TAYLOR WALTON SOLICITORS

NeTWork

November 2018

Employment Law Update

This month we talk about:

Changes to employment rates

On 23 November 2018 the Government published the proposed new benefit and pension rates for 2019 to 2020. The Government proposal reveals that in April 2019:

- the standard rate for Statutory Maternity Pay will increase from £145.18 to £148.68 per week;
- the rate for Statutory Paternity Pay, Statutory Adoption Pay and Statutory Shared Parental Pay will increase from £145.18 to £148.68 per week;
- the rate for Maternity Allowance (MA) will increase from £145.18 to £148.68 per week;
- the rate of Statutory Sick Pay (SSP) will increase from £92.05 to £94.25 per week; and
- the weekly lower earnings limit, that applies to National Insurance contributions, below which employees are not entitled to the statutory payments referred to above (save for Maternity Allowance), is set to rise from £116 to £118.

The Government has also released new advisory fuel rates to take effect for journeys on or after 1 December 2018. From 1 December 2018, the new advisory rates for LPG and diesel cars (per mile) will be:

- for LPG cars with an engine size of 1400cc or less the rate increases by 1p to 8p
- for LPG cars with an engine size of 1401cc to 2000cc the rate increases by 1p to 10p
- for LPG cars with an engine size over 2000cc the rate increases by 2p to 15p
- for diesel cars with an engine size over 2000cc the rate increases by 1p to 14p

All other rates (per mile) remain the same as follows:

- for Petrol cars with an engine size of 1400cc or less the rate is 12p
- for Petrol cars with an engine size of 1401cc to 2000cc the rate is 15p
- for Petrol cars with an engine size over 2000cc the rate is 22p
- for diesel cars with an engine size of 1600cc or less the rate is 10p
- for diesel cars with an engine size of 1601cc to 2000cc the rate is 12p
- The Advisory Electricity Rate for fully electric cars is 4p

Employers who use the Government advisory fuel rates should look to revise their Company Car or Expenses policy to take account of the new rates. Employers will have an implementation period until the end of December 2018 in which the old rates can still be used, but the changes should take effect from 1 January 2019.

Addison Lee v Lange & Others

The Employment Appeal Tribunal has considered whether drivers engaged by Addison Lee under a "Driver Contract" as independent contractors were workers for the purpose of their claims regarding holiday pay and the national minimum wage.

A worker is defined in the Employment Rights Act 1996 as "*an individual who has entered into or works under (or, where the employment has ceased, worked under): (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual*".

The drivers successfully argued that they were workers, not independent contractors. The employment tribunal took into account the following factors in finding that the driver were obliged to provide their services personally and were integrated into the business of Addison Lee:

- Addison Lee wanted customers to view the drivers as Addison Lee drivers;
- The drivers were required to perform work personally (there was no substitution clause in their contract);
- There was a rigorous recruitment process;
- Drivers were trained to a high level;
- The drivers worked six-day weeks and long hours;
- Drivers drove cars branded as Addison Lee cars;
- The drivers rented their cars from Addison Lee and could only use those cars for Addison Lee bookings;
- Addison Lee required drivers to adhere to a strict dress code;
- Drivers themselves could not accept bookings or tout for business;
- Once they were logged into an app indicating they were available to accept work, they had to provide reasons if a job was refused. Failure to do so led to sanctions.

The EAT stated that the Driver Contract did not accurately reflect the true agreement between the parties and that the employment tribunal is entitled to use a "realistic and worldly wise" approach to determining employment status.

This case is another example of so called "independent contractors" being miscategorised as such. If your organisation engages contractors who are required to provide personal service and are integrated into the business, there is a significant risk that they may have worker status together with the limited employment rights which apply to this catergory of employment status. Taylor Walton can assist you with any queries or concern regarding employment status.

The use of NDAs for Harassment and Discrimination

On the 25 July 2018 the House of Commons Women and Equalities Committee (WEC) published a report on Sexual Harassment in the Workplace which made various recommendations on how to combat the issue. Recommendations 24 to 28 concerned cleaning up the use of non-disclosure agreements (NDAs) for cases of sexual harassment in the workplace.

