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NEWSMATTERS

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WELCOME TO THE FINAL NEWSLETTER FOR 2022

Our newsletter is written quarterly to ensure that you are kept up to date with employment issues, back copies are available on the website so you never miss out on the ever changing aspects of employment law. We offer helpful hints on how to handle situations within the workplace, but feel free to give us a call for both guidance and support.

This Quarter the focus is on changes in the law which will affect your business immediately as well as a look at the following:-

1) What did the Mini Budget on Friday 23rd September do for employment

2) Helpful information on changes

3) Forthcoming Legislation from now through 2023

4) Salary is not enough to attract talent

Our main topic this quarter is about preparing your business for our departure from the EU and helping to give you some specific websites to look at rather than trawling through pages of internet searches.

We think you'll find the articles very interesting. Please call us on 01442 870742 to discuss any of these articles and see how we can help you and your business more effectively in the field of Human Resources. Alternatively have a look at our website www.workmattershr.co.uk and email us from there or on info@workmattershr.co.uk

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IN THIS ISSUE

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WHAT DID THE MINI BUDGET DO FOR EMPLOYMENT?

Following a flurry of regulatory reform announcements by newly appointed chancellor Kwasi Kwarteng there is plenty for company's to get on top of.

National insurance cuts

Reflecting on the regulations with the biggest impact on employment, Ben Chaplin, managing director at Croner-i, deems the reversal of the 1.25 per cent increase in national insurance (NI) that came into effect in April as "perhaps the main announcement affecting employers".

As the planned increase will now be abolished from 6 November, this will affect employers and employees alike.

"Work will need to be done to ensure the separate listing on payslips is taken off from this date, and employers should let their employees know that their payslips will look different, as well as the impact this will have on their final take-home pay," Chaplin says.

Also, delivering an important update for business owners, who will be paying 40 per cent on top of earnings, instead of the 45 per cent rate of tax as of April 2023 – "this will also have a knock-on effect on the dividend tax rate", Chaplin explains.

Removal of EU laws

Among the key changes outlined by Kwarteng as part of the update, another that will significantly affect employers – in terms of the rights of their workforce and their obligations as an employer – is the retained EU law. This mandates that employment laws derived from the EU are now all subject to change or removal.

Following the UK's departure from the EU, new guidance from the government has been expected to clarify how the current employment laws will change.

The introduction of a retained EU law bill will enable "government departments to review then retain or replace all EU-derived law"

"Any laws that are not formally retained will automatically expire on 31 December 2023".

The key components dependent on the Retained EU Law (Revocation and Reform) Bill include the Working Time Regulations, Transfer of Undertakings (Protection of Employment) (TUPE), part-time and fixed-term worker regulations, and agency worker regulations.

While many laws are expected to stay the same, reviewing these is a huge task and the profession can expect changes to almost every area of business and society.

With this in mind, all employers should put 31 December 2023 in their diary and make sure they are prepared for any changes that are announced before the deadline, as well as knowing which laws will automatically expire after it. Failure to do so could mean companies are wrongly following outdated laws, leading them to breach their legal obligations and withhold statutory entitlements, which, in turn, could lead to tribunal claims and widespread discontent.

It's important to highlight that, over the next 15 months, we will likely see a stream of updates, which employers will have to track and manage accordingly.

Reversal of IR35 reforms

Also finding its place among the most significant changes is the repeal of the 2017 and 2021 changes to IR35 legislation for those who use independent contractors, which will see the onus for paying the correct tax put back on contractors, instead of employing companies.

This doesn't necessarily mean it's the end of the IR35 story – the rules will still exist – it's just that contractors will once again be responsible for compliance and payment of tax – a step that will relieve companies from some of the associated bureaucracy when working with contractors.

Businesses will remain exposed to tax risks by virtue of other tax rules and the corporate criminal tax offences if they pay contractors off-payroll when they know that the contractors should be taxed as employees.

WHAT DID THE MINI BUDGET DO FOR EMPLOYMENT? CONTINUED...

There will likely be frustration among businesses regarding the significant amount of time and money that has been spent on compliance with the rules.

