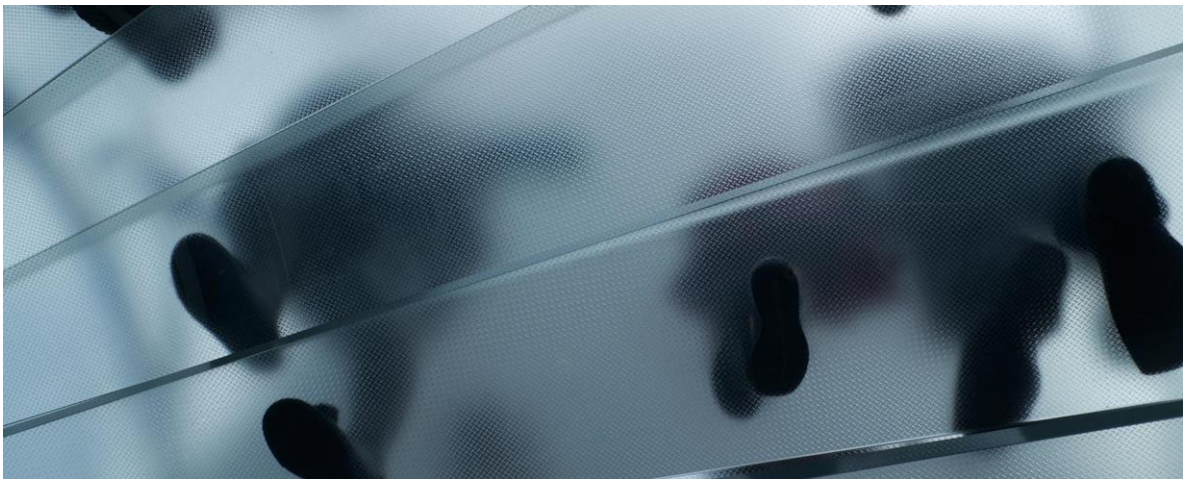

November 2017

# Employment Update

*Key employment and business immigration developments for employers*

## In the News

### Workplace mental health

Nearly a third of all fit notes are for mental health issues, according to a recent NHS report. Deloitte also estimates that poor mental health costs employers between £33 and £42 billion a year through absenteeism, turnover and low productivity. Earlier this year, the Government commissioned Lord Dennis Stevenson, former HBOS Chair, and Paul Farmer, Chief Executive of Mind, to carry out an independent review into what more employers can be doing to support mental wellbeing in the workplace. Their report, *Thriving At Work*, was published on 26 October 2017 and makes a number of recommendations, including:

- employers should be encouraged by legislation to report publicly on their initiatives to support employees' mental health
- all employers should adopt certain mental health core standards, as set out in the box
- public sector employers, and private sector employers with over 500 employees, should take additional steps, including:
  - increasing transparency and accountability through internal and external reporting
  - demonstrating accountability by nominating a mental health lead at board or senior leadership level
  - improving the disclosure process for employees with mental health issues to encourage openness during recruitment and throughout employment

**MENTAL HEALTH CORE STANDARDS**

All employers should:

1. produce, implement and communicate a mental health at work plan
2. develop mental health awareness among employees
3. encourage open conversations about mental health and the support available
4. provide employees with good working conditions and ensure a health work life balance
5. promote effective people management
6. routinely monitor employee mental health and wellbeing.

- ensuring the provision of tailored in-house mental health support and signposting to clinical help.

It is now for the Government to consider these recommendations and whether to require employers to report on their mental health initiatives. Nevertheless, employers should consider implementing the core standards now as best practice.

**Employment status in the spotlight**

Employment status remains firmly in the spotlight, with recent rulings in relation to Uber drivers and Deliveroo riders making headlines.

Uber has lost its appeal against the Employment Tribunal ruling that its drivers are workers. Last year, two Uber drivers brought, and won, a test case in the Employment Tribunal, claiming that they were workers and therefore entitled to holiday pay and national minimum wage. Uber appealed and the Employment Appeal Tribunal (EAT) has upheld the Tribunal's decision. The EAT agreed with the Tribunal that the complex contractual documentation describing the drivers as self-employed did not reflect reality so the Tribunal was entitled to look beyond it at what actually happened in practice. The level of control exercised by Uber meant that drivers were workers, and not self-employed. Uber has said it plans to appeal this decision, so this may not be the end of the story.

