



Employment law bulletin for employers

A month into the New Year and with the warm glow of the Christmas break just a distant memory, what better way to start our first bulletin of the year than with talk of

Feb 2007

More holidays!

Many businesses require their staff to book all their annual leave at the beginning of the new year. If you follow this practice, you may need to take into account forthcoming changes to employees' minimum holiday entitlement under the Working Time Regulations.

Currently employers can give their employees 20 days annual holiday **inclusive** of the 8 Bank and Statutory holidays. Over the next 18 months this will change so that all employees will be entitled to 20 days holiday **plus** the Bank and Statutory holidays.

The increase will take place in two stages: On 1st October 2007 annual entitlement rises from 20 to 24 days. It will rise again to 28 days on 1st October 2008. More information about the implementation of the changes may be available later this year following further public consultation due to end on the 13th April.

But no holiday pay?

Over the last year we have had clarification (finally) that rolling up holiday pay into salary is not permissible and employees cannot be paid in lieu of their holiday entitlement.



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Maternity leave

Last November saw the introduction of new rights for expectant mothers whose babies are due on or after 1st April 2007, so you should by now have updated your handbooks and information leaflets.

All employees will be entitled to six months ordinary maternity leave and six months additional maternity leave irrespective of length of service. There are also provisions for women to do some work whilst on maternity leave without losing their entitlement to SMP and employers can make reasonable contact with women whilst on their maternity leave. The idea behind these new measures is to keep employees on maternity leave in touch with their employers and developments in the workplace. Under the new provisions, the notice period for those returning early from maternity leave will rise from 28 days to 8 weeks. Similar provisions apply to new parents taking adoption leave

From April 2007:

The standard rate of statutory maternity, paternity and adoption pay will rise from £108.85 to £112.75 per week.

The standard rate of statutory sick pay will rise from £70.05 to £72.25 per week.

Mobile phones

It doesn't matter how much we moan about them intruding into our lives, it seems that none of us can really live without our mobile phone. Whether we call it a blackberry, dress it in a sock or decorate it with charms, it is part of our daily life and there's no getting away from it.



It is essential, therefore, that all employers have an effective mobile telephone policy in their workplace.

The main areas that we think you should cover are:

- rules relating to Company mobiles
- use of personal mobiles in the workplace
- use of mobile phones when driving

Remember that from 27th February if you are caught using a handheld mobile telephone whilst driving, you could get 3 points on your licence as well as a fine. This applies to your employees too - so get policy writing or give us a call.

Agency workers

Do you employ staff through an agency or are you one of our many employment agency clients? If so, you will no doubt have been following the various cases in relation to agency workers which have rumbled on over the last year. The courts seemed to be becoming very keen to imply a contract between agency workers and end users thereby enabling agency workers to bring employment related claims. However, the recent case of **James -v- Greenwich Council** sees a pulling back on the reins. The EAT decided on the facts that there was no mutuality of obligation between the agency worker and the end user and accordingly no contract of employment existed. Three points of guidance emerge from the case:

- The cases where a contract between end user and agency worker will be implied are likely to be the exception rather than the norm and there would need to be some words or conduct which entitle the tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed and that the reality of the relationship is only consistent with the implication of the contract. In other words the tribunal will require evidence to show that the agency relationship no longer applies and that there is some sort of mutual obligation binding the agency worker directly to the end user.
- The passage of time alone does not justify the implication of a contract.
- If the end user is not in a position to insist on the agency supplying a particular worker, a contract cannot be implied.

Tribunal awards limits

1st February saw the annual increase in limits for tribunal awards and redundancy payments:

A week's pay for the purpose of calculating a basic award or redundancy payment rises from £290 to £310.

The maximum compensatory award rises from £58,400 to £60,600.



Minimum wage

For those affected, increases to the national minimum wage came into effect in November last year:

For employees aged 22 and over the minimum wage is now £5.35. For 18-21 year olds it is £4.45 and for 16 and 17 year olds it is £3.30 per hour.

The DTI has recently made it very clear in its policy on issuing fines to employers who do not pay the minimum wage, that a fine of approximately £270 per week for each full time employee will be levied if the minimum wage arrears have not been paid within seven days of service of an enforcement notice.

Information and Consultation of Employees Regulations 2004

There are many occasions when as a matter of law or good practice you need to consult with your employees but to what extent do you need to formalise your consultation arrangements?

The Information and Consultation of Employees Regulations have been in existence since 2005 for companies with more than 150 employees. However, from April this year many more businesses will be caught as they are applied to businesses of more than 100 people. Businesses of between 50-100 employees will come under the Regulations from April 2008. Smaller businesses will not currently be affected.

The Regulations enable employees to request that their employer negotiates an agreement in respect of information and consultation. Provided that at least 15 of your workforce make such request, either in the form of one request or a number of individual requests received within a period of 6 months, you must comply with it. (If your company has more than 150 employees the figure of 15 is replaced by 10% of the workforce; if more than 2500 employees then such request must be made by 20% of the workforce). The request must be in writing, sent to the registered office, head office or principal place of business of employer or the CAC and must specify the names of the employees making it and the date it is sent. Provided that it is a valid request, and assuming that there is not in existence any previous written agreement on information and consultation, the employer must then enter into negotiations for an agreement. There are provisions as to who is to be counted as an employee which may fall to be considered if you have part time or casual employees.

