



# NeTWork

December 2018

Whilst the headlines in 2019 may continue to be dominated by Brexit, there are some important developments in employment law due to take place. This month we are discussing some of the most significant upcoming changes that employers ought to be aware of. This month we talk about:

- The good work plan
- Ethnicity pay gap reporting
- Itemised payslips
- National Minimum Wage: Consultation on Salaried Hours Work and Salary Sacrifice Schemes.
- Review of Modern Slavery Act 2015

## The good work plan

### Background

In November 2016, the Government launched the Independent Review of Employment Practices in the Modern Economy. Its purpose was to consider the implications of new models of working for the rights and responsibilities of companies and individuals. Matthew Taylor's report, Good Work: the Taylor Review of Modern Working Practices was published in July 2017 and made 53 separate recommendations.

The Government's response to the Taylor Review was published in February 2018 and promised to take action on all but one of the recommendations put forward in the Taylor Review. Four consultation documents were published with the Government's response concerning employment status, increasing transparency in the labour market, agency workers and enforcement of employment rights.

The Good Work Plan was published on 17 December 2018. The Plan includes the Government's position on the Taylor Review recommendations and has been

## Employment Law Update

### Looking ahead to 2019 and beyond

- Extension of The Senior Managers and Certification Regime (SM&CR)
- Sexual Harassment in the workplace
- Reintroduction of Employment Tribunal Fees
- Grandparental Leave
- Off-payroll working in the Private Sector
- Taxation of Termination Payments
- The Parental Bereavement (Leave and Pay) ACT 2018
- Changes for Large Employers
- Important cases

described by the Government as the biggest reform in employment law in the last 20 years. However, at this stage, the Plan sets out a series of proposals and none of the current proposals seem likely to be in place before 2020.

### The proposals

The proposals which are likely to be of interest to most employers are discussed below. However, there are no changes due to take effect imminently. Whilst the Government has confirmed that some changes will take effect from 2020, many are still subject to further consideration and research.

- Clarification of employment status. This is very topical given the recent line of cases regarding the status of individuals working for organisations such as Uber and Addison Lee and the upcoming changes to the IR35 rules in April 2020. The Government agreed with concerns raised by Matthew Taylor that businesses should not be able to avoid their responsibilities by trying to misclassify or mislead their staff.



The Government has commissioned further independent research relating to individuals with uncertain employment status to assist with this task. Whilst this may be an area of significant change for the future, it would appear that detailed proposals are not imminent.

- *Holiday Pay.* The government will launch a campaign to boost awareness of holiday and holiday pay rights among employers and individuals. This will include new guidance with real life examples to support the interpretation of holiday pay rules. Furthermore, the government will increase the reference period for determining an average week's pay from 12 weeks to 52 weeks. This will ensure that workers who do not have a regular working pattern throughout the year are not disadvantaged by having to take their holiday at a quiet time of the year when their weekly pay might be lower. Draft regulations relating to this change have been published and are due to come into force in April 2020
- *A new right for workers to request a more predictable and stable contract.* This is intended to address the issue of "one sided flexibility". Legislation will be introduced to allow all employees and workers with varying hours and shift patterns (including agency and zero hours workers) to formally request a more fixed working pattern after 26 weeks of work for the same employer. It is anticipated that there would simply be a right to make the request, and the plan does not suggest there will be any obligation on employers to agree. The new right is likely to work in a similar way to the current rules on flexible working applications
- *Extending the relevant break in service for the calculation of the continuous service qualifying period from one week to four weeks.* Matthew Taylor identified that those who work intermittently for the same employer can find it difficult to gain or access employment rights because they may struggle to build up continuous service. Under the new proposals, continuous service for the purpose of qualifying for certain employment rights will therefore be deemed not to be broken where there is a gap between assignments or a pause in work of up to 4 weeks (the present limit is one week). This will assist employees in atypical working relationships to establish continuity of service
- *Removal of the "Swedish derogation" in the Agency Workers Regulations 2010.* The Swedish derogation currently allows temporary work agencies to avoid the "equal treatment" provisions of the AWR by engaging agency workers in a way that allows for pay between assignments. The Government has published draft Agency Workers (Amendment) Regulations 2019. These contain provisions to abolish the Swedish derogation and to require temporary work agencies to inform agency workers who were dealt with under the derogation that they have the right to equality of treatment from 6th April 2020
- *A ban on employers making deductions from staff tips.* This is to ensure that workers receive all of the tips that that customers leave for them. The Government intends to introduce legislation to address this issue
- *Legislation to reduce the thresholds of support for information and consultation rights.* The Taylor Review highlighted the need for workers to have a voice, noting that high levels of employee engagement improve organisational performance and boost productivity. The government proposes legislation which will lower the threshold required to set up Information and Consultation arrangements from 10% to 2% of employees. The Government has published draft Employment Rights (Miscellaneous Amendments) Regulations 2019 which contain the statutory provisions to lower the threshold which are due to come into effect from April 2020
- Extending the right to a statement of employment particulars to all employees and workers from day one. This right currently only applies to employees and the statement can be provided up to two months after employment commences. The type of information to be included in the statement has also been expanded. Draft legislation has been published by the Government which is due to take effect in April 2020
- Key facts for Agency workers. Agency workers will be entitled to receive 'key facts' information, including who is responsible for their employment, any element of pay from an intermediary, any fee and relevant benefits. Failure to provide this information exposes an employer to enforcement action by the Employment Agency Standards Inspectorate
- New approaches to enforcement of worker rights. This includes:
  - » Introducing a "name and shame" scheme for employers who fail to pay Employment Tribunal awards.
  - » The government proposes to extend the role of the Employment Agency Standards Inspectorate so that it has a remit over umbrella companies and intermediaries. There will also be a consultation over whether the EAS should be able to fine non-compliant employment agencies
  - » The government proposes to enhance enforcement of statutory holiday pay (and possibly sick pay) by giving enforcement powers to HMRC.