The WEC has now launched an inquiry seeking views on the use of NDAs in cases of harassment or discrimination (or suspected harassment or discrimination), including pregnancy and maternity and racist abuse. The deadline for written submissions was the 28 November 2018. Questions asked by the WEC include:

1. Are there particular types of harassment or discrimination for which NDAs are more likely to be used?
2. Should the use of NDAs be banned or restricted in harassment and discrimination cases? What impact would this have on the way cases are handled?
3. What safeguards are needed to prevent misuse?
4. What is the role of internal grievance procedures? What obligations are there on employers to ensure these are fair and thorough?
5. How easy is it for employees and employers to access good quality legal advice on NDAs? How can quality and independence of legal advice for employees negotiating severance agreements be assured when advice is paid for by the employer?
6. Do some employers use NDAs repeatedly to deal with cases involving a single harasser? If so, is appropriate action being taken to deal with the behaviour?
7. What should the role of boards and directors be? And should employers be obliged to disclose numbers and types of NDAs?

The launch of the inquiry also follows the high profile Court of Appeal case of ABC v Telegraph Media Group where an interim injunction was granted to stop the Telegraph from publishing allegations of "discreditable conduct" covered by NDAs within the Settlement Agreements of five employees.

The individual was later named in parliament. Following the judgment of this case, the Prime Minister Theresa May confirmed that the government would be reviewing the potentially unethical use of NDAs.

Recent developments concerning the use of NDA's mean that employers should be extremely cautious about the circumstances in which an NDA may be used and the scope of the NDA. Where an employer is facing an issue where they would usually wish to put an NDA in place, Taylor Walton can assist with formulating an appropriate strategy taking account of the recent developments.

Expiration of Holiday Entitlement – Max-Planck Gesellschaft zue Förderung der Wissenschaften v Shimizu; Kreuziger v Land Berlin

The Court of Justice of the European Union (CJEU) has decided on two cases regarding holiday entitlement to determine that:

- The right to a payment in lieu of accrued but untaken holiday under Article 7 of the Working Time Directive 2003 and the Charter of Fundamental Rights will not be automatically lost at the end of the holiday period simply because an individual has failed to take their holiday entitlement for that period. The loss of holiday is, however, permitted where an employer can show it enabled the worker, in particular through the provision of sufficient information, to take the holiday before the end of the holiday period; and
- If the worker has not lost their holiday entitlement, they are entitled to payment in lieu on termination of their employment.

Article 7 of the Working Time Directive 2003 (WTD) provides that every worker is entitled to paid annual leave of at least four weeks and that this must not be replaced by "an allowance in lieu" except where employment is terminated. Article 31(2) of the Charter of Fundamental Rights (enshrining the fundamental rights and freedoms of individuals under EU law) states that every worker has the right to an "annual period of paid leave".

The facts of these cases were as follows:

Mr Shimizu was invited to take his untaken annual leave two months before the termination of his employment. He took two days and asked for payment in lieu of his remaining 51 days for the previous 2 years. Mr Shimizu's employer refused based on national law.

Mr Kreuziger was a legal trainee in a German state entity who, following termination, requested an allowance in lieu of his accrued but untaken holiday for previous holiday years. His employer refused based on national law.

The German laws relied on by the employers prohibited carry-over of holiday entitlement from one holiday year to the next year unless there are compelling operational grounds or reasons personal to the employee to justify the carry over.

The CJEU decided that unless an employer diligently gives a worker the opportunity to take their holiday during the relevant leave year, any leave not taken should not be automatically lost at the end of that leave year. The CJEU commented that it is for the employer to draw to the worker's attention that leave accrued during the holiday year will be lost if it is not taken. If the employer does not do so, the leave cannot be lost. Employers do not have to insist that workers take their holiday but must inform them accurately and in good time of the right to take their holiday.

This case demonstrates that employers should be contacting their workers on a regular basis to advise them of their outstanding holiday entitlement and the requirement to take it is the relevant leave year. Failure to do so will enable workers to carry over any accrued but untaken statutory holiday entitlement.

ACAS Publishes new guidance on performance management

ACAS has published new guidance which focuses on developing effective performance management procedures. This is partly in response to a survey which indicates that 9 out of 10 disciplinary hearings feature issues relating to performance. The guidance can be downloaded from the ACAS website.

Whilst it is not mandatory for employers to follow the guidance in the same way as the ACAS Code on Discipline and Grievances, the guidance highlights standards of best practice and is likely to be taken into account by employment tribunals considering performance issues.

If you have any questions about these or other employment issues please call: Heather Cowley (Partner & Head of Employment Law Department) on **01582 731161.**
Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk