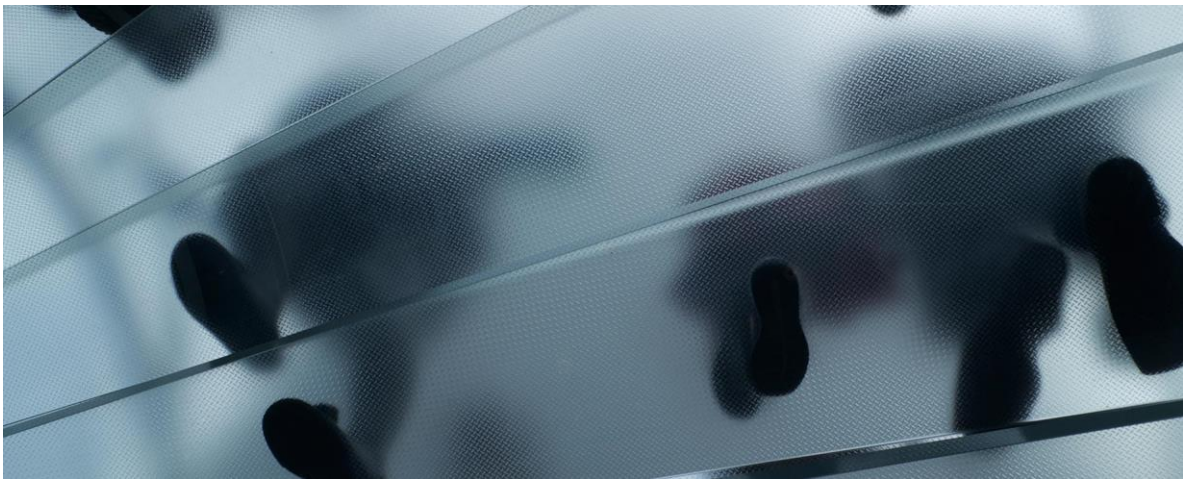

July 2016

Online Update – Essential Information for Employers

In the News

Gender pay gap – time to level the score?

The Mayor of London, Sadiq Khan, has published gender pay gap data for the Greater London Authority, revealing a gender pay gap of 4.6 per cent. This comes ahead of new rules due in force on 1 October 2016, which will require employers with 250 employees or more to publish figures on the gap between male and female pay within their organisation. The figures must be made available on the employer's website, and the Government also plans to publish sector-specific tables of employers' pay gaps for comparison.

In scope employers should begin preparing for the new reporting requirement now.

Although the first reports are not due until April 2018, the pay gap figures will need to be based on data from April 2017 and, in respect of bonuses, the year form 1 May 2016 to 30 April 2017. Employers therefore only have until April 2017 to correct any pay discrepancies which exist before the figures must be made public. For more details on the reporting requirements, see the March 2016 **Online Update.**

"...employers should begin preparing for the new reporting requirement now."

Employers preparing for the new reporting requirement may also wish to involve internal or external lawyers so that any preliminary analysis is privileged. We are already working with a number of our clients on steps such as:

- analysing whether current payroll systems can produce the relevant data or whether new systems and processes are required
- examining where pay gaps exist within the organisation, the reasons for them and how these might be explained in narrative to accompany the figures on the website

- considering whether additional figures should be published to provide a more accurate picture of pay across the workforce, for example, whether the figures should be broken down by grade or seniority, and

- considering what measures can be implemented to reduce any gaps between male and female pay.

If you would like to discuss how the pay gap reporting requirements will affect your business, please speak to your usual Employment Department contact or email employment@traverssmith.com.

Brexit – what now for EU nationals?

Theresa May has come under criticism from fellow Conservative MPs for refusing to guarantee the rights of EU nationals living in the UK. The issue is of great concern to the many EU nationals who currently live and work here. It is also a concern for their employers.

While the Home Office has confirmed that the rights of EU nationals will not be affected in the short-term, the longer-term picture remains unclear. So, what can employers be doing now?

- **EU audit:** Many employers are conducting an audit of the number of EU nationals currently working for the organisation, and the parts of the business in which they are working, to help identify the scale of the issue should the rights of EU citizens be altered in the future. Such an audit will be helpful for future resourcing and budgeting.

