

# Bulfin & Co

## 2011 Spring briefing update I

### **UPDATE ON THE REPEAL OF THE DEFAULT RETIREMENT AGE**

In our recent employment law briefing we wrote at length about the forthcoming abolition of the default retirement age and gave what was thought to be the up to date position following the publication of the regulations. However, as is so often the case with new legislation, the publication of the new regulations was immediately followed by legal debate about certain ambiguities and errors in the drafting and before we could commit further pen to paper another set of regulations appeared. We now have what we hope is the definitive position with regard to the forthcoming abolition of the default retirement age:

Previously it was thought that employees had to retire on 30<sup>th</sup> September 2011 meaning they could only be given 6 months or less notice of retirement on or before 5<sup>th</sup> April 2011. It now seems that employees can be given up to 12 months notice of retirement, in accordance with the current law, provided that notice is given on or before 5<sup>th</sup> April 2011 to employees who are already 65 or who will be 65 on or before 30<sup>th</sup> September 2011.

Employees given notice of retirement, as above, will still have the right to make a request to continue working beyond retirement. They must make that request no less than 3 months before the date on which they are due to retire.

### **Here comes the important bit for employers:**

If you grant the employee's request to continue working, you have, under the current legislation the choice of agreeing a fixed period of extended employment or an indefinite period of working. However if you agree an extension of more than 6 months, you will have to issue a fresh notice of intention to retire the employee if and when you want to take this course of action. **BUT** from 5<sup>th</sup> April 2011 you cannot issue any more notices of retirement. The practical effect of the combination of these provisions means that the latest date on which an employee can be retired under the current law is October 2012. Thereafter you will have to operate within the new framework i.e. to terminate an employee's employment you will need grounds such as capability or misconduct or you will need to be able to justify a default retirement age on objective grounds. The wise employer will, therefore, if granting requests by current employees to work beyond retirement age limit the extension to 6 months only.

As to specific dates, here there remains some ambiguity over the actual last date on which an employee can be compulsorily retired under the current law. Debate centres around whether it is the 3<sup>rd</sup>, 4<sup>th</sup> or 5<sup>th</sup> October 2012. The most popular view, based on common law principles, now appears to be that it is 5<sup>th</sup> October. To be on the safe side, however, employers might want to use the earliest possible date which is 3<sup>rd</sup> October.

Understanding the provisions is not easy and so in the help of clarifying the situation for employers we have produced a time line which we hope you find useful.

## **What are you doing on 29<sup>th</sup> April? – or more to the point – what are your employees doing?**

29<sup>th</sup> April is of course the day of the Royal Wedding, declared last year as an extra public bank holiday. Employees up and down the country naturally assume that they will get an extra day's paid holiday and employers - well what do employers expect? It seems that many haven't really thought about it and now as the big day approaches and for many companies new annual leave years are about to start, employers are suddenly questioning their obligations.

So what are those obligations? First port of call is your employment contract or employee handbook. It may say something along the lines of:

"You will be entitled to [20] days paid holiday in addition to the normal public holidays". It may go as far as number them as 8 or even name them: "New Year's Day, Spring Public Holiday, Good Friday, Easter Monday, May Day, Autumn Bank Holiday, Christmas Day and Boxing Day."

The Royal wedding day is not one of the normal eight bank and statutory or public holidays, so with this type of wording in your employment documentation there is no contractual entitlement to an additional day off with pay. It is up to employers to decide how to treat the day on a policy basis. Whilst the government's intention may be that people should be given an extra day off at the employer's expense, it cannot force this upon employers and there is nothing under the Working Time Regulations or any other legislation that obliges you to do this. Employers therefore would seem to have the following range of options:

1. Remain open for the day as normal and require employees to work unless they pre-book annual leave from their normal entitlement or take unpaid leave.
2. Close the business for the day and give all employees due to work, that day off at the company's expense
3. Close the business for the day requiring all employees to use a day's annual leave from their normal holiday entitlement. Employers are, under the Working Time Regulations, allowed to specify dates on which their employees must take their holiday provided that they give adequate notice. The period of notice is double the length of the amount of leave so there is still time to give notice to employees to take a day's leave on 29<sup>th</sup> April. To make life easier administratively, employers about to start a new leave year between now and 29<sup>th</sup> April could automatically reduce all employee's entitlement for the forthcoming year by a day's leave.
4. Close the business for the day giving employee's the choice of taking the day as unpaid leave or as holiday (or TOIL). For ease of administration, employers may want to inform employees that this will be a day taken from their annual holiday entitlement, unless they advise in writing to the contrary.
5. Agree with employees to close for the day and that they take the day as unpaid leave

If your contract or handbook does not refer separately to Bank and statutory holidays but just entitles employees to a set number of [normally a minimum of 28] days holiday to include bank and statutory holidays or if you have no employment documentation, the above principles can still be applied.

**BE WARNED HOWEVER....if your contract or handbook says "You will be entitled to [20] days paid holiday in addition to [all] public holidays" you will have to give an additional day's paid holiday on 29<sup>th</sup> April unless employees agree otherwise.**