In addition, it is now unclear what position HMRC will take when dealing with businesses that have inadvertently fallen foul of the rules in this interim period.

Real simplification would involve making it easier to determine whether an individual is employed or self-employed for tax purposes, but the government has recoiled from going down that difficult path before, and there's no suggestion that they are going to look at it again now.

Tax cuts all round

Both income tax and National Insurance (NI) contributions will be cut: the basic rate of income tax is now due to be cut from 20 per cent to 19 per cent from April 2023, instead of in 2024 as proposed by Rishi Sunak earlier this year. The higher rate of 45 per cent, paid on earnings above £150,000 per year, will also be abolished in England, Wales and Northern Ireland, to be replaced by one single higher rate of 40 per cent from April paid on anything earned over £50,270.

Employers, where they can, should look to reinvest any gains back into supporting their people at this difficult time. Some employers have already said they intend to use the money that would have been spent on this to help their employees during the cost of living crisis.

Universal Credit recipients to seek more work

The Government has also threatened to reduce Universal Credit (UC) for those not seeking more work from January next year. Around 120,000 people receiving UC will be asked to take steps to seek more work, or face a reduction in their benefits – an announcement that has already caused a stir among experts.

Support for over-50s returning to work

Moreover, UC claimants over 50 are to be given additional support to help them return to the workforce. It follows reports that older workers are returning to the labour market amid the cost of living crisis.

The Government said the changes would give claimants the best possible chance to be financially independent of UC, and added that older workers form a vital part of the UK labour force, bringing a wealth of skills and experience that can help businesses succeed.

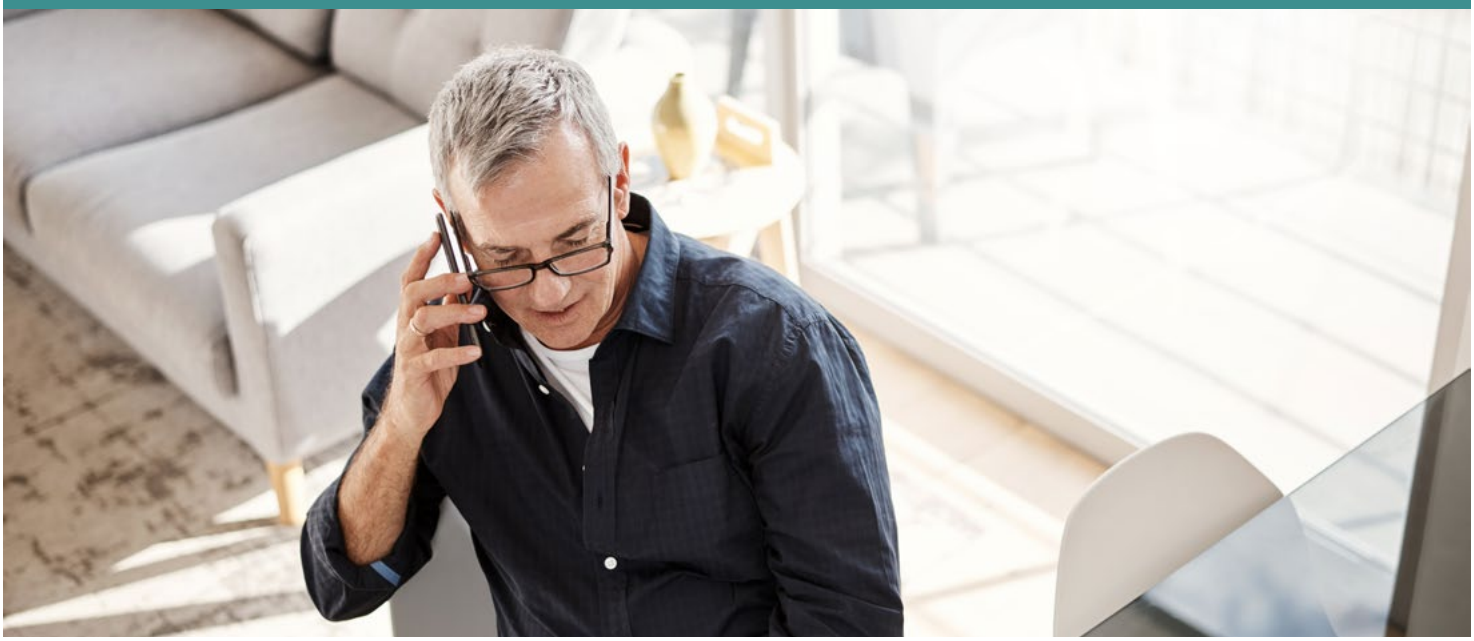
The Government will continue to consider further options to encourage people to stay in the labour market for longer, to support growth and people seeking to build up savings for their retirement, it said.