- **Providing reassurance:** Some employers are sending all-staff communications offering reassurance, while others are having individual conversations with affected staff. Employers must be careful not to offer any guarantees, when so much remains uncertain, but there is scope for some reassurance that nothing is changing in the short-term and that support would be provided if things did change in the longer-term. Employers may wish to consider what that support might look like.

- **Providing information:** Employers may wish to keep track of Brexit-related news and provide periodic updates to staff. Employers may also wish to encourage EU nationals working for them to consider applying for proof of their residency rights. EU nationals can currently apply to the Home Office for proof of their right to live and work in the UK, including permanent residency rights for those who have lived in the UK for at least 5 years. While such proof is currently unnecessary for most EU nationals, it may provide helpful evidence in future if the immigration rules do change. Those who have obtained proof of their permanent residency rights may also be eligible to apply for British citizenship, which would provide security.

"While the Home Office has confirmed that the rights of EU nationals will not be affected in the short-term, the longer-term picture remains unclear."

The position of EU nationals in the UK may not be clear until negotiations on Britain's exit from the EU have been resolved, which could be some time away. Many employers will therefore want to take steps to calm nervousness in the meantime.

For more details on the wider impact of Brexit on UK employment and immigration law, please **click here** to see our recent email bulletin, or speak to your usual Employment Department contact.

Case Watch

References – too much information?

Case 1: The employee in this case, who suffered from a disability, worked for a city council. She was made redundant and left under a settlement agreement, which included an agreed reference. She was subsequently offered a role with NHS England, subject to satisfactory reference checks. When the employee's former

manager was approached for a reference, she provided the agreed reference but also offered to discuss matters further over the phone. During a phone conversation, the manager told NHS England that the employee had had significant periods of sickness absence due to a long-term condition and that she did not think the employee would be suitable for the new role. The manager claimed that the "unsuitable" comment was because the new role involved much more responsibility. NHS England subsequently withdrew the job offer, and the employee claimed disability discrimination against both the council and NHS England.

The Employment Appeal Tribunal ruled that both the council and NHS England were liable for disability discrimination. With regards to the reference, the Employment Tribunal inferred that the employee's disability-related absence played at least a part in the "unsuitable" comment; and the manager giving the reference failed to prove otherwise. Since the withdrawal of the offer by NHS England was based on the unfavourable reference, this could also be linked back to the employee's absence and therefore the employee's disability. Accordingly, both the unfavourable reference and the withdrawal of the offer amounted to discrimination arising from disability.

Case 2: The employee was a consultant ophthalmic surgeon, who was offered a role at an NHS trust. One of his colleagues was approached for a reference. The colleague said that the rate of complications with the employee's surgery was higher than would be expected. He also suggested that about half a dozen of the employee's patients had complications, that one patient had sued and that another was expected to do so. The NHS trust withdrew the offer. The employee sued the colleague who gave the reference.

The Court of Appeal rejected the claim. It ruled that the reference had been misleading in two ways. First, there had been only three patients with complications; not half a dozen. Second, only one patient had sued and there was no basis for saying a second would do so. However, despite these inaccuracies, the Court ruled that the NHS trust would have withdrawn its offer in any event. The basic statement that the complication rate was higher than expected had been true and this was the real reason the NHS trust had withdrawn the offer.

"The cases highlight the dangers of providing too much information in response to a reference request."

The cases highlight the dangers of providing too much information in response to a reference request. Case 1 shows that an employer can get into hot water when discussing an employee's previous absence record, and that a prospective employer could equally face a claim for withdrawing the offer. Where there is an underlying disability, this could amount to discrimination arising from disability. It is, therefore, much safer for employers to provide only a basic reference which confirms dates of employment and job title.

Any policy of providing basic references (or no references at all) should be communicated clearly to managers. Managers should be told not to give references or to make it clear that any personal references they give are made in their personal capacity and do not represent the views of the organisation. Case 2 is a reminder that individuals giving references can be personally liable for what they say but it also shows that, in order to succeed with a claim, the employee will need to show that the reference caused a subsequent job offer to be withdrawn.

Where a reference has been agreed under a settlement agreement, this should also be made clear to relevant managers and members of HR so that they keep to the agreed terms. Case 1 highlights the dangers of straying beyond the terms of an agreed reference.

PNAISER V NHS ENGLAND AND COVENTRY CITY COUNCIL; ABDEL-KHALEK V ALI

Sickness absence – too much contact?