The approach will mirror the financial penalties and enforcement approach that already applies to underpayment of the National Minimum Wage.

- » The government proposes to encourage businesses at the top of supply chains to work with their suppliers to take corrective action when employment law non-compliance is identified to enable collaboration over corrective action.
- » The three main enforcement bodies, the EAS, HMRC and the Gangmasters and Labour Abuse Authority (GLAA) will work more closely together, share information and cooperate more closely with the Insolvency Service and ACAS in order to improve enforcement.
- » The government will also bring forward proposals in early 2019 for a new, single labour market enforcement agency to better ensure that vulnerable workers are more aware of their rights and have easier access to them.
- » Legislation has been published to increase the maximum level of penalty imposed by employment tribunals in cases of aggravated breach to £20,000 (currently £5,000)

### Ethnicity pay gap reporting

In October 2018, the Government launched a consultation on mandatory ethnicity pay gap reporting. The consultation, which seeks employers' views on issues such as reporting methods, closes on 11 January 2019 and further developments are expected during the course of the year.

### Itemised payslips

The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018 is due to come into force on 6 April 2019. The legislation introduces a right for all workers to be provided with an itemised pay statement and the ability to enforce this right at an employment tribunal. The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 is set to come into force on the same day and will require itemised payslips to contain the number of hours paid for where a worker is paid hourly.

### National Minimum Wage: Consultation on Salaried Hours Work and Salary Sacrifice Schemes

On 17 December 2018, the government launched a consultation seeking views on whether certain aspects of national minimum wage (NMW) legislation should be amended to ensure that they do not inadvertently penalise employers. The consultation focuses on the complex rules on "salaried hours work" and whether

they effectively prevent exploitation of workers. The government is also seeking views on the impact of the NMW rules on salary sacrifice schemes, in particular whether employers are withdrawing schemes from low-paid workers in order to avoid non-compliance with the NMW. The consultation closes on 1 March 2019.

### Review of Modern Slavery Act 2015

An independent review into the Modern Slavery Act 2015, which was announced by the Home Office on 30 July 2018, is expected to report to the Home Secretary before the end of March 2019. The report will assess the effectiveness of provisions and make suggestions for improvements.

### Extension of The Senior Managers and Certification Regime (SM&CR)

The SM&CR was introduced in 2016 for banks, building societies, credit unions and PRA-designated investment firms and will be extended to all firms authorised under the Financial Services and Markets Act 2000 on 9 December 2019. The extension will replace the approved persons regime and will affect around 47,000 firms including financial advisers, asset managers, mortgage brokers and consumer credit firms.

