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HR Support for Business
A simple and affordable solution to HR

Employers' Newsletter

2nd and 3rd Quarter 2015

Hello, and welcome to HR Support for Business's latest Employers' Newsletter.

Many businesses need professional support to help manage their workforce and stay legally compliant, but cannot justify recruiting a permanent HR person. As a freelance senior HR and health and safety professional this is where I can help by providing bespoke HR support, advice and resources to meet the individual needs of a business. To also help my fellow small businesses I provide this free newsletter to give an overview of relevant employment changes and issues important to our businesses.
Regards Carole Thomson

Zero hour contract – the exclusivity clause

The much talked about the ban on exclusivity clauses within zero hour contracts was implemented by the Government and came into force on 26th May 2015. It was implemented by Section 153 of the Small Business, Enterprise and Employment Act 2015 (inserted into the Employment Rights Act 1996).

The ban means employers can no longer prevent a person working for others when not working for them under a zero hours contact. Or, in fact, enforce that they must get permission prior to accepting any other work.

However, despite a March consultation and draft Anti-Avoidance Regulations being published, they are not yet law. A key element of these regulations will be to give the right for a worker to bring a tribunal claim if they consider they have suffered a detriment due to working for another. This basically means until the Anti-Avoidance Regulations are brought into force there is nothing to stop employers ignoring the ban.

So yes, the much talked about Anti Avoidance Regulations are law, but it seems that for now the approach will be one of best practice rather than strict legal enforcement. I will let you know when this is updated.

ACAS Code of Practice on Disciplinary and Grievance procedures is amended

The Employment Relations Act 1999 states that workers attending formal disciplinary or grievance hearings may make a reasonable request to be accompanied at their Hearing by a fellow worker, or trade union representative or official. Most of us know this already, but there was some question around the term 'reasonable' request.

The new Code now clarifies that the term 'reasonable' applies only to making the request itself and not to the worker's choice of companion. So for instance if a request was made 10 minutes prior to a hearing, or a chosen companion was located 100s of miles away, it may not be considered reasonable (depending on circumstances). However, as long as the request is made reasonably, there is nothing stopping an employee from choosing any companion from the three statutory categories.

So despite what some employers believed, there is little an employer can do to prevent a particularly difficult or disruptive companion attending a meeting when a request is made 'reasonably'. If you do exclude a chosen companion then you would be liable to pay up to two weeks' pay in compensation for breaching their right. And would this be taken into account by a tribunal when making a decision? It would potentially hang on the facts and how good they felt your reason was. But it is a risk.

As a side note, the amendments also cover that they may change their chosen companion if they wish. And, ACAS have amended their guidance to confirm employers may allow someone outside of the statutory categories. You may need to do this to comply with your duty to make reasonable adjustments for a disabled worker or a vulnerable adult.

I have also found it prudent if the worker has any difficulty in understanding English to allow someone to ensure full understanding of the proceedings.

Type 2 Diabetes is it a disability - or not?

Within the case *Metroline Travel v Stoute*, the Employment Appeal Tribunal decided type 2 diabetes (*controlled by diet rather than medication*) is not automatically protected. It will, as always, still be dependent on individual facts.

The Tribunal ruled it was a disability, but the Employment Appeals Tribunal felt the Tribunal had made an error of law in concluding that anyone with type 2 diabetes would be automatically disabled under the Equality Act. Mr S just avoided sugary drinks and it was decided this did not amount to medical treatment. The EAT stated that following a coping/avoidance strategy (*such as a controlled diet*) may mean the effects of an impairment are reduced to the extent they are no longer substantial. This would mean an individual would not be disabled under the Equality Act 2010.

Approximately 90% of the 3.1 million diabetics in the UK have type 2 diabetes. So, this case is important as it highlights even clinically well recognised conditions may not automatically be considered a disability. It is thought this may well extend to others who manage conditions by avoidance strategies (*allergies, intolerances, etc*). Note EAT did accept medicated diabetes sufferers (type 1 or type 2) would regularly be considered to be disabled for the purposes of the Equality Act.

