HR Support for business
A simple and affordable solution to HR

Contact: 07941 262492 /01295 788 579
E: carole@hrsupportforbusiness.co.uk www.hrsupportforbusiness.co.uk

Employment law & HR News letter April-June 2014

Hello, and welcome to our First Quarter Newsletter for 2014.

I'm Carole Thomson and I founded HR Support for Business to give small and medium businesses access to a trusted central HR Resource Centre when needed. With so many changes in the world of Employment Law, I have tried to provide you with a 'short and sweet' overview. The idea is to give you an overview of what's new, what is to come, and how it may affect you and your business.

Tougher £20,000 penalty for employing illegal workers

Basically, employers may be liable for a criminal and/or civil penalty of up to **£20,000** if they knowingly, or negligently employee an illegal worker.

Your defence rests on you providing evidence that you checked the employee/worker had the necessary documents entitling them to work in the UK.

This focuses the need for employers, no matter their size, to have a structured Induction system and the necessary documentation compliant to the UKBA requirements to check and record this information.

If you wish we can help you with this.

New Home Office Code of Practice: Unlawful Discrimination

Following on from above, a business must take care when undertaking the required document checks on an individual's right to work in the UK.

If you check only those who you may personally judge may not have the right to work in the UK, could land you with discrimination claims.

Please remember, discrimination compensation claims are uncapped.

We have all read about successful discrimination claims at six figure amounts, so too great a business risk for anyone to take.

This is another good reason why a business should have a systematic Induction process in place.

The Home Office draft Code of Practice has provided guidance on how an employer can avoid unlawful discrimination when complying with their duty to conduct Right to Work checks.

In simple terms it states:

- No job applicant should be excluded or discouraged from applying
- Don't guess. Check everyone, every time and make the same checks, at the same stage of employment
- Do not treat anyone less favourably if their right to work is time limited
- Ask only relevant questions to ascertain: immigration status; any limitations on hours, type of work or length of time they are permitted to work
- Do not assume a person is living or working illegally if they cannot immediately produce the documents required. If viable, try and keep a job open for as long as possible to give an opportunity to provide evidence of their Right to Work in the UK.

Like all Codes of Practice it is not legally binding, but failure to comply may be taken into account by a Tribunal if a discrimination claim is made against you.

The Code is effective from 16th May 2014 and applies to all employment from that date.

Flexible working extended to all

From 30 June 2014 all employees with at least 26 weeks' continuous service will have the right to make up to one written flexible working request per year.

Currently, only those with children under the age of 17 (or 18 if the child is disabled) or, those with adults in need of care have the right.

Flexible working includes a wide range of working patterns that can benefit a business as much as the individual.

Some examples are: Job sharing; part time working; working from home – but there are many more.

Fortunately, the very rigid statutory process on handling flexible working requests is gone. You do however need to deal with the request within three months.

You can refuse a request on any of eight given business grounds. Tribunals cannot normally investigate the rights and wrongs of the refusal, only whether the procedure has been properly followed.

The law actually now specifies you must deal with a request in a 'reasonable' manner. As usual no definite guide on what would be deemed 'reasonable'

The maximum compensation for failure to comply is eight weeks' pay (currently capped at £464 per week).

This emphasises the need to have a clear procedure and documentation to manage any requests.

I have produced a **HR Micro Guide** if you would like more information. And, of course, I can supply a procedure for you if you wish.

New tribunal fines for employers

From 6 April Tribunals have the power to order that an employer who has lost a Tribunal claim must pay a financial penalty if considered the claim has 'aggravating features'.

Minimum is £100 maximum £5,000. Payments are made to the Treasury and not the employee.

As useful as ever, it is not clear what is meant by 'aggravating features'. I suppose we may assume it is where a Tribunal considers there has been unreasonable behaviour, or conduct by an employer, but we will have to wait and see.

Compulsory Pre-claim Conciliation

Following the recent Tribunal fees, this is the next main change.

