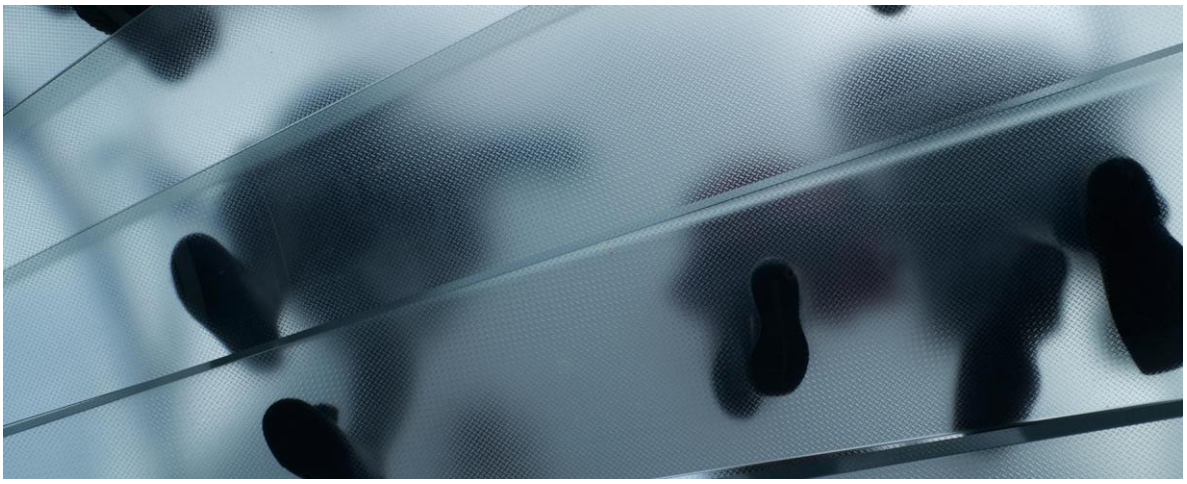

March 2019

Employment Update

Key employment and business immigration developments for employers

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In the News

Gender pay gap reporting – round two

According to news reports, four in ten employers that have published their gender pay gap figures this year have reported a wider gap than last year. However, so far, fewer than 20 percent of employers have published their figures ahead of the 4 April 2019 deadline.

"...fewer than 20 percent of employers have published their figures..."

Employers with 250 or more employees are required to report annually on the gender pay gap in their workforce. The information required includes a snapshot of the average difference in male and female pay as at 5 April each year, as well as the average difference in bonuses between men and women over the year ending 5 April. In-scope employers have until 4 April the following year to report, so reports for 2018 have to be published by 4 April 2019.

The challenge for employers publishing their second and subsequent reports will be explaining any widening of the pay gap, or any failure to make progress in closing it. Many employers are therefore focusing closely on the narrative that accompanies the figures and highlighting the measures they are taking to reduce the pay gap. Many employers are also working on their action plans to close the pay gap in their organisation. The Government Equalities Office has published two new sets of guidance to assist with this – Eight ways to understand your organisation's gender pay gap helps employers identify possible causes of the pay gap and Four steps to developing a gender pay gap action plan focuses on how to address the gap.

Immigration Radar

Brexit: no deal

The Government has announced the rules that will apply to EEA and Swiss nationals coming to the UK after Brexit if the UK leaves with no deal.

In a deal scenario, there would be a transition period until 31 December 2020 during which freedom of movement would continue, and EEA and Swiss nationals would be able to come to the UK for work visa-free, as is currently the case. In a 'no-deal' scenario, the Government has confirmed that freedom of movement would end on Brexit date. However, there would still be a transition period until 31 December 2020 during which EEA and Swiss nationals (and their family members) will be able to come to the UK for up to three months at a time for any purpose (including working) without a visa. For stays longer than three months, EEA and Swiss nationals will be able to apply for European Temporary Leave to Remain, which would allow them to stay and work in the UK for up to three years. However, this would not be extendable nor would it lead to indefinite leave or settled status. To stay longer than three years, EEA and Swiss nationals would need to apply for a visa under the new immigration regime which will apply from 1 January 2021 (please see January 2019 **Employment Update** for details).

Non-EU family members of EEA and Swiss nationals who wish to accompany or join an EU citizen under these arrangements would need to obtain a family permit in advance of travel to the UK. Family permits will be available only to close family members – spouses, partners and dependent children up to 18 years (which is a narrower group than under the current EU regulations).