Holiday pay: 2015 round up of changes

With so many cases going through the courts changing how you should calculate holiday pay this year, I felt it was important to give you an overview of some of the key decisions so far.

It has seemed to be never ending. First looking at whether to include compulsory overtime, then whether other intrinsic payments such as commission should be included when calculating holiday pay.

There is more detailed information within our Newsroom HR Newsroom | HR Support for Business but here is a brief overview so far across 2015:

EAT (*Bear Scotland v Fulton)* looked at whether non-guaranteed overtime should be included when calculating holiday pay. Their decision was yes, when it is an intrinsic part of 'normal pay'. They also ruled that a gap of more than 3 months between any alleged underpayment of holiday pay would break the series of any alleged underpayments.

The judge ruled his decision applied to overtime that was not guaranteed, but where the employer could insist the worker worked it. So many then asked where this left voluntary overtime. Some felt purely voluntary overtime, where a worker can refuse it, may not need to be included. However, most generally feel employers should be very wary of jumping to this risky conclusion.

Not law changing in England or Wales, but this very point was looked at in a recent case heard in the Court of Appeal in Northern Ireland (*Patterson v Castlereagh Borough Council*). It looked at whether voluntary overtime (the employer is not obliged to provide or the employee to work) should be included. The tribunal ruled no, but this decision was then appealed.

The Court of Appeal stated that the decision was 'erroneous' and referred the case back to the Tribunal to re-determine. Unhelpfully, it did not provide any further guidelines. Now as I mentioned, decisions by the Northern Ireland Courts are not legally binding on any courts or tribunals in England and Wales. However, many feel it does hint to a potential development path that may be followed in this ever continuing holiday pay saga.

Then, it was looked at whether regular commission payments and allowances (which are an intrinsic part of a person performing their role) should be included in any holiday pay calculations. The cases in question were *Lock v British Gas* and *Williams v British Airways.*

Basically, it was ruled yes, regular commission payments and allowances that were intrinsically linked to a person performing their role should be included in holiday pay calculations.

Unfortunately there has not been any ruling on a reference period for making this calculation other than it should mirror the treatment of a piece worker. This would mean for now the reference period would default to 12 weeks.

However, the reference period continues to be discussed as many employers feel either a 12 month period/start of employment (if shorter) would be fairer where working patterns are seasonal or variable. So we will see.

There has also been a good ruling for employers who were calculating the risk of potential alleged back payments going back years (if not naturally broken by a three month gap) for underpayment. From 1st July it was ruled that any subsequent claims for incorrectly calculated holiday pay will be limited to 2 years (Deduction from Wages (limitation) Regulations 2014).

The rulings apply only to the European right to four weeks' holiday, rather than to the whole of the 5.6 weeks UK annual statutory holiday entitlement. However, many feel the administration costs of managing different holiday pay rates would simply outweigh any potential holiday pay savings. The potential negative impact on employee engagement and performance is also a consideration. Each employer must make this decision.

Most feel this still leaves us all in somewhat '*murky waters'*. However, one thing is absolutely clear, employers will now have to change how they calculate holiday pay to take into account regular and intrinsically linked overtime and other elements of normal pay that are intrinsically linked to a person performing their work.

Redundancy – important case law decisions

It has been an important year for redundancy law. The first interesting case was the 'Woollies' case looking at the scope of 'one establishment'.

It is the Trade Union & Labour Relations (Consultation) Act 1992 (TULCRA) that requires an employer to collectively consult when it is considering dismissing 20 or more employees at one establishment within 90 days or less. If you don't your employees would be entitled to be awarded compensation of up to 90 days' pay per employee.

30th April saw the ECJ confirm the scope of collective consultation. The outcome was a welcome one for employers as it was decided that the requirement for collective consultation is triggered only when the employer proposes 20 or more redundancies within 90 days **at one establishment**, not across the entire undertaking as we saw across the many Woolworth stores.

Not new, but the other interesting case confirmed the rights of an individual on maternity leave during a redundancy situation. Basically all potential redundancy situations require you to consider suitable alternative positions prior to any dismissal for all employees.

