MOORE BLATCH

UPDATE

Employment - March 2019

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WELCOME TO OUR FIRST EDITION OF 2019!

Whilst we have been lucky to recently experience unseasonally warm weather, we are warned of a possible return of bad weather. In this edition we therefore look at what companies should do to prepare for any further cold episodes we may experience this winter. We also bring you another case looking at employment status; and our feature article this month is from our immigration team who consider how you can protect your business after Brexit.

We will of course aim to keep you up to date with any changes to employment law throughout 2019. You will be pleased to hear we are finalising our amendments to this year's data booklet. If any other members of your team would like to be added to our distribution list and receive copies, please just let us know.

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IF THE BEAST STRUCK AGAIN

A year ago this month 'The Beast from the East' cold wave hit the UK, causing chaos up and down the country.

We've already seen snow in parts of the UK in 2019. Some of the biggest problems it can cause are related to childcare, such as schools closing, transport issues and health and safety.

So it's worth considering a 'bad weather policy', in order that all of your staff know, in cases of sudden extreme weather, what the procedures are and how soon to make decisions about work.

You should think about the health and safety implications if, for example, only 50% of the staff can get to work. Would it be safe for production to go ahead? And should staff who can't get to work be forced to take annual leave, or should those who do attend get a day off in lieu? Also, how will it affect staff morale if someone living a mile from the office hasn't made it in, but someone 20 miles away has?

Is flexible working appropriate in such situations? Do your systems facilitate this option? If not, could you do more to help the business function in these circumstances?

If you'd like help putting a bad weather policy in place, contact a member of our team today. We'd be happy to talk.

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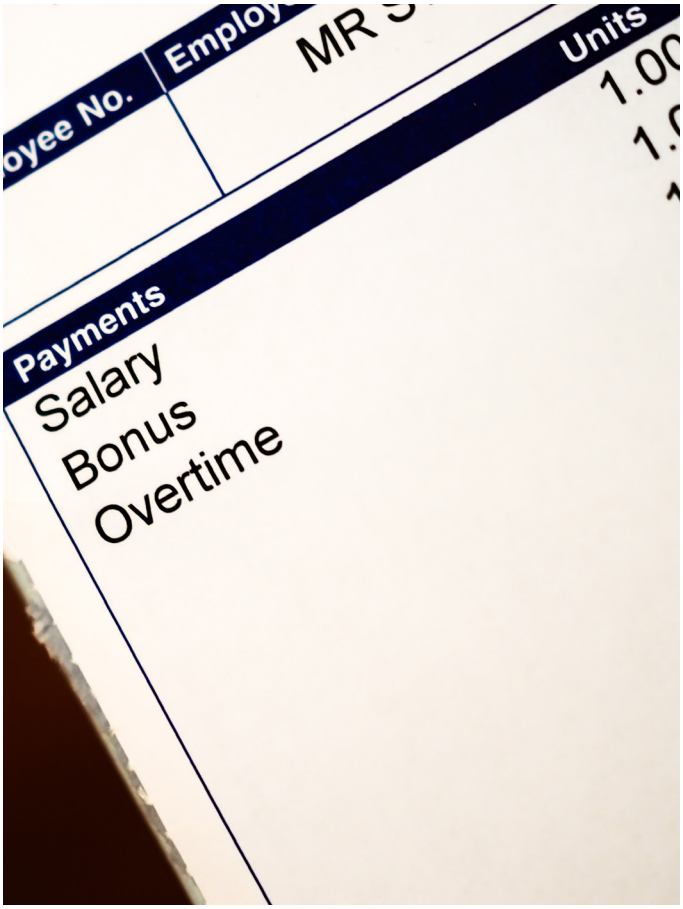
DON'T SLIP UP ON NEW PAYSLIP RULES

As a result of new legislation, employers who engage staff on an hourly-rate basis need to be aware that, from 6 April 2019, the right to itemised payslips will extend to all workers, not just employees paid by the hour.



If employees/workers earn varying rates of pay (more on night shifts or overtime, for example), their payslips will need to reflect this new breakdown.

The aim of the new legislation is to help low-paid workers check more easily that they've been paid correctly.

Legal opinion

Many employers will already operate on this basis and don't need to change. However, others need to be aware of this now-compulsory requirement, or the risk that staff may now be eligible to bring a claim for breaching this new legislation.

We would hope that the payroll providers will be aware of this new legislation and therefore the payroll software you use should make itemised payslips relatively easy to produce.

This may be something you want to discuss with your software provider before the new legislation comes into place.

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ICELAND IN FROSTY WAGE DISPUTE WITH HMRC

Iceland Foods are in a dispute with HMRC over the company's Christmas savings scheme.

In this salary sacrifice-type scheme, staff can voluntarily set aside part of their wages throughout the year and claim it back later, usually at Christmas.

HMRC asserts, however, that some employees in the scheme are technically paid less than the National Minimum Wage (NMW).

Iceland are fighting the assertion. The dispute is in its early stages but we're eager to see how it develops. If Iceland lose, they could have to pay up to £21m to the affected employees.