In contrast, the Central Arbitration Committee (CAC) has decided that a group of Deliveroo riders are properly classified as self-employed and are not entitled to worker rights. The ruling comes after the Independent Workers Union of Great Britain (IWGB) applied to the CAC for statutory trade union recognition on behalf of a group of Deliveroo riders in Camden, North London. Trade union recognition only applies in respect of employees or workers (not self-employed people). The CAC therefore had to decide whether the riders were workers. Since the riders were allowed under their contracts to use a substitute to do their deliveries, and some of them had actually done so, the CAC concluded that the riders did not work for Deliveroo "personally". This meant that they could not be workers, so the application failed.

The CAC ruling is unlikely to be the final word on the issue. A number of Deliveroo riders have brought separate Employment Tribunal proceedings claiming they are workers and therefore entitled to the national minimum wage and holiday pay. The CAC decision is not directly binding, so it will be interesting to see how far the Tribunal considers it relevant.

While these rulings focus on the gig economy, the impact is much wider. The increased scrutiny of employment status means that any business which operates atypical working arrangements (for example, casual or zero-hours workers, freelancers or consultants) could benefit from looking at these more closely to ensure workers are appropriately classified and the contractual documentation reflects what happens in practice.

*"...any business which operates atypical working arrangements ... could benefit from looking at these more closely..."*

We have been assisting a number of clients on employment status matters including:

- carrying out an audit of their employment arrangements and contracts to ensure they are appropriate and accurate
- advising (with our tax colleagues) on the correct tax treatment of different worker categories
- defending claims brought by individuals in relation to worker status.

We have also been working with IPSE (the Association of Independent Professionals and the Self-Employed) in relation to various employment status issues including tax and IR35.

### Criminal records checks

How should employers handle criminal records checks on recruitment? The issue has been the subject of some debate, with a recent Justice Committee report calling on public sector employers to "Ban the Box" by delaying the point at which job applicants are asked about criminal records.

In general, employers are entitled to ask candidates about their criminal records but there are some limitations. Employers should only ask about prior convictions where these could be relevant for the role – eg if the individual will be handling money, dealing with clients or in a position of trust. Asking for details that are unnecessary or irrelevant would likely breach data protection legislation.

*"Asking for details that are unnecessary or irrelevant would likely breach data protection legislation."*

For most roles, employers should only ask for details of "live" or "unspent" convictions (most convictions become spent after a certain "rehabilitation" period and the individual is then considered to have a clean record). Employers may only ask about spent convictions for certain roles, such as regulated positions in the financial sector or roles involving working with children or vulnerable adults.

The "Ban the Box" campaign encourages employers to avoid asking about criminal records on application forms and to delay questions until later in the recruitment process. This is consistent with guidance from the Information Commissioner's Office (ICO), which recommends checks are only done once an offer is made (the offer being conditional on satisfactory records checks). To manage expectations, advertisements or application forms should also make it clear that background checks will be conducted.

For some employers, a criminal record will be a bar to employment – others see hiring ex-offenders as an important part of their CSR commitment. The Disclosure and Barring Service (DBS) recommends that employers consider the nature of any conviction and its relevance to the post before rejecting a candidate. However, candidates rejected because of their criminal record have very little redress. Whatever the stance, employers should consider having a consistent policy on conducting criminal records checks and the approach to hiring ex-offenders.

## Immigration Radar

### Brexit and EU nationals

Under current rules, EU nationals who have lived and worked in the UK for at least five years have a right to permanent residence and can apply for a permanent residence card as proof. Some eligible EU nationals have held off making such applications, on the basis that they will have to reapply for a new "settled status" document on Brexit. The Government has now confirmed that there will be a simple, low-cost procedure for existing permanent residence cards to be exchanged for settled status documents on Brexit; applicants will not have to resubmit evidence of having lived in the UK for five years. In the light of the Government's announcement, eligible EU nationals who have not yet applied for a permanent residence card may now wish to do so. We are working with a number of employers to provide information and support to their EU staff members making such applications.