Sefton Borough Council v Wainwright [2014] confirmed a person who is put at risk of redundancy (whilst on maternity leave) must be automatically offered any suitable alternative vacancy over other suitable candidates. This is regardless of whether or not she is considered the best candidate (Regulation 10 of the Maternity and Parental Leave Regulations 1999).

Basically a restructuring process put two individuals at risk of redundancy when their old positions were amalgamated and expanded into one position. Both Mrs W (the claimant) and the other employee were placed at risk of redundancy and invited to interview for the newly created position. Mrs W was unsuccessful and she was dismissed by reason of redundancy due to there being no other suitable alternative role available.

Mrs W brought a claim for automatic unfair dismissal (failure to comply with Regulation 10). She also claimed pregnancy discrimination under the Equality Act 2010. She was successful in both. Although Sefton Borough Council appealed this was rejected by EAT stating that the obligation under Regulation 10 arises as soon as the position is identified at risk of redundancy. They further stated Mrs W should have been offered the new position and not had to compete for it.

Many feel this now clarifies the position. However if you find yourself in this situation I would always recommend taking professional advice prior to taking any action.

Statutory rates 2015 changes

There were some changes in April which were included in my last Facts and Stats update [HR Support - Employment Facts and Stats | HR Support for Business]

Pensions and Auto Enrolment

We have discussed this before, but I felt it was important to quickly remind everyone that from July 2015 and across 2017 Staging Dates for small and micro employers will start rolling out.

Your staging date will have been based on the size of your PAYE scheme as of 1 April 2012, or if you are a new business (post this date) then the date you started trading.

Penalties for non-compliance range from £50-£10,000 per day. Feedback so far from SMEs is that it takes much longer than you think to get the best scheme for you and your business. So if you have not already done so, it is time to take action. I have posted a free **HR Micro-Guide** overview on Auto enrolment which you are welcome to

access as a start. http://hrsupportforbusiness.co.uk/your-guide-to-auto-enrolement/

Forthcoming Changes the Tribunal Service

Just a quick overview of some of the changes I feel are key in this area:

Restricting applications to postpone ET Hearings Regulations. This draft legislation will amend the Employment Tribunal Rules of Procedure with the aim to restrict the number of postponement requests to two. Exemptions will be built in to consider further applications if there are exceptional circumstances. For instance, if a postponement would facilitate a settlement or a postponement is due to an act or omission by the tribunal or another party to the claim.

Fines for non-payment of ET awards Will introduce a scheme for penalising employers who fail to pay tribunal awards or settlement sums. Basically there is one warning notice then a financial penalty will be applied unless it is paid by the requested date. Financial penalties will be set at 50% of the unpaid sum and subject to a minimum of £100 - maximum of £5,000 penalty (depending on individual circumstances). If both the unpaid relevant sum and the penalty are paid within 14 days the amount of the penalty will be reduced by 50%.

New Government funded occupational health service

New scheme

Sickness absence has a huge impact on the smaller business. This new free service is aimed at helping employees off sick leave and back into work so it may be of some help to employers in reducing absences.

It offers free telephone advice and web based information which is available now. There will also be a free assessment by an occupational health professional for employees who are off sick for four weeks or more (currently being rolled out so not available in all areas).

Unfortunately there are many limitations in how employers can use this new free service. As this is just a quick reminder, you are welcome to access the **HR Micro-Guide** which will give you more information on this new free service – the potential benefits and its limitations. http://hrsupportforbusiness.co.uk/the-new-fit-for-work-service-top-10-questions-answered/

Family friendly legislation 2015

2015 saw many sweeping changes in the package of 'Family friendly' legislation. All designed to work together to give working parents more flexibility and to expand the rights on Adoption.

The biggest change seen was the new right to Shared Parental Leave (SPL) which replaced Additional Parental Leave. And despite the Government's pledge to simplify employment legislation for employers, most agree SPL is a complicated legislation for all to manage and understand. For this reason I have written a **HR Micro-Guide** on this new legislation for my clients which you are welcome to access: http://hrsupportforbusiness.co.uk/the-new-shared-parental-leave-top-10-questions-answered/

Parental Leave. In brief from April 2015 parents, adoptive parents, those who are deemed to have parental responsibility for a child. And, who have one year's service, have the right to 18 weeks unpaid parental leave up to each child's 18th birthday (previously capped at a 5 years). Some feel this may cause a problem, for small employers if too many employees wish to use this right at the same time (for instance to cover school holidays). We will just have to wait and see, but if this is potential risk for your business, you should ensure your procedures manage this effectively and fairly.