To negotiate an agreement you will need employee representatives to negotiate with. These employee representatives should be elected by the employees and all employees are entitled to participate in their election. There is no set requirement for how many representatives there are. The only requirement is that all groups of workers are represented.

You must then start negotiations for an agreement within three months of receiving a request to do so. The negotiations can last up to 6 months, although both parties can agree to extend time if they wish to do so.

A negotiated agreement must

- set out the circumstances in which employer will inform and consult employees
- provide either for employee representatives or for information and consultation directly with employees (or both)
- be in writing and be dated
- cover all the employees of the undertaking
- be signed by the employer
- be approved by the employees.

The above are the minimum requirements and more detailed information on issues such as method, subject matter, frequency and timing of information and consultation arrangements can be included. If you are a larger company it is possible to have different arrangements for different parts of the undertaking either in terms of sites, business units or sections of the workforce.

If despite entering into negotiations an agreement cannot be reached then standard provisions as set out in the Regulations apply.

Where either a negotiated agreement has been reached or the standard provisions apply a complaint may be made to The Central Arbitration Committee by an applicant who considers the employer has failed to comply with the terms of the agreement. If the CAC finds in favour of the applicant they will make a declaration to that effect and may make an order requiring the employer to take steps to comply with the agreement. An applicant may then within a further three months make an application to the Appeal Tribunal for a penalty notice to be issued. A penalty can be up to £75,000. If a penalty notice is imposed and not paid, it can be recovered as a civil debt.

Although therefore, there is no absolute requirement upon you to negotiate an agreement unless you receive a request to do so, you should be aware of the potential dangers of failing to do so, if requested.

For more help and guidance on the consultation requirements themselves, contact us.

Employing illegal workers

As the EU expands, the issue of identifying who has the right to work here becomes a more pertinent one. You will probably have heard the many advertisements on the radio threatening employers with hefty fines if they are found to have employed an illegal worker.

The offence arises under the **Asylum and Immigration Act Section 8**. However the Act also provides a defence to employers, provided that they have checked and retained copies of certain original documents from a specified list **before employment begins**.

Following the introduction of new regulations in 2004 the list actually comprises two lists and employers must check **either** one document from List 1 or two documents from List 2. List 1 is essentially a passport or a national ID card. List 2 comprises other documents but at least one must contain a valid national insurance number.

To rely on the defence, it is not enough just to have looked at documents. You must take a copy of all the pages of each document that you have checked and keep the copy on your employee's personnel file. You should also write on the copy that the original has been seen and sign and date your copy. It is sensible to retain these documents even after an employee has left your employment just in case there are any ongoing enquiries.

Do not forget that we are talking about workers and not just employees and this can include people who work in your own home. Therefore if you are a working parent employing a nanny in your home you must carry out the same checks as if it were one of your workplace employees. With fines of up to £2,000 per illegal worker, it is not worth taking any risks.

Future developments?

If you think that employment law has moved too far in favour of employee rights, note this:

A feature on the BBC News earlier this week revealed that the majority of employees think that their employer should be required by law to give them time off to care forsick pets!

No this is not an April Fool and for the animal lovers amongst you we are not seeking to belittle the relationship between humans and their pets. However we have to ask where it will all end?



Flexible working rights for carers

The new right for carers to request flexible working will come into force on 6th April this year. A carer will be any employee who is or expects to be caring for an adult who:

- Is married to or the partner or civil partner of the employee or
- Is a near relative of the employee
- Falls into neither category but lives at the same address as the employee.



The near relative definition includes parents, parents-in-law, adult children, adopted adult children, siblings, siblings-in-law, aunts, uncles, grandparents and step relatives.

The definition is obviously very wide and employers need to be prepared for their own employees making applications.

The method of dealing with the applications will be no different to the existing procedure for dealing with applications from working parents.

Redundancy policies

We have long advised our clients not to include any policy or statement on redundancy practice, procedures or payments in their handbooks for fear that it could be regarded as a contractual term. A contractual obligation of this nature will compromise the employer's flexibility in dealing with redundancy situations according to the circumstances that dictate at the time.

Our view has been confirmed by the Court of Appeal in the case of **Keeley -v- Fosroc International Limited**. The court confirmed that where a staff handbook contains details for an enhanced redundancy payment there is a presumption that it has contractual status rather than policy status. Therefore an employee can bring a breach of contract claim if it is not followed.

Bulfin & Co has been advising employers since 1994.

We are members of the Law Society and Employment Lawyers Association

Let us help you safeguard your business

Call us on **0208 866 0044**

Not another office move?

We have unexpectedly had to vacate our offices at Truscon House, Gerrards Cross. This means that as far as our Bucks clients are concerned we are homeless - but only until 1st March when we will take up residence in our new office at Moorhouse Farm, Higher Denham. This beautiful complex is in the heart of the Bucks countryside surrounded by fields, streams and lambs, yet it's just a couple of minutes from the Chiltern Line, M25 and A40 - and there are no parking issues. Idyllic it most certainly is, but large it isn't. So having already re-centred the Firm back in our Eastcote office, we will be using these new offices as consulting rooms only and they will not be manned full time. So please ring to book an appointment before calling and make sure that all post is sent to the Eastcote office. Email addresses and fax numbers are unaffected and although you will still get through on the old phone number, it would be better to call us direct on the main number 0208 866 0044. If you have two minutes, please change your mobile and speed dial.

We look forward to meeting with you there and in the summer we will even be able to hold meetings outside - how de-stressing is that!