Now anyone wishing to make an ET1 claim must first contact ACAS and obtain an EC certificate. The certificate will have a unique reference number that is required on the new ET1 form.

Although available from 6 April, it becomes mandatory for most claimants from 6 May 2014. Basically if any ex-employee wants to submit a claim against you, ACAS will try and consolidate a settlement before it reaches a Tribunal through Early Conciliation (EC).

The process:

- The complainant sends the EC form to ACAS or completes the form on line, or phones
- An ACAS EC Support Officer will try to contact both parties. They will explain the process, take details and check if both parties would like to proceed with the early conciliation. Neither party has to, but if they do;
- The Conciliation Officer (CO) will facilitate for up to one calendar month to try and reach a settlement. This runs from the date on which the potential claimant first contacted ACAS. This can be extended by up to 14 days if the CO believes a settlement is imminent and both parties agree
- If not settled the complainant can then still file a claim at the Employment Tribunal.

An EC certificate will be issued to the potential claimant:

- If parties do not wish to participate in EC
- It has not been possible to contact either party
- Settlement is not achieved within the allowed time
- The CO considered a settlement is not possible.

The claimant will then use the unique reference number on the EC certificated to complete their ET1 prior to presenting a claim to a Tribunal. Except in a few minority cases, Tribunals will not accept and ET1 without a corresponding number.

So any benefit to employers?

It gives you the 'heads up' someone is thinking of going to a Tribunal. Of course, they will now need to pay a fee first, so may not go ahead anyway – but they may.

Although no legal requirement for anyone to enter EC it may avoid expensive costs later. It also gives you time to evaluate all relevant factors. For instance one factor is

even defending a Tribunal claim is an expensive waste of your valuable time and money whether or not you win.

It is good practice to put in a procedure now. The ACAS approach may be informal, but your response should be the same as any formal legal communication regarding any claim against your business.

At the very least, it will give you time to prepare and you will gain more information on the background of the allegations. This will all help you respond comprehensively if an ET1 does land on your desk.

It may be worth noting all communication to the ACAS CO in charge of the EC is not admissible as evidence in any tribunal proceedings (unless consent is given by the communicator).

You should however, ensure your procedure states all internal correspondence regarding a potential settlement is marked 'without prejudice'. This will help prevent it from being a 'disclosable item' in any future tribunal proceedings.

How will this affect Tribunal time limits?

This process will extend the time available to a complainant to make his/her Tribunal claim. The current three months that applies to most claims will be frozen the day after the complainant files the EC form with ACAS.

It is unfrozen when the EC certificate is issued by ACAS (for whatever reason).

Will this cause confusion? There is clearly scope.

Statutory payments rise

From 6th April 2014

- Statutory Sick pay is £87.55 per week and you will no longer be able to recover the cost of SSP from the HRMC (*prior to 6 April 2014 employers could reclaim SSP exceeding 13% of National Insurance contributions*)
  Statutory Maternity, Adoption, Paternity pay £138.18 per week, or 90% of average earnings, whichever is the lesser

- Statutory Redundancy £464 per week, or the employee's weekly pay, whichever is the lesser

- Maximum compensatory award for unfair dismissal claim (where the effective date of termination falls on or after 6 April 2014) increased to £76,574 (or 52 weeks' gross pay if lower) and

- The National Minimum Wage for employees aged 21 and over is £6.31, but likely to increase this October

Ban on secondary industrial action is ruled unlawful

Secondary action or, 'solidarity action' as it is sometimes referred to, is when one union (who is in a dispute with an employer) threatens to induce employees of another employer to also take industrial action.

The UK law provides that, in the context of secondary action, a trade union is not immune from liability for the tort of inducing employees to breach their contracts by striking.

The RMT went to the European Court of European rights (ECHR) to challenge that the UK law breached the human right of 'Freedom of Association'. **They lost.**

The ECHR held it did not breach the right to freedom of association under Article 11 of the European Convention on Human Rights. In fact, it supports the legitimate aim of protecting the rights and freedoms of others – including: the employer; domestic economy and the general public so the ban was proportionate. So good news.