### Sexual Harassment in the workplace

In July 2018, the Women and Equalities Select Committee published its report on sexual harassment in the workplace. The report called on government, regulators and employers to take a more proactive role in relation to sexual harassment, and called for changes in the law in some areas. On 18 December 2018, the government published its response to the report. In its response the government announced 12 broad action points. These include asking the Equality and Human Rights Commission to develop a statutory code of practice on sexual harassment. It is suggested that observing this code will help employers demonstrate that they have taken reasonable steps to prevent sexual harassment taking place. The government will also be consulting on a mandatory duty to protect workers from sexual harassment; how best to tackle third-party harassment; protection of interns and volunteers; the possible extension of time limits; and the better regulation of non-disclosure agreements.



## Reintroduction of Employment Tribunal Fees

In November 2018 it was suggested in evidence given to the House of Commons Justice Committee that a new fee regime was in development. Further proposals and developments may occur in 2019.

## Grandparental Leave

Despite government announcements of plans to extend shared parental leave and pay to working grandparents by 2018 further development is still awaited during 2019.

## Off-payroll working in the Private Sector

As announced in the Autumn 2018 Budget, the public sector off-payroll working rules will be extended to the private sector from 6 April 2020. In the public sector, where an individual provides their personal service through an intermediary directly or indirectly to a public authority client, the IR35 rules are modified so that the public authority client rather than the intermediary is responsible for determining whether IR35 applies and, if the public authority client decides that IR35 applies, the "Fee Payer" (i.e. the person paying the intermediary) rather than the intermediary is generally responsible for deducting income tax and employee NICs from, and accounting for employer NICs on, broadly, the fees it pays to the intermediary (excluding VAT). Essentially, from April 2020, these public sector rules will be extended to large and medium sized private sector businesses with the existing rules remaining in place for small businesses. A small business is likely to be defined in the same terms as under the Companies Act.

## Taxation of Termination Payments

From 6 April 2020 all termination payments above the £30,000 threshold will be subject to class 1A NICs.

## The Parental Bereavement (Leave and Pay) ACT 2018

This legislation is expected to come into effect in April 2020. Under the new legislation, which received Royal Assent on 13 September 2018, all employed parents will be entitled to a day-one right to two weeks' leave if they lose a child under the age of 18 or suffer a stillbirth from 24 weeks of pregnancy.

## Changes for Large Employers

*The Companies (Miscellaneous Reporting) Regulations 2018* come into force on 1 January. These regulations bring in mandatory reporting of the ratio between CEO pay and average staff pay for companies with 250 or more employees, and a package of other corporate governance changes, all of which will be effective for accounting periods beginning on or after 1 January 2019 (and so the first pay ratio reports will be published in 2020). The measures include the obligation to prepare an annual statement of engagement with employees for companies with 250 or more employees (including details of any information and consultation arrangements, and how directors have had regard to employee interests).

*Increased employee engagement for listed companies.* The 2018 UK Corporate Governance Code, which will apply to financial years beginning on or after 1 January 2019, provides for enhanced employee engagement for listed companies. Provision 5 of the 2018 Code recommends three methods for promoting employee engagement: appointing a director from the workforce, creating a workforce advisory panel or the creation of a designated non-executive director responsible for employee engagement. Companies will be obliged to follow a comply or explain approach, justifying any decision to depart from the suggested methods, and explaining why their alternative method is effective.



## Important cases

***Tillman v Egon Zehnder Ltd*** - In January 2019, the Supreme Court will hear the appeal of this case in which the Court of Appeal found a six-month non-compete restrictive covenant to be invalid. The restriction, which sought to prevent a former employee from being concerned or interested in any competing business, was deemed impermissibly wide because the phrase "interested in" included holding one share in a publicly quoted company. This will be the first case involving construction of an employment restrictive covenant to be decided by the Supreme Court in over a century.

***Uber BV & Others v Aslam & Others*** - we can expect the Supreme Court to hear the appeal in *Uber BV and others v Aslam*, in which the Court of Appeal recently held by majority that Uber drivers are workers.

***Kocur v Angard Staffing Solutions Ltd*** - the appeal in this case will reach the Court of Appeal in April. The Court will consider the interpretation of regulation 5(1) of the Agency Workers Regulations 2010 which gives agency workers "the same basic working and employment conditions" as permanent employees after 12 weeks. The question for consideration is whether rights can be assessed as a "package".

If you have any questions about these or other employment issues please call:

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