Bankers' bonuses to be unlimited (again)

The cap on bankers' bonuses, which limits them to twice the banker's salary and was introduced in the wake of the 2008 financial crisis, will be scrapped.

However, a shift away from fixed salaries to larger bonuses for bankers will come with inevitable legal risks, a lot of bankers have got used to more predictable earnings through increased levels of fixed salary and may resist a system where a much higher percentage of their compensation is based on a variable and usually discretionary bonus.

Bank shareholders will not want to see bonuses rise without salaries falling. HR teams are going to find a wholesale shift to bonuses a legal and practical challenge – you can't unilaterally change such an important part of an employment contract without risking employment disputes along the way.



HELPFUL INFORMATION ON CHANGES

1. Sickness and absence fitnotes

New regulations have been put before Parliament which change the rules on who can sign employees off sick from work. Usually the work of a GP, and limited currently to doctors, the new rules allow other healthcare professionals to provide employees with fit notes for the purposes of statutory sick pay and social security claims.

From 1 July 2022, registered nurses, occupational therapists, pharmacists and physiotherapists can also sign off fit notes. The aim of the change is to free up GP time so they can see more patients. The BBC quotes the health secretary, Sajid Javid: 'That's why we are slashing bureaucracy to reduce GPs workload, so they can focus on seeing patients and giving people the care they urgently need'.

2. Restrictive Covenants

Restrictive covenants are terms in contracts of employment which restrict the employee's activities after employment has ended. They will be void – and unenforceable – for being in restraint of trade unless the employer can show it has a legitimate proprietary interest to protect and the clause goes no further than is reasonable to protect it. If an employer thinks that an employee has breached a restrictive covenant, they can apply for an interim injunction to stop the employee's activities pending a full trial which will decide whether the clause is enforceable. The court will consider whether the employer has a strong case, whether damages (compensation) would be an adequate remedy, the 'balance of convenience' between the parties in relation to an injunction and whether the 'status quo' should be maintained pending a trial. In a recent case, the Court of Appeal has analysed the test which the court must apply when making decisions about interim injunctions.

In Planon v Gilligan, the employee was a sales manager. His contract contained a non-compete clause, preventing him from working for a competitor for a period of 12 months following termination. He resigned in July 2021 but refused to say who he was going to work for. On 1 September, he started working for a competitor. The employer found out the following day. A few weeks later, the employer sent a letter before action. A month after that, in late October, the employer lodged a claim and made an application for an interim injunction. A hearing took place on 5 November 2021. The High Court judge refused to grant the injunction. The non-compete clause would make it extremely difficult for the employee to get any work at all during that 12-month period. The Court also said that the clause was not likely to be enforceable. The employer appealed.

The Court of Appeal refused to overturn the decision but for different reasons. They overturned the judge's decision on the enforceability of the clause because the judge had not applied the test correctly. One Court of Appeal judge said that the employee had now been employed for 7 months, and even if the clause were enforceable in theory, the delay meant that it would not now be appropriate to grant the injunction because the damage was already done. Another judge said the damage would have been done in the first few days and certainly well before the November hearing, such that refusal of the injunction was reasonable at the first hearing. The Court of Appeal said the High Court had been entitled to decide that damages were not an adequate remedy for the employee. One judge noted that unless the employee were independently wealthy, or the employer offered paid garden leave for the whole period of restraint, damages would not be adequate as a remedy, especially if the employee has a mortgage and a family.