And, what to watch out for

Could Zero Hour Contract be banned?

An interim report in April 2014 stated "*in the majority of cases zero hour contracts (ZHC) need not, and should not be used at all*". This is follows months of media coverage highlighting the alleged abuses of ZHC.

It has been reported 20% on ZHC are paid less than permanent comparators; 40% receive no notice of termination; 6% turn up to find no work and no compensation; 5% are paid less than the NMW.

The Government is being pressed to take positive action to protect workers and with an election on the horizon it may be a quick win.

I have personally seen ZHC work extremely well for both employer and employee, but I suppose it is all down to the individual parties involved.

We will have to wait and see. It is unlikely the Government will ban ZHC, but we should expect something.

Can commission form part of holiday pay calculations?

Lock v British Gas Trading LimitedC-539/12 considered whether **commission** should be taken into account when calculating the worker's statutory holiday pay.

Mr Lock was paid basic plus commission and the commission made up about 60% of is pay on average. He was however only paid basic pay when on holiday. He took this to an Employment Tribunal stating this reduced income breached the WTR. In turn the tribunal asked the CEJU for a ruling.

In brief, the Court of Justice of the European Union (CJEU) decision held that an employee, whose "*normal remuneration"* consists of regular commission, as well as basic salary, must have that commission taken into account for the purposes of calculating their holiday pay.

The Working Time Directive (WTD) states workers have the right to at least four weeks' annual paid leave. It does not, however, specify how this should be calculated. In the UK the WTD is implemented into law by the Working Time Regulations (WTR) which states an employee must receive a week's pay for each week of leave.

The CEJU held *"any inconvenient aspect which is **linked intrinsically** to the performance of the tasks which the worker is required to carry out under his contract of employment, and in respect of which a monetary amount is provided, must be taken into account [for the purposes of calculating holiday pay]."*

This case has now been returned to the Employment Tribunal to determine how the commission element in respect of a period of holiday should be calculated.

So what now? As long as there is an *intrinsic link* that different elements make up the total pay paid to carry out the tasks (as per their contract of employment), then it would seem these components must be included in any holiday pay calculation.

We await the outcome of the Tribunal.

We also await two other linked cases with regard to holiday pay. Currently with EAT and due end July 2014 (***Neil v Freightliner, Fulton v Bear Scotland*****).**

One looks at whether voluntary overtime, the other whether earn work based bonuses should form part of holiday pay. Or, at least apply to the statutory element (WTD) of holiday pay which is currently 4 weeks.

Should overtime be viewed as intrinsic to the performance of tasks required under the worker's contract even when overtime is voluntary?

Should bonuses be viewed as an intrinsic element to the performance of tasks required under the workers' contract?

We will have to wait and see.

2014 Auto enrolment arrives for SMEs

Finally, I cannot do a Newsletter for SMEs without mentioning Auto enrolment.

There is an estimated 32,000 medium sized employers (50-249 workers) who are expected to reach their given staging date in the 12 months from 1st April 2014 alone.

Then it is the under 50 workers turn.

The Regulator has the power to issue a daily penalty fine of up to £10,000 for non compliance. It is imperative that employers have a plan in place to get everything done in time to meet their obligations on or before their staging date.

I have been part of this, and trust me, it takes time to ensure your current pension complies – or even worse to source a suitable pension scheme. Then you need a HRIS/Payroll that will monitor and manage all the variable elements and changes this scheme requires.

Recent warnings from the industry have suggested that some pension providers are simply not assisting with setting up the new pension arrangements if it has been left too late. And this is an industry that is already being overwhelmed by sudden demand.

If you want an overview of what Auto enrolment is, and what you will need to action, request our SME Auto enrolment **HR Micro Guide**.

Contact us:

For a free no obligation HR Consultation to discuss your business needs.

HR Support for Business

T: 079412 62492 /01295 788579

E: carole@hrsupportforbusiness.co.uk

www.hrsupportforbusiness.co.uk