"In a 'no-deal' scenario, the Government has confirmed that freedom of movement would end on Brexit date."

None of this affects the rights of EEA and Swiss nationals already living in the UK as at the date of Brexit, who will be able to stay indefinitely in the UK in a deal or no-deal scenario but who will have to register under the EU Settlement Scheme (please see January 2019 **Employment Update** for details).

Brexit: travel for UK employees

If the UK leaves the EU with no deal, the rules for travel to most countries in Europe will change. UK nationals will generally be required to have at least six months remaining on their passport from the date of arrival. Many employers are encouraging employees who travel regularly for business to ensure their passports are up-to-date. The UK Government used to have a practice of adding additional months to passports on renewal over and above the standard 10-year renewal. Any extra months added to the passport over 10 years may not count towards the six-month requirement, and staff who may be required to travel post-Brexit should check this.

Changes to UK Immigration Rules

The Government has announced changes to the UK Immigration Rules, which will take effect over the coming weeks. The key changes are:

- it will become possible to submit an application under the EU Settlement Scheme from outside the UK as an entry clearance application
- the current Tier 1 (Graduate Entrepreneur) visa will be replaced by a new Start-up visa route, which will be open to those starting a business for the first time in the UK
- the Tier 1 (Entrepreneur) route will be replaced by a new Innovator visa route and will require applicants to be endorsed by designated business bodies as part of the application process
- the Tier 1 (Investor) visa category will include a new requirement for applicants to evidence the source of their funds unless they can show they have held the funds for at least 2 years
- the job-specific minimum salary levels required for Tier 2 visas under the sponsor codes of practice for skilled work will change.

The above changes will take effect on various dates from 30 March 2019 onwards. In addition to the changes to the Immigration Rules, some of the immigration filing fees will be increasing for certain applications submitted on or after 29 March 2019.

Case Watch

Agency workers – have you got it right?

This case involved London Underground, which engaged a number of agency workers through an agency. Under the Agency Worker Regulations, agency workers are entitled to the same pay rates as comparable employees after twelve weeks in a given role. However, the agency in this case assured London Underground that the regulations did not apply and paid the agency workers less than employees of London Underground doing the same job. When the parties discovered that the Agency Worker Regulations did apply, the agency had to correct the pay rates. However, there was a delay in doing so due to London Underground being slow to provide information on its pay rates for employees. The agency eventually corrected the workers' pay going forward. London Underground also paid an amount over to the agency to cover back-pay but the agency went into liquidation before the money was paid on to the workers. The agency workers brought claims against London Underground for the back-pay.

An Employment Tribunal initially ruled that London Underground did not have to pay the back-pay twice. However, on appeal, the Court of Appeal said it did. In the Court's view, although this was regrettable, it would not be just for the agency workers to miss out on their back-pay. However, London Underground only had to pay 50 percent of the back-pay because it and the agency were equally liable for the breach. The agency had been at fault for initially asserting that the Agency Worker Regulations did not apply but the delay in correcting the error had largely been down to London Underground.

This case is a reminder for any business that engages agency workers of the importance of complying with the Agency Worker Regulations. This means engaging with the agency effectively at an early stage. Businesses that use agency workers ("hirers") should not simply rely on an assertion by the agency either that the regulations do not apply or that the agency is complying with them; the hirer should do its own due diligence. Hirers should also ensure that they give the agency adequate information about the pay rates and other terms of employment for direct employees, and that they do so in a timely fashion. A hirer that fails to do so may be liable to compensate agency workers for any shortfall in pay.

Where an employer is required to pay back-pay to agency workers (or any workers), this case also highlights the need to put in place mechanisms to ensure workers actually get their pay. It was unfortunate that London Underground had to pay twice because the money it originally paid to the agency had not been handed over to the workers. In such circumstances, employers may also wish to consider having workers sign settlement agreements or COT3s as a pre-condition to passing over any payments.

LONDON UNDERGROUND LTD V AMISSAH

Whistleblowing – is it in the public interest?

To be protected as a whistleblower, a worker must make a "protected disclosure" – i.e. a disclosure of information which, in the worker's reasonable belief, tends to show a breach of a legal obligation and is in the public interest.