The Government has not yet set out its proposals for EU nationals coming to the UK post-Brexit. Immigration Minister Brandon Lewis had suggested a white paper on the Government's post-Brexit immigration policy would be published in the "late autumn" this year but this may be delayed due to Brexit negotiations. **Employment Update** will report developments

### Right to work checks

Employers have a duty to check that all employees have a right to work legally in the UK before they start work. Employers must check certain prescribed original documents in the presence of the employee and keep a copy

on file, along with a record of the date the check was conducted. The Home Office has issued revised guidance on conducting right to work checks, which states that simply writing the date on the copy document is not sufficient – this should be accompanied by a statement confirming that this is the date the on which the check was actually conducted. Employers should consider revising their right to work procedures to reflect the change.

## Case Watch

**Whistleblowing – when is it in the public interest?**

The employee in this case was a senior manager at an estate agent. He was entitled to commission which was based in part on the company's profits. He complained on a number of occasions that the company had manipulated its accounts to reduce profits, which meant that the senior managers, of which there were around 100 including the employee, received lower commission. The employee was dismissed and claimed that he had been unfairly dismissed for blowing the whistle about the accounts. The employer argued that the employee was not a whistleblower because he had not raised a concern that was in the public interest. The employee succeeded in the Tribunal and the EAT, and the employer appealed to the Court of Appeal.

The Court of Appeal decided that the employee's disclosure was in the public interest. In deciding what is in the public interest, the Court emphasised there is no one single test, and the answer will always depend on the precise facts, but factors which may be relevant include:

- the number of individuals affected by the disclosure
- the nature of the interests affected (the more important the interests the more likely it is to be in the public interest)
- the nature of the wrongdoing (for example, deliberate wrongdoing is more likely to be in the public interest than an accidental error)
- the identity of the employer (the larger or more prominent the more likely it is that a disclosure about its activities will be in the public interest).

In this case the disclosure related to alleged deliberate wrongdoing, in the form of financial misstatements, at a substantial and prominent business in the London property market, affecting 100 employees, which was enough for the disclosure to be in the public interest.

***When the "public interest" test was introduced in 2013, there was much debate over what this would mean in practice. This case provides some helpful guidance. The public interest test was designed to prevent employees claiming whistleblowing protection by raising private workplace issues (such as a breach of the employee's own contract of employment). The Court in this case confirmed that it is irrelevant that an employee is motivated by self-interest (as in this case, where the employee was concerned about commission payments). As long as an employee reasonably believes the disclosure is in the public interest, he or she will be protected as a whistleblower.***

***It is usually safest for employers to assume that any employee raising an allegation of wrongdoing or breach of any legal obligation is a whistleblower. The key question in most whistleblowing cases is "causation" – whether the disclosure was the reason for the employee's dismissal. It is therefore critical for employers to ensure they have clear reasons for dismissal backed up by a paper trail, in order to defend any claims.***

CHESTERON GLOBAL LTD V NURMOHAMED

**Risk assessments – how should they be carried out?**

The employee in this case was a nurse in a Spanish hospital. She expressed concerns to her employer about her working conditions, which she believed posed a risk because she was breastfeeding. She asked for adjustments to be made but the hospital rejected her request, taking the view that her role did not pose any risk to her ability to breastfeed. The employee's job had been identified as not posing a risk to breastfeeding mothers in a list drawn up by the hospital in consultation with workers' representatives. The employee brought a claim in the Spanish court, which was referred to the European Court of Justice (ECJ).

The ECJ concluded that a failure to carry-out a specific risk assessment for a breastfeeding worker amounts to direct sex discrimination. The Court emphasised the need for the employer to examine the specific circumstances of the individual employee's working conditions. It was not enough to make a general decision that certain roles do not pose a risk, as the employer had done in this case.

***This case is a reminder of the importance of carrying out risk assessments for employees who are pregnant or breastfeeding. A specific risk assessment must be carried out in relation to each individual employee that informs the employer she is breastfeeding, even if risk assessments have been done for similar roles in the past. The risk assessment should involve individual consultation with the employee, and should also be carefully documented.***

RAMOS V SERVICIO GALEGO DE SAÚDE

*"A specific risk assessment must be carried out in relation to each individual employee that informs the employer she is breastfeeding..."*

## New Law

**Failure to prevent facilitation of tax evasion**

On 30 September 2017, two new corporate criminal offences came into force under the Criminal Finances Act 2017. One of the offences relates to the failure to prevent the facilitation of UK tax evasion, while the other relates to the failure to prevent the facilitation of foreign tax evasion. A company (or an LLP or partnership) will commit an offence where it has failed to prevent the criminal facilitation of tax evasion by a "person associated" with the company – ie someone who provides services for, or on behalf of, the company (eg an employee, contractor or supplier). The aim is to encourage companies to put in place, and communicate, good corporate governance on preventing tax evasion – it is a defence if the company has "reasonable prevention procedures" in place.