This case shows how vital it is to take prompt action when applying for an injunction in cases where restrictive covenants have been breached. The Court of Appeal noted that the damage is usually done within the first few days of the new employment. Courts may be minded to maintain the status quo if employers delay and the damage has already been done by the time the matter gets to court. It is also important to ensure that covenants are only as wide, and last for as long, as necessary to protect business interests to maximise the chances of enforceability.

3. Exclusivity Clauses

Back in 2015, the Government banned the use of exclusivity clauses in zero hours contracts. Clauses that stop a zero-hours contract worker from working for another business, or which say that the worker cannot work for anyone else without the employer's consent, are void and unenforceable. Following a consultation exercise, the Government has now decided to extend the ban to the contracts of other lower income workers, those whose guaranteed income either equals or is less than the Lower Earnings Limit, which is currently £123 per week. The Government believes that this will have a two-pronged effect – lower income workers will be free to top up their income elsewhere, at a time where the cost of living is increasing, and businesses will be more likely to fill vacancies, especially in the hospitality and retail sectors which are currently struggling to recruit.

The Government will protect these new rights by extending the right not to be unfairly dismissed, or subjected to a detriment, to lower income workers who are dismissed or treated badly because they refuse to comply with an exclusivity clause. The Government intends to bring these new laws into effect in due course.

4. Off the record conversations

'Without prejudice' correspondence or conversations, which take place in a genuine attempt to settle a dispute, cannot then be used as evidence in subsequent legal proceedings. There are a few exceptions, including that the without prejudice rules should not be allowed to hide any clear cases of 'unambiguous impropriety', such as blackmail or perjury (lying under oath). Unambiguity is the key – the situation must be clear cut. As such, the without prejudice label will only be lifted very rarely.

In **Swiss re Corporate Solutions v Sommer**, the employee was a risk underwriter who was placed at risk of redundancy shortly after returning from maternity leave. She raised grievances to which she attached company and client information in support of her complaints. She openly copied these grievance emails to personal email address and copied her husband into one of them. Her grievances were not upheld. HR wrote to her about copying the information to herself and her husband, saying it was a low-level data breach and asking her to delete the material, which she did. She issued tribunal claims. The company said it was going to investigate the data breaches. The employer then sent a without prejudice letter. It said the employee had breached contractual confidentiality obligations, committed a criminal data protection offence, and said her conduct could lead to dismissal, criminal convictions, fines and regulatory findings that would make it difficult for her to work in her regulated sector. The letter contained an offer of £37,000 to terminate employment and settle all claims. A few days later, the investigation concluded that there were strong mitigating factors relevant to the employee's conduct in emailing information to herself and informal action only was recommended. The employee was dismissed a couple of months later and said wanted to use the without prejudice letter in evidence in tribunal proceedings as it constituted 'unambiguous impropriety'.

The employment tribunal agreed. They said the letter contained improper threats and pressure, and grossly exaggerated the situation, to persuade the employee to accept the settlement. The employer appealed. The EAT allowed the appeal and said the letter could not be used as evidence. The EAT said baseless allegations could be unambiguous impropriety if there was evidence of dishonesty. But the tribunal had not engaged with the potential merits of the employer's allegations in the without prejudice letter. Although they may have been right to say the allegations were grossly exaggerated, they didn't deal with the facts arguably showed data protection and other breaches. The EAT said exaggeration would not usually pass the unambiguous impropriety test without findings on the employer's state of mind, which the tribunal did not do, and could not have done (according to the EAT) without oral evidence on the issue. Although the letter 'sailed close to the wind', public policy meant that, in this case, exaggeration was not enough.

Despite the marked difference in tone between the open 'low level' breach allegations from HR and the 'exaggerated' allegations in the without prejudice letter, the EAT decided the employee in this case could not use the without prejudice letter as evidence in her future tribunal proceedings. This case is good news for employers and the sanctity of without prejudice discussions which are so vital to employers in avoiding expensive and time-consuming litigation. But this judgment shows that exaggeration can cause problems, and in some cases may result in the without prejudice veneer coming off. Employers should ensure that without prejudice offers and negotiations do not overegg the pudding. A genuine without prejudice offer should not need any exaggeration.