Adoption Leave. The legislation simply redressed the previous differences seen between maternity and adoption leave and pay. Briefly, parents who want to take adoption leave can now do so from day one of employment, need the same 26-week service, and adoption pay now mirrors maternity pay.

Rights have also been extended to surrogate parents (who have applied for a parental order) who will now be entitled to adoption leave. Finally eligible adoptive parents are now entitled to take paid time off to attend up to 5 adoption appointments (capped at 6.5 hours for each appointment).

The Budget – The new National Living Wage

The Chancellor announced the new National Living Wage (NLW). Marketed as *'Britain deserves a pay rise'.*

The National Living Wage (NLW) was previously a voluntary rate, with the National Minimum Wage (NMW)

the compulsory statutory rate as recommended by the Low Pay Commission (LPC).

A Statutory form of the NLW will be introduced as a top up of the NMW for workers aged 25 and over. The aim will be to reach more than £9 per hour within 5 years, but increases will be incremental. In the shorter term from 1st October 2015 the previously reported increase of £6.50 (March budget) will see an increase to £6.70 per hour. Then from 1st April 2016 a further initial NLW premium of 50p an hour will increase the rate to £7.20 The after this the LPC, will recommend the rates for both the NLW premium and NMW.

I hope you have found this useful?

It is important for me to emphasise this is just an overview to give fellow small businesses an idea of some of the relevant changes. I cannot possibly deal with every aspect of the topics covered, or take into account various individual circumstances. I always recommend you take legal or other professional advice (bespoke to your circumstances and facts) prior to taking any actions.

However, I hope this taster is useful to you. And, if I can help you in any way I do offer **a free 30 minute telephone consultation** to discuss your needs and see how HRSfB can help you.

Free 30 minute telephone consultation

Contact us | HR Support for Business

And please feel free to be sociable and share with others who you feel would find it useful. And, if you have any feedback or suggestions for future content, or would like to sign up to our Mailing List please e-mail me at: Carole@hrsfb.co.uk

HR Newsroom

And as mentioned, you are also very welcome to access any of the other free HR resources and law updates.

HR Newsroom | HR Support for Business

About HR Support for Business

One of my clients (after finding me via Google) recently told me "I did not know people like you existed to help small businesses". We do.

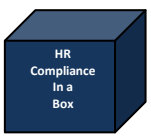
With over 20 years practical experience I now provide freelance HR and health and safety support and advice to small businesses and fellow HR professionals. Basically if you have a HR need, but cannot justify employing someone, why not phone for a no obligation chat. And see how I, or one of my associates, can help you.

I have also developed a specific range of HR and H&S resources to meet the bespoke needs of small businesses.

All designed to deliver a professional quality service and product, but at a price affordable to small and micro businesses. Why not take a look:

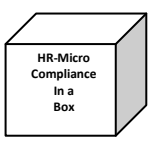
http://hrsupportforbusiness.co.uk/

The most popular employee resources are:



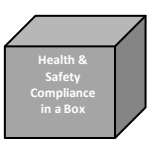
HR Compliance in a Box

A flexible and affordable route to employee contracts, handbook and template documents/letters to manage the lifecycle of your Employees, and ensure legal compliance within your business.



HR-Micro Compliance in a Box

The aim is to ensure your business is legally compliant with Section 1 of the Employment Rights Act. Includes a template contract and key information needed. Designed so more can be added later when you are ready.



Health & Safety Compliance in a Box

An essential Health and Safety Handbook and key documents. All designed by a Technician Member of IOSH with over 18 years' experience.

The HR Annual Retainer Service

Keeping you legally compliant to ever changing employment and health and safety law and best practice. Also, there to help your resolve workforce issues as they happen – or whenever needed.

Or why not just contact me:

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