Legal opinion

Salary sacrifice schemes are common; another example would be childcare voucher schemes or enhanced pension contributions.

These forms of remuneration are not part of an employee's contractual salary, and therefore do not count for NMW purposes. Some organisations have started to withdraw their salary sacrifice schemes for fear of falling below the NMW requirements.

The Government is carrying out a consultation on salary sacrifice schemes as part of its project to upgrade workers' rights. It acknowledges that the rules and legislation are complex and says changes could be made to make them easier to understand.

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PAY-GAP REPORTING DEADLINES LOOM

Gender pay: New legislation introduced in 2018 requires large employers (250 employees or more) to publish their overall mean and median gender pay gaps.

There was a high volume of media coverage last year in anticipation of the results being published for the first time. However, this year the media doesn't seem to be building the same amount of hype around the statistics. Regardless, the deadline is fast approaching and companies should ensure that they have submitted their 2018 statistics by 4 April 2019.

We can assist with providing guidance on what statistic you should be publishing and/or drafting the commentary to publish with the statistics.

Executive pay: New Government regulations issued on 1 January 2019 oblige large companies (250 employees or more) to disclose, annually, the ratio of their CEO's pay to the median, lower-quartile and upper quartile of their employees.

The new regulations are part of a new Government initiative in which the gender pay gap was introduced in 2018, in response to concerns that some CEOs' pay may have been "out-of-step" with company performance. Statistics for the year 2019 must be reported early in 2020 and so companies need to start thinking about this now. If you would like further information in relation to this please get in touch.

Ethnicity pay: A Government consultation on ethnicity pay-reporting closed on 11 January 2019. In future updates we will bring you more information about the relevant requirements. Along with new legislation on gender and CEO pay gap-reporting, companies should also think about preparing for upcoming reforms in ethnicity pay gap-reporting.

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NEW COMPENSATION LIMITS PUBLISHED FOR APRIL 2019

The government has published the Employment Rights (Increase of Limits) Order 2019 which increases compensation limits for employees in various situations, applicable from 6 April 2019.

The main changes are:

- The compensatory award for unfair dismissal has been increased from £83,682 to £86,444;
- The minimum basic award for unfair dismissal in certain situations has been increased from £6,203 to £6,408; and
- A 'week's pay' (relevant for statutory redundancy calculations among other calculations) has increased from £508 to £525.

Perhaps the most important change for employers is the increase in a week's pay for redundancy and other similar calculations. Those making employees redundant after 6 April 2019 should take the increase into account when calculating the necessary statutory redundancy payments.

If you have any queries about statutory redundancy payments or the increases in compensation, please do not hesitate to contact a member of our team.

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RESTRICTIVE COVENANTS UNDER SCRUTINY IN LANDMARK CASE

In the case of Tillman v Egon Zehnder Ltd, the Supreme Court is considering whether professional services firm Egon Zehnder unreasonably restrained trade by means of a covenant preventing its former employee, Mary Tillman, from taking a job with a competitor for six months.

The claimant had worked for Zehnder for 13 years, most recently as co-global head of the financial services practices group. She handed in her notice in January 2017 and was placed on gardening leave.

Her employment contract contained a 'non-competition clause' (aka restrictive covenant), which meant she could not be 'engaged, concerned or interested in' any business in competition with Zehnder for 6 months following her termination (i.e, after the gardening leave period). Non-compete clauses are very common in the employment contracts of high-level staff in the professional services sectors. Tillman argued that the clause was unreasonable because it was too wide. It would have prevented her from becoming a shareholder in a competitor, although she had no intention of doing so.

Legal opinion

If the Supreme Court finds in favour of the claimant, any contract with such a covenant could become invalid, meaning that employers can no longer ensure leavers don't go straight to a competitor. Therefore, such contracts would need to be reviewed and potentially re-written.

This would cause problems because employers can't impose changes to employment contracts unilaterally. They must either have authority in the contract to make the amendment, or the employee's agreement, or, in extreme cases, they must dismiss the employee and offer them re-engagement with an amended non-compete clause in their new (otherwise unchanged) contract.

This leaves employers vulnerable to unfair dismissal claims. It could also give employees the opportunity to negotiate more favourable terms with regard to pay, holiday and bonuses, in exchange for allowing the clause to be altered.

We look forward to the decision of the Supreme Court and will keep you posted.

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TOP ATHLETE FAILS TO WIN EMPLOYMENT STATUS

Former Team-GB cyclist Jess Varnish brought an Employment Tribunal claim against British Cycling and UK Sport, with the aim of establishing that she was an employee of the organisation(s).

This claim was part of a wider campaign against the industry and Jess Varnish is pleased with the changes that have been made as a result of her speaking up.

UK Sport supports a number of athletes by providing £25,000 grants to cover their training and competing costs. They do not, however, pay for holiday, sickness or pensions.Varnish argued that the level of control the organisation had over her was akin to that of an employer-employee relationship.

Employee status would have given her statutory rights, such as the right not to be unfairly dismissed, as well as sickness and holiday pay and pension payments. The 7 day employment tribunal hearing involved two barristers and eight other lawyers. It is thought to have cost close to £1million in legal fees.

