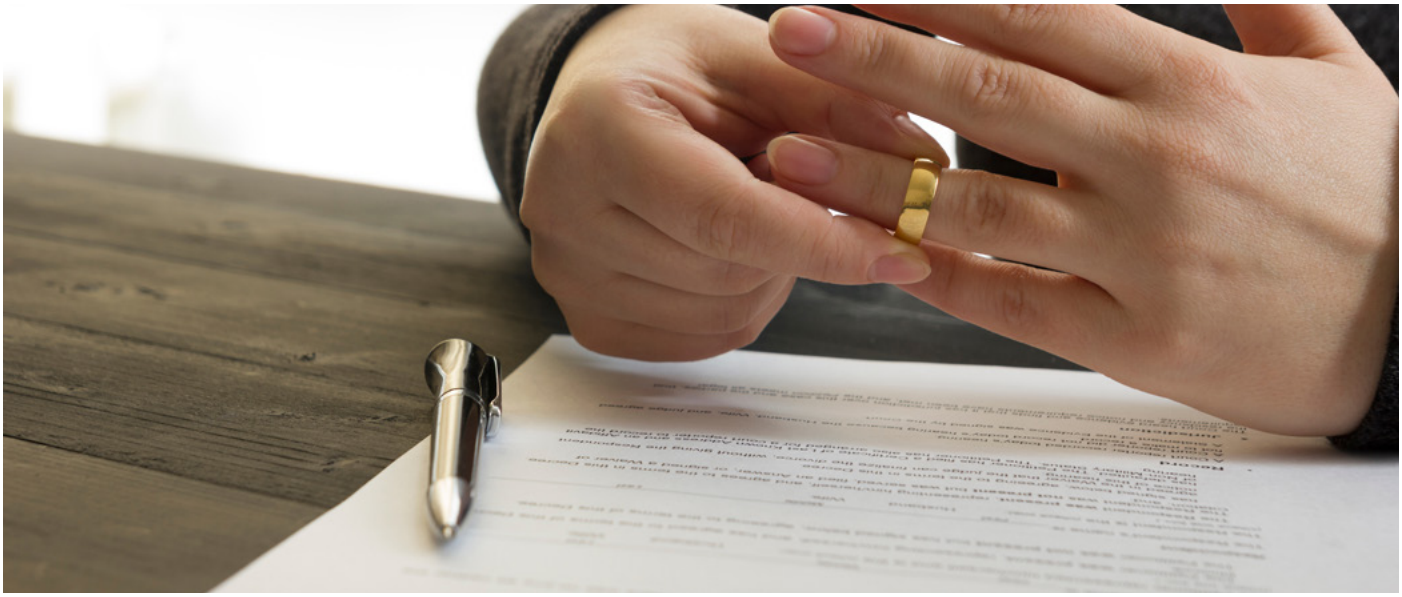

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