The employee in this case was signed off sick with anxiety and depression. She claimed this was due to bullying and intimidation from her line manager and the company's managing director. The CEO of the company wrote

to her while off sick asking if she wished to raise a grievance and offering to meet with her to discuss her concerns. She responded saying she was far too ill and upset to communicate. The CEO wrote again two weeks later proposing a meeting with the employee. The letter stated that he had spoken to the line manager and managing director to work out what had gone wrong. It also stated that there were six areas of concern that the managers had, which he wanted to discuss with her. The employee resigned, claiming constructive unfair dismissal.

The Employment Tribunal and Employment Appeal Tribunal ruled that the employee had been constructively dismissed. The concerns raised by the CEO in his letter were not particularly serious and did not need to be dealt with at that stage; some of the issues had already been raised and dealt with previously. The CEO should have known that writing to an employee who was very ill could have caused her to be so upset that she could not return to work.

Employers will usually want to maintain contact with employees who are off sick, to see how the employee is getting on and whether anything can be done to facilitate an earlier return to work. Such contact is entirely appropriate, and employers should not feel they can never approach someone off sick. However, caution must be exercised, particularly where the employee is suffering work-related stress. In this case, there was nothing wrong with the CEO initially asking whether the employee wanted to discuss her concerns. However, given the employee's response, it was entirely inappropriate to follow up by pressing the issue and raising concerns that were not serious and did not need to be dealt with. Such issues should usually be left until the employee has recovered and returned to work.

PRIVATE MEDICINE INTERMEDIARIES LTD V HODKINSON

"...employers should not feel they can never approach someone off sick. However, caution must be exercised..."

New Law

Immigration

On 12 July 2016, the criminal offence of knowingly employing an illegal worker was extended so that:

- employers are liable for the offence not only where they actively know an employee is an illegal worker but also where there is "reasonable cause to believe" an employee does not have the right to work in the UK; and
- the maximum penalty for any manager or director involved in the offence has increased from two to five years imprisonment.

The change underlines the importance for employers of getting immigration identity checks right. Under the new regime, an employer who fails to follow up with an employee whose visa is expiring could face criminal liability for continuing to employ the individual with "reasonable cause" for believing he or she no longer has the right to work in the UK.

On 12 July 2016, a new offence of illegal working for individuals also came into force, enabling the earnings of illegal workers to be seized as the proceeds of crime. A new post of Director of Labour Market Enforcement has also been created to oversee the enforcement of worker exploitation legislation.

"The change underlines the importance for employers of getting immigration identity checks right."

Data protection

As reported in the May 2016 **Online Update**, new data protection rules have been agreed in Europe, which will make significant changes to UK data protection law. The new rules were finalised on 24 May 2016 and must be implemented in the UK by 25 May 2018. It is unlikely that Brexit will have a significant impact on the new rules, as they will need to be implemented in the UK before Britain is likely to leave the EU. It is also likely the UK would keep the new rules after Brexit to allow organisations to transfer personal data freely between EU member states (and some multinational employers with EU operations will be caught by the EU rules in any event).

Watch This Space

Apprenticeship levy

From April 2017, employers with an annual pay bill of more that £3 million will be required to pay an apprenticeship levy. The levy will be charged at 0.5 per cent of the employer's annual pay bill. The levy applies to the entire pay bill, but employers will be given a levy allowance of £15,000 per year, to offset against this. In practice, this means that the levy is only payable on the amount by which the pay bill exceeds £3 million.

Employers who pay the levy will be able to access funding for apprenticeships through a new digital apprenticeship service account, and use this money to pay for training and assessment for apprentices. Employers who do not pay the levy will still receive some Government funding towards apprenticeship training, provided they also make a contribution. By 2020, all employers will be able to access funding through the digital service, even those who do not pay the levy.

Our Work

Since the last edition of **Online Update**, our work has included:

- advising on the conduct of a whistleblowing investigation and decision making process
- advising on TUPE and Acquired Rights Directive issues surrounding the transfer of a pan-European outsourced service provision contract from our client to a third party
- advising on strategy and process surrounding the removal of a client's CEO, including subsequent negotiation of settlement terms
- advising an asset management firm on the UK aspects of a global restructuring/RIF (reduction in force) exercise, and
- advising a medical practice on the TUPE and other employment issues arising in connection with its outsourcing of receptionist and administrative functions.

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

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