The worker in this case was an interpreter at a private hospital. He asked a member of senior management to investigate false rumours among patients and their families that he was responsible for breaching patient confidentiality. He followed up with an email saying that he needed to clear his name. The issue was referred to the hospital's HR team and the worker met with the Chief Human Resources Officer. He reiterated that he believed there were false rumours circulating about him and that he wanted to clear his name. When the worker was later dismissed, he claimed that he had been dismissed for blowing the whistle, relying on the two complaints about false rumours.

The Employment Tribunal ruled that he was not a whistleblower because his complaints did not tend to show a breach of a legal obligation and were not made in the public interest. On appeal, the Employment Appeal

Tribunal took a slightly different view. It ruled that the complaints did tend to show a breach of a legal obligation. The worker had complained about rumours of him breaching patient confidentiality, which he said were damaging and false. Although he did not use the term "defamation", this was essentially what he was complaining about. However, the EAT agreed that the disclosures were not in the public interest, as the worker was only concerned about the effect of the rumours on him and with clearing his own name. The worker was therefore not protected as a whistleblower.

On one hand, this case shows how wide the protection for whistleblowers potentially goes. A worker does not necessarily need to articulate the piece of law being breached to be protected. Nor does it matter if the worker is ultimately wrong, and there is in fact no breach, so long as the worker reasonably believed there was one.

"...this case shows how wide the protection for whistleblowers potentially goes ..."

However, the case also highlights that a worker must reasonably believe that what they are disclosing is in the public interest. If the worker is seeking to protect their own personal interests only, they are unlikely to be a whistleblower. A word of caution, though – the worker does not need to be motivated by the public interest. A worker would be protected as a whistleblower if their primary aim is to protect their own interests but they believe what they are disclosing is also in the public interest. This might be the case, for example, if the worker is alleging sexual harassment or that employees are being underpaid or overworked. It is, therefore, safer to assume that a worker making a disclosure of this nature is a whistleblower and is protected from any detriment or dismissal for having blown the whistle.

IBRAHIM V HCA INTERNATIONAL LTD

New Law

National minimum wage

On 1 April 2019, the rates of the national minimum wage and the national living wage will increase. The new rates are as follows:

- £8.21 per hour for workers aged 25 and over (rising from the current national living wage of £7.83 per hour)
- £7.70 per hour for workers aged 21 to 24 (rising from £7.38 per hour)
- £6.15 per hour for workers aged 18 to 20 (rising from £5.90 per hour)
- £4.35 per hour for workers aged 16 to 17 (rising from £4.20 per hour)

The apprenticeship rate for apprentices under 19 or in the first year of their apprenticeship will also increase from £3.70 to £3.90 per hour.

Unfair dismissal compensation

For dismissals taking effect on or after 6 April 2019, the maximum compensatory award for unfair dismissal will increase to the lower of £86,444 and a year's pay. (The maximum award is currently the lower of £83,682 and a year's pay.)

Statutory redundancy pay

For dismissals taking effect on or after 6 April 2019, the limit on a week's pay used for calculating the unfair dismissal basic award and statutory redundancy pay will increase from £508 to £525 per week.

Employment Tribunal penalties

Employment Tribunals may award penalties against employers for aggravated breaches of employment law, up to a maximum of £5,000. This limit will increase to £20,000 from 6 April 2019, as part of the Government's Good Work Plan which takes forward the recommendations of the Taylor Review.

Payslips

From 6 April 2019, employers will be required to provide itemised payslips to all workers (not just employees). Where workers are paid by the hour, the payslip will also be required to specify the number of hours paid. This is also part of the Government's Good Work Plan.

Statutory sick pay

On 6 April 2019, the rate of statutory sick pay will increase from £92.05 to £94.25 per week.

Maternity pay rates

On 7 April 2019, the lower rate of statutory maternity pay and the rate of statutory paternity, adoption and shared parental pay will increase from £145.18 per week to £148.68 (or 90% of the employee's average weekly earnings if lower).

Consultations

Pregnant workers and new parents

The Government is consulting on proposals that would give greater protection from redundancy to pregnant women and new parents. Currently women who are at risk of redundancy while on maternity leave have a right to be offered any suitable alternative vacancies which exist in the employer's business ahead of any other employees who are at risk. The Government is proposing to extend this protection to cover not only redundancies during maternity leave, but also during the six months after the mother returns to work. This would give new mothers who have recently returned the same protection as those on maternity leave. The Government also proposes that the redundancy protection should begin as soon as the mother notifies her employer in writing of her pregnancy, rather than when her maternity leave starts.