5. Banter – the right approach!

The B word – banter – is a word employers should dread. Good teams will thrive on a joke or two between workplace friends. However, offensive and potentially discriminatory comments can be masked as 'banter', indicating to the recipient that taking offence is unreasonable. A culture where banter is acceptable is likely to affect productivity and staff retention. It will also expose the employer to the risk of tribunal claims, especially harassment. Harassment is unwanted conduct related to a protected characteristic which has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile or offensive environment for the employee.

The incidence of 'banter' being cited in employment tribunal claims as a defence to discrimination claims has increased by 45 per cent in a year and hit a record high, the Telegraph has reported recently. Earlier this year, employment tribunals found name-calling such as 'half-dead Dave' (in **Robson v Clarke's Mechanical**) discriminatory on the basis of age. In another case, calling someone a 'bald c***', in a robust industrial environment, was found to be harassment on grounds of sex (**Finn v British Bung Manufacturing**).

The solution is to create an appropriate workplace culture, whatever the working environment. Employers must ensure that they have robust equalities policies on which both staff and managers are trained and regularly refreshed. Day to day line management must call 'banter' out, however reciprocal it may seem. Employees must be assured that complaints will be taken seriously. Banter might seem funny, but it's anything but if it lands the employer in the employment tribunal.

FORTHCOMING CHANGES TO EMPLOYMENT LAW FROM NOW THROUGH 2023

This table shows forthcoming changes.

1 October 2022	A permanent system of digital right to work checks will replace temporary covid measures.
1 April 2023	National Minimum Wage rates likely to change (rate to be confirmed)
2 April 2023	Family friendly payment rates likely to change, including SMP, SAP, ShPP, SPPand SPBP (rate to be confirmed)
5 April 2023	End of the request to include the following message on all payslips "1.25% uplift in NICs funds NHS, health & social care."
6 April 2023	The following rates are likely to change: SSP Rate Compensation limits, statutory guarantee pay and weekly redundancy payments (rate to be confirmed)
To be confirmed	Neonatal care leave and pay to be introduced
To be confirmed	A new statutory code on "fire and re-hire" to be introduced
To be confirmed	Employers to be given a new legal duty to pass on all tips to workers without deductions
To be confirmed	A duty requiring employers to prevent sexual harassment will be introduced, including explicit protections from third-party harassment. The time limit for bringing related claims will be looked at and possibly extended to 6 months.
To be confirmed	New law prohibiting confidentiality clauses in contracts or settlement agreements from preventing disclosures to the police, regulated health and care or legal professionals to be introduced.
To be confirmed	New law requiring confidentiality clauses to set out their limitations to be introduced
To be confirmed	Laws on criminal record disclosures to be amended, reducing the disclosure period for sentences lasting four years or less
To be confirmed	Redundancy protection for new parents to be extended to 6 months after their return from leave
To be confirmed	New law introducing right for all workers to request a more predictable and stable contract after 26 weeks' service to be introduced, and requiring compensation for shifts cancelled at short notice.
To be confirmed	New law to increase break in continuous employment from one week to four weeks to be introduced.
To be confirmed	A new righto Carer's leave will be introduced as soon as parliamentary time allows
To be confirmed	Exclusivity clauses to be extended to employees on contracts that guarantee hours earning them less than the lower earnings limit.
To be confirmed	Whistleblowers to be protected when applying for jobs within children's social care
To be confirmed	A duty requiring employers to prevent sexual harassment will be introduced, including explicit protections from third-party harassment. The time limit for bringing related claims will be looked at and possibly extended to 6 months.
To be confirmed	New law prohibiting confidentiality clauses in contracts or settlement agreements from preventing disclosures to the police, regulated health and care or legal professionals to be introduced.

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SALARY IS NOT ENOUGH TO ATTRACT TALENT...

Experts emphasise need to advertise roles as flexible to improve retention instead of focusing solely on pay

Research by the CIPD has revealed that while an increasing number of organisations are inflating pay to retain talent, this approach is not sustainable for most employers in the face of rising costs.

