

# HR Spring Update

## KEY CHANGES

### CHANGES TO MATERNITY AND PATERNITY LEAVE PROVISIONS

In April there were two changes to Maternity and Paternity leave provisions.

Fathers of children with an expected week of birth beginning on or after 3 April 2011 will be allowed up to 26 weeks' additional paternity leave in the first year of the child's life if the mother has returned to work from maternity leave.

On the same date, the rates for statutory maternity, paternity and adoption pay will increase from £124.86 to £128.73 per week.

### TAXATION CHANGES

Significant changes will soon be made to the operation of PAYE on both payments made to employees following the termination of their employment and on the engagement of new employees who fail to provide a P45. From that date, employers will be required to operate PAYE on payments made using an 'OT' tax code which will require deductions to be made at the basic, higher or additional rates as appropriate.

### TOP TIPS ON EMPLOYMENT CONTRACTS

1. You should make sure all members of staff are provided with an Employment Contract containing full terms and conditions as soon as possible after their start date - latest within eight weeks.
2. Regularly review all contracts to ensure that they take account of updates in employment legislation.
3. Wherever possible, make sure that all employees sign their contracts. However, if they do not, but continue to work and are paid this clearly establishes the contract.
4. Ensure all appropriate clauses are included e.g. restrictive covenant, mobility clause to head off any HR issues that may arise at a later date.
5. Ensure that the employee handbook is clearly referenced in Employment Contracts as appropriate and that it is accessible to all members of staff.

### RIGHTS ON FLEXIBLE WORKING EXTENDED

The right to request flexible working will be extended to parents of children under the age of 18 on 6 April 2011. It currently applies to parents of children under the age of 17, or 18 if the child is disabled.

### SMALL FIRMS TO BE GIVEN THREE YEAR MORATORIUM ON NEW LAWS

From April small firms with few than 10 staff will be given a three-year moratorium on new employment regulations under plans unveiled by the Government.

At a speech to the Federation of Small Businesses (FSB) annual conference in Liverpool, the Business Minister Mark Prisk announced a raft of changes aimed at cutting red tape and boosting the economy.

The Chancellor George Osborne later confirmed the move in his Budget speech on 23 March adding that it was part of the coalition's ambition to 'make Britain the best place in Europe to start, grow and finance a business'.

### GOVERNMENT EQUALITY STRATEGY: BUILDING A FAIRER BRITAIN

The Government has a new approach to dealing with inequality in the UK through 'transparency and behaviour change' beyond simply introducing



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new legislation. A reduction in the amount of new employment legislation will undoubtedly be welcomed by employers. A Ministerial Group on Equalities has been created to watch over the implementation of the strategy across the UK and to report annually on progress.

Some proposals of particular interest include the following:

- With section 159 of the Equality Act 2010 being brought into force from April, employers will be able to “apply voluntary positive action in recruitment and promotion processes when faced with two or more candidates of equal merit, to address under-representation in the workforce”. Note this does not mean that quotas or positive discrimination will be allowed,
- There may be changes to flexible working rules as the Government proposes to extend the right to request flexible working hours to all employees,
- In an attempt to encourage shared parenting, the Government intends to consult on a new system of flexible parental leave. The idea is to grant all types of families the right to share parenting between them,
- Research will be published regarding lesbian, gay, bisexual and transgender equality in the workplace. The Government will encourage and work with businesses to consider the report’s recommendations.

Another key strategy in dealing with inequality is the phasing out of the default retirement age.

#### MORE DETAILS ON DEFAULT RETIREMENT AGE

The Government recently published its response to the consultation on phasing out the default retirement age (DRA). Fulfilling a pledge in the coalition agreement, the Government has announced that, from October 2011, employers will no longer be able to force staff to retire at 65. Whilst employers will still have the option to retain a fixed retirement age, they need to be able to objectively justify it. Such a fact sensitive issue will inevitably lead to further case law and in reality is likely to be the exception and not the norm.

The Government’s intention is that the change will be phased in between April and October, giving employers just six months to prepare and change their human resources policies.

The precise ramifications of scrapping the DRA are too complex to predict, but from an employment law perspective, the most immediate issue is likely to be how employers will dismiss employees who have stayed on past the current DRA and whose performance has dropped. If an employee’s performance drops but they do not want to leave, what then? Most employment lawyers would agree that ‘capability’ is by far the most difficult ‘fair reason’ to rely on in dismissing an employee, as it carries an obligation to allow an employee an opportunity to improve their performance via support, training, redeployment and so on - all of which can take months. This can be a difficult process for an employee and relatively easy for another solicitor to challenge. It therefore remains to be seen whether scrapping the DRA will promote good industrial relations or become a source of conflict.

#### CASE LAW - REDUNDANCY GUIDANCE

The recently decided EAT case *Morgan v Welsh Rugby Union* provides authority for the position that where redundant employees apply for new and different roles, employers are not bound by the principles in *Williams v Compair Maxam* as those principles only apply to selection for dismissal from a redundancy pool. As a reminder, *Williams* dictates that an employer must select candidates using its defined criteria and that the selection process must be objective.

In *Morgan*, the appellant appealed against a tribunal decision that he had not been unfairly dismissed. The appellant’s role, together with that of a fellow employee, had been made redundant. A new amalgamated role was created, which both employees applied for. The appellant’s co-worker was successful even though the appellant met the job description and the successful employee did not.

The original claim for unfair dismissal was made on the grounds that the appointment process lacked objectivity and fairness as the job description and prescribed interview format had not been followed. The tribunal found that the dismissal was not unfair as the candidates had been tested using an objective scoring process and the decision could not have involved favouritism.

The EAT refused to disturb the tribunal’s finding and held that the *Williams* principles should only be applied when employees are selected from an existing pool and there is no new or different role available.

In situations where a new or different role is available, employers should consider the candidate’s ability to perform the new role rather than rigidly following defined criteria.

#### BRIBERY ACT GUIDANCE

The Ministry of Justice has recently published its guidance on the Bribery Act 2010, clarifying the ‘adequate procedures’ that a business should put in place to defend successfully a prosecution for failing to prevent bribery by employees.

The Act imposes strict liability on a company for the acts of its employees and gives UK enforcement authorities broad jurisdictional reach covering the failure to prevent bribery by anyone associated with the company anywhere in the world.

The penalties are severe, with up to 10 years imprisonment for individuals convicted of the new offences and unlimited fines for corporate entities that fail to prevent bribery. A company’s only defense will be to show it had in place ‘adequate procedures’ to prevent bribery.

The Act will come into force on 1 July 2011 and the guidance states that reasonable and proportionate corporate hospitality is permitted, where it seeks to cement relationships or showcase products or services. For example, taking a client to a sporting event, or paying for a foreign public official to travel abroad for a site visit and then providing a meal and entertainment, would not breach the Act if that were reasonable and proportionate for the business.

There is no exemption for facilitation payments, which, in common with the vast majority of legal international systems, will amount to a bribe. This new piece of legislation could become a significant hurdle for employers, despite Government’s best intentions.