"This would give new mothers who have recently returned the same protection as those on maternity leave."

In terms of widening the protection further, the Government is also seeking views on whether to extend this protection to employees on other forms of leave, including adoption leave, shared parental leave and longer periods of unpaid parental leave.

The consultation paper can be found here and employers have until 5 April 2019 to respond. We are preparing a response to the consultation – do please speak to your usual Employment department contact if you have any feedback.

Confidentiality clauses

The Government is consulting on what limitations might be put on confidentiality clauses in settlement agreements and employment contracts. This follows recommendations made in the wake of the #MeToo movement that tighter controls should be placed on confidentiality clauses and non-disclosure agreements in discrimination and harassment cases.

The Government is considering the following measures:

- introducing a ban on any provision in a settlement agreement or employment contract that prevents someone from making any kind of disclosure to the police
- requiring settlement agreements and employment contracts to state expressly that any confidentiality provisions do not prevent the worker from making certain disclosures (e.g. whistleblowing disclosures and reporting matters to the police)
- making confidentiality clauses in settlement agreements void if they fail to specify which disclosures the worker can still make
- requiring employees who enter into a settlement agreement to receive independent advice, not just on the terms and effect of the agreement, but also the nature and limitations of any confidentiality clause
- requiring any terms and conditions about confidentiality to be summarised in the written statement of employment particulars that employees must give all employees at the start of employment.

"The Government is consulting on what limitations might be put on confidentiality clauses ..."

The consultation, Confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination closes on 29 April 2019.

Changes to taxing contractors

As reported in the November 2018 **Employment Update**, the Government has announced that the public sector off-payroll working rules will be extended to the private sector in April 2020. The Government has now launched a consultation seeking views about how the rules will apply in the private sector.

Under the proposals, where a business engages contractors or consultants through a personal services company, the business, as the end client, will be required to decide whether the "IR35 legislation" applies. This broadly involves asking whether, without the personal services company, the individual would be regarded as an employee of the client. If so, the client or the body responsible for paying the contractor's company must deduct income tax and NICs from payments to the contractor's company as if the contractor were an employee. Where the client engages an agency, the agency will be responsible for paying the contractor's company and therefore deducting income tax and NICs. However, the client will remain responsible for making the determination about the contractor's IR35 status. The consultation paper proposes that the client would have to give its determination to the agency and the individual contractor, and establish a process for considering challenges from the contractor.

Small businesses will be exempt from the rules. Under the proposals, a business will qualify as small if it meets two or more of the following criteria: (i) annual turnover of not more than £10.2 million; (ii) a balance sheet total of not more than £5.1 million and (iii) no more than 50 employees.

The consultation, Off-payroll working rules from April 2020, closes on 28 May 2019.

Our Work

Since our last **Employment Update**, our work has included:

- presenting whistleblowing training for a client in the financial services sector, including sessions for staff, line managers and executive management
- presenting update sessions and advice surgeries for EU nationals in our clients' workforces, and training for our clients' HR and recruitment teams, on the immigration implications of Brexit
- advising on complicated grievance-based disputes leading to litigation
- advising a client on the departure of a board-level executive, including the approach to settlement terms and negotiating terms of exit
- advising on responding to a subject access request under the GDPR made against a client, including the scope of the request and the extent of search obligations
- undertaking an investigation for a client in relation to allegations of harassment on the grounds of sex
- successfully defending a Tribunal claim from a man claiming sex discrimination following a pay freeze on gender pay parity grounds
- reviewing an executive incentive scheme in seven jurisdictions across Europe and Asia.

If you have any queries on this edition of Employment Update, please contact any member of the Employment Department

Siân Keall
Partner

Tim Gilbert
Partner

Ed Mills
Partner

Adam Wyman
Partner

Ailie Murray
Senior Counsel

Alex Fisher
Senior Counsel

Anna West
Professional Support Lawyer

Adam Rice
Professional Support Lawyer

Moji Oyediran
Senior Associate

Charmaine Pollock
Senior Associate

Zoë Dearmer
Associate

Sarah Baker
Associate

Katy Matthews
Associate

Elliot Roberts
Associate

Clare Skinner
Associate

Tessa Gilligan
Associate

If you have a colleague or a contact in another organisation who would like to receive **Employment Update**, please send contact details to employment@traverssmith.com

10 Snow Hill
London EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500
www.traverssmith.com