The offences therefore require UK and foreign companies, irrespective of size or sector, to review their business and supply chains for potential tax evasion risk. Employers who have not already done so should consider updating compliance policies, procedures and contracts to ensure they have adequate procedures in place.

**Taxation of termination payments**

The Government has published draft legislation which will change the way termination payments are taxed from 6 April 2018.

Currently, the tax treatment of a notice payment depends on whether there is a payment in lieu of notice (PILON) clause in the employee's contract. Where there is a PILON clause, the payment is subject to income tax and national insurance contributions (NICs). In contrast, where there is no PILON clause, the first £30,000 is usually free of income tax and the entire amount is free of NICs. From 6 April 2018, all notice payments will be subject to income tax and NICs on the entire amount, regardless of whether there is a PILON clause in the contract.

For other termination payments beyond notice pay, the first £30,000 will continue to be free of income tax and NICs. Currently, amounts above £30,000 are subject to income tax only and are free of NICs. The Government plans to introduce employer NICs on amounts above £30,000 but has announced that this measure will be postponed until April 2019.

**Employment Tribunal fee refunds**

The Government has launched a refund scheme for Employment Tribunal fees, following the Supreme Court ruling that the fees regime was unlawful. All those who have paid Employment Tribunal fees can now apply for a refund. Successful applicants will receive a refund of the fee paid along with 0.5 per cent interest on the fee (calculated from the date of payment up until the refund date). Employers who were ordered to pay the employee's fees can also apply for a refund by post or email using the relevant form (Form 2-R). Full details of how to apply for a refund can be found here: https://www.gov.uk/employment-tribunals/refund-tribunal-fees.

There has been no announcement about how Employment Tribunals will deal with employees who had their claims rejected or dismissed for non-payment of a fee but it is understood that HM Courts and Tribunals Service is writing to such employees to ask them if they wish to have their claims reinstated. **Employment Update** will report developments.

## Watch this space

**Parental bereavement leave**

The Government proposes to introduce a new right to paid leave for parents who lose a child below the age of 18 (including a still birth after 24 weeks). Draft legislation has been published which would introduce two weeks' paid "parental bereavement leave". The leave would be available to parents from day one of employment but parents would need 26 weeks' service to benefit from statutory pay, which would be paid at the lower of a prescribed statutory rate (currently £140.98) or 90% of the employee's earnings. Employers would be able to claim back some or all of the statutory parental bereavement pay from the Government in the same way as statutory maternity, paternity, adoption and shared parental pay. The legislation is expected to come into force in 2020.

*"The Government proposes to introduce a new right to paid leave for parents who lose a child below the age of 18..."*

**Ethnic diversity on listed company boards**

On 12 October 2017, the Parker Review Committee (led by Sir John Parker) published its final report into the ethnic diversity of UK boards. The report makes a number of recommendations, including that listed companies should:

- increase the ethnic diversity of their boards by having at least one director of colour on each FTSE 100 board by 2021 and on each FTSE 250 board by 2024
- require their HR teams and recruiters to identify and present appropriate candidates when board vacancies arise
- plan for succession, by developing mechanisms to identify, develop and promote people of colour
- enhance transparency and disclosure, with a description of the board's policy on diversity and efforts to increase ethnic diversity at board level in the annual report.

Initially, listed companies are encouraged to adopt the recommendations on a voluntary basis but if there is insufficient progress then some of the recommendations may become mandatory.

## Our Work

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

- advising on employment status issues for a tech start up
- advising a client on appropriate TUPE protections as the incoming service provider on a second generation outsourcing
- conducting a mediation to settle a multiple (15) claimant Employment Tribunal claim
- advising on ideas and initiatives around handling all forms of sickness absence in the workplace (long-term, short-term and intermittent)
- advising a new UK hedge fund spun out of a multinational organisation on the TUPE issues associated with the transfer, along with the limited liability partnership documentation, employment contracts and immigration sponsor licence issues going forward
- defending a multinational organisation against claims for unfair dismissal and race discrimination from a senior manager.

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

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