A poll of 1,055 HR people professionals, conducted in April this year by the CIPD and Omni as part of the Resourcing and Talent Planning report, found that more than half (54 per cent) of organisations were inflating pay to retain talent, highlighting the need to offer other components of good working practice when recruiting.

The research also found that companies were increasingly offering better pay and benefits to address recruitment difficulties (36 per cent, up from 29 per cent last year) and this was now the most common step they take to improve retention – with private sector organisations far more likely to increase pay than those in the public sector.

Pay and benefits were now most commonly ranked among the three most important elements of an employer brand for attracting candidates; however, nearly three in five (58 per cent) said they did not include pay and benefits among their top attractors.

Despite this, the research found that more than two-thirds (69 per cent) of the employers surveyed advertised at least some jobs as open to flexible working.

Among those who had recruited in the last 12 months, 30 per cent reported that advertising roles as open to flexible working was the most effective recruitment method for attracting candidates.

Claire McCartney, senior resourcing inclusion adviser at the CIPD, said that with a cost of living issue and possible recession in the upcoming year, businesses were facing "some of the most challenging times imaginable".

"It is now more important than ever to be proactive with workforce planning and to develop compelling offerings to attract and retain a diverse group of employees," she said.

She added that although many employers would not be able to afford ongoing salary hikes, they would still have various alternatives to draw on and retain employees. Businesses "shouldn't simply focus on pay" but instead look to advertise roles as flexible and offer options for hybrid and remote working where possible to "strengthen their attraction and retention offering", she said.

Sarah Dauncey, head of partnership and practice at Timewise, agreed, adding that offering flexible working was key to attracting and keeping talented people. "Employers need to step up to create more good-quality, part-time and flexible roles and advertise them openly, so that people who need flexibility to work are not locked out of the workforce," she said.

Gary Cookson, director of Epic HR, said even while salary increases were highly desirable for a lot of employees, there was only a fixed amount of cash that could be used for this purpose, and organisations would soon run out.

Cookson said it was "sensible to look at other good working practices" that were also consistent with the theory of total reward, which says that, while money is necessary as a justification for employment, it is not usually the main reason people are attracted to or remain with specific employers.

"Employers should take care to fully understand what hybrid working means – it isn't as simple as arbitrary days of the week split might suggest, and if they focus too much on that it can have potential negative cultural connotations and, if not properly thought through or implemented, could well harm later talent attraction and retention aims," he added.

The report also found that 54 per cent of organisations that have had recruitment difficulties were offering greater work flexibility to address them.

Additionally, almost half (49 per cent) of businesses stated that their use of hybrid or remote working had greatly or somewhat increased, and almost a quarter expected this to increase further in the next 12 months. Nearly two-thirds expected it to remain the same.

McCartney added: "Greater availability of flexible working is usually a low-cost option for employers looking to improve their benefits package, and businesses can also reap the rewards through improved job satisfaction, loyalty and business flexibility."

Louise Shaw, managing director at Omni RMS, said given the skills gap and the rising cost of living, firms needed to make strategic plans for luring, upskilling and keeping their employees.

"There is a constant battle for top talent, and businesses must assess what they can realistically offer candidates and what they can improve upon to retain existing employees. Candidates want more than just good pay and are seeking meaningful jobs that are culturally and personally rewarding," she said.

Four Day working week

Research suggests working fewer days per week with no loss of pay could save parents thousands per year in childcare and commuting costs.

Salary is not enough to attract talent...continued

The introduction of a four-day week could save employees thousands of pounds per year in childcare and commuting costs, which could help ease the pressure of the rising cost of living, data has shown.

Future of work think tank Autonomy calculated the potential savings across commuting and childcare costs for workers transitioning to a four-day, 32-hour work week with no loss of pay to help with the cost of living problem.

It found that a parent with two children would have a combined saving of £3,232.40 on average per year, roughly £269.36 per month.

A parent with one child would save £1,789.40 on average per year across both costs, roughly £150 per month.

It also calculated that an employee with a child under two years old would save £1,440 in childcare and £340 in commuting costs on average in a year if their working week was cut by one day.