The judgment confirmed that Varnish was neither an employee nor a worker of either British Cycling or UK Sport. It appears that the Judge was more swayed by the counter argument that the athlete awards are like student grants and the athlete/governing body relationship is educational rather than amounting to that of an employer-employee.

Legal opinion

This claim had the potential to disrupt the athlete world completely. If Varnish had won her case, the result would have paved the way for similar claims from other athletes and we would more than likely have seen the floodgates open in a similar manner to other gig economy cases.

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GUEST ARTICLE: HOW TO PROTECT YOUR BUSINESS AFTER BREXIT

With so much uncertainty about Brexit, many employers are anxious about the status of their EU employees and employment in the future.
The UK is set to leave the EU on 29 March 2019. Even if there is no deal, the Government has made promises that EU nationals living in the UK by 29 March 2019 will be able to stay.

What is the current system?

At present EU nationals don't need to make any application to the Home Office to be able to stay in the UK. However, it is much easier for them to work, study, rent property and access NHS services.

EU nationals can make an application for a Residence Card or Permanent Residence Card. Residence Cards can be applied for by EU nationals and their family members as soon as they arrive in the UK, as long as they are exercising the free movement rights, e.g. looking for work, working, self-employed, studying or self-reliant. The last two categories require that they have private medical insurance. Permanent Residence Cards can be applied for after the EU national, or their family members, have exercised their free movement rights for 5 years. This category confirms that they can stay in the UK permanently. All EU nationals and their family members must get a Permanent Residence Card before they can apply to become British Citizens. Permanent Residence applications can be made until 31 December 2020. Both applications require a £65 Home Office fee to be paid.

What will the new scheme be?

On 30 March 2019, the EU Settlement Scheme will open nationwide. The Scheme will apply to all EU nationals and their family members, except Irish Citizens. Applications will have to be made by 30 June 2020.

There will be 2 categories:

1. settled status
2. pre-settled status

Settled status is similar to the current Permanent Residence. This will be granted if individuals started living in the UK by 31 December 2020, for 5 years in a row. If settled status is granted, the individual will not have to make any more applications to the Home Office. Pre-settled status is similar to the current Residence Card. It will be granted to individuals who haven't lived here for 5 years continuously when they apply. They can make an application to change to settled status once they have lived here for 5 years continuously.

The new system doesn't require applicants to show they have been exercising free movement rights. The Government has clarified "residing" only means being physically present and living in the UK. Any EU national who arrives and intends to live in the UK by 20 March 2019 (no deal situation), or by 31 December 2020 (if Withdrawal Agreement goes ahead), will meet this requirement. Applicants won't be able to choose to apply for a settled or pre-settled status. There will be a Home Office fee of £65 per person aged 16 and over, and £32.50 for children under 16. Applicants in the following categories won't have to pay a fee:

- People who have indefinite leave to remain and want to change settled status.
- Those with a Permanent Residence Certificate.
- When applying to move from pre-settled to settled status.
- Children in Local Authority care.

5 Key things you can do to support your EU workers now

Navigating around the minefield of Brexit is a significant challenge for most employers. We have recommended 5 steps you can take to protect your EU employees and continuity of your business:

1. Do a full audit: Examine all employees to see who made be affected by Brexit. Don't forget the EU family members who may not have EU nationalities. Make sure you update your right to work checks.

2. Work with your employees: Explain to your employees they must apply for confirmation of their status. Many of your staff may be unsure when to apply and which scheme is better for them. You mustn't give them any immigration advice (unless you are regulated to do so) as this is a criminal offence. You can signpost them to the UKVI website, or for more bespoke advice contact our expert Immigration Team to arrange a "no cost-no obligation surgery" at your premises.

3. Contribute to the fee: You may want to contribute or pay all or some of the Home Office application fee. This is an approach taken by many employers such as Carluccios, various NHS Trusts, Heathrow Airport and universities such as Oxford and Edinburgh. If you choose this option you must make sure it's offered to all eligible employees to avoid discrimination.

4. Apply for a sponsor licence: You could consider applying for a sponsor licence, so that you can continue to employ non-EU nationals to fill potential skills gap.

5. Keep yourself updated: With changes being announced on an almost daily basis you should be aware of these. You can do this by prescribing to Home Office announcements. Alternatively, you can subscribe to our Immigration Team's simple bright side plain English updates on Twitter, LinkedIn and Facebook.

6. Don't panic! Although there is a lot of ambiguity about the process and no one really knows about the impact Brexit has, it is important that employers don't make any rash decisions that could have a negative impact on their business. This means it's crucial that you take steps to retain your EU employees and their family members, as well as ensure that your HR systems are up-to-date to protect your business in the future.

It isn't clear what will happen to employers who continue to employ workers who haven't applied for confirmation of their status by the deadline. Most likely, they will be considered to be in the UK unlawfully and under current laws, employers could face heavy fines (up to £20,000 per employee) and face criminal conviction for continuing to employ them.

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