This analysis comes as the UK has more than 70 companies and 3,300 workers currently taking part in the world's largest four-day working week trial, which sees staff receive 100 per cent of their pay while working 80 per cent of their usual hours.

Will Stronge, Autonomy's director of research, said: "The benefits of a four-day week for the wellbeing of workers and boosting productivity are well known, but the impact it could have on the cost of living has so far been overlooked.

"A four-day week with no loss of pay could play a crucial role in supporting workers to make ends meet over the next few years."

He added that the government should look into the potential effects of a wider rollout on assisting people in getting through the cost of living issue, especially as hundreds of enterprises in the UK are currently trying a four-day working week.

Nicola Inge, employment and skills director at Business in the Community, said employers needed to think about methods to support their colleagues as many homes will start to face an increase in their energy expenses this autumn.

Employers urged to prioritise fair pay as real living wage increases

As the voluntary wage scheme sees the largest jump in its history, experts call on more businesses to support their workers ahead of winter.

Employers have been urged to support staff with their living costs, as the real living wage has increased by 10.1 per cent, the largest yearly increase in the 11 years that it has been calculated by the Living Wage Foundation.

As of today, the UK living wage – which employers voluntarily sign up to rather than being mandatory – for outside London has gone up to £10.90 per hour, while for London the figure is £11.95 per hour. These are increases of £1 and 90p per hour respectively.

The figures for the living wage are calculated annually by the Resolution Foundation and overseen by the Living Wage Commission, and are based on what people need to live on.

Full-time workers on the real living wage stand to earn £2,730 more per year than those on the government-set national living wage (£9.50 per hour for over 23-year-olds). And through this year's increase in pay, they stand to earn £1,950 more than they currently earn.

Real living wage workers in London, meanwhile, could earn £4,777.50 more per year than workers on the national living wage.

Katherine Chapman, director of the Living Wage Foundation, said the real living wage was more vital than ever going into the winter, but businesses have stepped up to the challenge in record numbers. "The living wage is good for employers as well as workers – that's why the real living wage must continue to be at the heart of solutions to tackle the cost of living crisis," she said.

The cost of living boost, announced today, will impact almost 400,000 workers at more than 11,000 real living wage employers. And since the beginning of this year, living wage workers have benefited from more than £338m in extra wages, according to research from Cardiff University Business School.

Charles Cotton, senior reward adviser at the CIPD, said today's increase shows the importance of fair pay and good work, but that, for some of the lowest-paid workers, it may not be enough. He also pointed out that some businesses may not be able to afford this rise themselves, but that the recent government support package should assist somewhat. "As well as offering enough hours for staff to have a decent standard of living, organisations should review aspects of employment such as flexible working, Ccareer progression opportunities and financial wellbeing benefits; for example, occupational sick pay or hardship loans," he said.

However, improved productivity can also go a long way: "Employers should review how jobs, tasks and workplaces are designed to see where improvements can be made," Cotton added.

As well as living wage employers, there has also been an increase in living hours employers, which provide workers with a minimum of 16 hours per week, a month's notice of shift patterns, and a contract that reflects hours worked. Currently, there are 36 such employers.

However, analysis by the Living Wage Foundation has also found that there are still 4.8 million workers paid less than the real living wage, and research published last week revealed that, over the past six months, more workers than ever are skipping meals and using food banks.

Nicola Inge, employment and skills director at Business in the Community, said the news comes at a vital time, when many employees are struggling to make ends meet. She pointed out that while many businesses have signed up, the Living Wage Foundation has given a deadline of 14 May 2023 at the latest to take part. "Paying the real living wage is a critical step in supporting employees to cope during the cost of living crisis, as well as marking a long-term commitment to offering good work," she said.

Source for article from the CIPD

Thank you for taking the time to read our Newsletter which I hope you found informative. An e-newsletter will be sent on a quarterly basis to help keep you up to date with current legislation changes, as well as giving you some helpful hints and tips to help your business run smoothly.

In the meantime please contact us if we can be of service to you or your company.

Have an enjoyable quarter and we look forward to issuing you with our next newsletter in January 2023.

May you have a Happy and Prosperous New Year.

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